REAUTHORIZATION OF THE USA PATRIOT ACT (CONTINUED)

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

JUNE 10, 2005

Serial No. 109–29

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REAUTHORIZATION OF THE USA PATRIOT ACT (CONTINUED)

FRIDAY, JUNE 10, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 8:30 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The meeting will be in order, a quorum for the taking of testimony is present. This hearing has been called by the Democratic Members of the Committee pursuant to clause 2(j)(1) of Rule 10 of the Rules of the House of Representatives. They have chosen the witnesses. They have also chosen the topic of the hearing, and the Chair now recognizes the gentleman from Michigan, Mr. Conyers to make his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman, this is a special hearing brought by the request of the Democratic side of the House of Representatives. I thank you for complying with it. There are few issues more important to this Committee, and I might add, the Congress, than the war against terror and the PATRIOT Act that accompanied it from a legislative perspective.

This not only affects the rights and privacy of every American, but it impacts, the extent to which our Nation is able to hold itself out as a beacon of liberty as we advocate for democracy, both here and around the world.

For many of us, this process of hearings is not merely about the extension of 16 expiring provisions that sunset in the PATRIOT Act, but it is about the manner in which our Government uses its legal authority to prosecute the war against terror, both domestically and abroad.

And as we hear from our witnesses today, I think we will demonstrate that much of this authority has been abused.

We learn from Amnesty International about the routine torture and degradation of detainees in American-run prisons that clearly and obviously violate American and international law.

Both then White House counsel Gonzalez and the then Attorney General of the Department of Justice, all with others, conspired to create an end run around the international and United States laws that criminalize that sort of behavior. While the Justice Department has supposedly reversed these opinions, it still refuses to charge those in its jurisdiction.

We expect that there will be testimony concerning the illegal detention and mistreatment of individuals at Guantanamo Bay. A

Federal Court has found their detention and denial of legal process to be unconstitutional under the fifth amendment.

And after the recent confirmation that jailers have, in fact, desecrated the Koran on more than one occasion, it is clearly time for the military to shut the Guantanamo facility down, and I join with those Members of Congress that have urged that that happen. We will also learn about the abuse of the immigration system to unjustifiably detain and harass men of Middle Eastern descent. The Department of Justice has held over 1,000 people in the wake of 9/11 and the Inspector General has found the detentions to violate the law. But no one has been punished and nothing has been done to ensure that it doesn't happen again.

Finally, we will hear about the failure of our Administration's racial profiling tactics employed in the war against terror. Not only are tactics like these immoral, they have been proven to be completely useless in the war on terror.

For example, the Government's registration of 80,000 Middle Eastern men who did nothing, did nothing but create a deportation nightmare for families who had long been upstanding members of our communities. And not a single terrorist was found.

Yesterday, the President announced with the usual fanfare that we need to not only reauthorize——

Chairman SENSENBRENNER. Gentleman's time has expired.

The Chair recognizes himself for 5 minutes.

As I said earlier when I called this hearing to order, this hearing was requested by the Democratic Minority. The Democratic Minority also stated what the scope of this hearing would be, which would be the reauthorization of the USA PATRIOT Act. I am disturbed that some of the testimony that has been presented in written form by the witnesses today are far outside the scope of the hearing which the Democratic Minority called and which they said in their letter.

I am also disturbed that a number of the Members of this Committee who decided it was important to have this hearing and who sent me the letter, which I complied with, aren't here this morning. Members have changed their travel schedules in order to participate in the hearing which they called. But, apparently they decided it wasn't important enough to show up, even though they thought it was important enough to have this hearing. And I am going to read off their names because these are the people who decided the hearing was important enough to call, but not important enough to participate in. Rick Boucher of Virginia, Zoe Lofgren of California, Anthony Weiner of New York, Debbie Wasserman Schultz of Florida, Gerald Nadler of New York, Sheila Jackson Lee of Texas, Martin Meehan of Massachusetts, and Adam Schiff of California.

They are AWOL. And apparently they have decided that this hearing is not important enough to participate in. Now——

Mr. CONYERS. Mr. Chairman.

Chairman SENSENBRENNER. I didn't interrupt you, Mr. Conyers.

Mr. CONYERS. I wanted to raise a point of order but I will be happy to wait.

Chairman SENSENBRENNER. Now, this Chair has bent over backwards to be fair to the Minority and everybody else and to provide plenty of due process on the question of reauthorizing the PA-

TRIOT Act. We have had eleven hearings at the full and Subcommittee level here. The Minority has been offered to provide witnesses at all of the Subcommittee hearings. The two full Committee hearings included the Attorney General and the Deputy Attorney General. And this shows that I have worked in a bipartisan manner to give everybody an opportunity to express their concerns about the 16 sections of the PATRIOT Act that were subjected to the sunset.

At each one of the hearings which were held at the Subcommittee level, the Minority had at least one witness, sometimes two, and there was an additional Subcommittee hearing that was held at the end of last month at the request of the Minority, where they were able to choose the scope of the topics that were discussed at this hearing.

I also point out the American Civil Liberties Union has testified four times before at the Subcommittee level. I guess they weren't able to say what they planned to say, and that is why they're brought back here for the fifth time.

Now, since commencing this latest series of oversight hearings on the PATRIOT Act, we have examined those provisions that are set to expire at the end of this year and the scope of the hearings has been broadened at the request of the Democrats to include provisions that will not sunset and some issues that are only tangentially related to the PATRIOT Act have also received formal Committee consideration. This was at the request of the Minority. And it is a request that I was happy to grant so that there would be full and complete discussion of this law.

Now, the American people expect and deserve that Members of Congress will approach terrorism prevention in a thoughtful, factual and responsible manner. All too often, opponents of the PATRIOT Act have constructed unfounded and totally unrelated conspiracy theories, erected straw men that bear no relation to reality, engaged in irresponsible and totally unfounded hyperbole, or unjustly criticized or impugned the honorable law enforcement officials entrusted with protecting the security of the American people. These efforts that which often bear no relation to the reauthorization of the PATRIOT Act, coarsen public debate and undermine the responsible, substantive examination which must inform this Committee and Congress' consideration of this critical issue.

As the Members of this Committee know, I have great respect for the Rules of the House, and believe they should be enforced fairly and uniformly. In keeping with the spirit of those rules, it is the Chair's intention to limit the scope of the hearing to the topic that was chosen by the Democratic Minority that called this hearing and chose the witnesses, which is the "Reauthorization of the USA PATRIOT Act." This should be a serious hearing on a serious subject and not a forum for assertions or complaints that concern matters unrelated to the PATRIOT Act.

Members and witnesses are advised that questions and testimony not falling within the subject matter of the hearing chosen by the Democrats will not be included in the hearing record pursuant to House Rule 11, section (k)(8).

We will now hear testimony from the witnesses. Gentlemen from Michigan.

Mr. CONYERS. Thank you very much. I would like to——

Mr. NADLER. Mr. Chairman, point of order.

Chairman SENSENBRENNER. The gentleman from Michigan is recognized.

Mr. CONYERS. Well, I would like to strike the requisite number of words, Mr. Chairman, if I might at this time.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. I want to, again, thank you for complying with the rules. But, I mean, we can do this in a friendly tone or a hostile tone. I think that tells the story to everybody about what the real environment is like here. But first of all, we have never had the meeting that we were going to set. Number two, we have never, we have never determined what the limits will be on this hearing, because I never talked with you about it. Number four, it is very important that we understand that in this Committee and in the other body, we have gone way beyond the 16 sunsetting provisions as we all know and there are more coming every day.

So to suggest to me and our membership that we are now going to talk about the 16 sunsetting provisions precisely misses the point of why we have asked for the hearing.

Chairman SENSENBRENNER. Will the gentleman yield.

Mr. CONYERS. Of course.

Chairman SENSENBRENNER. The Chair has complied with the rules. The Chair believes in complying with the rules. And the Chair expects all of the other Members to comply with the rules, which includes the Rules of the House of Representatives relative to pertinence and relevancy and the Chair will enforce the rules as they are written.

Mr. CONYERS. Well, I am happy to have yielded for that information. But section 1001 of the PATRIOT Act gave the Inspector General the responsibility of investigating "complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice."

All of the topics today that are before us with these four witnesses fall under this category. It does not say only civil liberties abuses under the PATRIOT Act, but civil liberties in general in their totality. And all of the witnesses today I claim are experts in this area.

So we didn't come here to have a special hearing to be told that we are only going to investigate 16 sunsetting provisions. That is what we have had, nine, 10, 11 hearings about. The question is about the issues of violations or abuses alleged of civil rights and civil liberties. So we didn't come here today to be muted by some well-intentioned recitations of the rules by the Chairman.

And, I thank you. And I return the time.

Chairman SENSENBRENNER. The Chair strikes the last word and recognizes himself for a very brief 5 minutes. First of all, the Rules of the House and specifically, Rule 11 clause 2(j)(1) under which this hearing is called, requires that the subject matter of the hearings requested under this rule be confined to that measure or matter, which was the subject of the earlier hearing. Furthermore, the letter that I received from the Democratic Members of the Committee, dated June 7, exercising the provisions of this rule, re-

quested at least one additional day of oversight hearings be authorized or be conducted, "on the Reauthorization of the USA PATRIOT Act."

So both the rule and the letter requires that the testimony, in order to be pertinent and relevant, be on the subject of the reauthorization of the USA PATRIOT Act, and that is specifically the 16 sections of the USA PATRIOT Act, which were sunsetted in the law which was passed 3½ years ago. I would like to get to the——

Mr. NADLER. Mr. Chairman, I have a personal privilege.

Chairman SENSENBRENNER. The gentleman will state his point.

Mr. NADLER. Thank you, Mr. Chairman. I gather that my name was mentioned specifically by the Chair as not being present despite the fact that I signed the letter. I point out for the record that I walked in here at 8:27 a.m., put my jacket on the chair, put my Diet Coke over here, put my papers here and walked out to the staff room. The Chairman may not have noted my presence, but I was here prior to 8:30.

Chairman SENSENBRENNER. The Chair notes your presence now.

Mr. NADLER. Now, Mr. Chairman may I strike the last word?

Chairman SENSENBRENNER. Well if the gentleman does not want to listen to the witnesses, the gentlemen may strike the last word.

Mr. NADLER. I am very desirous of listening to the witnesses, and I will be very brief. I would simply observe—I would simply, first of all, second what the distinguished Ranking Minority Member said about the role of this hearing and about the breadth of it. And I would wonder why the Chairman seems so fearful of elucidating any information beyond what he thinks proper. Are we afraid of learning about this misconduct by agents of the executive branch that traduce civil liberties? If that happened, if it happened, we should know about it and we should discuss in this Committee what actions to take about it. We should not be fearful of knowledge and we should not be fearful of laying out to the American people such information, officially laying out to the American people information, the readers of much of which the readers of any newspaper in the United States or the world knows.

Much conduct has occurred, I shouldn't say that. Much conduct has allegedly occurred which, if true, disgraces this country, spoils its good name and action should be taken about that if true. And we should learn about it. And I hope we are not fearful of learning about the truth or falsity of those statements that we have all read in the general press. Thank you. I yield back.

Chairman SENSENBRENNER. The Chairman will swear the witnesses in.

Ms. JACKSON LEE. Mr. Chairman, point of order.

Chairman SENSENBRENNER. Today we are joined by Carlina Tapia Ruano, who serves as first vice-president for the American Immigration Lawyers Association. Next is Dr. James J. Zogby, president of the Arab American Institute. Deborah Pearlstein is the director of U.S. Law and Security Program, at Human Rights First. And finally Chip Pitts is chair of the board of Amnesty International USA.

I thank all of these witnesses for their attendance today and admonish the witnesses to confine their testimony pursuant to the Rules of the House and the scope of the letter that was sent to me

by the Democrats calling this hearing. Would all of the witnesses please raise your right hand and stand and take the oath.

[Witnesses sworn.]

Chairman SENSENBRENNER. Let the record show that all of the witnesses answered in the affirmative. Without objection, the witnesses prepared testimony, will be included in the record at the point they give their verbal testimony. We would ask that the witnesses confine their verbal testimony to 5 minutes. And, first up is Ms. Tapia Ruano.

Ms. JACKSON LEE. Mr. Chairman, point of order.

Chairman SENSENBRENNER. Ms. Tapia Ruano is testifying.

TESTIMONY OF CARLINA TAPIA RUANO, FIRST VICE-PRESIDENT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Ms. TAPIA RUANO. Good morning. My name is Carlina Tapia Ruano. I am an immigration attorney practicing in Chicago, Illinois. I am also the first vice-president of the American Immigration Lawyers Association, a National Bar Association that represents almost 9,000 immigration lawyers and professors of immigration law. I would like to thank Chairman Sensenbrenner, and also Representative Conyers for allowing me the opportunity to address you this morning. And also the fellow Committee Members, which includes Representative Jackson Lee from Texas, who is present this morning.

I would like to talk about the PATRIOT Act and other initiatives related to the PATRIOT Act post 9/11. But let's begin with the PATRIOT Act. The American Immigration Lawyers Association is deeply troubled by some of the provisions found in this Act, such as section 411 of the act, which expands the grounds of removability and deportability for individuals that engage in conduct that we believe is constitutionally protected.

In addition, section 412 creates a certification process whereby individuals can be designated suspect terrorists without ever being formally charged as terrorists, thereby depriving these individuals from the ability to defend themselves or to explain facts that may have led to their incorrect certification. We would ask that Congress address these provisions. We understand that in a democracy, especially such as ours, which is in need of security, we must have provisions which enhance security but we would also ask that these provisions not deprive individuals of their individual rights in the process of reaching the security. These provisions in the PATRIOT Act are very troubling, but also troubling are other administrative initiatives that took place post 9/11 which are irrevocably interconnected with the PATRIOT Act and what it is attempting to achieve.

In my written testimony, I have provided an addendum that lists chronically some of these administrative initiatives.

Today I would like to just address three in particular. First, the blanket closure of administration judge's proceedings; number two, the failure to file charges against individuals being detained, in effect, indefinitely; and third, the evisceration of the Board of Immigration Appeals, the only body that reviews decisions made by the Immigration Agency.

We, the American Immigration Lawyers Association, believe that the Civil Liberties Restoration Act is a bill which should be strongly supported by Congress and it addresses fairly in a measured way these three concerns I have just addressed.

Lets go back and talk about them in a little more detail. Closing of the immigration hearings. This took place as a result of the September 21, 2001, memo by the Department of Justice, which has become known as the Creppy memo, which the Department of Justice repeatedly denied, existed for months. As a result of this memo, hearings were ordered to be held in secret, not only the hearing preventing the family members, friends, and of course, the press, from attending, but the very fact that the hearing was taking place and its location and date and its subject matter was considered a matter of secrecy.

We believe that hearings should be held open. We believe that in an open and democratic society such as ours, open hearings are a necessity. And closed hearings, such as these, are a normal tool of repressive regimes. Number 2, our concern with holding noncitizens in jail indefinitely. Again, the Department of Justice on September 20, 2001, just a day before the Creppy memo and a full month before the PATRIOT Act was enacted, authorized individuals, non-citizens, to be able to be held in custody for 48 hours, or an unspecified additional amount of time, if necessary. These are regulations that circumvent, that totally ignore congressional mandate in the very PATRIOT Act of putting a limit of 7 days to individuals who can be held in custody without charge.

The Department of Justice has not had to depend on the Immigration Agency and the PATRIOT Act and its 7-day limitation. It simply ignores them and it relies on its own regulation which results in indefinite custody. The Department of Justice's own internal report, inspector general report dated April 2003, documented that most of these post 9/11 detainees were held not only days, weeks, months in custody without being charged. Ultimately those individuals were charged with civil immigration violations. Not one was ever charged with any offense related to the 9/11 attacks.

Chairman SENSENBRENNER. Ms. Tapia Ruano, could you wrap it up? Your time is expired.

Ms. TAPIA RUANO. I would like to jump to the last concern, and that is the Board of Immigration Appeals. And I will conclude my comment with that. The Board of Immigration Appeals has, in fact, been reduced to a nonexistent body. As a result of alleged reforms, that body was dismantled, and in reducing the number of individuals that was allegedly going to reduce the backlog, all, in essence, it resulted in transferring its entire backlog to the Federal courts.

I practice in the Seventh Circuit. A circuit, which is not known to be, in the past, friendly to overturning board decisions. Yet in the last 2 years, it has been, has become renowned for overturning board decisions as a result of the lack of review that exists due to the BIA reforms. We would urge the Committee to look to policies that provide security for our country, but not ignore or trample on individual rights. Thank you for allowing me to address.

Chairman SENSENBRENNER. Thank you.

[The prepared statement of Ms. Tapia Ruano follows:]

PREPARED STATEMENT OF CARLINA TAPIA RUANO

Statement of

Carlina Tapia Ruano

First Vice President

American Immigration Lawyers Association

for the

Oversight Hearing on the Reauthorization of the PATRIOT Act

Before the

House Judiciary Committee

June 10, 2005

Washington, D.C.

Chairman Sensenbrenner, Ranking Member Conyers and distinguished Members of the Committee, my name is Carlina Tapia-Ruano and I am the First Vice President of the American Immigration Lawyers Association (AILA). I am honored to be here today representing AILA.

AILA is the immigration bar association with more than 8,900 members who practice immigration law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is an affiliated organization of the American Bar Association (ABA). AILA members represent tens of thousands of American families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States; U.S. businesses, universities, colleges, and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers when required, on a permanent basis; and healthcare workers, asylum seekers, often on a pro bono basis, as well as athletes, entertainers, exchange visitors, artists, and foreign students. AILA members have assisted in contributing ideas for increased port of entry inspection efficiencies and continue to work through their national liaison activities with federal agencies engaged in the administration and enforcement of our immigration laws to identify ways to improve adjudicative processes and procedures.

Thank you for this opportunity to appear before you today on this very important issue. In response to the September 11, 2001 terrorist attacks, Congress with insufficient deliberation passed the USA PATRIOT Act (the "Act"). The Act includes a number of highly troubling immigration-related provisions and casts such a broad net that it allows for the detention and deportation of people engaging in innocent associational activity and constitutionally protected speech, and permits the indefinite detention of immigrants and noncitizens who are not terrorists.

The Bush Administration also has taken some deeply troubling steps since September 11. Along with supporting the USA PATRIOT ACT, the Administration has initiated new policies and practices that negate fundamental due process protections and jeopardize basic civil liberties for non-citizens in the United States. These constitutionally dubious initiatives undermine our historical commitment to the fair treatment of every individual before the law and do not enhance our security. Issued without Congressional consultation or approval, these new measures include regulations that increase secrecy, limit accountability, and erode important due process principles that set our nation apart from other countries.

In the 108th Congress, Members in the House and Senate introduced a bill, the Civil Liberties Restoration Act (CLRA), that sought to roll back some of the most egregious post-9/11 policies and strike an appropriate balance between security needs and liberty interests. The CLRA (H.R. 1502), which was reintroduced in the 109th Congress by Representatives Berman (D-CA) and Dellahunt (D-MA), would secure due process protections and civil liberties for non-citizens in the U.S., enhance the effectiveness of our nation's enforcement activities, restore the confidence of immigrant communities in

the fairness of our government, and facilitate our efforts at promoting human rights and democracy around the world.

While every step must be taken to protect the American public from further terrorist acts, our government must not trample on the Constitution in the process and on those basic rights and protections that make American democracy so unique.

THE PATRIOT ACT: Deeply Troubling Provisions

AILA is deeply troubled by the following practices included in the PATRIOT Act :

Punishing innocent associations and constitutionally protected speech: The USA PATRIOT Act includes provisions that:

- Authorize the Attorney General (AG) to arrest and detain noncitizens based on mere suspicion, and require that they remain in detention *"irrespective of any relief they may be eligible for or granted."* (In order to grant someone relief from deportation, an immigration judge must find that the person is not a terrorist, a criminal, or someone who has engaged in fraud or misrepresentation.) When relief from deportation is granted, no person should be subject to continued detention based merely on the Attorney General's unproven suspicions.
- Require the AG to bring charges against a person who has been arrested and detained as a "certified" terrorist suspect within seven days, but the law does not require that those charges be based on terrorism-related offenses. As a result, an alien can be treated as a terrorist suspect despite being charged with only a minor immigration violation, and may never have his or her day in court to prove otherwise.
- Make material support for groups that have not been officially designated as "terrorist organizations" a deportable offense. Under this law, people who make innocent donations to charitable organizations that are secretly tied to terrorist activities would be presumed guilty unless they can prove they are innocent. Restrictions on material support should be limited to those organizations that have officially been designated terrorist organizations.
- Deny legal permanent residents readmission to the U.S. based solely on speech protected by the First Amendment. The laws punish those who "endorse," "espouse," or "persuade others to support terrorist activity or terrorist organizations." Rather than prohibiting speech that incites violence or criminal activity, these new grounds of inadmissibility punish speech that "undermines the United States' efforts to reduce or eliminate terrorist activity." This language is unconstitutionally vague and overbroad, and will undeniably have a chilling effect on constitutionally protected speech.
- Authorize the AG and the Secretary of State to designate domestic groups as terrorist organizations and block any noncitizen who belongs to them from entering the country. Under this provision, the mere payment of membership

dues is a deportable offense. This vague and overly broad language constitutes guilt by association. Our laws should punish people who commit crimes, not punish people based on their beliefs or associations.

POST 9/11 REGULATIONS AND POLICIES

Many of the post-9/11 regulations and policies of the Bush Administration have undermined law enforcement officials' ability to perform their duties, have done little to gather worthwhile intelligence, have granted the executive branch broad powers to act in secret, and have made it difficult for foreign visitors to maintain legal status. These actions waste law enforcement's valuable resources by focusing on people who pose no threat to our national security, and violate fundamental principles of justice. The CLRA would redress a number of troubling post-9/11 policies affecting non-citizens, including the following:

- **Closing immigration hearings and refusing to disclose basic information on detainees:** On September 21, 2001, the Department of Justice (DOJ) through what is now known as the "Creppy memo," ordered immigration judges to close all hearings related to individuals detained in the course of the 9/11 investigation. Not only were the hearings held in secret—excluding all visitors, family, and press—but the very identities of the jailed individuals were withheld from public disclosure. Although these cases involved no classified evidence, the records of these proceedings were never released and court officials were prohibited from confirming or denying the mere existence of the cases. To this day, the government refuses to provide any information about these cases despite repeated Freedom of Information Act (FOIA) requests. These FOIA denials were litigated up to the Supreme Court, which recently declined to grant *certiorari*, leaving intact a split federal appeals court decision upholding the denials.

  The immigration process should be open to the public; secret hearings are the practice of repressive regimes, not open and democratic societies. The CLRA would prohibit blanket closures of immigration proceedings, authorizing closure only after a judge has determined that there is a compelling reason to keep out the public or withhold information in a particular case or portion thereof.

- **Holding non-citizens in jail indefinitely without charges:** The DOJ issued regulations on September 20, 2001 authorizing the INS to hold any non-citizen in custody for 48 hours or an unspecified "additional reasonable period of time" before charging the person with an offense. Congress subsequently weighed in on this subject in the USA PATRIOT Act when it authorized detention of up to 7 days before charges must be brought *in the case of certified suspected terrorists*. The DOJ, however, has never invoked that provision and has relied instead on its own open-ended regulation as the legal justification for the detention of non-citizens without charge. The DOJ rule is unlimited in its application and can be applied to any non-citizen. A DOJ Inspector General Report (April 2003) on post-9/11 detainees documents how INS detained non-citizens for weeks, and in some cases months,

before charging them with immigration violations. Tellingly, none of the detainees ever was charged with an offense related to the 9/11 attacks.

As amply manifest in its implementation, this rule violates a fundamental principle in our constitutional system and in internationally recognized standards of fair legal process—that no person should be subject to arrest and imprisonment without reason, explanation, and due process. It also demonstrates that DOJ willfully circumvented Congress's mandate about how long an individual suspected of terrorist activity can reasonably be detained before charging them. The CLRA would explicitly supersede the DOJ regulation by requiring charges to be filed, and notice of charges to be served, within 48 hours of the detention (unless certified as a suspected terrorist under the PATRIOT Act provision). It also would require the detainee to be brought in front of an immigration judge within 72 hours of being detained.

- **Keeping non-citizens jailed even after an immigration judge has found them eligible for release:** The Attorney General issued regulations on October 31, 2001 that require people in immigration proceedings to remain in custody even though an immigration judge has found them eligible for bond. In its rationale, the DOJ does not assert that immigration judges or the Board of Immigration Appeals (BIA) were abusing their power or failing to keep terrorist suspects in detention. Rather, the DOJ argues that the new regulation will "avoid the necessity for a case-by-case determination of whether a stay [of a release order] should be granted in particular cases." This regulation effectively enables prosecutors to circumvent the considered decision of independent adjudicators regarding the likelihood that an individual will appear for future proceedings and the threat a detainee poses to the community. Prosecutors present their case before the court, and if they should lose, they can simply overrule the judge. It thus completely eviscerates the longstanding role of immigration courts in making bond determinations and the BIA in reviewing those decisions.

  When an individual faces detention—a fundamental deprivation of liberty—a case-by-case review is exactly what the principles of our judicial system demand. Allowing the agency with the chief interest in prosecution (DHS) to also determine whether an individual can be released from jail is a violation of fundamental principles of due process. The CLRA would eliminate the power of DHS prosecutors to automatically stay immigration judges' bond determinations and it defines the conditions under which temporary stays should be granted, giving the government ample opportunity to demonstrate a person's dangerousness while providing a fair process of adjudication.

- **Denying bond to whole classes of non-citizens without individual case consideration:** The detention of non-citizens for indefinite periods without an individualized assessment of their eligibility for release on bond or other conditions raises serious constitutional questions. Although the Supreme Court has upheld mandatory detention when Congress has expressly required such detention for a discrete class of non-citizens, it has not authorized the executive branch to make

sweeping group-wide detention decisions. Nevertheless, since September 11, 2001, DOJ and DHS have established policies mandating the detention of certain classes of non-citizens without any possibility for release until the conclusion of proceedings against them. For example, all of the individuals who were detained on immigration violations during the course of the post-9/11 investigation were subjected to a "hold until cleared" policy. Even individuals who did not contest their removability, and against whom final orders of removal had been entered, remained in detention until the FBI cleared them. It bears repeating that the government never charged any of these detainees with a terrorism-related offense.

DOJ and DHS also have extended mandatory detention policies to certain non-citizens seeking asylum. In *Matter of D-J*, the Attorney General (AG) reversed a BIA decision upholding bond to a detained asylum seeker from Haiti. The AG's precedent decision argues that releasing the individual on bond would trigger a wave of sea-going migrations from Haiti and would divert Coast Guard resources from the fight against terrorism. He then concludes, on that specious basis, that national security interests necessitated the mandatory detention of all similarly situated asylum applicants during the pendency of their proceedings. DHS's (now defunct) Operation Liberty Shield initiative reinforced this harsh and inappropriate policy by subjecting all asylum seekers from 30-plus unspecified countries to mandatory detention.

Unilateral executive branch decisions to mandatorily detain whole classes of individuals contravene important due process principles and individual liberty interests. The CLRA would require immigration authorities and immigration judges to provide an individualized assessment of whether persons should remain in detention because they constitute a flight risk or a danger to society. If not, the CLRA would require their release under reasonable bond or other conditions.

- **Entering certain immigration status violators into a criminal database and exempting the data from accuracy requirements of the Privacy Act:** The DOJ reversed a legal opinion drafted under a previous Administration, concluding that states and localities, as sovereign entities, have the "inherent authority" to enforce federal immigration laws, including civil violations of immigration law. This opinion conflicts with the long-standing legal tradition that immigration is exclusively a federal matter. Moreover, by conscripting local police to serve as federal immigration agents, immigrant communities will lose confidence in the police, thereby undoing decades of successful community-based policing initiatives.

  DOJ also announced in December 2001 that it would begin entering the names of hundreds of thousands of immigration status violators into the National Crime Information Center (NCIC) database so that local police could apprehend them. Compounding the potentially disastrous consequences of this initiative is a regulation DOJ issued in March 2003 that exempts the NCIC database from the accuracy requirements of the Privacy Act. The database thus will provide information of dubious accuracy to local law enforcement officials who have little or no training in

immigration law, increasing the likelihood of unfair or unlawful arrests and detentions or other civil rights abuses. To forestall some of these concerns, the CLRA would require information entered into the NCIC database to comply with the Privacy Act accuracy standards.

- **Implementing a discriminatory "special registration" policy:** The National Security Entry-Exit Registration System (NSEERS or special registration) imposes new registration requirements on certain applicants for admission to the U.S. as well as on certain non-citizens already living in the U.S. The latter requirement, known as call-in registration, required all males 16 years of age or older, who were citizens or nationals of one of twenty-five designated predominantly Muslim countries, and who entered the U.S. as nonimmigrants before certain designated dates, to be interrogated, fingerprinted, and photographed. Administration protests to the contrary notwithstanding, the call-in registration program targeted people based on national origin, race and religion, rather than on specific intelligence information. Billed as a national security initiative, NSEERS obligated men from Muslim countries to register so that the government could get a better sense of who was in the country. Dutifully, more than 85,000 people registered; tragically, more than 13,000 of the registrants were placed into removal proceedings due to immigration status violations. Although many of the violations were technical and many registrants were on the path to normalizing their status, they were placed in proceedings nevertheless.

  As with the post-9/11 detainees, none of the call-in registrants was charged with a terrorist-related offense, providing further evidence that this initiative succeeded only in alienating immigrant communities, straining international relations, and diverting precious law enforcement resources from identifying people who intend to harm us. In December 2003, DHS wisely suspended certain re-registration requirements associated with the program, but left other components intact. The CLRA would terminate the NSEERS program in its entirety and provide relief from immigration consequences to some individuals who were placed in immigration proceedings due to this failed program.

- **Instituting "reforms" that severely undermine due process rights for immigrants appearing before the BIA:** Despite nearly universal agreement that our immigration system is replete with serious deficiencies, the Administration has begun dismantling the only review apparatus currently in place, the immigration appeals system. Through a series of regulations issued by Attorney General John Ashcroft, the BIA—the court of last resort for many immigrants fighting deportation—has been stripped of its ability to serve as a meaningful watchdog over the lower courts. Because the Executive Office for Immigration Review (which currently houses the immigration courts) is a regulatory creation, the Attorney General possesses virtually unfettered discretion to reconstitute the system in whatever way he deems appropriate. The "reforms" at issue include the following: reducing the overall number of judges sitting on the Board of Immigration Appeals from 23 to 11 by reassigning the 5 most "immigrant friendly" judges to other positions; making one-judge review of lower court decisions the norm as opposed to the traditional three-judge panels; expanding

dramatically the range of cases which can be affirmed without any opinion; and eliminating the Board's de novo review authority. (See AILA Issue Paper entitled "The Importance of Independence and Accountability in Our Immigration Courts".)

The results of this initiative have been stunning. A report commissioned by the American Bar Association (ABA) that evaluated the regulations determined that the increased speed in the decision-making process has had a significant impact on substantive outcomes: "decisions in favor of the respondents have decreased alarmingly from 1 in 4 to 1 in 10." Not only did the regulations fail miserably from a fairness perspective, they also failed to achieve their stated purpose of improving efficiency. The United States Courts of Appeals have experienced a massive surge in BIA appeals, in volume and rate, since the regulations were implemented. Hence, the net effect of the Attorney General's streamlining measures has not been to eliminate the backlogs, but merely to shift the backlog to another branch of government, the federal courts. The CLRA would establish an independent immigration court system and establish, for the first time, explicit statutory parameters for its makeup and functions.

AILA'S POSITION: AILA strongly supports policies undertaken since 9/11 that truly promote our security (such as the Enhanced Border Security and Visa Entry Reform Act, P.L. 107-173 and the Intelligence Reform ACT GET PL NUMBER) However, the immigration-related provisions in the PATRIOT Act and The executive actions highlighted in my testimony do not enhance our security. What they have done is erode our constitutionally protected civil liberties. In thoughtful, measured fashion, the Civil Liberties Restoration Act (H.R. 1502) would rein in those policies that go too far in tilting the scales against individual rights and would reaffirm our Constitutional commitment to provide due process to all persons.

APPENDIX

Selected Executive Branch Actions since September 11, 2001

The following are selected administrative actions taken by the Executive Branch since September 11, 2001 listed in reverse chronological order. These actions:

- curb rights and due process
- undermine fundamental constitutional protections
- profile certain communities based on race, religion, and ethnicity and target them for heightened measures
- respond to various actions by the INS that have drawn criticism

- **December 2, 2003: Suspension of Certain NSEERS Requirements**

The Department of Homeland Security (DHS) published an Interim Rule in the Federal Register announcing the suspension of certain re-registration requirements for individuals initially registered under the National Security Entry-Exit Registration System (NSEERS or "Special Registration"). Specifically, the Rule amends 8 CFR §§ 264.1(f)(3) and 264.1(f)(5), which required 30-day re-registration for those specially registered at a Port of Entry (POE) and annual re-registration for all individuals subject to Special Registration. Suspension of the re-registration requirements applies to all previously registered foreign nationals, whether under POE registration or "call-in" registration. All other requirements (including departure registration and POE registration) and the Special Registration program itself remain in effect. Anyone who fails to comply with the continuing requirements of Special Registration could be subjected to denial of admission to the U.S., denial of immigration benefits, possible criminal prosecution, and/or removal proceedings. [*68 FR 67577, 12-2-03, Interim Rule*]

- **July 7, 2003: Personal Appearance Required for Visa Interviews**

DOS published an Interim Rule in the Federal Register, effective August 1, 2003, requiring applicants for visas to appear (in most cases) for a personal interview. The Department of State Cable sent to consular posts on May 22, in anticipation of the new regulation, warned of backlogs yet advised posts that they "must implement the new interview guidelines using existing resources. Post should not, repeat not, use overtime to deal with additional workload requirements but should develop appointment systems and public relations strategies to mitigate as much as possible the impact of these changes." *[68 FR 40127, 7-7-03, Interim Rule]*

As AILA noted in its comments on the Interim Rule, "In fiscal year 2002, 843 consular officers processed 8.3 million nonimmigrant visa applications. It is thought that in some posts as few as 20 percent of applicants were interviewed. The new…policy will mean that about 90 percent of visa applicants will now be interviewed (thus generating, in some

posts, an increase in visa workload of up to 70 percent)—without an attendant increase in the number of consular interviewers or other resources."

- **April 24, 2003: Matter of D-J**

In a far-reaching precedent decision, the Attorney General denied undocumented immigrants recourse to an individualized bond hearing if immigration officials say their release would endanger national security interests. The national security interest identified by the Attorney General in this decision was the prevention of "further surges of mass migration…with attendant strains on national and homeland security resources."

The Attorney General issued this ruling in the case of an 18-year-old Haitian who arrived in the U.S. on October 29 with more than 200 other refugees and subsequently applied for asylum. The Attorney General's ruling overturns the decisions of both the Immigration Judge (IJ) and the Bureau of Immigration Appeals (BIA) to release the individual on bond pending the outcome of his asylum proceedings. Both the IJ and the BIA concluded that the individual did not present a flight risk or a danger to the community. By eliminating the possibility of release on bond for whole classes of people, this decision represents a significant departure from the well-established due process principle that every individual deserves a hearing to determine whether his or her liberty interest outweighs the government's interest in preventing flight and danger to society.

- **March 17, 2003: Operation Liberty Shield**

Secretary Ridge issued a fact statement and press release discussing a new DHS initiative called Operation Liberty Shield. One component of this initiative requires that asylum applicants be detained for the duration of their processing period if they come from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated.

- **February 19, 2003: Additional Exit Ports Designated**

DOJ published a Notice in the Federal Register providing the public with an expanded list of ports through which nonimmigrant aliens who have been specially registered may depart from the United States. There are now 99 authorized ports of departure for special registrants.

- **February 19, 2003: Special Registration Deadlines Extended for Groups 3 & 4**

DOJ published a Notice in the Federal Register extending the registration deadline for two groups of affected foreign nationals. Nonimmigrant aliens of Pakistan or Saudi Arabia who are required to register were given until March 21, 2003 to do so. Nonimmigrant aliens from Bangladesh, Egypt, Indonesia, Jordan, or Kuwait who are required to register are permitted to do so before April 25, 2003. [*68 FR 8046, 2-19-03, Notice]*

- **January 16, 2003: Call-In Special Registration Expanded**

DOJ published a Notice in the Federal Register expanding the special registration program to foreign nationals from five additional countries. The Notice requires all nonimmigrant males aged 16 or over who are citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan or Kuwait, and who entered on or before September 30, 2002, to appear for call-in registration between February 24, 2003 and March 28, 2003. *[68FR 2363, 1-16-03, Notice]*

- **January 16, 2003: Special Registration Deadlines Extended for Groups 1 & 2**

DOJ published a Notice in the Federal Register reopening the registration periods to permit citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Iran, Iraq Lebanon, Libya, Morocco, North Korea, Oman, Qatar, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, or Yemen who were required to register previously but did not do so, to appear and register with the INS between January 27, 2003, and February 7, 2003. The Notice indicates that registration during this extension period would be considered timely under the original notices.

- **December 18, 2002: Call-In Special Registration Expanded**

DOJ published a Notice in the Federal Register expanding the special registration program to foreign nationals from two additional countries. The Notice requires all nonimmigrant males aged 16 or over who are citizens or nationals of Saudi Arabia or Pakistan and who entered on or before September 30, 2002, to appear for call-in registration between January 13, 2003 and February 21, 2003. This Notice also rescinds a December 16, 2002 Notice which erroneously included Armenia on the list of affected countries. *[67 FR 77642, 12-18-02,-Notice]*

- **December 18, 2002: Attorney General Secret Order Delegating Authority to FBI to Exercise the Powers and Duties of Immigration Officers**

The Attorney General issued an order authorizing the FBI Director and his delegates to perform the functions of immigration officers. Specifically, the order authorizes the FBI to investigate and detain aliens suspected of violating any immigration law or regulation and to enforce all immigration provisions, including those related to special registration. The actual text of this order has not been released by the Attorney General although its contents have been leaked to the press.

- **November 22, 2002: Call-In Special Registration Expanded**

DOJ published a Notice in the Federal Register expanding the special registration call-in program to foreign nationals from 13 additional countries. The Notice requires all nonimmigrant males aged 16 or over who are citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, or Yemen and who entered on or before September 30, 2002, to appear for call-in registration between January 13, 2003 and February 21, 2003.

- **November 13, 2002: Expansion of Expedited Removal**

DOJ published a Notice in the Federal Register authorizing INS to place in expedited removal proceedings certain aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to the determination of inadmissibility. *[67 FR 68924 11/13/02]*

- **November 6, 2002: Call-In Special Registration Implemented**

DOJ published a Notice in the Federal Register requiring certain nonimmigrants from five countries - Iran, Iraq, Libya, Sudan, or Syria – who are already in the U.S. to appear for fingerprinting and photographing, answer questions, present documentation, and register before an immigration officer. The Notice requires all nonimmigrant males aged 16 or over who are citizens or nationals of one of the five countries and who entered the U.S. on or before September 10, 2002, to appear for call-in registration on or before December 16, 2002.

The Notice advises that a willful failure to comply with the call-in special registration requirements constitutes a failure to maintain nonimmigrant status under section 237(a)(1)(C)(i) of the Immigration and Nationality Act, rendering the individual removable unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful. It further advises that if an alien subject to the registration requirements fails to comply with the requirement that the alien report to an inspecting immigration officer when departing the U.S., the alien shall thereafter be presumed to be inadmissible under section 212(a)(3)(A)(ii) of the Act.

- **September 30, 2002: 26 Exit Ports Designated**

DOJ published a Notice in the Federal Register advising the public of the list of ports through which nonimmigrants who have been specially registered must depart from the United States. The list includes 26 land and air ports of entry/exit. *[67 FR 61352, 9-30-02, Notice]*

- **September 24, 2002: Special Registration Expanded**

A special memo from INS Executive Associate Commissioner, Office of Field Operations, was leaked to the press and published by WorldNetDaily.com. The memo indicates that nationals of five countries—Iraq, Iran, Sudan, Syria and Libya—are subject to special registration as of September 11, 2002. The memo further indicates that as of October 1, 2002, national from Pakistan, Saudi Arabia and Yemen who are males between 16 and 45 will also be subject to "registration". The memo also instructs inspecting officers to order "registration" based on 7 criteria, including previous visa overstays, "demeanor", and unexplained travel.

- **August 26, 2002: BIA "Reforms"**

The Attorney General published a final rule that is substantially the same as the proposed regulation published in February. The new regulation will restructure the Board of

Immigration Appeals. The BIA "reform" will institute one-judge review, streamlined procedures, and will reduce the Board itself to 11 members (from the current complement of 21 positions.) Effective September 26, 2002. *[67 FR 165 at 54877, 8-26-02]*

- **August 13, 2002: "St. Cyr" Relief Regulation**

The Attorney General published a proposed rule, purportedly implementing the Supreme Court decision in the *St. Cyr* case, which makes certain immigrants with criminal convictions eligible to apply for a waiver of deportation. The rule fails to make provisions for those who were deported from the country while the litigation resulting in the Supreme Court case was pending. On August 22, 2002, the Attorney General published a technical correction to the proposed rule. Comments are due October 15, 2002. *[67 FR 156 at 52627, 8-13-02; 67 FR 163 54360, 8-22-2002]*

- **August 12, 2002: Registration and Monitoring of Certain Nonimmigrants** *[Final Rule]*

Attorney General John Ashcroft announced that the first phase of the National Security Entry-Exit Registration System (NSEERS) will be implemented by the Immigration and Naturalization Service (INS) at selected ports of entry throughout the United States on September 11, 2002. After an initial 20-day period for testing and evaluating the system at selected ports of entry, all remaining ports of entry -- including land, air and sea -- will have the new system in place on October 1, 2002. The final rule adopted the proposed rule "without substantial change".

The registration requirements may be applied to certain named nation groups already within the United States whenever the Attorney General so orders. The new registration requirements will first apply to nationals from Syria, Libya, Iraq, Iran and Sudan. The list is contemplated to expand to all 26 countries now subject to heightened security checks at visa posts (Afghanistan, Algeria, Bahrain, Dijbouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen.) [*67 FR 155 at 52584, 8-12-2002]*

- **July 26, 2002: Address Notification to be Filed with Designated Applications**

The Attorney General proposed a rule clarifying the alien's obligation to provide an address to the Service, including a change of address within 10 days. The rule will require every alien to acknowledge having received notice that he or she is obliged to provide a valid address to the Service. The rules clarify that a "willful" failure to register with the INS, or a failure to give written notice of a change in address, is a criminal violation. This proposed regulation is accompanied by a statement by DOJ.

The proposed regulations will allow the Service to mail a "Notice to Appear" to the most recent address reported by the alien. Upon such mailing, the Service will have met its burden of the "advanced notice" an alien must receive before an Immigration Judge issues an *in absentia* order of removal. See, Matter of G-Y-R. This expanded definition of "notice" increases the likelihood for *in absentia* orders to be issued against non-criminal aliens who fail to report an address change.

The stated intent of this rule is to provide clear notice to aliens of their obligation to report their address, and to punish those who fail to do so. *[67 FR 144 at 48818, 7-26-02]*

- **July 24, 2002: Powers of State or Local Law Enforcement Officers To Exercise Federal Immigration Enforcement** *[Final Rule]*

DOJ issued a final rule which implements INA 103(a)(8), which allows the Attorney General to authorize any state or local law enforcement officer, with the consent of the head of the department whose geographic boundary the officer is serving, to exercise and enforce immigration laws during the period of a declared "mass influx of aliens."

The rules authorize the Attorney General to consider the definitions of "immigration emergency" and "other circumstances" under 28 C.F.R. 65.81 when making a declaration of "mass influx of aliens". The rules purport that civil liberties and civil rights will be protected with officer training, and a complaint reporting procedure. The final rule is effective August 23, 2002. *[67 FR 142 at 48354*, 07-24-02]

- **July 2, 2002: DOJ and State of Florida sign MOU**

DOJ and the State of Florida executed a Memorandum of Understanding authorizing 35 state and local law enforcement officers working specifically as part of the State of Florida's Regional Domestic Security Task Forces (RDSTFs) to perform certain immigration officer enforcement functions. It gives such officers the power to interrogate any person believed to be an alien as to his right to be in the United States and to arrest those believed to be in violation of the law.

- **June 13, 2002: Registration and Monitoring of Certain Nonimmigrants**

The Attorney General issued a proposed rule requiring certain yet-to-be-designated aliens to register (fingerprints and photographs and other information) at entry, at 30 days after entry, at one-year intervals thereafter, and at exit, which must be through designated exit points. The registration requirements may be applied to certain named nation groups already within the United States whenever the Attorney General so orders.

Failure to satisfy any of the required reporting results in criminal penalties, and in the entering of the person's name in the NCIC database. The regulation is accompanied by a statement by the Attorney General indicating that local law enforcement officers will be requested to check the names of any persons they encounter against the NCIC data base, and arrest and detain not only those who have violated the registration requirement, but also those who have overstayed a visa whose names will also be entered into the database.

The power of local law enforcement to arrest people for mere civil violations of immigration laws is stated to derive from a new DOJ Office of Legal Counsel opinion which has not been made public, which states that local law enforcement officers have "inherent authority" to enforce not only criminal violations of immigration law, but civil violations as well. *[67 FR 114 at 40581, 6-13-02]*

- **May 28, 2002: Immigration Judges Given Authority to Seal Records and Issue Protective Orders**

The Attorney General issued an interim regulation authorizing immigration judges to issue protective orders and seal records relating to law enforcement or national security information. The rule applies in all immigration proceedings before EOIR. The rule is made effective as of May 21, 2002, *a week prior to publication.* Comments due 7-29-02. *[67 FR 102 at 36799, 5-28-02]*

- **May 16, 2002: Student Reporting Required**

The Attorney General issued a proposed regulation that implements a new student reporting system, SEVIS. The system will become voluntary on July 1, 2002, and mandatory for all covered school on 1-30-03. The new SEVIS system will require reporting of student enrollment, start date of next term, failure to enroll, dropping below full course load, disciplinary action by school, early graduation, etc. Comments due 6-17-02. *[67 FR 95 at 34862, 5-16-02]*

- **May 10, 2002: New Security Checks Required**

The INS issued a memo requiring District Offices and Service Centers to run IBIS (Interagency Border Inspection System) security checks for *all* applications and petitions, including naturalization. The checks are to be run not only on foreign nationals, but also on every name on the application, including US citizen petitioners and attorneys. IBIS includes information on "suspect" individuals and can also be used to access NCIC records. It is used by INS, Customs, and 20 other federal agencies (FBI, Interpol, DEA, ATF, IRS, Coast Guard, FAA, Secret Service, etc.) *[INS Memorandum from William Yates to Regional Directors, Service Center Directors, and District Directors, 5-10-02]*

- **May 9, 2002: Aliens Ordered to Surrender within 30 days**

The Attorney General issued a proposed regulation that requires that aliens subject to final orders of removal surrender to INS within 30 days of the final order or be barred forever from any discretionary relief from deportation, including asylum relief, while he/she remains in the U.S. or for 10 years after departing from the U.S. Comments due 6-10-02. *[67 FR 90 at 31157, 5-9-02]*

- **April 22, 2002: States Forbidden to Release Detainee Information**

The Attorney General issued an interim regulation that forbids any state or county jail from releasing information about INS detainees housed in their facilities. This regulation flies in the face of a New Jersey state court decision ordering the release of information regarding detainees in New Jersey facilities. The rule is made effective 4-17-02, *a week prior to publication.* Comments due 6-21-02. *[67 FR 19508, 4-22-02]*

- **April 12, 2002: New Limitations on Student Change of Status**

INS issued an interim rule prohibiting a visitor from attending school while an application for a change to student status is pending. The rule is made effective 4-12-02. Comments due 6-11-02. *[67 FR 71 at 18062, 4-12-02]*

- **April 12, 2002: New Limitations on Visitors/Students**

INS issued a proposed regulation establishing a presumptive limitation on visitors to the US of 30 days, or a "fair and reasonable period" to accomplish the purpose of the visit. The regulation also prohibits a change of status from visitor to student, unless student intent is declared at time of initial entry. Comments due 5-13-02. *[67 FR 71 at 18065, 4-12-02]*

- **April 10, 2002: Local Law Enforcement Powers**

News of a new DOJ legal opinion that states that local law enforcement personnel have "inherent" power to enforce the nation's immigration laws is leaked to the press. *[Various news reports]*

- **March 19, 2002: Additional Interviews**

DOJ announced another round of interviews of 3000 Arab/Muslim men. *Memorandum from U.S. Department of Justice, Executive Office for U.S. Attorneys, TO: All US Attorneys, from Kenneth L. Wainstein, Director, entitled "Interview Report", dated 3-19-02.*

- **February 26, 2002: Interview Report**

DOJ issued a final report on its project of interviewing the 5,000 Arab/Muslim men. The Report states that approximately half (2261) of those on the list were actually interviewed and that fewer than twenty interview subjects were taken into custody. Most of these were charged with immigration violations; only three were arrested on criminal charges. *[Report from U.S. Department of Justice, Executive Office for U.S. Attorneys, Memorandum for the Attorney General, from Kenneth L. Wainstein, Director, entitled "Final Report on Interview Project, dated 2-26-02]*

- **February 19, 2002: BIA "Reforms"**

The Attorney General published a new regulation proposing to restructure the Board of Immigration Appeals. The BIA "reform" would institute one-judge review, streamlined procedures, and would reduce the Board itself to 11 members (from the current complement of 21 positions.) Comment due 3-21-02. *[67 FR 33 at 7309, 2-19-02]*

- **January 25, 2002: "Absconder Initiative"**

The Deputy Attorney General issued a memo of instructions for the "Absconder Apprehension Initiative", announced by INS Commissioner Ziglar in December, to locate 314,000 people who have a final deportation or removal order against them. 6,000 men from "al Qaeda-harboring countries will be first to be entered in the National Crime Information Center (NCIC) database. DOJ uses country, age, and gender criteria to prioritize this selective enforcement list. *[Office of Deputy Attorney General, Subject: Guidance for Absconder Apprehension Initiative, dated 1-25-02]*

- **December 4, 2001: Senate Hearings**

Senator Feingold held hearings on the status of 9-11 detainees. The Attorney General stated that those who question his policies are "aiding and abetting terrorism."

(http://www.lexis.com/research/retrieve/frames?_m=d88b568e87c195aecaf968445f816c1f&csvc=bl&cform=bool&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=dGLbVlb-lSllB&_md5=cbdb097ca85216c342e7a33a47c91389)

- **November 29, 2001: "Snitch Visas"**

The Attorney General issued a memo announcing the use of S visas for those who provide information relating to terrorists. *[Attorney General Directive on Cooperators Program, 10-29-01]*

- **November 26, 2001: Interviews to be "voluntary"**

US Attorneys in Detroit issued a letter stating that the interviews are voluntary, but that "we need to hear from you by December 4." *[Letter from U.S. Attorney, Eastern District of Michigan, signed by Jeffrey Collins and Robert Cares, dated 11-26-01]*

- **November 23, 2001: INS Actions re Interviewees**

INS issued memo stating that "officers conducting these interviews may discover information which leads them to suspect that specific aliens on the list are unlawfully present or in violation of their immigration status." The memo directs INS to provide agents to respond to requests from state and local officers involved in the interviews. *[Memorandum for Regional directors, from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, dated 10-23-01]*

- **November 16, 2001: Secrecy re INS Detainees**

DOJ issued a letter to Senator Feingold asserting that identities/locations of 9-11 detainees will not be disclosed. *[U.S. Department of Justice, Office of Legislative Affairs, to Senator Russell D. Feingold, dated 11-16-01]*

- **November 15, 2001: New 20-Day Wait for Certain Visa Applicants**

The State Department imposed new security checks on visa applicants from unnamed countries. The State Department refuses to confirm the new requirement, but the following message appears when individuals born in certain countries attempt to make a visa appointment through the on-line Visa Appointment Reservation System:

> "Effective immediately, the State Department has introduced a 20-day waiting period for men from certain countries, ages 16-45, applying for visas into the United States."

The following countries of birth are among those for whom this message appears: Afghanistan, Algeria, Bahrain, Dijbouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen.

- **November 13, 2001: Military Tribunals**

President Bush issued an Executive Order authorizing creation of military tribunals to try non-citizens alleged to be involved in international terrorism (http://www.whitehouse.gov/news/orders/).

- **November 9, 2001: Interviews of Arab/Muslim Men**

The Attorney General issued a memo directing interviews of a list of 5000 men, ages 18-33, who entered US since Jan. 2000 and who came from countries where Al Queda has a "terrorist presence or activity". The interviews are to be "voluntary" but immigration status questions may be asked (see Pearson memo, Nov. 23).

- **November 7, 2001: Creation of Foreign Terrorist Tracking Task Force**

The President announced the first formal meeting of the full Homeland Security Council, and the creation of a "Foreign Terrorist Tracking Task Force" which will deny entry, locate, detain, prosecute and deport anyone suspected of terrorist activity. The Task Force includes DOS, FBI, INS, Secret Service, Customs and the intelligence community. The Task Force is charged with a mandate to perform a thorough review of student visa policies. *[White House Announcement, 11-07-01]*

- **October 31, 2001: New Terrorist Groups Designated**

The Attorney General issued a letter requesting that the Secretary of State designate 46 new groups as terrorist organizations, per powers authorized by USA Patriot Act (9 groups identified in President's Executive Order of 9-23-02; 6 groups identified in joint State-Treasury designation of 10-12-02, and 31 groups designated by DOS Patterns of Global Terrorism Report, published April 2001). *[Letter from Attorney General to Colin L. Powell with attachment]*

- **October 31, 2001: Eavesdropping on Attorney/Client Conversations**

DOJ issued a Bureau of Prisons interim regulation that allows eavesdropping on attorney/client conversations wherever there is "reasonable suspicion…to believe that a particular inmate may use communications with attorneys to further or facilitate acts of terrorism"; the regulation requires written notice to the inmate and attorney, "except in the case of prior court authorization". The rule is made effective 10-31-01. Comments due 12-31-01. *[66 FR 211, at 55062, 10-31-01]*

- **October 31, 2001: Automatic Stays of Bond Decisions**

DOJ issued an interim regulation that provides an automatic stay of IJ bond decisions wherever DD has ordered no bond or has set a bond of $10K or more. The rule is made effective 10-29-02, two days *prior to publication.* Comments due 12-31-01. *[66 FR 211, at 54909, 10-31-01]*

- **October 12, 2001: Attorney General FOIA Memorandum**

The Attorney General issued a memorandum to the heads of all federal departments and agencies encouraging them to carefully consider protecting legal privileges before releasing information pursuant to a FOIA request. The memo states that the decision to

disclose information that could be protected "should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information." Moreover, the memo advised that in making a decision to withhold records, "you can be assured that the [DOJ] will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

- **October 4, 2001: FBI "mosaic" Memo, Opposing Bond**

The FBI began to use a boilerplate memo to oppose bond in all post-9-11 cases. The memo states:

> "The FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individuals who have been detained…the FBI has been unable to rule out the possibility that respondent is somehow linked to, or possesses knowledge of, the terrorist attacks…" *[Memo submitted to United States Department of Justice, Executive Office for Immigration Review, Immigration Court, "In Bond Proceedings", "Exhibit A", signed by Michael E. Rolince, Section Chief, International Terrorism Operations Section, Counter terrorism Division, Federal Bureau of Investigation]*

- **September 21, 2001: Closed Hearings**

Chief Immigration Judge Michael Creppy issued a memo stating: "the Attorney General has implemented additional security procedures for certain cases in the Immigration Court". Creppy further states that these procedures "require" IJs to "close the hearing to the public…". *[Creppy Memo, 9-21-01, 12:20 PM]*

- **September 20, 2001: Detention without Charges**

The Department of Justice (DOJ) published an interim regulation allowing detention without charges for 48 hours or "an additional reasonable period of time" in the event of an "emergency or other extraordinary circumstance". The rule is made effective 9-17-02, *three days prior to publication.* Comments due 11-19-01. *[66 FR 183 at 48334, 9-20-01]*

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Chairman SENSENBRENNER. Dr. Zogby.

TESTIMONY OF JAMES J. ZOGBY, PRESIDENT, ARAB AMERICAN INSTITUTE

Mr. ZOGBY. Thank you, Mr. Chairman. Thank you, Ranking Member Conyers and Members of the Committee. I appreciate the convening of this hearing and thank you for inviting me today.

The horrific terrorist attacks of September 11th were a profound and painful tragedy for all Americans. None of us will ever forget the awful day when thousands of innocent lives were lost. The attacks were dual tragedy for my community. As Americans, it was our country that was attacked. Arab Americans died in the attacks. Arab Americans were also firefighters and police officers in New York and in Washington who aided in the rescue efforts. Some lost their lives doing so. Sadly, however, many in my community were torn away from their morning, because we became targets of hate and discrimination. Some assumed our collective guilt. Arab Americans and American Muslims and others perceived to be Arabs and Muslims were victims of hundreds of bias incidents.

Thankfully the American people rallied to our defense. President Bush spoke forcefully against hate crimes. Both the Senate and House of Representatives unanimously passed resolutions condemning hate crimes. Federal, State and local law enforcement investigated and prosecuted. I received death threats. My family and I did. Two individuals have been prosecuted and convicted for those crimes. My community and I personally will always been grateful that our fellow Americans defended us at a critical time.

Much has been done in the past 3½ years to combat the threat of terror. Among other significant accomplishments is we created the Department of Homeland Security. We have taken steps to enhance airport and border security and we have improved information sharing between intelligence and law enforcement. However, as someone who has spent my entire professional life working to bring Arab Americans into the mainstream of American politics and to build a bridge between my country and the Arab world, I am concerned about the direction of some of our efforts to combat the terrorist threats and the impact that some of these efforts have had on my community and my country.

Unfortunately the Administration has devoted too many resources to some measures that threaten civil liberties while doing little to protect our community. I share the concerns of my colleagues with some provisions of the PATRIOT Act that give law enforcement broad authority to monitor the activities of innocent Americans with inadequate judicial oversight.

These concerns, I might add, are shared by Americans across the political spectrum. I am supportive of reasonably reforms like those recommended in the Security and Freedom Enhancement, or SAFE Act. I am concerned as well about a series of high profile initiatives not authorized by the PATRIOT Act, which have explicitly targeted tens of thousands of innocent Arabs and Muslims and have resulted in the detention and deportation of thousands.

Policies and statements that have conflated undocumented Arab and Muslim immigrants with terrorists has cast a cloud of suspicion over the entire community and contributed to additional dis-

crimination. I therefore support passage of the Civil Liberties Restoration Act.

Look, the measures I am talking about are counterproductive. They're counterproductive, and I want to talk about why. What policies am I talking about? For example, I am talking about the initial round up of 1,200. I am talking about the two so-called voluntary call-ins, and especially, I am talking about the national special registration program, NSEERS. That did not result in apprehending terrorists. They did not do anything but waste law enforcement resources. The FBI says that as well. They created fear and broke trust with many in the immigrant communities that law enforcement needs cooperation with in order to do its job, and they resulted in placing thousands in deportation, often for mere technical reasons because the INS simply had a backlog and couldn't get to their forms.

In addition, they were placed based on the mistaken notion that you conflate immigration policy with any terrorism policy. All it did was cast a wide net and alienated communities that law enforcement needs to have cooperation with. They ran counter to the basic principles of policing. And took a toll on my community, a serious toll. They also took a particular toll on Americans abroad and I want to make that point as I close.

As a result it has become more difficult for our allies to cooperate with us, and it has made America less popular abroad. Now that may not mean something to some people. But it means something to me and it ought to mean something to our country because we are engaged in a long-term conflict in that region.

President Bush is right when he links the spread of democracy to the war on terrorism. But civil liberties abuses against Arabs and Muslims in America and the indefinite secret detention and highly coercive interrogation techniques used in Guantanamo Bay and elsewhere have undermined our ability to advocate credibly for democratic reform. In fact, some Arab governments now point to our policies to justify their policies. We have learned anti democratic practices and human rights abuses produce instability and create conditions that breed terrorism. Democratic reformers and human rights activists used to look to America as the city on the hill. We once set a high standard for the world. We have lowered the bar. The damage to our image, to our values, and all that we have sought to project and our ability to deal with the root causes of terror have been profound.

Chairman SENSENBRENNER. Thank you, Dr. Zogby.

[The prepared statement of Mr. Zogby follows:]

PREPARED STATEMENT OF DR. JAMES J. ZOGBY

Mr. Chairman, Ranking Member, Members of the Committee, thank you for convening this important hearing and for inviting me to be with you today.

The horrific terrorist attacks of September 11 were a profound and painful tragedy for all Americans. None of us will ever forget that awful day when thousands of innocent lives were lost.

The attacks were a dual tragedy for Arab Americans. We are Americans and it was our country that was attacked. Arab Americans died in the attacks. Arab Americans were also part of the rescue effort. Dozens of New York City Police and rescue workers who bravely toiled at Ground Zero were Arab Americans.

Sadly, however, many Arab Americans were torn away from mourning with our fellow Americans because we became the targets of hate crimes and discrimination.

Some assumed our collective guilt because the terrorists were Arabs. Arab Americans and Muslims and other perceived to be Arab and Muslim were the victims of hundreds of bias incidents. According to the Justice Department's Civil Rights Division, "The incidents have consisted of telephone, internet, mail, and face-to-face threats; minor assaults as well as assaults with dangerous weapons and assaults resulting in serious injury and death; and vandalism, shootings, and bombings directed at homes, businesses, and places of worship." As a result of the post-9/11 backlash, in 2001, the FBI reported a 1600% increase in anti-Muslim hate crimes and an almost 500% increase in ethnic-based hate crimes against persons of Arab descent.

Thankfully, the American people rallied to our defense. President Bush spoke out forcefully against hate crimes, as did countless others across the nation. Both the Senate and the House of Representatives unanimously passed resolutions condemning hate crimes against Arab Americans and Muslims. Federal, state and local law enforcement investigated and prosecuted hate crimes, and ordinary citizens defended and protected us, refusing to allow bigots to define America. My family and I received death threats and two individuals have been prosecuted by the FBI and convicted for these hate crimes. My community and I, personally, will always be grateful that our fellow Americans defended us at that crucial time.

Much has been done in the past three and one-half years to combat the threat of terrorism. Among other significant accomplishments, we have created the Department of Homeland Security, taken steps to enhance airport and border security, and improved information sharing between intelligence and law enforcement.

Arab Americans are proud to have played a crucial role in these efforts, serving on the front lines of the war on terrorism as police, firefighters, soldiers, FBI agents, and translators. The Arab American Institute has worked with federal, state and local law enforcement to assist efforts to protect the homeland. We helped to recruit Arab Americans with needed language skills and we have served as a bridge to connect law enforcement with our community. Unfortunately, our best efforts have been somewhat frustrated by the difficulties that many Arab Americans who possess the requisite language skills and a strong desire to serve our nation have experienced with obtaining security clearances.

Working with the Washington Field Office of the FBI, the Arab American Institute helped to create the first Arab American Advisory Committee, which works to facilitate communication between the Arab-American community and the FBI. I served as a member of that FBI Advisory Committee, which we still hope will be a model to be copied across the United States.

As someone who has spent my entire professional life working to bring Arab Americans into the mainstream of American political life and to build a bridge between my country and the Arab world, I am very concerned about the direction of some of our efforts to combat the terrorist threat and the impact these initiatives have on our country and my community.

Unfortunately, the administration has devoted too many resources to counterterrorism measures that threaten our civil liberties and do little to improve our security. I share the concerns of my colleagues with some provisions of the Patriot Act that give law enforcement broad authority to monitor the activities of innocent Americans with inadequate judicial oversight. These concerns, I might add, are shared by Americans across the political spectrum. I am supportive of reasonable reforms like those recommended in the Security and Freedom Enhancement, or SAFE, Act.

I am as concerned, if not more, about a series of high-profile initiatives, not authorized by the Patriot Act, which have explicitly targeted tens of thousands of innocent Arabs and Muslims and have resulted in the detention and deportation of thousands. Policies and statements that conflate undocumented Arab and Muslim immigrants with terrorists cast a cloud of suspicion over the Arab American community that contributed to additional discrimination. I support passage of the Civil Liberties Restoration Act, which would help to end such counterproductive policies.

In the immediate aftermath of 9/11, the Justice Department rounded up at least 1200 immigrants, the vast majority of whom were Arab or Muslim. The DOJ refused to release any information about the detainees, and charged that the detentions were related to the 9/11 investigation. At the time, the Arab American Institute and others in the Arab-American community expressed concern about the broad dragnet that the Justice Department had cast in Arab immigrant communities. We fully supported the government's efforts to vigorously investigate the 9/11 terrorist attacks, but we questioned the efficacy of this dragnet approach. Based on reports from family members of the detainees, we also were very concerned about the conditions in which the detainees were confined, and their ability to contact counsel and their families.

Pursuant to Section 1001 of the Patriot Act, in 2002, the Justice Department's Inspector General issued a report which vindicated our concerns. The IG found that the Justice Department classified 762 of the detainees as "September 11 detainees." The IG concluded that none of these detainees were charged with terrorist-related offenses, and that the decision to detain them was "extremely attenuated" from the 9/11 investigation. The IG concluded that the Justice Department's designation of detainees of interest to the 9/11 investigation was "indiscriminate and haphazard." and did not adequately distinguish between terrorism suspects and other immigration detainees.

The IG also found detainees were subjected to harsh conditions of confinement, including cells that were illuminated 24 hours per day, and confinement to their cells for all but one hour per day. Disturbingly, the IG also found, "a pattern of physical and verbal abuse by some correctional officers at the MDC [Metropolitian Detention Center] against some September 11 detainees, particularly during the first months after the attacks." In testimony before this committee exactly one month ago, Inspector General Glenn Fine raised concerns that, with regard to abuse allegations at MDC, "The BOP [Bureau of Prisons] initiated its own investigation based on the OIG's findings to determine whether discipline is warranted. Yet, more than a year later, the BOP review still is ongoing. We believe that this delay is too long and that appropriate discipline should have been imposed in a more timely fashion."

I'm not suggesting that the government should never use immigration charges to detain a suspected terrorist, but the broad brush of terrorism should not be applied to every out-of-status immigrant who happens to be Arab or Muslim. Moreover, if detained, they should most certainly not be subjected to abusive and degrading treatment. Our immigration system is fundamentally broken. Comprehensive immigration reform is required to address this problem. We should not confuse the problems with our immigration system with our efforts to combat terrorism. Detaining large numbers of undocumented Arab and Muslim immigrants will not aid our efforts to combat terrorism, and might actually harm them.

Another example of conflating immigration enforcement against Arab and Muslims with counterterrorism was the National Security Entry-Exit Registration System (NSEERS) "call-in" program (also known as Special Registration), which required male visitors from 24 Arab and Muslim countries and North Korea, to register with local INS offices. By singling out a large group of mostly Arabs and Muslims, Special Registration involved a massive investment of law enforcement resources with negligible return. It also created fear of law enforcement in our immigrant communities, whose cooperation law enforcement needs. At the same time, these discriminatory practices validated and even fed the suspicion that some have of Arabs and Muslims.

From the outset, NSEERS was plagued by implementation problems. Due to inadequate publicity and INS dissemination of inaccurate and mistranslated information, many individuals who were required to register did not do so. Many who were required to register in the call-in program were technically out of status due to long INS backlogs in processing applications for permanent residency. Many such individuals have been placed in deportation proceedings.

Across the country, many were detained in harsh conditions due to the government's inability to process registrants in a timely fashion. For example, in December 2002, the INS in Los Angeles detained hundreds of men and boys who report they were denied access to legal counsel and their families, held in handcuffs and leg shackles, and forced to sleep standing up due to overcrowding.

In response to criticism that the "call-in" program discriminated against Arabs and Muslims, Justice Department officials originally said that it would be expanded to include visitors from all countries. When the program was transferred to the Department of Homeland Security, the administration announced that the program was being terminated. However, those who were already required to register, including male visitors from every Arab country, are still subject to the program's requirements and penalties for noncompliance, including deportation. "Call-in" registration is over, but its consequences are still with us.

The Department of Homeland Security reported that more than 80,000 people registered in the call-in. Of these, more than 13,000 have been placed in deportation proceedings. If a goal of Special Registration was to track possible terrorists, deporting those who complied with the program undermined this aim, especially since it may reduce future compliance. The Special Registration "call-in" program did not result in the apprehension of any terrorists. This clearly raises questions about the efficacy of the program.

In a similar vein, the Justice Department also launched the "Interview Project," to interview thousands of Arabs and Muslims, including U.S. citizens. The latest

round of FBI interviews, the so-called "October Plan," coincided with an Immigration and Customs Enforcement (ICE) initiative which apparently used the NSEERS-compiled database to prioritize leads. Given the pre-election nature of this initiative, the Arab American Institute expressed concern, at the time, that these tactics may have had a chilling effect on the participation of some segments of the Arab American and American Muslim communities in the election. We have found that these interviews created fear and suspicion in the community, especially among recent immigrants, and damaged our efforts to build bridges between the community and law enforcement.

Like other DOJ programs that cast a wide net, the interviews created a public impression that federal law enforcement viewed our entire recent immigrant community with suspicion, which, in some cases, fostered discrimination. For example, we received reports of instances where the FBI visited individuals at their workplace, and then these individuals were subsequently demoted or terminated by their employers.

FBI officials with whom I have spoken also questioned the project's usefulness as a law enforcement and counter-terrorism program. They told me it involved a significant investment of manpower, produced little useful information, and damaged their community outreach efforts.

The General Accounting Office reviewed the Interview Project and concluded:

> How and to what extent the interview project—including investigative leads and increased presence of law enforcement in communities—helped the government combat terrorism is hard to measure . . . More than half of the law enforcement officers that [the GAO] interviewed raised concerns about the quality of the questions or the value of the responses.

According to the GAO, "Attorneys and advocates told us that interviewed aliens told them that they felt they were being singled out and investigated because of their ethnicity or religious beliefs." The GAO also concluded that many of those interviewed "did not feel the interviews were truly voluntary," and feared "repercussions" if they declined to be interviewed.

I am concerned about these and other government efforts that infringed upon civil liberties for several reasons. First, it is wrong to single out innocent people based on their ethnicity or religion. This runs contrary to the uniquely American ideal of equal protection under the law.

By casting such a wide net, these efforts squandered precious law enforcement resources and alienated communities whose cooperation law enforcement needs. They ran counter to basic principles of community policing, which rejects the use of racial and ethnic profiles and focuses on building trust and respect by working cooperatively with community members.

According to polls conducted by the Arab American Institute and Zogby International, the Justice Department's efforts took a toll in the Arab American community. Immediately after 9/11 Arab Americans were heartened by President Bush's strong display of support for the community. In October 2001, 90% said that they were reassured by the President's support, while only six percent were not reassured. By May 2002, those who felt reassured dropped to 54% as opposed to 35% who were not. In a July 2003 poll, the ratio dropped even further, with only 49% now saying that they feel assured by Bush's support for the community while 38% say that they are not assured. By 2004 this number dropped to the 20% range. In addition, we found that thirty percent of Arab Americans reported having experienced some form of discrimination, and 60% said they were concerned about the long-term impact of discrimination against Arab Americans.

Civil liberties abuses against Arabs and Muslims have been well-publicized in the Arab world, and there is a growing perception that Arab immigrants and visitors are not welcome in the United States. As a result, America is less popular, and it is more politically difficult for our Arab allies to cooperate with our counter-terrorism efforts.

According to polls conducted by the Arab American Institute and Zogby International, Arab public opinion attitudes toward the United States had dropped to dangerously low levels even before the U.S.-led invasion of Iraq. We found that Arabs had strong favorable attitudes toward American values, and also had largely favorable attitudes toward the American people. However, they had extremely negative attitudes toward U.S. policy, which shaped their views of America. To be sure, U.S. policy toward the Israeli-Palestinian conflict and Iraq contributed to these attitudes, but perceptions of civil liberties abuses against Arab and Muslims Americans are also a contributing factor. In fact, in a 2004 poll of Arab attitude toward the US, we found that our treatment of Arab and Muslim immigrants had eclipsed Pal-

estine and Iraq as the number one reason for negative attitudes toward Americans in some Arab countries.

The countries polled included some of the United States' strongest allies in the Middle East: Egypt, Jordan, Morocco, Saudi Arabia and the United Arab Emirates. In an earlier AAI/ZI poll, done in March of 2002, we found that U.S. favorable ratings were already quite low. The most significant drops in U.S. ratings occurred in Morocco and Jordan. In 2002, for example, 34% of Jordanians had a positive view of the United States as compared with 61% who had a negative view. By 2004, only 10% of Jordanians held a positive view of the United States, while 81% see the country in a negative light. Similarly in Morocco the favorable/unfavorable rating towards the United States in 2002 was 38% to 61% percent. Two years later, it was 9% favorable and 88% unfavorable.

The U.S. favorable/unfavorable rating was already quite low in Egypt, Saudi Arabia, and the UAE. It has remained low.

Buttressing these poll results are my experiences in the Arab world, where I travel frequently. In conversations with opinion leaders across the region, the concern they raise most frequently is American civil liberties abuses against Arabs and Muslims.

Due to a variety of factors, including fear of discrimination, many fewer Arabs come to the U.S. for medical treatment, tourism, study, or business. In the past, Arab visitors to the U.S. have had a chance to observe first-hand the unique nature of American democracy and freedom and have returned to the Arab world as ambassadors for our values.

President Bush has rightly linked the spread of democracy to the war on terrorism. Unfortunately, civil liberties abuses against Arabs and Muslims in the U.S. and the indefinite secret detention and highly coercive interrogation of Arab and Muslim detainees in Guantanamo Bay and other locations has undermined our openness and harmed our ability to advocate credibly for democratic reforms in the Middle East. In fact, some Arab governments now point to American practices to justify their own human rights abuses. As President Bush suggested, and as we have learned so painfully, anti-democratic practices and human rights abuses promote instability and create the conditions that breed terrorism. Democratic reformers and human rights activists used to look to the U.S. as an exemplar, the city on a hill. Now they are dismissed by their countrymen when they point to the American experience.

Once we set a high standard for the world, now we have lowered the bar. The damage to our image, to the values we have sought to project, and to our ability to deal more effectively with root causes of terror have been profound.

Chairman SENSENBRENNER. Ms. Pearlstein.

TESTIMONY OF DEBORAH PEARLSTEIN, DIRECTOR, U.S. LAW AND SECURITY PROGRAM

Ms. PEARLSTEIN. Thank you. Thank you, Mr. Chairman, Mr. Conyers, for inviting Human Rights First to share our views today on the reauthorization of the PATRIOT Act.

My name is Deborah Pearlstein, and I direct the U.S. Law and Security Program at Human Rights First, which is formerly the Lawyers Committee For Human Rights.

We are grateful for the opportunity to speak and we welcome your review today of the PATRIOT Act as part of a much needed move to engage in more aggressive congressional oversight of U.S. counterterrorism laws and policies. I would like to focus on these brief remarks on the profound need for greater oversight in this area, and particularly the critical importance of building on the scope of section 804 of the PATRIOT Act, which recognizes the need for enforcing U.S. laws and U.S. operations overseas. This idea of oversight and accountability is one that the PATRIOT Act itself squarely incorporates in a provision we urge this Committee to champion anew. Section 804 of the act amends the definition of special maritime and territorial jurisdiction of the United States to

include "offenses committed by or against a national of the United States."

On diplomatic, consular or military premises overseas, the act thus now makes clear that the Department of Justice now has jurisdiction to prosecute crimes by or against U.S. persons committed on these sites as part of the special maritime and territorial jurisdiction.

In light of the sustained public focus on the ongoing detention of foreign nationals throughout the world and the substantial hit our national security interests have taken as a result of these practices, using the power of the PATRIOT Act in this respect has never been more important. We believe that the way to build on this provision of the act is by establishing a bipartisan independent commission to look comprehensively at U.S. detention and interrogation operations in the war on terror. We believe such a commission is not only critical to restoring America's commitment to protecting basic human rights, but also is an increasingly urgent requirement to prevent U.S. national security.

Let me explain briefly why I believe this is the case. Since September 11, 2001 the scope of U.S. detention and intelligence collection operations worldwide has grown dramatically. Far from diminishing in importance is U.S. missions in Afghanistan and Iraq have matured, detention operations are picking up permanence and pace with the numbers of individuals in U.S. custody worldwide close to 12,000 today. Despite the sustained nature of these operations, a startling number of questions about the U.S. global detention system remain shrouded in secrecy. What is the legal basis of detaining those held? And what are the plans for their future? Does the International Red Cross now have access to all held in U.S. custody or do we continue to hold ghost detainees beyond the reach of humanitarian aid or law? Critically, what methods of interrogation and conditions of detention do U.S. held detainees face and are we now in compliance worldwide with basic constitutional and treaty prohibitions on torture as well as cruel, inhuman and degrading treatment of any kind.

One need not be an expert in U.S. international and human rights law to recognize the urgency of these questions. According to the Pentagon's own figures, more than 100 people have died in U.S. custody since 2002. This includes 28 cases classified already by the Pentagon as homicides. At least half of those were people who were literally tortured to death.

To be clear, this is not a problem about a handful of actors from Abu Ghraib. Only one of the criminal homicides identified by the Department of Defense occurred at Abu Ghraib. The rest occurred at others of the two dozen-some detention facilities the United States maintains worldwide, well beyond the few young soldiers facing courts martial from Abu Ghraib. 137 U.S. soldiers so far have been punished for acts of torture or abuse, perhaps worse, the problem appears to be ongoing. At least 45 detainees have died in U.S. custody since Secretary Rumsfeld was informed of the torture at Abu Ghraib on January 16, 2004.

This is not a problem, first and foremost, about our brave troops. This is about command responsibility and congressional oversight. Our concern for the scope and nature of this problem is Americans

and human rights lawyers have been matched and indeed exceeded by our friends and colleagues in the military and intelligence communities who believe current policies have been devastating both to the safety of our troops and the security interests of our nations. As a distinguished coalition of retired admirals and generals wrote last fall, "understanding what is going wrong and what can be done to avoid systemic failure in the future is essential to ensure that the effectiveness of the U.S. military and intelligence operation is not compromised by an atmosphere of permissiveness, ambiguity or confusion."

Even more starkly as one U.S. Army interrogator returning from Afghanistan noted, "The more a prisoner hates America, the harder he will be to break. The more a population hates America, the less likely its citizens will be to lead us to a suspect."

Our detention practices have inflamed our enemies and alienated potential allies and they continue to run contrary to the security imperatives this body seeks to protect.

Finally, there can be no question that the investigations to date have been inadequate. As Human Rights first detailed at length in our recent report, Getting to Ground Truth, Government investigations so far have suffered from a lack of independence, failures to investigate relevant agencies and personnel, cumulative reporting, increasing the risk that error and omissions are perpetuating in successive reports, contradictory conclusions, questionable use of security classification withheld information, failures to address senior military and civilian responsibility, and an absence of any comprehensive game plan for corrective action. Human rights for the past 4 years——

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Ms. PEARLSTEIN. Can I conclude briefly?

Chairman SENSENBRENNER. Briefly.

Ms. PEARLSTEIN. Our past 4 years of active engagement on these issues has persuaded us a 9/11-style commission, independent, bipartisan and of unassailable credibility is critical to understand finally what has gone wrong in the U S detention interrogation operations, and to chart a way forward to accountability and correction. Today's hearing can be a valuable first step in taking seriously the cause of liberty and safety. And we thank you for your consideration.

Chairman SENSENBRENNER. Thank you.

[The prepared statement of Ms. Pearlstein follows:]

PREPARED STATEMENT OF DEBORAH PEARLSTEIN

Thank you for inviting Human Rights First to share our views on the reauthorization of the PATRIOT Act. My name is Deborah Pearlstein. I am the Director of the US Law and Security Program at Human Rights First. We greatly appreciate the opportunity to speak, and welcome your review today of the Patriot Act in the context of a much needed Congressional assessment of all U.S. counter-terrorism laws and policies. In my testimony today I would like to offer a few basic principles we hope the Committee will consider as it exercises its critical responsibility for reviewing and overseeing the authority given the Executive Branch under the PATRIOT Act.

For nearly 30 years, Human Rights First, formerly the Lawyers Committee for Human Rights, has worked in the United States and abroad to advance the values we believe all Americans share: a respect for justice and human dignity, and a commitment to the rule of law. One role we have worked hard to play is in providing

dispassionate legal analysis and pragmatic policy advice to help craft solutions to the most pressing human rights problems facing the world today.

It was with these values—and this approach to our work—that Human Rights First responded to the attacks of September 11 by creating a new U.S. Law and Security Program to engage on the human rights questions presented by U.S. national security policies. As the first director of that program, and a constitutional lawyer by training, I approach this work starting from three guiding principles.

First, Al Qaeda poses a very serious security threat to the American people, and the U.S. Government has the right and duty to protect Americans from attack. We thus welcome efforts to improve coordination among federal, state and local agencies, and between law enforcement and intelligence officials. Equally welcome are greater efforts to protect the nation's infrastructure supporting energy, transportation, food and water; efforts to strengthen the preparedness of our domestic frontline defenders, police, firefighters and emergency medical teams, as well as those working in public health. That recognition has meant for us, among other things, reaching out to members of the U.S. military and intelligence communities to understand the nature of the security challenge we face, and to discuss rights-respecting solutions that are equal to the challenge. We are proud to say that we have found many allies in these communities, and many areas of common cause.

The second principle is that the governments that are most effective in safeguarding human security are those that operate strictly under the rule of law: that is, under a system in which people are governed by public laws that are set in advance, applied equally in all cases, and are binding and enforceable on both individuals and on the government that serves them. For this reason, we have worked hard to engage all three branches of government in fulfilling their responsibilities to sustain our rule-of-law system. We have participated as monitors at Guantanamo Bay as the President's military commission trials began; advocated in the courts to ensure in all cases independent judicial review; and urged the vigorous exercise of congressional oversight in all aspects of U.S. counterterrorism activities—most recently in leading bipartisan calls for Congress to appoint an independent commission to study the challenges of detention and interrogation in Afghanistan , Iraq, at Guantanamo and elsewhere. In this spirit, we strongly welcome this hearing today.

Finally, we believe that the relationship between security and liberty is not zero-sum. That taking rights away does not necessarily improve security. And likewise, that some of the most effective security-enhancing measures we have seen since September 11—including efforts to improve tracking of cargo containers coming into the United States, and a renewed commitment to disease surveillance to safeguard against biological attack—are broadly neutral with respect to rights.

It is because we believe that the security costs and benefits that flow from laws cannot be gleaned simply from what rights they burden that we believe the PATRIOT Act discussion remains one in which more questions than answers remain. Homeland Security Department Secretary Chertoff emphasized recently the importance of risk-management principles in designing an effective approach to minimizing the threat of terrorism, urging that in "weigh[ing] the risks of a particular action, you conduct a cost-benefit analysis, and you factor these into your considerations." Four years in to the PATRIOT Act's implementation, we still lack a full, public accounting from the Department of Justice of the Act's use and its effects, for good and ill. Without this, we all remain poorly equipped to measure how much liberty or security we should cede.

Underlying all of these principles is an idea the PATRIOT Act itself incorporates, in a provision we urge this Committee to champion anew—the idea of accountability. Section 804 of the Act in particular amends the definition of "special maritime and territorial jurisdiction of the United States" to include "offenses committed by or against a national of the United States" on diplomatic, consular or military premises overseas. The Act thus now makes clear that the Department of Justice has jurisdiction to prosecute crimes by or against U.S. persons committed on these sites as part of this "special maritime and territorial jurisdiction." In light the sustained public focus on the ongoing detention of foreign nationals throughout the world, and the substantial hit our national security interests have taken as a result of these practices, using the power of the PATRIOT Act in this respect has never been more important.

This Committee should oversee, enhance, and enforce this aspect of the PATRIOT Act—and the Justice Department's pivotal role in carrying it out. With the powers that this Act and others like it provide comes the strict responsibility to enforce the laws as they exist. In including Section 804 in the Act originally, we believe Congress meant to signal its commitment to coupling new grants of power with equal measures of oversight and enforcement. Now is the time for Congress to strengthen its oversight of offenses committed in the special maritime and territorial jurisdic-

tion of the United States. And where the Department of Justice falls short, this body must bear the weight.

Thank you for considering our views. We welcome your active engagement and the opportunity to continue to work with you on these vitally important issues.

Chairman SENSENBRENNER. Mr. Pitts.

TESTIMONY OF CHIP PITTS, CHAIR OF THE BOARD, AMNESTY INTERNATIONAL USA

Mr. PITTS. Thank you, distinguished Chairman, Ranking Member and Committee Members. Amnesty international's millions of activists in the U.S. and in over 100 countries around the world call human rights violations as we see them, based on rigorous research and regardless of the government or armed group committing them.

Our touchstone is international law, including the universal declaration of human rights and the Geneva conventions, international instruments that the U.S. helped create. Amnesty vigorously condemns terrorists attacks like the horror of 9/11. We also understand history's clear lesson that human rights and the rule of law are indispensable prerequisites to true security for all. The PATRIOT Act, along with other post 9/11 laws, executive orders and policies seriously undermine human rights, weaken the global human rights framework and contribute both to human rights violations and, we believe, increased terror attacks. The mere existence of such measures has a chilling effect on fundamental freedoms, including speech and association, religion and belief, privacy, due process and equal protection.

These are U.S. constitutional rights. But they're also binding international law treaty obligations. Encouraging the presumption of guilt rather than innocence, the PATRIOT Act sweeps innocent people within its ambit. It has inspired a cascade of similar laws around the world that weaken the rule of law, so essential to protecting human rights, including the right to be protected from terrorist attacks.

With active U.S. encouragement almost every country around the world now has new anti-terror legislation, often modeled on the USA PATRIOT Act. Abusive governments globally, including China, Cuba, Zimbabwe, Colombia, Egypt, Uzbekistan, now cite U.S. actions to justify their own violations.

We urge Congress to correct the deficiencies of the PATRIOT Act by three main measures, restoring checks and balances, restoring individualized fact-based suspicion, and thirdly, independent judicial review. Amnesty is especially concerned about section 802's broad definition of domestic terrorism, which has already discouraged free association and peaceful dissent. Section 412's allowing indefinite detention merely upon the Attorney General's say-so, violating U.S. and international rights to due process and nondiscrimination, reduced or eliminated judicial review in sections like 215 and 505 which allow secret Government invasions of free thought, belief, religion, expression, press and privacy, and section 213's overbroad sneak-and-peak home search provision also infringing privacy rights.

Congress should enforce the Patriot Act's current sunset provisions or modify them significantly to protect individual rights and

eliminate, modify or sunset the other provisions infringing individual rights. Congressional oversight should also evaluate Justice Department compliance with section 1001 to ensure that abuses under the PATRIOT Act are fully investigated, especially those against Muslim, Arab and immigrant communities. Amnesty's racial profiling report last year found that such practices increased dramatically after 9/11.

We agree with Human Rights First and others that section 804, which expands U.S. jurisdiction to include offenses committed by or against a national of the U.S. provides grounds for Congress to support appointment of a special counsel and an independent commission to comprehensively investigate the torture and ill treatment of detainees in U.S. custody.

Over 500 people have been detained without charge at Guantanamo for over 3 years, and tens of thousands more in Iraq, Afghanistan and secret detention centers around the world. The rest of the world knows of this. And, they also know about the more than 100 deaths in U.S. custody, including the, at least, 28 homicides referred to. And the world views all this as an egregious abuse of power and a denial of the most fundamental rights of human existence.

In Amnesty's 2005 annual report, we noted that U.S. tolerance for torture and ill treatment sends a tragic and counterproductive message to the world that human rights may be sacrificed in the name of security.

Right now the U.S. domestic and foreign approaches are both preemptive, secretive, unchecked, subjective, counter to the presumption of innocence, unilateral, unreliable and abusive. Instead of being fair, legal, objective, fact-based, tested, cooperative and most importantly perhaps effective.

Congress must reiterate that human rights are an integral part of true security. Policies that facilitate torture at Guantanamo and elsewhere make us less safe and true security cannot be achieved without respect for human rights and the rule of law.

Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Thank you, Mr. Pitts.

[The prepared statement of Mr. Pitts follows:]

PREPARED STATEMENT OF CHIP PITTS

Mr. Chairman, Distinguished Ranking Member, Members of the Committee, on behalf of Amnesty International USA[1] thank you for the opportunity to be here today.

Amnesty International's 1.8 million members in over 100 countries—including hundreds of thousands in the United States—are committed to exposing human rights violations committed by governments and armed groups around the world. Amnesty International is guided by international human rights and humanitarian law, and the standards set forth in the Universal Declaration of Human Rights and the Geneva Conventions, international instruments the United States championed and helped create half a century ago. The organization was founded to defend the right of individuals incarcerated for the peaceful expression of their views and to oppose the use of torture on any person. Its members have helped free over 40,000 political prisoners, many of whom are survivors of torture, and continues to work for the eradication of torture worldwide and the implementation of relevant international instruments that establish universal human rights standards.

[1] Amnesty International is a grassroots organization with 1.8 million members worldwide working to promote and defend human rights. For information, contact Ms. Alex Arriaga or Ms. Jumana Musa at 202–544–0200, or visit www.aiusa.org.

The USA Patriot Act was adopted in the weeks after the horrific attack on September 11, 2001. Amnesty International vigorously condemned the 9/11 attack as a brutal assault and a crime against humanity, and recognized the duty of every nation to protect its citizens and to seek fair justice. Amnesty International vigorously condemns terrorist attacks, and upholds the international human right to be safe from terrorism. The organization also maintains that the lesson of history is that preserving human rights and the rule of law is the indispensable and preferred route to true security.

We are concerned that the USA Patriot Act, combined with other, related post-9/11 legislation, executive orders, and policies, undermines the human rights of Americans and non-citizens in this country, weakens the framework for promoting human rights internationally, and contributes to a climate conducive to human rights violations as well as increased incidents of terror.

Amnesty International believes that the USA Patriot Act, as it exists today, is out of step with the legal requirement and critical need to preserve core principles, constitutional freedoms, and adherence to human rights even in times of crisis. The Patriot Act and related measures threaten rights otherwise protected in the U.S. Constitution and international instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture, and the Convention on the Elimination of All Forms of Racial Discrimination.

Provisions of the Patriot Act have had a chilling affect on freedom of speech and association, freedom of religion and belief, and privacy. The law jeopardizes due process and fair trial procedures by encouraging a presumption of guilt until proven innocent, instead of the normal presumption of innocence. The Patriot Act is of concern both in itself, and also because it has inspired a significant cascade of similar legislation around the world that weakens the rule of law which is so essential to the protection of human rights, including the right to be defended against terrorist attacks.

The overly braod and heavy-handed approach of the Patriot Act is also reflected in other US laws, executive orders, policies and tactics that have led to excesses in the 'war on terror' and have allowed abusive governments around the world to cite the United States as an example to justify their own violations. The policies of the world's superpower disproportionately influence other nations. Governments in countries as diverse as Britain, China, Colombia, Cuba, India, Jordan, and Uzbekistan have stepped up efforts to enact or expand similarly restrictive policies. According to U.S. officials, at least 180 countries—almost every country in the world—have followed suit with legislation of their own since the USA Patriot Act was passed.

Amnesty International urges Congress to correct the deficiencies of the Patriot Act by restoring checks and balances, fact-based individualized suspicion, and independent judicial review over government implementation of the Patriot Act. These corrections are necessary both to protect fundamental civil and human rights and to more thoughtfully enhance the law's contribution, if any, to curbing terrorism. Provisions of special concern to Amnesty International include the following:

- The USA Patriot Act creates a broad definition of "domestic terrorism" that discourages the right to free expression and association. Section 802 of the law defines "domestic terrorism" as acts committed in the United States "dangerous to human life that are a violation of the criminal laws" if the US government determines that they "appear to be intended" to "influence the policy of a government by intimidation or coercion," or "to intimidate or coerce a civilian population." Already, the Patriot Act has emboldened some school administrators to discourage participation in free speech activities, and has discouraged some peaceful dissenters from protesting.
- The USA Patriot Act allows non-citizens to be detained without charge and held indefinitely once charged, if the US Attorney General certifies that there are "reasonable grounds" to believe this person is engaged in conduct that threatens national security. This runs counter to US and international rights to due process and to non-discrimination.
- And the USA Patriot Act infringes on the right to privacy and removes many types of judicial review over law enforcement and intelligence activities, which may in turn facilitate the commission of abuses of other human rights. For example, Section 215 of the USA Patriot Act permits the government to scrutinize peoples' reading habits through monitoring of public library and bookstore records and requires bookstores and libraries to disclose, in secrecy and under threat of criminal prosecution, personal records of reading and websurfing habits. This harms freedom of thought, belief, religion, expression,

press, as well as privacy. Librarians have stated publicly that they are torn between abiding by the law and violating their patron's right to privacy. The Patriot Act also allows for "sneak and peek" search warrants to conduct physical searches of property and computer records without providing notification, wiretapping and monitoring of e-mail, access to financial and educational records, among other areas. The right to be free from arbitrary interference with individual privacy is protected in both the US Constitution and the International Covenant on Civil and Political Rights, to which the United States is a party.

Amnesty International urges the U.S. Congress to enforce the sunset provisions currently in the USA Patriot Act, or modify them significantly to protect individual rights, and eliminate, modify, or place sunsets on other provisions that infringe on individual rights of all Americans and non-citizens.

We urge the U.S. Congress to exercise its important oversight role to examine implementation of the USA Patriot Act. In particular, Amnesty International is concerned by abuses against Muslim and Arab communities in the United States, and the generally hostile climate against immigrants. Amnesty International last year released a report on racial profiling in the United States and found that racial profiling practices by law enforcement have expanded in the government's "war on terror" and threaten to affect an estimated 87 million individuals in the United States. The report, "Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States" finds that law enforcement's use of race, religion, country of origin, or ethnic and religious appearances as a proxy for criminal suspicion undermines national security. Racial profiling blinds law enforcement to real criminal threats and creates a hole in the national security net.

Congress should evaluate the Department of Justice compliance with Section 1001 of the law with regard to complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice. Congress must ensure that department policies prevent racial profiling and abuse. This is a matter of upholding civil and human rights, applying the rule of law, and enhancing national security by protecting the human rights and freedoms of all.

Amnesty International also urges the U.S. Congress to exercise its important oversight role in examining the performance of the U.S. Government in implementing Section 804 of the Patriot Act. Section 804 amended the definition of "special maritime and territorial jurisdiction of the United States" to include "offenses committed by or against a national of the United States" on diplomatic, consular or military premises. The U.S. government has failed to date to support a truly independent and comprehensive investigation into abuses against detainees in U.S. custody.

That is why Amnesty International continues to call on the U.S. Congress to establish a truly independent commission , which has not happened yet, and to urge the Attorney General to appoint a Special Counsel to investigate reports of torture and ill-treatment of detainees held in U.S. custody in Guantanamo, Bagram, Abu Ghraib, and detention centers—including secret detention centers—around the world. For over three years, over 500 individuals have been held in indefinite detention in Guantanamo in conditions that spurred the International Committee of the Red Cross to break its tradition of silence and protest publicly U.S. mistreatment of detainees. General Richard Myers has indicated that at least 68,000 individuals have been detained around the world in the so-called "war on terror". We have all seen the photographs taken at Abu Ghraib, but we may not know that there have been over 100 deaths in custody, of which at least 27 have been ruled "homicides".

Amnesty International recently released its 2005 Annual Report which summarized human rights conditions in 149 countries and territories. Upon releasing the report, Amnesty International noted that the images of detainees tortured in Abu Ghraib shocked the world. As evidence of torture and ill-treatment of detainees in US custody in other countries continues to emerge, the United States is sending an unequivocal and severely damaging message to the world that human rights may be sacrificed ostensibly in the name of security. Congress must act to reverse this message, ensure an independent investigation into abuses, and uphold the rule of law and international standards of human rights for all. We are not safer when we abuse others. But we are safer when we promote conditions that allow every person to exercise their human rights and freedoms.

Thank you.

Chairman SENSENBRENNER. The Chair will recognize Members under the 5-minute rule. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I first begin by praising the four witnesses who, on such short notice were able to pull these excellent statements together. I want to put out these questions because, as you know, 5 minutes is a very short amount of time. And you may respond to them as you feel inclined. What changes do you think need to be made in the PATRIOT Act to prevent legal and innocent people from being unjustly punished or persecuted? That is the first question. The second, the Inspector General found that the detention of aliens after 9/11 "indiscriminate and haphazard." Do you believe that the Department of Justice's approach in this matter has become any better? Do you believe the Administration has adequately investigated allegations of torture, in Iraq, Afghanistan, and Guantanamo?

And, is there anyone here that does not support an independent commission or select committee to investigate? And is any one of you experts here aware of a single terrorist arrest or conviction that came from the registration of or interview of over 10,000 men of Middle Eastern descent? Please, those of you who are witnesses may.

Chairman SENSENBRENNER. Who wants to be first?

Mr. CONYERS. You can begin.

Chairman SENSENBRENNER. Ladies first.

Ms. TAPIA RUANO. Thank you, Mr. Pitts, and I would like to address some of these questions, not all of them, since I understand it is as we feel willing and with regards to the detention of illegals as it relates to non-citizens that, at this time, Department of Homeland Security is, you know, is a newly-created department and has been very distracted with reorganizing itself and that has definitely contributed to its ability to detain less people. I do think less people at this time are being detained as a result of post 9/11 investigations. But I also think it is important to note that the Department has recognized the failures of its prior policies and of its prior initiatives.

And, as any good agency, is attempting not to repeat its failures. I would also say that, of course, I would support an independent commission to investigate this. And no, as an immigration attorney which considers herself pretty well informed as to what happens in the country with regards to immigration detentions, I am not aware, and that is all that I can address to—I am not aware of a single occasion where any of the individuals that were brought in, noncitizens, as a result of these post 9/11 investigations were, in fact, charged with any 9/11 terrorist activity.

Mr. CONYERS. Thank you so much.

Mr. Pitts.

Mr. PITTS. Thank you, Congressman. In answer to your first questions about changes needed to prevent unjust persecution in the PATRIOT Act, we think again that there are three broad categories, adding checks and balances, adding independent judicial review, and adding requirements of individualized fact-based suspicion. We think that those are essential to make sure you are not stereotyping innocent Muslims or Arabs. And it is interesting how much ignorance there is on this issue. People assume that Muslims are Arabs and vice versa when Arabs are a small minority of Muslims in the world and the U.S., and, of course, Muslims are of as

infinite variety as the world itself. One out of every 5 people in the world. So the anti-foreigner provision in section 412 of the PATRIOT Act, for example, which allows rolling and potentially indefinite detention, and is discriminatory based on the subjective say-so of one man is a good example of the discriminatory disrespect for the objective rule of law that we need to have effective action against terrorism, not stereotyping but identifying the real threats.

Similarly, our racial profiling report last year pointed out that racial profiling just doesn't work. Think for a second about the most famous alleged members of al-Qaeda, Richard Reid, the shoe bomber, British national of West Indian descent; or the white guy from California, John Walker Lind, for example, or Jose Padilla, Hispanic gang member. You cannot possibly say that we are going to profile against people who look Middle Eastern and expect to be successful against Al Qaeda. What we need to do is not just have formal rhetoric against racial profiling, but recognize that the huge, gaping national security exception is illegitimate. It allows discrimination and a resurgence of religious, national origin and race-based discrimination that doesn't work.

Mr. CONYERS. Thank you. Mr. Chairman——

Chairman SENSENBRENNER. The chairperson will recognize the witnesses and the time of the gentleman has expired. The gentleman from Iowa, Mr. King.

Mr. KING. I thank the Chairman and I appreciate the witnesses being here today and those Members of the Committee that are here today, and I had the privilege of adjusting my travel plans to be someone who could benefit from this testimony today. Some of the things that come to mind, I think, I will direct initially to Mr. Pitts.

Could I ask you, if you could define for this Committee, the distinction between the standards in a criminal investigation with regard to subpoenas, that have been long accepted in the United States as something that protects and preserves the human rights of all citizens in this country. The distinction between that standard and the standard that is implemented by the PATRIOT Act with regard to that same type of search warrant.

Mr. PITTS. Absolutely, Congressman King. Thank you for the opportunity to clear up the rampant confusion on this point. In fact, just a couple of days ago with Deputy Attorney General James Comey's testimony before this Committee, he said that the standard in the PATRIOT Act is the same thing, probable cause. And he reiterated that there is probable cause to be an agent of a foreign power. That is a bit misleading, because when you read the actual language of the statute, at several points, for example, in section 215, the actual standard in the law is that an investigation is launched by the subjective interest of the law enforcement powers, and the information is sought for the purposes of that investigation. That is not a probable cause standard. Neither is the standard in section 505, which isn't even a relevant standard, the national security letter.

So there is a dramatic difference between the regular criminal authority, which can be challenged. A grand jury subpoena can be

challenged. That is not allowed under the gag orders of those sections of the PATRIOT Act.

Mr. KING. Mr. Pitts, I want to point out that you stated before this Committee that your opinions are based upon rigorous research, and I would ask the Committee to note that you brought a lot of that with you today. I have not seen one quite so prepared with their office in front of them. It looks like my office, at any rate.

Mr. PITTS. Sorry for littering your table.

Mr. KING. But the distinction between the legal standard of the search warrant being the distinction on a grand jury subpoena versus a court order, could you speak to that?

Mr. PITTS. Absolutely. I welcome again the opportunity to clear this up. The FISA warrants of the secretive FISA court, which are a secret court that are mandated, they have no discretion to refuse the application if they find an informal order is very different from the normal criminal process, whether it is a grand jury subpoena, which, as I said, can be challenged, or whether it is a search warrant, which actually is premised on information that generally has a probable cause to think that the person or place is guilty of a crime or terrorism.

Mr. KING. And you are also aware that there is a report required to come before Congress, if there are any abuses of the PATRIOT Act, and I would ask if you could name a specific case where there has been someone in a library, in a bookstore, that has had their human rights violated based upon the language in the PATRIOT Act.

Mr. PITTS. Absolutely, Representative King. This is another important point that I welcome the opportunity to clarify. The notion that there hasn't been an abuse is one of the most egregious myths about this act. First of all, the mere existence of these laws as I said is an abuse. It is a chilling effect on Americans' rights to get library records. Secondly, in the climate of secrecy under the PATRIOT Act, there is no way that we can know what abuses have occurred. But thirdly we all have, at the ACLU, at Amnesty, the American Library Association, the Bill of Rights, defend committees, the other witnesses here, have all independently received word of abuses.

I got an e-mail last week from a librarian, sir, in Seattle, Washington, who had been approached by the FBI to give a list of all people who had checked out a biography of Osama Bin Laden since 9/11. Now she had the courage to refuse that. But how are we going to understand our enemy and understand Al Qaeda and the truth the threat the violent extremism poses if we can't expose Government vulnerability?

Mr. KING. I understand your list of allegations, but I wonder if you can give us a specific list of people, individuals with names, specific cases that could be looked into by this Committee to see if there actually have been specific cases of violation of the PATRIOT Act and violations of people's human rights rather than the allegations under your vigorous research standard?

Mr. PITTS. Sure. There are a number of people who have been affected. Again, it is difficult to know exactly how many because librarians are under a—subject to criminal prosecution if they report

these things. But a number of librarians courageously came to me in Dallas, Texas and I heard from people that they have been approached.

Mr. KING. Could I ask you, Mr. Pitts, to present that list to this Committee? Would you provide that information about specific cases?

Mr. PITTS. I did mention a couple before the Dallas City Council when we had a bill of rights defense committee resolution on this subject. Toby Baldwin is the name of one librarian, for example, who experienced a request.

Mr. KING. Has that been looked into, do you know? Is that factual or is it an allegation at this point?

Mr. PITTS. No. We know that lots of librarians have been approached for records. Often the PATRIOT Act is not formally——

Chairman SENSENBRENNER. The gentleman's time has expired. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Pitts, let me follow through on the probable cause thing, because they shout probable cause in a criminal investigation, you have to have probable cause that a crime has been committed. Is that not right.

Mr. PITTS. That is correct, sir.

Mr. SCOTT. And under the FISA warrant, you only have to have probable cause that the target is an agent of a foreign government and you are trying to get foreign intelligence which may be criminal or not, is that right?

Mr. PITTS. That is correct. And a key point is that the PATRIOT Act, reduces that standard even further in ways that have not yet, I think, been realized by the public at large.

Mr. SCOTT. You mean, like the probable cause is the agent of foreign government and a substantial reason for the wiretap is foreign intelligence, but it may not be the main reason, so you could be talking about something that is not even a crime, that is not even the primary reason you are getting the wiretap.

Mr. PITTS. That is right. That is the problem with one of the——

Mr. SCOTT. So when they shout probable cause, you have to listen very carefully because it is not probable cause that any crime is even being alleged as part of the reason for the wiretap?

Mr. PITTS. Exactly.

Mr. SCOTT. You mentioned 100 deaths, 27 homicides. What is the status of those? How many have been arrested in those homicides?

Mr. PITTS. I am going to let Ms. Pearlstein address that.

Ms. PEARLSTEIN. Thank you, Mr. Scott. And thank you, Mr. Pitts. The status of many of those cases remains unclear because of the level of secrecy surrounding the investigations, the individual investigations. But to the extent they are known, there have been some prosecutions within the context of the military justice system and those are welcome.

The record, however, is completely inadequate, that is to say, there are deaths, gruesome deaths, to be frank, that have occurred in U.S. custody, people who have been tortured to death. Their stories to some extent have appeared on the front pages of the paper. And to date, no one, no individual has been held criminally or otherwise liable for those deaths. So, not only is this a challenge for the Department of Justice, this is a challenge for the Department

of Defense. And, I think, at this point now that these deaths are several years old and the trail of evidence and so forth, of course, grows cold, it is time for Congress to engage.

Mr. SCOTT. Thank you. Dr. Zogby, you mentioned the fact that America may be less popular. What impact does that have on our war against terrorism? Does it make a difference?

Mr. ZOGBY. Sure it does.

Number one it makes some foreign governments less willing to publicly cooperate. Number two, it creates a groundswell of support for those who would do harm to our country. The less popular we are, the more popular those who attack us are.

Mr. SCOTT. And what difference does that make?

Mr. ZOGBY. The difference is that the pool of those who are available to be recruited to do harm against America grows larger, and the ability of governments to act together with America becomes smaller. And I will also say that we have seen repressive policies instituted by governments in the Middle East. Contrary to the President's own program, wanting to promote democracy, some of our allies have become more repressive precisely because there is an anti-American groundswell in those countries as a result of our policies. And when we polled in the region, we always found that issues like the Arab-Israeli conflict, and more recently Iraq, were sources of discontent.

In the most recent poll that was done by Zogby International in the Middle East, we found that America's treatment of Arab and Muslim immigrants have, in some countries, eclipsed those other issues as the number one source of anger with America and the frustration of America in not projecting its values, even as it applies to those who live within their borders.

Mr. SCOTT. And the translation is that the activities make us less safe.

Mr. ZOGBY. Decidedly so. And I think that we ought not fall prey to spinning our successes. We ought to look at the reality on the ground. You wouldn't run for office without doing some polling. And we do polling, and what we find in our polling is that America is actually less popular, and I believe less safe as a result of those policies.

[9:30 a.m.]

Mr. SCOTT. Ms. Tapia Ruano, can you talk about holding people without charges, and the checks and balances that are available when people are held as enemy combatants or material witnesses indefinitely?

Ms. RUANO. Well, what I would like to address, from individuals who are alleged to be charged for being here engaging in 9/11 terrorist activities, and ultimately result in only being charged with civil minor immigration violations. And those individuals, again, as I mentioned before, do not have the opportunity to even know why they're being detained; they're held in custody for months. This is something that, to our knowledge, is not happening at the present time. It definitely is documented as having taken place immediately post-9/11 and for a few months thereafter.

Mr. SCOTT. What are the checks and balances available, and when do people get to be heard as an enemy combatant?

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from California Mr. Lungren.

Mr. LUNGREN. Thank you very much, Mr. Chairman. And thank you for holding this hearing.

I would just—I say that at the outset, I've been involved in these issues for a long time. I served for a year and a half on a panel that looked at, in retrospect, our treatment of Japanese nationals and Japanese-Americans during World War II, where we were able to review mistakes that were made at that time.

When I ran for Congress this last time, I was accused of being soft on terrorism and soft on immigration because I supported legislation which gave rights to people who were immigrants. I had to respond to an attack that I thought was unduly critical and racially and religiously profiling certain groups as a part of a political attack.

Having said that, however, I am somewhat disturbed by the contours of the request for this hearing. I wonder why those who asked for this hearing did not ask for any witnesses from the Administration to be able to respond specifically to the allegations that are raised, number one.

Number two——

Mr. CONYERS. Will the gentleman yield?

Mr. LUNGREN. Well, I only have 5 minutes, and the gentleman has had 15, I think, so far.

Number two, some of the statements suggesting that we had routine torture that somehow causes the rest of the world to respond negatively to us are way over the top. The investigations have shown specific examples of inappropriate activity, criminal activity by individuals, and they're being prosecuted at the present time.

A statement made about the routine desecration of the Koran is absolutely contrary to the facts of the investigation that were shown. And the gentleman, Mr. Zogby's, statements that those kinds of things, that kind of evidence gives us a negative response in the non-U.S. world, the Arab community, the Muslim community, ought to be cautionary to those of us when we look at these sorts of things.

One should look in detail at the report with respect to the instance involving the Koran. And one, I think, would be impressed by the care which is taken by those that at Guantanamo Bay with respect to the protection of religious rights there. And in those specific instances where there have been violations, those have been investigated; action has been taken against those people.

So I just would hope that those on the other side would understand the concerns some of us have about the contours of this particular activity.

Secondly, the Creppy memo is no longer followed by the Administration. We had testimony to that effect by Mr. Comey, testimony to the effect of Mr. Comey that they were trying to do things immediately after 9/11 to try and respond to the risk and the threat as they saw it at that time, but they have made changes, and it is not being followed. That was the direct testimony of Mr. Comey under oath here, and I wish that to be entered into the record.

And finally, with respect to section 215, let's understand what section 215 is. Section 215 has to be an application to a court that has to make a determination, number one, that it involves a for-

eign agent; number two, that it is relevant to an investigation against international terrorism or clandestine intelligence activities; number three, that it is not directed against a United States person solely on the basis of activities protected by the first amendment of the Constitution of the United States. All of those things have to be shown to the court. The court has to make a determination that, in fact, those things are present. So the idea that somehow section 215 is being used willy-nilly to go after people merely because they check out books in one particular place or another is just not correct. The court does make those determinations. We have made specific inquiry with respect to that and found that to be the case.

And finally, I would just say this: It is patently absurd to create a moral equivalence between the United States and China, Zimbabwe and other countries, as your statement, Mr. Pitts, has suggested. If the suggestion is they need examples to prop up the activities that they engage in versus their citizens, that's patently absurd. The suggestion that somehow, because of the passage of the PATRIOT Act, we are leading those kinds of countries to involve themselves in abuses of other countries is, frankly, I think, seriously amiss.

This Committee has had—actually, Mr. Chairman, we've had 11, not 7, 11 oversight hearings in the Subcommittee and full Committee on the PATRIOT Act. We have gone over section by section by section——

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from North Carolina Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. And I want to thank the Chairman for convening the hearing, even though he is doing it according to the rules, and it started out kind of testy.

And I also thank the Chairman for not interrupting the witnesses and applying an overly technical view of this hearing. I think it would have served a very negative purpose to do that, and I want to applaud you publicly for not doing that during the testimony of these witnesses.

Briefly, I'd just like to reiterate a point that I made yesterday in a speech I gave to the Charlotte Chamber of Commerce, interestingly enough, in which I said that it is not unusual in the aftermath of things like Enron or things like the accounting scandals or things like 9/11 for the legislative process to overreact and do more than is necessary to address or correct the problem, and that the true test of a legislative body is really our ability not so much to overreact sometimes, but to, once we have overreacted, understand the impact of that overreaction and then make the necessary adjustments, because all of us are engaged in not a science, but a process of trying to find what the appropriate and right balance is in all of these situations. And it seems to me that if we try to find that balance listening only to the people who have defended the action or reaction that the legislative process has made, either to Enron or to 9/11 or to accounting scandals or whatever we're doing in the legislative process, if we're not listening to all of the people who are impacted by these decisions, then we do ourselves, as legislators, a real disservice, and we do our country a real disservice.

So I think really that's what we are involved in here, trying to find what that appropriate balance is, what was, should have been, should be going forward. We found a balance in this Committee which we unanimously endorsed, only to see it changed in the PATRIOT Act when it went to the Rules Committee.

And so I just want to generally thank the Chair for the series of hearings and these witnesses for being here today to help us try to find that balance.

Now, my colleague on the other side has made a number of comments, which I could tell each of you are anxious to respond to, and him having run out of time, perhaps I should give Ms. Pearlstein at least an opportunity to respond.

Ms. PEARLSTEIN. Thank you very much, and thank you for your comments.

I want to just respond briefly to the suggestion about the prosecution of individual acts of torture and abuse that have been identified by the Pentagon as occurring in U.S. detention facilities overseas. A handful of these have been prosecuted under the Uniform Code of Military Justice. A much larger number of them, to the extent they've been dealt with at all, have been dealt with by administrative or incredibly light disciplinary punishment; that is, revoking of mess hall privileges. The vast majority of them have yet to be addressed. This is a failure of the Department of Justice. This is a failure of the Pentagon. This is why we believe an independent commission is needed to look at these things.

On the point of why the international community and many Americans may be frustrated by this——

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Arizona Mr. Franks.

Mr. NADLER. Mr. Chairman, point of order.

Chairman SENSENBRENNER. The gentleman from Arizona Mr. Franks is recognized.

Mr. NADLER. Mr. Chairman, point of order.

Chairman SENSENBRENNER. The gentleman will state his point of order.

Mr. NADLER. Mr. Chairman, it has generally been the practice of this Committee that witnesses are permitted to finish the sentence so that what they're saying will not be interrupted in midsentence——

Chairman SENSENBRENNER. The rules state that the Chair has the prerogative to recognize Members and to enforce the time limits. The Chair is enforcing the time limits, and the gentleman from Arizona Mr. Franks is recognized.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, sometimes an open, democratic Republic like the United States of America is so transparent that both its warts and its qualities are seen before the world, and that's a healthy practice. But, Mr. Chairman, in recent days we've seen and heard comparisons of the policies of the United States and the practices even in prisons with the Soviet gulags, that somehow the United States has become a negative for the cause of human freedom in the world. And I find that to be something that completely defies reason in the mind of any person who has any historical view of the United States.

And I think sometimes we do a great disservice to the cause of human freedom when we tear down the greatest force for human freedom that the world has ever known, and that's the United States of America. And, Mr. Chairman, having said that, I'd like to direct a couple of questions to Dr. Zogby.

Dr. Zogby, in your recent testimony, you made the complaint that the Justice Department had detained immigrants in the aftermath of the 9/11 attacks, but isn't it true that the investigation of these individuals had absolutely nothing to do with the PATRIOT Act, and, in fact, these events occurred before the PATRIOT Act was even enacted; is that correct?

Mr. ZOGBY. Some of them were before, and some of them were after. The call-ups that occurred following this in October, and then later on, I think, in January of 2002 and special registration went well beyond the initial round-up, the numbers of which we actually don't know. They were making numbers public, and at one point they stopped making numbers. People got stuck on the 1,200, but frankly the numbers appeared to go much higher.

We don't know the outcome of all of those. There have been independent reviews, both within the Department of Justice and by groups outside, who have interviewed several of the people, both still here in the United States and those overseas. The inspector general's report, I think, was very clear on the number of those cases that reported abuse, reported horrific treatment within the prisons. And I think it is important to recognize this is an issue that requires closer scrutiny.

Ms. TAPIA RUANO. If I may also respond to that question?

Mr. FRANKS. Let me ask an additional question, Dr. Zogby, and then you feel free to respond.

In your written testimony you also mentioned that the detainees—in Guantanamo Bay in general, but isn't it a fact that those being held in Guantanamo Bay are not being detained pursuant to any authority contained in the PATRIOT Act? And, in fact, if the PATRIOT Act was repealed today, would it have any effect on the status of these detainees in Guantanamo Bay at all?

Mr. ZOGBY. I'm not aware and can't speak to that issue, but I will tell you the issues I mentioned were Guantanamo and other locations around the world. And I was speaking about that in the context of what it has done to our image internationally.

And I want to address that and want to address as well the remarks raised by Congressman Lungren. The issue of torture. You know, once we're authorized the use of practices that previously were considered and in international law are considered torture, and lowered the standard of what constitutes torture so that now sleep deprivation, use of creating stress in those under detention, and even physical abuse to some degree is not constituting torture, then of course the number of those cases that we're going to prosecute are going to be less because we absolve people of priority of torture by saying this no longer constitutes torture.

And this is what concerns me is that we have governments in the Middle East and elsewhere in the world who now say, we do not torture people, we do what the United States of America does. That bothers me, and it ought to bother everybody on this Committee.

It's not covered in the PATRIOT Act, but it is an issue that we ought to be concerned about.

Mr. FRANKS. Dr. Zogby, just for the record, I think to suggest that deliberate routine torture is the committed policy or the deliberate policy of the United States defies any sort of credibility.

Mr. ZOGBY. Sir, I didn't write the memos, I didn't write the memos; the memos are there. There is a paper trail about what we have done. And I think that the degree to which we continue to deny that we've done it, we do not look good in the eyes of the world, nor should we feel good about ourselves as we face the American people. We have an issue that must be addressed, and it will be addressed either by us or future generations——

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from New York Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. And let me express my appreciation for your civility to the witnesses.

Ms. Pearlstein, you talked about 12,000 prisoners in major new permanent detention. Section 412 of the PATRIOT Act, I think Ms. Tapia Ruano mentioned that under section 412 the Attorney General can detain alien terrorist suspects that he designates as such for up to 7 days, and that he must certify he has reasonable grounds to believe—et cetera. Within 7 days the Attorney General must initiate removal of criminal proceedings or release the alien.

The President, under military order number 13, allows the Secretary of Defense to detain designated alien terrorist suspects within the United States without express limitation and condition, and apparently without any length of time restriction. Under what legal authority did the President issue that order? And how do they get around the 7-day restriction, which was very carefully negotiated in this Committee in section 412 of the PATRIOT Act?

Ms. PEARLSTEIN. I think the short answer to your question is there is no clear answer from the Administration to what the basis of the legal authority is, and I think it is important to distinguish——

Mr. NADLER. Has that been challenged in court?

Ms. PEARLSTEIN. The basis of the legality of the detention of people being detained at Guantanamo Bay, that people being detained in the United States, in particular Jose Padilla, who was subsequently released following a ruling of the Superior Court, and the detentions in Afghanistan and Iraq have been challenged in U.S. courts only in the context of civil litigation challenges brought by people who were subsequently released from detention, challenging acts of torture and abuse that they were subject to while in detention.

There is currently no mechanism of which I'm aware and no suits or any other proceeding through which I'm aware of anybody held in custody in Afghanistan and Iraq to challenge the legality of their detention in U.S——

Mr. NADLER. Under section 804 of the PATRIOT Act, I think you said, giving jurisdiction abroad,why can't you get a writ of habeas corpus?

Ms. PEARLSTEIN. Section 804 of the PATRIOT Act provides only that the Department of Justice now has jurisdiction to prosecute offenses that are committed——

Mr. NADLER. But does not give jurisdiction for the defense attorney to question his intentions.

Ms. PEARLSTEIN. Under that particular provision. All that is about is the U.S. Government's prosecutorial authority. The Federal habeas statute, which exists on the books separate from the USA PATRIOT Act, is still on the books. To my knowledge it has not been deployed by a current detainee abroad.

Mr. NADLER. Thank you.

Ms. Tapia Ruano, is it true that immigrants who have been found eligible for bail have been kept from being released?

Ms. TAPIA RUANO. Yes. And it's even more outrageous to consider that immigrants who have been granted legal permanent residence after their full merits hearings have also, as a result of 9/11, detainee status been retained in jail until they received a clearance from the United States.

Mr. NADLER. Under what authority?

Ms. TAPIA RUANO. Under the regulation that allows individuals to be kept under—it's not a regulation, I'm sorry, under the understanding of policy memos—I can't point to them directly because we haven't seen them in writing, but we know it exists—but it is a policy, it's a cooperation that until the individual is "cleared by the FBI, such individual is not released, regardless of the decision by the agency."

Mr. NADLER. Regardless of the decision of the agency. And why aren't people subject to habeas corpus release?

Ms. TAPIA RUANO. Based on my understanding of the law, until those individuals are subject to some final order, those individuals, in fact, don't have an opportunity to file a habeas. Since the Real ID Act was passed very recently, now I would suspect—and I haven't been able to study it well enough to advise you—but I would suspect that that would also limit any right that individuals have to take habeas court proceedings if it involves immigration-related relief.

Mr. NADLER. So an immigration-related case, even after they have been found eligible for bail, they can be detained indefinitely?

Ms. TAPIA RUANO. The individuals normally—and this happens today—individuals, noncitizens, can be detained after they have been granted bail by a judge by having the agency, the prosecutor, issue a stay of that order——

Mr. NADLER. The prosecutor or a court?

Ms. TAPIA RUANO. The prosecutor.

Mr. NADLER. The prosecutor can stay the court's judgment?

Ms. TAPIA RUANO. Absolutely. And that happens every day.

Mr. NADLER. Do you know of any other area of law where a prosecutor can overrule a judge?

Ms. TAPIA RUANO. I'm unfamiliar with other areas of law, so I can't really answer that question.

Mr. NADLER. Anybody on the panel know of any other area of law where a prosecutor can overrule a judge's decision to release a person on bail?

Mr. PITTS. Well, it is happening right now. The Supreme Court of the United States decided in the *Rasul* case a year ago, the enemy combatant case, that detainees in Guantanamo were enti-

tled to a lawyer and to Federal court review, and that has not happened——

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from North Carolina Mr. Coble.

Mr. COBLE. I thank the Chairman. I thank the witnesses for being here.

I too want to thank Mr. Scott and Members of the Democrat and Republican side of the aisle and staffers who have worked with me as we conducted nine oversight hearings under the Subcommittee on Crime, Terrorism, and Homeland Security, and I think this is the 12th hearing. And I take great umbrage, Mr. Chairman, when I hear people say, well, you all are trying to ram through the PATRIOT Act.

We're not trying to ram through it at all. After nine hearings—and, by the way, the nine hearings were very productive, I think. Now, in some instances the witnesses departed from the PATRIOT Act, as I may do in my statement, and I was generous about that, and I didn't admonish anybody. But I've heard some folks claim that the United States has the worst human rights record in the world. Folks, that boggles my mind. I'm not suggesting that you all said that; others have said that to me. Conversely, I think we probably have one of the best human rights record than anybody in the world. Perfect? No, not by any means, but far more than most countries.

Abu Ghraib, do I support what was done there? Indeed not. But, folks, I'm not going to use a broad paint brush to portray our men and women in the armed services as being human rights abusers. Now, there were a couple, perhaps a limited number, of stupid acts that have been addressed through a court martial, I'm told, and that is, indeed, appropriate.

I guess what gets my juices flowing, Mr. Chairman, is when I see these thugs, whose faces are concealed by masks that cover their face, anxiously waiting to behead innocent hostages, when I see that on the one hand, which is a 1-day news story, and then we hear about Abu Ghraib, and—and again, I'm not defending Abu Ghraib, but the Abu Ghraib story appears to be eternal. The thugs who are anxious to behead innocent hostages is a 1-day story and obviously not newsworthy. Folks, it's damn newsworthy to me and to most Americans.

And I think these hearings are healthy; I think we are plowing sometimes new ground, Mr. Chairman. Sometimes we are plowing the ground that has been plowed nine times before, but I don't mind doing that if we can get to the truth, if we can improve the situation.

Dr. Zogby, I think you mentioned about 9/11. It's a day that will, indeed, live in infamy. We were minding our business, and then we were attacked, and over 3,000 people killed, and you say many Arab Americans, inexcusable. And if I appear to be subjectively involved, I am subjectively involved. And before I get too subjectively involved, before the Chairman comes down on me, before that red light illuminates, I'm going to yield back my time.

Chairman SENSENBRENNER. The gentleman from Maryland Mr. Van Hollen.

Ms. JACKSON LEE. Point of order, Mr. Chairman.

Chairman SENSENBRENNER. State your order.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Let me, first of all, thank my distinguished colleagues Mr. Van Hollen and Ms. Wasserman Schultz——

Chairman SENSENBRENNER. The gentlewoman will state her point of order.

Ms. JACKSON LEE.—for being willing to yield to me. I want to make it clear——

Chairman SENSENBRENNER. The gentlewoman is not stating a point of order, and the gentleman from Maryland Mr. Van Hollen is recognized.

Ms. JACKSON LEE. Mr. Chairman, I was in the room before my two colleagues; however, I will yield to my two colleagues because of the disorientation of the Chairman. Thank you very much.

Mr. VAN HOLLEN. I thank my colleague, and I thank all the witnesses for their testimony this morning.

And, Mr. Zogby, I wanted to follow up on a couple of points you made, because you talked about the impact on people around the world of actions taken here in the United States, and the perceptions that that gave to people. And you mentioned those in the context of the PATRIOT Act, but also Abu Ghraib and some of the indefinite detentions that took place. And you made what I think is a very important point that needs to be emphasized, which is, this is not about winning a popularity contest. Yes, it's nice to be liked around the world, but the most important thing that we can do as Americans is to make sure that we protect our security.

But essential to protecting our security is making sure that people around the world in many cases have a positive impact upon the United States, especially when we're pursuing an effort to encourage and promote democracy around the world. And as you said, we all share the view that the United States must be a leader in promoting democracy and human rights around the world, and if we're going to be encouraging elections, free and open and fair elections, in places in the Middle East, if we're going to be encouraging free and fair elections in many other places around the world, then it's important to us how people who are going to be voting in those elections perceive the United States, because we hope that they will elect leaders who will be supportive and friendly toward the United States' interests, and to the extent they have a negative view of the United States, it's much easier for those who would want to demagogue the United States to win in those elections.

And so an integral part of our democracy promotion effort overseas, it seems to me, is making sure that the United States continues to be perceived, as it has been in the past, as a great leader for freedom and a great leader for human rights. And to the extent that we tarnish that image, we hurt our own national security interests, and we hurt our ability to fight the war on terrorism.

You've done a lot of work in this area. Could you please talk a little bit more about how those negative perceptions of the United States can undermine our own efforts to promote democracy in those regions in a way that is consistent with our national security interests?

Mr. ZOGBY. And, Congressman, I thank you. And I would say I'm not sure I could do it more eloquently than you've just done. I think you have made the case very clear.

But I would say to you that this is not about us being the best or the worst. At the end of the day, there is not a scale that judges America with other countries. And I think Congressman Coble is right about that. We set a higher standard and always have. We have always been and wanted to see ourselves be the city on the hill, and that's why democratic reformers have looked to us. When they no longer look to us in their governance, instead look to us to validate policies that bring about repression, then I think we have to examine ourselves not only for our foreign policy purposes, but I think also for a sense of are we being true to ourselves and to our Founders, and to the sense of the value of America that we teach our children. I think that is really fundamental here.

The pictures of Abu Ghraib were not a 1-day story, and they shouldn't have been, because that's not who we are. And those pictures are going to be soon replicated by other pictures from Abu Ghraib that will come out at the end of the month, and we will be reminded again and the world will be reminded again that America stopped being America.

The stories of the Koran are not a few, but there are many, number one. And number two, the inspector general reported that the Department of Justice shows that those very practices took place domestically in metropolitan detention centers.

We need to be fair to who we are. If we deny who we are, I think we lose our ability to lead in the world. When foreign governments become more repressive—because as people become more angry at America and become more angry at their government's leadership for being supportive of America, we are, in effect, creating a groundswell for terrorism. As we said, antidemocratic practices produce terrorism. By those very practices that we are encouraging or by example leading other governments to pursue, we are making other countries in the world less free, we're making the countries less democratic, and we're making America a role model for less democratic and less free practices. And there is a tragedy in all of that because it undercuts our effort to fight terrorism and make us more secure.

Mr. VAN HOLLEN. Thank you. And let me just say——

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Indiana Mr. Pence.

Mr. PENCE. Thank you, Mr. Chairman. And thank you for the long series of hearings that you have held on the PATRIOT Act; they have been enormously informative to me as a Member of this Committee who was involved in drafting this PATRIOT Act.

I also want to thank the panel. It is not easy to come before Congress, and I am grateful for your patriotism and your citizenship displayed today.

I want to direct my remarks and my questions specifically and respectfully to the Chairman of the Board of Amnesty International, Mr. Pitts. And let me say I'm a bit of a fan of Amnesty International. I actually went to the floor a week before the initiation of hostilities against Iraq and for a full hour quoted Amnesty

International's outstanding research on the profound and appalling human rights record of Saddam Hussein. Tens of thousands incarcerated. I, frankly, found your research to be very moving. Quite a few people in precincts around the country didn't appreciate this conservative Republican quoting Amnesty International to justify, in part, the war, but I have appreciated your work.

It's in that context that I must tell you, Mr. Pitts, I was very troubled by your description of the U.S. detention facility at Guantanamo Bay as a gulag of our times. There has been a lot said by Mr. Van Hollen a few moments ago and other colleagues about the importance of our image in the world, and I think prison abuse is an appalling thing, and I'm pleased at the aggressive prosecutions that have taken place of military personnel who have been accused of that, and believe that that should be the case. But I also believe that anti-historical, irresponsible rhetoric, like referring to the U.S. detention facility at Guantanamo Bay as the gulag of our times, endangers the lives of Americans in uniform by fueling the very worst stereotypes of our enemies about this country in the world.

The gulag, of course, was a Soviet system of forced labor camps. The word is a Russian abbreviation for the term chief administration of camps. In The Gulag Archipelago, the famous book by Alexander Solzhenitsyn, he brought the story of the gulags to the world; 28.7 million people put into forced labor. The death rates in those camps reached their apex in World War II. The total number of prison deaths is impossible to calculate. It ranges from a low end of 3 million people systematically executed or starved to death or worked to death in the gulags to numbers of 10, 12 and even 20 million.

In the book, Gulag: A History, a journalist named Anne Applebaumgate writes that after 1937 the camps "transformed themselves from indifferently managed prisons in which people died by accident into genuinely deadly camps where workers were deliberately worked to death or murdered."

It is extraordinary to think of a comparison between a U.S. detention facility, where maybe mistakes have been made and have been made by American personnel, to the systematic death camps of the Soviet empire. It's also peculiar to me that Amnesty International would refer to Guantanamo as the gulag of our times when there is a much better candidate in the Kwan-li-co couldn't find system of concentration camps in North Korea. North Korea is a bona fide Soviet state run by the son of a man who was actually put into power by Stalin. In fact, Kim Jong-il was reportedly born in a training camp in Siberia where his father was groomed for power. But to suggest that, you know, in all of the world the gulag of our times is not the death camps that are the natural progeny of the gulags of the Soviet empire that exist today in North Korea, but that Guantanamo Bay is, that seems to me, as I said, anti-historical, irresponsible and the type of rhetoric that endangers American lives.

Now, I'm not alone in this. It was former Soviet political prisoner Vladimir Bukowski who characterized your term as "stupid" and "an insult to the memory of millions who perished in Soviet camps."

With all of that said, and I ask this respectfully, Mr. Pitts, are you or is Amnesty International prepared to retract your statement that the U.S. detention facility at Guantanamo is the gulag of our times, or are you prepared before this hearing to qualify that before this hearing, given the extraordinary record of history of the gulags and the reality of gulags in our times in countries like North Korea?

Chairman SENSENBRENNER. The gentleman's time has expired. The gentlewoman from Florida——

Mr. NADLER. Point of order, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman will state his point of order.

Mr. NADLER. I believe it is improper under our rules to cast aspersions on the integrity of our witnesses, and I would like to give the witness an opportunity to respond to that.

Chairman SENSENBRENNER. First of all, that is not a proper point of order; secondly, I believe the gentleman——

Mr. NADLER. It's a point of decency.

Chairman SENSENBRENNER. Well, point of decencies are determined other than by rulings of the Chair.

The statements that were made by the gentleman from Indiana were not impugning the integrity of any of the witnesses, including Mr. Pitts, before the Committee; they were value judgments on the part of the gentleman from Indiana, Mr. Pence, on statements that have been made by representatives of Amnesty International other than the witness that is before us.

Mr. NADLER. I would ask that the witness have an opportunity to respond.

Chairman SENSENBRENNER. Without objection, the witness may proceed.

Mr. PITTS. I would like to respond to Mr. Pence's question, and also some of the other statements made that Amnesty has in some way applied amoral equivalency either with the horrendous regime of Stalin, which we were at the forefront of condemning the perpetuation of that system in the Soviet Union in the 1970's and 1980's. And we're not suggesting moral equivalency, Mr. Pence, with China, or North Korea or Iran. Our point is that it's not Amnesty International that is putting the U.S. in this position, and it's not just Amnesty International's reports—although we have issued several reports, hundreds of pages in each, enumerating numerous instances of torture that would break our heart—and I'm prepared to read them if you would like. But as we've heard today, it is the Government's own reports, it is the reams of Government memos that show that we created a black hole, and that the same principles or practices that were at play in the gulag—disappearances, putting people in the gulag, stripping them, beating them—these are practices that people that were there we are now seeing in Guantanamo.

How can the U.S. have credibility in condemning North Korea as it does, or Iran or Cuba, for arbitrary detentions, for beatings, for torturing people when the same things are going on in Guantanamo? And Secretary Rumsfeld himself approved techniques like forced nudity, like stripping, like hooding people. One of the people hooded in Guantanamo, whose name was Manadel al-Jamadi, we

know died from the hooding, the beating. He was one of the ghost detainees that Secretary Rumsfeld personally approved.

And so I don't think it's absurd for Amnesty International to make these points, I think it is absurd for the U.S. to create that legal black hole. And it's time to fill in that legal black hole and shut Guantanamo.

Chairman SENSENBRENNER. The Chair would point out that the activities of the Department of Defense are not within the jurisdiction of the Judiciary Committee, but are within the jurisdiction of the Armed Services Committee, and it is their responsibility to investigate allegations and to conduct oversights over the Department of Defense.

The gentlewoman from Florida, Ms. Wasserman Schultz.

Mr. CONYERS. Would the gentlelady yield to me just briefly?

Ms. WASSERMAN SCHULTZ. Of course.

Mr. CONYERS. I would like to point out that it is the jurisdiction of the Judiciary Committee to consider human rights, civil rights, civil liberties violations. That is not an inappropriate subject for this Committee. As a matter of fact, we have the sole jurisdiction over those concerns.

I thank the gentlelady for yielding.

Ms. WASSERMAN SCHULTZ. You're welcome.

Mr. Chairman, it is a pleasure to join this Committee. It is a baptism by fire for me as a new Member. And as the gentleman from Arizona stated, sometimes the world does see our version of democracy, warts and all. This proceeding would be one version of that democracy.

I wanted to ask Mr. Zogby if he could discuss the Justice Department's claims that it is not racially profiling, but is profiling by country of passport. For me, because I represent communities in south Florida where we have many Hispanic Americans and many Hispanic immigrants who have darker skin, I think that they would beg to differ on that difference, and that it would be deemed as a difference without distinction. And actually, if I could get my questions out to the three of you, and then I will be quiet so I can hear your answers and not use up my 5 minutes talking.

My other question would be first, Ms. Tapia Ruano, your testimony discussed the secret immigration hearings that are taking place. Can you talk a little bit about why the secrecy is a problem, and why it's important for the American public and the world to know who has been detained? And do we even know how many people and who has been detained and for how long? And in general, between the two of you, if you can discuss what changes you think need to be made to the PATRIOT Act, because obviously that is a product that we would like to bring forward from the results of this hearing so that legal and innocent immigrants, and Americans, who have been unjustly punished or detained can receive justice. Thank you.

Mr. ZOGBY. Congresswoman, you are right, it is a difference without distinction, bottom line. When all the people brought in in the call-ins, when people from Arab or Muslim countries, there is a single set of characteristics there that constitutes profiling. There was no behavior issue at stake; there was no broader definition of those who were the target audiences. As one law enforcement said,

we're looking for a needle in the haystack, and all the Department of Justice keeps doing is adding more hay to the stack.

So there are 160,000 in the field with special registration, about 83,000 registered. Almost 14,000 of them are held deportable, but no terrorist suspects and no information about terrorism resulted from any of this. And so the result is that it was ineffective, created fear, and it was based on crude profiling. It didn't work, and yet it caused irreparable damage to a whole lot of young, innocent people across the country who are now facing dramatic, life-changing decisions because of this program.

Ms. TAPIA RUANO. With regard to these closed hearings, these hearings were held in secret, and you asked what is the problem with that. Well, we believe part of a democratic society which is open, that this is an important concept. Not only were the individuals not allowed to have their family members and also have other individuals there for moral or other support, but family members often didn't even know where these individuals were, the fact that they were being held by the agency, where they were transferred to, the fact that they were facing any possible expulsion from the United States. And that created an enormous amount of anxiety.

What's the solution? Well, eliminate closed hearings with regard to blanket closed hearings, which is what these rules allow, just blanket closed hearings, without taking a look at was it justified, was there any possible reason to sustain the need to have a hearing closed.

We believe that the act that I mentioned just before, the Civil Liberties Restoration Act, is a solution to that by prohibiting closed hearings except in situations where a judge, after reviewing the individual facts, determines that it is in the interest of national security, or because of sensitive information, or at the choice of the individual detained. Those are rational, legal, fair reasons to have a closed hearing. But blanket closures, without the consent of the parties involved, appears to be abhorrent to our system.

Ms. WASSERMAN SCHULTZ. Mr. Chairman, if I can just also point out and request permission to note that I apologize for being tardy. I arrived at 8:38, and wanted to have my presence noted for the record. And I yield back.

Chairman SENSENBRENNER. And your presence is noted, and your contribution is appreciated.

The gentlelady from Texas Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Conyers, for your insight on holding what I think may be one of the more crucial constitutional hearings that we may have in the history of this particular judiciary body.

Let me also thank Mr. Coble and Mr. Scott, as a Member of their Subcommittee, for the number of hearings that have been held, as well recognize the fact that this hearing is being held today.

I don't want this hearing to center around any one Member, but I do want to relate what I think we're trying to do today, and I really hope that we can do this in a bipartisan manner.

I think you remember, Dr. Zogby, that we did produce a bipartisan PATRIOT Act out of this Committee, with the partnership of the Chairman and the Ranking Member and all of us. Ultimately when the bill went to the floor, it lost all of its bipartisanship and

began to become a product of the Majority. In essence, the tyranny of the Majority ruled.

What I'm concerned about is that we're being clouded by our rightness on an issue, refusing to look at how we can fix problems. Reminds me of the time when this country held slaves for 400 years and refused to acknowledge the wrongness of that terrible act, and again, we were ruled by the tyranny of the Majority. Even reflecting upon President Lincoln's decision, history will tell you that it was not for the humanitarian needs of the slaves, but for some other reasons.

Then I cite prior to the attack by the Japanese on Pearl Harbor our refusal to acknowledge the Holocaust that was going on in the 1930's before we entered World War II; again, refusing to acknowledge dark times in our history.

The brutality of the civil rights movement in the 1950's and 1960's, we refused, for a period of time, to acknowledge the dark time in the history of America; just a few years ago when we turned the lights out on the brutality of a million people in Rwanda.

So I think what we have an opportunity to do today, as we all embrace those who lost lives and the families of 9/11, I don't think there was an American of any race, color or creed that did not mourn, did not fall to their knees, did not pray to their person of faith, who they believed in during that time. And so I think where we're going here today and the tone that I've heard by some of my colleagues is again trying to turn the lights out on absolute abuses.

My question is, one, are there any checks and balances under the PATRIOT Act to even prove one's innocence? That is a general question that I have.

Ms. Ruano, I want to know what have we done by diminishing the powers of the Bureau of Immigration Appeals so that there is no due process? How do Americans understand that by due process being eliminated from that Bureau, you are really beginning to eliminate due process rights for others as well?

Dr. Zogby, I think it's important, a point that you made earlier, that immigration does not equate to terrorism. Tell me, what kind of intimidation is fusing through the Muslim community in the United States and around the world because of that synonym now seems to be coming together?

Amnesty International, I'd appreciate if you would again speak to Guantanamo and as well the specifics of why the sort of elusiveness or unclarity, if I might say, of what Guantanamo means is putting young soldiers in Afghanistan and Iraq in jeopardy of their lives.

And, Ms. Pearlstein, I would ask you as well about—if you would again speak to this whole question of detention, people being picked up randomly. And others may wish to comment on this whole registration of Muslims or Pakistani individuals which generated, I believe, no conviction and no arrests of terrorism.

And lastly let me say under the PATRIOT Act we have Minutemen at the border. That is what we are being driven to at this point. America needs to understand that we're in dark days that is not reflective of our fears of 9/11. And I would appreciate your

answers on those questions. I hope we can turn the lights on in this room.

Chairman SENSENBRENNER. Nineteen seconds left of her 5 minutes.

Mr. ZOGBY. I would like to submit my testimony in full for the record to those questions for my part.

Chairman SENSENBRENNER. Without objection.

Ms. TAPIA RUANO. And I will just say one comment. The concern is, when you abuse noncitizens' due process rights, it is not going to take much more to abuse citizens' rights.

Ms. PEARLSTEIN. If I could just also submit for the record the recent report of the Human Rights First called Behind the Wire——

Chairman SENSENBRENNER. Without objection.

[The information referred to can be found in the Appendix.]

Ms. PEARLSTEIN. And also a recent report called Getting to Ground Truth, which responds, I think, to the questions——

Chairman SENSENBRENNER. Without objection.

[The information referred to can be found in the Appendix.]

Mr. PITTS. And I will submit our report on the specifics of Guantanamo. But I want to point out briefly that not just Amnesty, but academic institutions, Rand, International Institute for Strategic Studies, our own State Department have noted that terrorism is on the rise. And I think that's more than just correlation, it's causation.

Chairman SENSENBRENNER. Without objection.

[The information referred to can be found in the Appendix.]

Mr. CONYERS. Mr. Chairman, I would ask that the gentlelady from Texas be given enough time to have brief remarks from any of the witnesses before we close down. She is the last——

Chairman SENSENBRENNER. How much time does the gentleman from Michigan request that the gentlewoman from Texas be granted?

Mr. CONYERS. Four minutes, 1 minute for each of the witnesses.

Chairman SENSENBRENNER. Is there objection to the request of the gentleman from Michigan to give each—an objection is heard.

Mr. CONYERS. Mr. Chairman, I have a list of documents that I ask unanimous consent to submit to the record.

Chairman SENSENBRENNER. Without objection.

[The information referred to can be found in the Appendix.]

Chairman SENSENBRENNER. The Chair now recognizes himself.

First, the Chair would like to thank all the witnesses for coming and appearing, and particularly preparing your testimony on short notice.

Let me say that the purpose for which this hearing was called and the scope of the hearing was stated in a letter that was submitted to me, signed by the Democratic Members, which was the reauthorization of the USA PATRIOT Act. I have sat here listening very patiently to the testimony and the answers to the questions, and much of what has been stated is not relevant to the 16 sections of the USA PATRIOT Act which were sunsetted when the law was enacted in October of 2001.

One of the things that people who are opposed to the PATRIOT Act have been doing is stating that the PATRIOT Act was responsible for a whole host of frustrations or objections to Administration

policy. This hearing confirmed that fact, that the PATRIOT Act is being used as a buzzword for people who have very broad-brush objections.

I think that when Congress debates the reauthorization of the PATRIOT Act, we ought to stick to the subject, and that subject is the 16 provisions of the PATRIOT Act which we must consider and decide whether to reauthorize, whether to lapse or whether to amend.

The PATRIOT Act has nothing to do with Guantanamo; the PATRIOT Act has nothing to do with enemy combatants; the PATRIOT Act has nothing to do with indefinite detentions. Those were provisions of other sections of the law, many of which occurred prior to the enactment of the PATRIOT Act in October of 2001.

The so-called Creppy memorandum, which had a blanket closure of immigration proceedings, was issued before the PATRIOT Act was enacted, and the Deputy Attorney General testified earlier this week that it's no longer being followed.

And some of the testimony related to provisions of the PATRIOT Act that were not sunsetted, and this Committee put the sunset on provisions of the law which actually increased the powers of law enforcement, but did not put the sunset on those provisions of the law which restated the powers that law enforcement had had prior to October of 2001.

I think particularly irresponsible and indicative of the broad-brush accusations of the PATRIOT Act was what I just heard, saying the PATRIOT Act has resulted in Minutemen being on the border. That's not true, and that's irresponsible, and I think anybody who knows what is going on——

Ms. JACKSON LEE. Will the gentleman yield?

Chairman SENSENBRENNER. No, I will not yield—will see that fact.

Let me say that I think this hearing very, very clearly shows what the opponents of the PATRIOT Act are doing. They will talk about practically everything but what's in the PATRIOT Act and what this Committee is considering. The only really relevant testimony that I heard was from Mr. Pitts, relative to section 215 of the PATRIOT Act that said that librarians have been receiving all kinds of questions from law enforcement. I'd like to ask you, Mr. Pitts, to submit for the record the names of the librarians that have received actual section 215 orders from the FISA Court to produce business records, and we will give you a week to put that in the record.

[The information referred to can be found in the Appendix.]

Chairman SENSENBRENNER. So thank you all for coming today. I thank the Members——

Ms. JACKSON LEE. Will the gentleman yield?

Mr. NADLER. Mr. Chairman.

Ms. JACKSON LEE. Will the gentleman yield?

Chairman SENSENBRENNER. And the Committee is adjourned.

[Whereupon, at 10:23 a.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

There are few issues that are more important to this Committee or this Congress than the PATRIOT Act and the war against terror. This not only affects the rights and privacy of every American, but impacts the extent to which our nation is able to hold itself out as a beacon of liberty as we advocate for democracy around the world.

For many of us, this process of hearings is not merely about whether we should extend 16 expiring provisions of the USA PATRIOT Act; it is about the manner in which our government uses its legal authority to prosecute the war against terror, both domestically and abroad. As we will hear from our witnesses today, those authorities have been abused.

We will learn from Amnesty International about the routine torture and degradation of detainees in American-run prisons that clearly violate American and international law. Both then-White House Counsel Gonzales and the Department of Justice conspired to create an end-run around the international and U.S. laws that criminalize that sort of behavior. While the Justice Department has supposedly reversed those opinions, it still refuses to charge those in its jurisdiction.

We will also receive testimony concerning the illegal detention and mistreatment of individuals at Guantanamo Bay. A federal court has found their detention and denial of legal process to be unconstitutional under the Fifth Amendment and illegal. And after the recent confirmation that jailers there desecrated the Koran, it's clearly time for the military to shut the Guantanamo facility down.

We will also learn about the abuse of the immigration system to unjustifiably detain and harass men of Middle Eastern descent. Our Justice Department held over 1,000 people in the wake of 9/11, and the Inspector General has found the detentions to violate the law. But no one has been punished, and nothing has been done to ensure it doesn't happen again.

Finally, we will receive testimony concerning the failure of our Administration's racial profiling tactics. Not only are tactics like these immoral, they have been proven to be completely useless in the war on terror. For example, our government's registration of 80,000 Middle Eastern men did nothing but create a deportation nightmare for families who had long been upstanding members of our communities. And not a single terrorist was found. Let me repeat that—not a single terrorist was found.

Yesterday, the president announced with much fanfare that we need to not only reauthorize but expand the PATRIOT Act. But rather than making us safer, the abuses and excesses of our war against terrorism are actually tarnishing our nation's reputation and making us less safe. The testimony we are receiving today—and introducing into the record—will make that point abundantly clear.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

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SUBCOMMITTEES:
INFRASTRUCTURE AND BORDER SECURITY
CYBERSECURITY, SCIENCE, AND
RESEARCH & DEVELOPMENT

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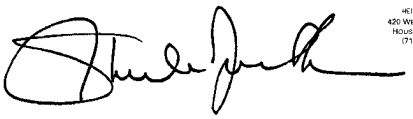

Congresswoman Sheila Jackson Lee
Committee on the Judiciary
***Continued* Oversight Hearing on the Reauthorization of the USA PATRIOT Act**

June 10, 2005
2141 RHOB, 8:30 a.m.

Judge Learned Hand is cited to have stated that "The spirit of liberty is the spirit which is not too sure that it is right. . . ."

Mr. Chairman and Mr. Ranking Member, as you well know, the legislation that we discuss today, the "Uniting and Strengthening America by Providing Appropriate Tools

Required to Intercept and Obstruct Terrorism" Act, or the "USA PATRIOT Act" expanded law enforcement powers in the aftermath of Sept. 11. Sixteen (16) provisions that are due to sunset at the end of 2005 are set for reauthorization. These provisions include Section 213 that allows delayed notification search warrants, Section 209's emergency disclosure of e-mails without a court order, and the provision that allows access to business records.

I commend the Chairman for his disposition to hold the 10 oversight hearings that have been held on these controversial provisions. However, if my colleagues on this side of the hearing room were to file an action based on the common law principle of *forum non conveniens*, we would likely be justified based on the fact that this hearing has been called for 8:30 a.m. on the day following the end of votes for the week!

Nevertheless, we applaud this *de minimis* effort to appeal to the requests for hearings that have been made by the distinguished Ranking Member of this body.

By way of background, I remind this body that PATRIOT was passed into law a mere six weeks following the terrorist attacks on September 11, 2001. The process of drafting this bill until its signing into law by President Bush took only ***four days*** from October 23 to October 26, 2001. The final measure, H.R. 3162, incorporated provisions of H.R. 2977, which the House passed on October 12, 2001, and S. 1510, which the other body passed on October 11, 2001.[1] While Congress grappled with the need to act expeditiously to fight terrorism, I still marvel that a bill more than three hundred pages long moved from

[1] Katherine K. Coolidge, "Baseless Hysteria: The Controversy Between the Department of Justice and the American Library Association Over the USA PATRIOT Act," 97 LLibJ 7 (Winter, 2005).

introduction to enactment at such a daunting speed. The process of reauthorization seems to resemble this path.

As a law review note entitled "Playing PATRIOT Games: National Security Challenges Civil Liberties" in the Houston Law Review, the late Supreme Court Justice William J. Brennan once said that "several factors lead to infringement of civil rights during a time of crisis. First, the crisis creates a "national fervor," which in turn leads to an exaggeration of the 'security risks posed by allowing individuals to exercise their civil liberties.'"

The Fourth Amendment of the Constitution protects Americans from unreasonable searches and seizures. However, several provisions of the Patriot Act authorize federal law enforcement to skirt the line of reasonableness. For example, section 206 of the Patriot Act "amends FISA and eases

restrictions involving domestic intelligence gathering by allow[ing] a single wiretap to legally 'roam' from device to device, to tap the person rather than the phone."

Also, the Act allows federal law enforcement to delay notifying subjects of sneak-and-peek searches, as long as notice is provided within a "reasonable" time. A sneak-and-peek search is one in which a law enforcement official searches the premises of a subject but delays the notification required by the Fourth Amendment until a later time. This type of delay is allowed when notification of the subject might have an "'adverse result.'" The "reasonable" time may be extended for "good cause." These expanded surveillance powers are especially troubling because of their apparent contravention of the Fourth Amendment's protection against unreasonable searches and seizures.

3. "Domestic Terrorism" Broadly Defined. "Domestic terrorism"

has been added to the list of terms defined in the federal criminal code. It is defined as activities that –

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
(B) appear to be intended –

(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.

This broad definition of domestic terrorism could be used to deter the First Amendment rights of freedom of speech and freedom of association. Because the terms of this definition are "vague and broad," political dissent could be criminalized. This definition of domestic terrorism might encourage "federal law enforcement agencies to investigate and conduct surveillance of various organizations based on their opposition to official policies."

With the Patriot Act on the books, the Attorney General now has the power to place noncitizens in detention during removal proceedings as long as he "has reasonable grounds to believe" that they are involved in terrorist activities. These aliens can be detained up to seven days without any charges being filed. As soon as the Attorney General "certif[ies]" an individual as a suspected terrorist, the individual may be indefinitely detained by the U.S. Citizenship and Immigration Services, with limitation on indefinite detention only if "removal is unlikely in the reasonably foreseeable future."

Mr. Chairman, while this body has exercised oversight on the provisions that are up for reauthorization, I feel that, given their continued and increasing contentiousness, we must further analyze the possibly negative impact that they will have on our

civil rights, civil liberties, and other guarantees under the U.S. Constitution. For these reasons, I strongly object to the reauthorization and join my colleagues in advocating the same.

RESPONSE BY AMNESTY INTERNATIONAL TO REQUEST FOR ADDITIONAL INFORMATION REQUESTED BY CHAIRMAN SENSENBRENNER

June 15, 2005

Hon. James F. Sensenbrenner, Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you inviting Amnesty International to testify before the House Committee on the Judiciary on June 10, 2005 regarding reauthorizing or amending the USA PATRIOT Act. On behalf of Amnesty International, I write in response to your request for additional materials.

The Committee requested information on librarians who have received law enforcement requests. Amnesty International USA and other organizations have organized joint forums across the country at which citizens have come forward with concerns about the PATRIOT Act. Among those who have come forward are librarians who have expressed concerns about their obligations in current law. These citizens have shown courage by coming forward. In particular they have raised questions and concerns about section 215 of the PATRIOT Act which makes it a crime to reveal specific orders received from law enforcement.

This is why it is why the mere existence of such provisions in the PATRIOT Act have the effect of preventing enjoyment of basic human rights, such as freedom of expression, conscience, assembly, press, and religion so vital to preserving truth and security. Abridging such freedoms prevents the informed citizenry that Thomas Jefferson and others have pointed out is so essential to effective democracy. Because the PATRIOT Act cloaks law enforcement orders in secrecy, it is difficult to measure the true impact of this provision. The University of Illinois Library Research Center has conducted research that is publicly available and indicates that librarians have received formal orders under section 215.

In addition to the chilling effect referenced above, such expansions of government power have made it unnecessary to invoke formally provisions such as section 215. Many librarians are keenly aware of the government's new powers to request records on patrons and of their criminal liability either for failing to respond or for disclosing the request Section 215. These expanded powers make it much more difficult to resist even "informal" requests from law enforcement to "voluntarily" turn over information on patrons. Security is not enhanced when the U.S. government is in an adversarial relationship with either the nation's librarians or library patrons. As FBI Director Mueller's own statements indicate, librarians work with law enforcement to protect their communities, but they also have a professional and legal obligation to protect the privacy of their patrons.

The prohibitions placed on librarians to report requests and the secrecy imposed by the PATRIOT Act, make it impossible to estimate how many requests are occurring and whether they are justified. The law also makes it extremely difficult for Congress to exercise meaningful oversight in this area. As indicated by the House's bipartisan passage of Rep. Sanders' Freedom to Read amendment, such overbroad provisions of the PATRIOT Act are increasingly seen as such and should be sunsetted or amended to be realigned with common sense security requirements and rights otherwise protected in the U.S. Constitution and international law.

Sincerely,

Chip Pitts
Chair, Amnesty International USA

June 17, 2005

The Honorable James F. Sensenbrenner, Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of Amnesty International, thank you for the invitation to testify before the House Committee on the Judiciary on June 10, 2005, on "Oversight of the USA Patriot Act." I appreciate the opportunity to clarify an issue raised during the question and answer session of the hearing.

Congressman Pence questioned Mr. Chip Pitts, who serves as the current Chair of the Board for Amnesty International USA, regarding Amnesty International's characterization of the mistreatment of detainees. Mr. Pitts made the point that Amnesty International is concerned about the pattern of mistreatment of detainees held not only in Guantanamo but also in Iraq, Afghanistan, and elsewhere. Mr. Pitts referenced some of the controversial interrogation techniques that Secretary Rumsfeld approved, which we now know included stripping, isolation, hooding, stress positions, sensory deprivation, and use of dogs. Mr. Pitts cited, as an example of the consequences of these US policies, the death of "ghost detainee" Manadel al-Jamadi, a case listed among many of concern in Amnesty International's recent report "Guantanamo and Beyond: The continuing pursuit of unchecked power."

According to Amnesty International reports, the information on this case is as follows: Manadel al-Jamadi died in Abu Ghraib prison on November 4, 2003. The autopsy report concluded that his "external injuries are consistent with injuries sustained during apprehension. Ligature injuries are present on the wrists and ankles. Fractures of the ribs and a contusion of the left lung imply significant blunt force injuries of the thorax and likely resulted in impaired respiration. According to investigative agents, interviews taken from individuals present at the prison during the interrogation indicate that a hood made of synthetic material was placed over the head and neck of the detainee. This likely resulted in further compromise of effective respiration.... The cause of death is blunt force injuries of the torso complicated by compromised respiration. The manner of death is homicide." He was a "ghost detainee" brought into the prison by the CIA and left unregistered and untreated for injuries sustained on arrest. Seven Navy Seals confessed to assaulting the detainee. The army investigation was closed and referred to the Naval Criminal Investigation Service. Several Navy personnel have been charged.

Amnesty International believes that this and other cases point to the need for an independent investigation. Thank you for the opportunity to provide Amnesty International's information on this case. We welcome the opportunity to work with you further.

Sincerely,

Alexandra Arriaga
Associate Deputy Executive Director
and Director of Government Relations
Amnesty International USA

"BEHIND THE WIRE" SUBMITTED FOR THE RECORD BY DEBORAH PEARLSTEIN, DIRECTOR, U.S. LAW AND SECURITY PROGRAM

Behind the Wire

AN UPDATE TO *ENDING SECRET DETENTIONS*

March 2005

Written by Deborah Pearlstein and Priti Patel

About Us

For nearly 30 years, Human Rights First (formerly the Lawyers Committee for Human Rights) has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and make sure human rights laws and principles are enforced in the United States and abroad.

Acknowledgements

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Behind the Wire

AN UPDATE TO *ENDING SECRET DETENTIONS*

March 2005

Written by Deborah Pearlstein and Priti Patel

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I. Preface

When Human Rights First originally published its *Ending Secret Detentions* report last June, the Pentagon was just beginning a series of internal investigations related to allegations of torture and abuse by U.S. authorities in the course of global U.S. detention and interrogation operations. The Coalition Provisional Authority, established by the United States, still held power in Iraq. And the U.S. Supreme Court had heard but not yet ruled on the first three major terrorism-related cases to come before it.

The developments of the past nine months have yielded some significant insights about U.S. detention and interrogation operations around the world, and about the legality of the policies that have animated them. Almost a year since the photos from Abu Ghraib thrust U.S. detention operations into the international spotlight, this report updates our assessment of where U.S. operations stand.

The U.S. Government has taken several positive steps since last year in some effort to normalize detention operations overseas. The month after *Ending Secret Detentions* was published, and more than a year after U.S. military operations began in Iraq, the Pentagon announced the creation of a new Office of Detainee Affairs, charged with correcting basic problems in the handling and treatment of detainees, and with helping to ensure that senior Defense Department officials are alerted to concerns about detention operations raised by the International Committee of the Red Cross (Red Cross). While the effect of this new structure remains unclear, it has the potential to help bring U.S. detention policy more in line with U.S. and international legal obligations.

The Pentagon has also conducted a series of important investigations into abuses in detention and interrogation operations in Iraq, Afghanistan, and at the U.S. Naval Base at Guantanamo Bay. The reports that have been completed to date have helped to make clear that failures in planning and ambiguities in policy contributed to the confusion surrounding the U.S. system of global detentions. Legally suspect advice to the President that the key elements of the Geneva Conventions need not apply to the conflict in Afghanistan was not coupled with meaningful guidance to soldiers in the field about what rules or procedures did govern the capture and treatment of detainees. The Defense Department also used a rotating set of designations to describe the status of detainees in U.S. custody in Iraq – designations without clear meaning under the law of war or U.S. military doctrine. Pre-war planning for Iraq did not include adequate planning for detention operations, and no central agency existed to keep track of detainees in U.S. custody, as required by military regulations implementing the Geneva regime. The first step in correcting such failures is identifying their source, and while several investigations remain outstanding and others have proven incomplete, the reports to date have played some constructive role in this effort.

Perhaps most important among the positive developments, Congress enacted legislation in October 2004 requiring the Secretary of Defense to report regularly to the relevant committees in the U.S. House and Senate on the number and nationality of detainees in military custody, as well as on the number of detainees released from custody during the reporting period. The law, which tracks many of

the recommendations of the original *Ending Secret Detentions* report, requires the Secretary to report on the legal status of those detained – whether they are held as prisoners of war, civilian internees, or unlawful combatants – and to report whether detainees once held by the United States have been transferred to other countries. The legislation is, in many respects, declarative of existing law and policy. But its imposition of compliance deadlines – the first of which occurs on July 28, 2005 – provides an important opportunity for the Defense Department to make good on its statements in recent months that it is correcting the policy and operational failures it has identified.

Despite these welcome developments, the scrutiny of the past nine months has still failed to produce full answers to many of the most basic questions posed in our original report. How many individuals are held in U.S. custody – both by military and intelligence agencies – in connection with the "global war on terror," and where are they held? Are "ghost detainees" still being held without access to visits from the Red Cross? Why are family members not promptly notified that their family member is in custody, or given information about their health or whereabouts? And significantly, what is the legal basis for these detentions, what limits exist on U.S. power to seize and detain, and what if any rights do the detainees have as a matter of law?

Far from diminishing in importance as U.S. missions in Afghanistan and Iraq mature, these questions are becoming more urgent as U.S. detention operations appear to be picking up permanence and pace. Last June, the Defense Department told Human Rights First that there were 358 individuals detained by the United States in Afghanistan. By January 2005, Combined Forces Command in Afghanistan reported the number was on the order of 500 – an increase of 40 percent. The numbers in Iraq are also increasing. The United States now maintains eight official detention facilities in Iraq – down from 11 at the height of the occupation last June. But in March 2005, the number of detainees officially reported held by U.S. forces in Iraq had risen to about 8,900 in permanent facilities and 1,300 in transient facilities – more than double the number in custody in October, and 60 percent more than the Coalition Press Information Center reported in custody nine months ago. In addition, the Pentagon has announced plans to build a new $25 million prison facility at Guantanamo Bay, where the rotation of detainees in and out continues, with new arrivals as recent as September 2004.

Beyond these well known facilities, and of particular concern, remain detentions in so-called "transient facilities" – field prisons designed to house detainees only for a short period until they can be released or transferred to a more permanent facility. Interviews conducted by Human Rights First with now-released detainees held by U.S. authorities in such facilities in Afghanistan and Iraq, consistent with the findings of official investigations, reveal conditions there that have been grossly inadequate. Many of the worst alleged abuses of detainees, including deaths in custody, have occurred in these facilities, where visits from the Red Cross are limited. Detainees are sometimes transferred from these facilities before they can be visited by the Red Cross, and deteriorating security conditions have compromised monitors' ability to visit regularly or at all. While military officials have stated that detention in these facilities is now limited to 10-15 days maximum, the increasing numbers of detainees and deteriorating security conditions will make adhering to this commitment enormously challenging.

Finally, we have learned a great deal about the security policy consequences of U.S. detention operations. The Administration has argued that, faced with the unprecedented security threat posed by terrorist groups "of global reach," it has had to resort to preventive detention and interrogation of those suspected to have information about possible terrorist attacks. According to the Defense and Justice Departments, a key purpose of these indefinite detentions is to promote national security by developing detainees as sources of intelligence. And while much of what goes on at these detention facilities is steeped in secrecy, some intelligence agents have insisted that "[w]e're getting great info almost every day."

But the past nine months have seen growing evidence of the adverse security consequences of the United States' global detention system. As thirteen retired admirals and generals – including former head of the Joint Chiefs of Staff, General John Shalikashvili – noted in a letter to the Senate Judiciary Committee in January 2005, the United States' equivocal observance of the Geneva Conventions and attendant procedures in U.S. military operations has put our own forces at greater risk, produced uncertainty and confusion in the field, and undermined the mission and morale of our troops. The lack of a central system for detainee information has

hindered U.S. efforts to obtain information from detainees. Pentagon investigations have also pointed to this confusion as contributing to the widespread torture and abuse now evident in U.S. detention operations; and the use of these tactics, in turn, has undermined intelligence and counterinsurgency efforts. As one U.S. Army intelligence officer now returned from Afghanistan has cautioned: "The more a prisoner hates America, the harder he will be to break. The more a population hates America, the less likely its citizens will be to lead us to a suspect." Indeed, polling in Iraq suggests that U.S. detention practices have helped galvanize public opinion in Iraq against U.S. efforts there. And the Pakistani Sunni extremist group Lashkar-e-Tayba has used the internet to call for sending holy warriors to Iraq to take revenge for the torture at Abu Ghraib. Our detention practices abroad – which have inflamed our enemies and alienated potential allies – continue to run contrary to all of these security imperatives.

This report reviews these and other developments in U.S. global detention operations in the past nine months. Updated since the original report, Chapter 2 summarizes what is known about the nature and status of U.S. detention facilities and those held within them. With the critical exception of new statutory reporting requirements, the law governing U.S. detention operations, discussed in Chapter 3, is largely unchanged. The U.S. policy interests that led to these laws, discussed in Chapter 4, remain as or more salient than they were last year, and have been expanded below to discuss recent insights from members of the military and national security communities. These professionals have observed first-hand how abstract policies play out in practice, and how an abiding commitment to the rule of law serves both the security interests of Americans and the values America seeks to protect.

Michael Posner and Deborah Pearlstein
New York
March 30, 2005

II. The Known Unknowns

In all, roughly 65,000 people have been screened for possible detention, and about 30,000 of those were entered into the system, at least briefly, and assigned internment serial numbers.

Maj. Gen. Donald J. Ryder
Army Provost Marshal General
February 2005

While the United States has made it clear that it has arrested and detained tens of thousands of individuals in the "war on terrorism" since September 11, 2001, it has provided scant information about the nature of this global detention system – information critical to preventing incidents of illegality and abuse. Since the release of Human Rights First's original report about this detention system in June 2004, the number of those held briefly declined as a result of an acceleration of detainee processing following the revelations at Abu Ghraib. But these numbers are now back on the rise – and official accounting of critical information continues to be minimal and conflicting.

As was the case last year, some detention facilities remain well known – such as the U.S. Naval Base at Guantanamo Bay, Abu Ghraib in Iraq, or the U.S. Air Force Base at Bagram, Afghanistan – but there is troubling information about inadequate provision of notice to families about detainees' location and condition, or conflicting statements about detainees' legal status. While the Red Cross has visited these facilities, their visits have in the past been undermined contrary to the letter and spirit of binding law.[1]

In other cases, the existence of the detention facility is acknowledged by the United States – as in the case of transient detention facilities in Afghanistan – but very little else is known, particularly how many such facilities exist and the nature of the legal status and rights of those held there.

Finally, there remain cases in which the existence of the detention facility itself is not officially acknowledged but has been reported by multiple sources – for example, Peshawar, Kohat and Alizai in Pakistan;[2] a U.S. detention facility in Jordan;[3] and U.S. military ships, particularly the USS Bataan and the USS Peleliu.[4] In the absence of official acknowledgment of such locations, there is of course no information on whether they are in use, how many might be held at such facilities, whether their families have been notified, why those detained there are held, or whether the Red Cross has access to them. Indeed, the Red Cross has stated publicly that it does not.[5]

U.S. concerns for the security of lawful detention facilities and for force protection are of course appropriate. But as the Secretary of Defense has acknowledged, it is contrary to U.S. law and policy that information be withheld or classified without a basis in law.[6] And it remains unclear how disclosing, in a comprehensive and regular manner, the following basic information endangers legitimate U.S. missions abroad:

- How many individuals are currently held by the United States at military or intelligence detention facilities in connection with the "global war on terror;"
- What legal status have these detainees been accorded (e.g., prisoners of war, civilians who engaged directly in combat, or some other status) and what process is followed to determine this status;
- Have all detainees been afforded access to Red Cross officials;
- Have the immediate families of the detainees been notified of their loved ones' location, status, and condition of health.[7]

Afghanistan

Bagram was a much more depressing environment [than Kandahar]. It was, in every sense of the word, a dungeon. . . . It was impossible to spend any amount of time inside that facility and not have it affect you psychologically.

Chris Mackey (pseudonym)
U.S. Army Interrogator in Afghanistan
The Interrogators
2004

Since November 2001, the United States has operated approximately 25 detention facilities at various times in Afghanistan.[8] According to CENTCOM, the U.S. unified military command with operational control of U.S. combat forces in the region, there remain two main detention facilities in Afghanistan: the Collection Center at the U.S. Air Force Base in Bagram and a detention center at Kandahar Air Force Base.[9] Since June 2004, the Defense Department has upgraded the detention facility at Kandahar Air Force Base from an intermediate site – where detainees awaited transportation to Bagram – to a main holding facility.[10]

Numerous sources continue to report an additional interrogation facility under CIA control at Bagram, reportedly known as "the Salt Pit."[11] In early 2002, CIA officials refused military interrogators access to prisoners detained at the CIA facility; some prisoners were eventually transferred from the CIA facility to Bagram or Kandahar.[12] In November 2002, one Afghan detainee, held in the Salt Pit, was stripped, chained to the floor and left overnight without blankets in the cold.[13] By morning he had frozen to death. The detainee was never registered on any detainee logs, including the CIA's "ghost detainee" logs.[14] The fate of others held at the CIA facility remains unknown, including that of Khalid Sheikh Mohammed, who in March 2003, was reportedly transferred from the CIA interrogation facility to an undisclosed location.[15]

In addition to these main detention facilities, CENTCOM acknowledges a series of "field detention or transient holding areas located at the forward operating bases" that are used to hold detainees until they may be transferred to a main holding facility - either to Kandahar or Bagram.[16] The number of these transient facilities is not publicly available, and change as "units move and combat operations change."[17] Some press reports put the total number of these facilities at 20.[18]

Press reports, as well as interviews of released detainees conducted by Human Rights First in August 2004, confirm that U.S. transient facilities include sites in or near Asadabad,[19] Gereshk,[20] Jalalabad,[21] Tycze,[22] Gardez, and Khost.[23] These facilities have at times seen extensive use since early 2002,[24] with released detainees reporting stays of up to 30 days as recent as early 2004.[25] Several detainees held from fall 2003 to winter 2004 report being detained in small windowless rooms; toilets were in public places and provided no privacy.[26] Others report being detained in large areas without roofs, with intense heat or cold depending on the season.[27] More recently, in September 2004, the family of Sher Mohammed Khan traveled to a U.S. firebase near Khost to collect Khan's body.[28] Mr. Khan, along with his cousin, was taken by U.S. forces during a raid on his house.[29] His brother was reportedly killed by U.S. forces during the raid.[30] Despite reports from the family that Mr. Khan's body showed signs of abuse, U.S. officials contend that Mr. Khan was killed while in U.S. custody by a snake bite.[31] His cousin's whereabouts remain unknown.[32]

Mehboob Ahmad lives in Afghanistan. In June 2003, he was detained by U.S. military forces in Afghanistan and taken to the U.S. run detention facility in Gardez and Bagram Air Force Base. Mr. Ahmad remained in U.S. custody for approximately five months. While in detention, U.S. officials threatened Mr. Ahmad with transferring him to Guantanamo Bay. The conditions of his detention were difficult. He charges that he was detained outside for a period of weeks without any protection from the intense cold or heat and interrogated for several hours every night in order to humiliate him. He also says that U.S. officials insulted his mother, wife, and sister and implied that they would rape his wife. He was eventually released in November 2003, with papers stating that he "pose[d] no threat to the United States Armed Forces."

Human Rights First Interview with Mehboob Ahmad, August 18, 2004.

A report by the Army Inspector General released in July 2004 recognized that conditions in these transient facilities were inadequate for holding individuals for more than two weeks.[33]

Combined Forces Command (CFC) in Afghanistan stated in October 2004 that by rule detainees were now to be held at these transient facilities for less than 10 days, and detention beyond this period requires the approval of a commander.[34] Human Rights First was unable to confirm whether U.S. personnel were complying with this rule.

In all events, the time limit may now be tested, as the number of detainees in Afghanistan has increased significantly over the last nine months. Prior to June 2004, the Defense Department had a policy of keeping the number of detainees in Afghanistan classified, citing "ongoing military operations and force protection concerns."[35] In June 2004, however, the Defense Department told Human Rights First that there were 358 individuals detained by the United States in Afghanistan.[36] (Other reports at the time put the number slightly higher at about 380.[37]) By October 2004, CFC officials reported the number of detainees held by the United States had increased to 550.[38] Despite recent statements by U.S. officials suggesting fewer detentions, the number of detainees in Afghanistan remained well above the number last summer, at approximately 500 in January 2005.[39] More recently, the Combined Forces Command has reimplemented its earlier policy of keeping the numbers of detainees in Afghanistan classified.[40] No reason was provided for this change in policy.[41]

It is unclear where among the known facilities the growing number of detainees is held. According to the Army Inspector General, the detention facility at Bagram can house up to 275 detainees.[42] The number of detainees that can be held at Kandahar is uncertain due to ongoing construction, but the Army Inspector General reported that in August 2004 the facility at Kandahar "held anywhere from 23-40 detainees."[43] In light of reported conditions at the transient sites, continued use of these facilities for extended periods of detention would raise serious concerns.

Red Cross access to detainees in Afghanistan has improved somewhat since the release of the *Ending Secret Detentions* report in June 2004, but it remains limited. The Red Cross continues to visit detainees in Bagram, but does not meet with detainees immediately after arrest.[44] The Red Cross had visited detainees at Kandahar early in the war, from December 2001 to June 2002.[45] As evidence emerged that the United States continued to hold some suspects for longer periods at Kandahar, the Red Cross asked to be allowed to visit the facility again.[46] After considering the request for three weeks, the Pentagon agreed to begin making arrangements to allow the Red Cross access.[47]

The United States officially allows Red Cross observers to visit all detainees held for more than 15 days.[48] But the time lag in Red Cross access to detention facilities is troubling in light of Pentagon findings that significant abuse has occurred in the first two weeks of detention while interrogations and screenings closer to the point of capture are conducted.[49] Among reported instances was one involving 18-year-old Afghan soldier, Jameel Naseer. Press reports indicate that he was detained at the U.S. firebase in Gardez along with seven other Afghan soldiers. All eight were tortured for approximately two weeks while in Gardez. Naseer died in U.S. custody in Gardez as a result of the torture he suffered.[50]

Red Cross representatives, as well as some U.S. Army officials, have also publicly expressed concern that detainees in Afghanistan continue to have no clear legal status.[51] The Red Cross has emphasized that even as the periods of detention at Bagram increase, "the U.S. authorities have not resolved the questions of [the detainees'] legal status and of the applicable legal framework."[52]

According to Pentagon investigations into allegations of torture and abuse by U.S. officials, the lack of clarity of detainees' legal status stems from policy decisions early in the war in Afghanistan. In October 2001, CENTCOM Commander General Tommy Franks issued an appropriate order, following Army Regulations and decades of military practice, providing that the Geneva Conventions were applicable to all captured individuals in Afghanistan.[53] The first detainee was seized in Afghanistan in November 2001.[54] The CENTCOM policy remained in effect until February 7, 2002, when President Bush issued an order declaring that Al Qaeda detainees were not protected by the Geneva Conventions, and Taliban prisoners were not entitled to the protections of prisoner of war status under the Conventions.[55]

Since then, detainees in Afghanistan have been defined variously as "unlawful combatants," "enemy combatants," or "unprivileged belligerents."[56] According to the Army Inspector General, most detainees in Afghanistan are classified as civilian internees and subclassified in categories not provided for by Army doctrine, such as "Persons Under U.S. Control, Enemy Combatant, and Low-level Enemy

Combatant."[57] The Army Inspector General noted that, "due to the suspension of the Geneva Conventions," soldiers were no longer able to keep up with legal status determinations for "a large number of detainees in a short period of time as required in the Afghanistan theater."[58] A separate Pentagon inquiry into torture and abuse concurred that the Administration's policy regarding detainees was "vague and lacking."[59] According to the Combined Forces Command, the United States is holding detainees in Afghanistan under UN "Security Council Resolutions 1368, 1373, and 1566 directing States to take necessary steps to prevent the commission of terrorist acts"; further guidance is reportedly provided by the President, Secretary of Defense, and the Joint Chiefs of Staff.[60] The Department of Defense has classified all "further guidance."[61] To date, the Administration has not publicly clarified the detainees' legal status.

Mohammed Karim Shirullah was detained in Afghanistan by U.S. military personnel in December 2003 and remained in U.S. detention facilities in Afghanistan until his release in June 2004. Mr. Shirullah was imprisoned at the U.S.-run 'transient facility' in Gardez and at Bagram Air Force Base. While in detention, Mr. Shirullah says that he was placed in solitary confinement in a windowless room with limited access to other people for more than a month. At other times, he was forced to wear opaque goggles. Mr. Shirullah charges that he was severely beaten by U.S. forces. Because a resultant ear injury went untreated for six months, he lost hearing in one ear. He says that he now has difficulty sleeping without medication.

Human Rights First Interview with Mohammed Karim Shirullah, August 18, 2004.

From interviews with those released from detention facilities in Afghanistan (or interviews with their families), the United States does not appear to have followed a standard family notification policy there.[62] For example, the family of one former detainee at Bagram Air Force Base, Saifullah Paracha (recently transferred to Guantanamo Bay), was notified of Saifullah's detention at Bagram not by the United States, but by the Red Cross.[63] The family of Moazzam Begg (formerly detained at Kandahar) was also informed of Begg's detention via the Red Cross.[64] A CFC official reached by Human Rights First was unaware of any "official" policy on family notification.[65]

Closely linked with the requirement of notifying families of the detention of their loved ones are Army Regulations mandating the establishment of a comprehensive detainee information database.[66] The required database is to include the personal information of each detainee, date and place of capture, "name and address of a person to be notified of the individual's capture."[67] As of December 2004, no such central database had been established for Afghanistan.[68] This apparent continuing failure comes despite military investigations finding that military personnel at points of capture and collection facilities have failed to adequately document detainees' personal information. The Army Inspector General in particular concluded that the lack of a central system for detainee information exacerbates families' difficulty in trying to locate their relatives and has hindered U.S. efforts to obtain information from the detainees.[69]

Iraq

More aggressive U.S. military operations in Iraq over the past two months have generated a surge in detainees, nearly doubling the number held by U.S. forces.

Maj. Gen. Geoffrey Miller quoted in the *Washington Post*, November 27, 2004

The United States continues to maintain eight official detention facilities in Iraq – down from 11 at the height of the occupation last June.[70] This number includes three main facilities in Iraq: Camp Redemption and Camp Ganci both located at Abu Ghraib near Baghdad; Camp Cropper near the Baghdad Airport; and Camp Bucca near Umm Qasr close to the Kuwaiti border.[71] In addition, five facilities are under division or brigade command, including the 1st Infantry Division DIF; 1st Marine Expeditionary Force DIF; 1st Cavalry Division DIF; Multi-National Division-Central; and Multi-National Brigade North. (An additional facility, Camp Sheba, is run by the Multi-National Division-Southeast under British command.[72]) By policy, detainees may be held in brigade or division facilities for up to 14 days before being released or transferred to a main facility.[73]

In November 2004, following an increase in U.S. military engagements in Iraq, the U.S. head of Iraqi detainee operations, Maj. Gen.

Geoffrey Miller, stated that the number of detainees held by or in connection with U.S. forces in Iraq had risen to about 8,300 – more than double the number in custody in October 2004.[74] Of the 8,300 detainees, according to Maj. Gen. Miller, about 4,600 were held at Camp Bucca, about 2,000 at Abu Ghraib, and about 1,700 remain in the custody of field commanders.[75] By March 2005, the total number of detainees had risen again – to at least 8,900 in permanent facilities and 1,300 others held at transient facilities throughout Iraq.[76] The number of total foreign detainees held in Iraq is approximately 330.[77] As of December 5, 2004, multi-national forces in Iraq held 65 children under the age of 16.[78] A spokesman for the multi-national forces indicated that child detainees are separated from the adult population in detention centers unless they have immediate family members detained in the same facility.[79]

Arkan Mohammed Ali is an Iraqi citizen. U.S. military personnel detained him in Iraq over a period of almost one year, from July 2003 until June 2004. During the period of his imprisonment, he was transferred to a number of different detention facilities in Iraq, including a civil defense station and a military prison in Baghdad, and at Abu Ghraib. At least one of the detention centers in which Mr. Al-Hasnawi was detained had a "silent tent" where he says that detainees were prohibited from sleeping. According to Mr. Al-Hasnawi any individual detained in the "silent tent" appearing to fall asleep would be beaten by soldiers. In other instances, Mr. Al-Hasnawi says that he was severely beaten by U.S. officials, subjected to sleep deprivation, and threatened with transfer to Guantanamo, where he was told U.S. soldiers could kill detainees with impunity. Upon his release, Mr. Al-Hasnawi charges that a U.S. official threatened him, telling him that he would never see his family again if he spoke about the conditions of his detention.

Human Rights First Interview with Arkan Mohammed Ali, August 11, 2004.

The legal status accorded to U.S.-held detainees in Iraq has shifted repeatedly over the course of the conflict. In April 2003, shortly after the outset of armed conflict, the Defense Department stated flatly that the Geneva Conventions would govern detainees in Iraq – the Third Geneva Convention applying to prisoners of war and the Fourth Geneva Convention for the protection of civilians to all others.[80] In May 2003, the U.S. Government seemed briefly to introduce a new category of detainees – "unlawful combatants" – a term that had been used at times to describe suspected Al Qaeda and Taliban fighters in Afghanistan.[81] But the "unlawful combatant" designation was soon dropped, and on September 16, 2003, Brig. Gen. Janis Karpinski, commander of the 800th Military Police Brigade, announced that more than 4,000 people were being held as "security detainees." This apparently new category, announced in September 2003, was separate from prisoners of war and criminal detainees. It applied to those believed to pose a threat to coalition forces in Iraq.[82]

The "security detainee" designation is not mentioned in the Geneva Conventions, or in existing Army regulations. This contributes to the confusing, ambiguous – and in several respects, unlawful – procedures for the treatment and processing of detainees.[83] For example, under the Fourth Geneva Convention governing the treatment of civilians by an occupying power, there are two narrow bases on which an occupying power can detain civilians: (1) if it is "necessary, for imperative reasons of security," or (2) for criminal prosecutions.[84] But, as the Army Inspector General's report of July 2004 made clear, some fraction of those detained in Iraq were held for the purpose of intelligence collection – an impermissible basis, standing alone, for depriving Iraqis of liberty under the Geneva regime.[85] The failure to follow the letter of the law – or indeed any settled policy – governing detainees' legal status contributed to severe problems of accountability, security, and reporting now well documented in official reports.[86]

The legal status of nearly 4,000 members of the Mujahideen-e-Khlaq (MEK), an Iraqi-based organization seeking to overthrow the government in Iran (and listed as a terrorist organization by the U.S. State Department), was similarly unsettled. In early January 2004, Brigadier General Mark Kimmitt, Deputy Director for Coalition Operations, commented that the status of MEK detainees was being determined,[87] but when Human Rights First asked the Coalition Press Information Center for information on the detainees' status six months later in June 2004, the CPIC refused to respond.[88] Then, in July 2004, immediately before the transfer of sovereignty, the Pentagon informed the MEK detainees that the MEK members were being designated "protected persons," entitled to rights under the Fourth

Geneva Convention for the protection of civilians.[89] Since this general determination, however, it is unclear what if any steps have been taken to resolve the status of individual MEK members still held under U.S. control.[90]

The use of novel status designations to avoid Geneva Convention obligations extended beyond military personnel to include CIA officials working in the region. A March 2004 memorandum by Jack L. Goldsmith III, then U.S. Assistant Attorney General, sought to establish a legal basis for the transfer by U.S. military and intelligence officials of certain "protected persons" seized in Iraq to locations outside of Iraq for interrogation.[91] Article 49 of the Fourth Geneva Convention categorically prohibits the forcible transfer or deportation of "protected persons" outside occupied territory.[92] Nonetheless, CIA officials had begun transferring detainees in April 2003, and reportedly transferred as many as a dozen people out of Iraq.[93] Among these was an Iraqi detainee known as Triple X, whose transfer and interrogation was authorized by Secretary of Defense Rumsfeld.[94] Triple X was eventually returned to Iraq for further detention, but the Red Cross was not informed of his whereabouts for eight months.[95]

The ambiguity about the application of Geneva protections in Iraq extends beyond just a handful of high-value captives. Roughly 330 foreign fighters are currently in U.S. custody in Iraq and "have been deemed by the Justice Department not to be entitled to protections of the Geneva Conventions."[96] The foreign detainees, whose numbers swelled by more than 140 after U.S. troops entered Fallujah in early November, may soon "be transferred out of the country for indefinite detention elsewhere."[97]

If the legal status of U.S.-held detainees in Iraq was unsettled during the invasion and occupation, it remains so following the United States' June 28, 2004 transfer of sovereignty to the Interim Government of Iraq. The United States today asserts the power to detain individuals in Iraq not as an occupying force, but pursuant to UN Security Council Resolution (SCR 1546), which recognizes Iraq's request for ongoing security assistance and gives multinational forces "the authority to take all necessary measures to contribute to the maintenance of security . . . in Iraq."[98] In a letter to the President of the UN Security Council annexed to the UN Resolution, former Secretary of State Colin Powell seemed to adopt the Geneva Convention standard for detention by an occupying power, writing that the United States would interpret SCR 1546 as authorizing "internment where . . . necessary for *imperative* reasons of security."[99] He added that U.S. and allied forces in Iraq "remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions."[100]

Despite this statement, the thousands still held in Iraq today remain governed by an ambiguous set of legal strictures. Of the approximately 8,000 prisoners of war the CPIC says were processed during the occupation, the CPIC stated in July 2004 that all had either been released, transferred to Iraqi custody to face criminal charges (as in the case of Saddam Hussein and eleven of his senior associates), or reclassified as "security detainees."[101] The United States itself now officially holds only "security detainees"[102] – a category that may refer to those who may be held "for imperative reasons of security" under SCR 1546, but that remains unclear. At a minimum, the United States is bound in its detention operations by relevant U.S. law constraining government conduct, as well as by Common Article 3 of the Geneva Conventions and customary international law (barring torture and humiliation, and requiring a basic level of humane treatment).[103]

Sherzad Kamal Khalid was detained by U.S. forces in Iraq for approximately two months. He was incarcerated in at least two separate detention facilities—at al-Qasr al-Jumhouri and al-Qasr al-Sujood. While in U.S. detention, he developed a stomach infection, which went untreated. Upon his release, he was diagnosed with a stomach illness caused by lack of medical attention to his stomach infection and may need stomach surgery.

Human Rights First Interview with Sherzad Kamal Khalid, August 11, 2004.

During the war and occupation, Red Cross access to detainees held in U.S.-run facilities in Iraq was incomplete. While the United States afforded Red Cross access to some facilities, it hid particular prisoners within those facilities from Red Cross monitors.[104] Some detainees were never registered on official logs as present in detention facilities at all.[105] General Paul J. Kern, commander of U.S. Army Materiel Command, has suggested that this practice of keeping "ghost detainees," at least once authorized by the Secretary of Defense himself, extended beyond a handful of "high-value" de-

tainees to include as many as 100 held in U.S. custody.[106]

Military personnel today deny the existence of ghost detainees in Iraq and state that all detainees in U.S. military custody are fully accounted for.[107] Pentagon officials indicated they were unable to answer whether ghost detainees were still held by other government agencies, such as the CIA.[108] It remains unclear whether the Red Cross has access to all detainees. Late last year, a U.S. public affairs officer with multinational forces in Iraq indicated that the Red Cross still had limited access to detainees in U.S. custody.[109] According to a spokesperson for the multi-national forces in Iraq, Red Cross access to detainees held at facilities under division and brigade command is often limited due to concerns regarding the security of Red Cross officials in specific areas of Iraq.[110]

Information on detainees held by the United States prior to the transfer of sovereignty on June 28, 2004, was poor – making it extremely difficult for families to find those detained. 'Capture cards' containing biographical information, required for prisoners of war under the Third Geneva Convention, were often incomplete, compounding the problems for the Red Cross to effectively notify families.[111] Official databases of detainees were neither comprehensive nor accurate.[112] They often did not contain detainees' full names; translation rendered some names unrecognizable; and identification numbers for detainees did not correspond with lists of names.[113] Inadequate procedures created situations where detainees could exchange identification tags with others while being moved from a collection point to a detention facility.[114] The failure to establish a central location for detainee tracking led to confusion over the location of specific detainees.[115]

Today, Iraqi families have only limited access to a list of detainees in U.S. custody; the lists are generally not current and names are often wrongly recorded.[116] A Coalition Provisional Authority website providing a list of detainees in Arabic ceased operations in June 2004.[117] An official with the Multi-National Forces in Iraq (the entity called CJTF-7 before the transfer of sovereignty) indicates a list of detainees is available through the Iraqi Assistance Center, a military-run center in Baghdad providing assistance to Iraqis and non-governmental organizations. But the list of detainees available at the Iraqi Assistance Center's website is infrequently updated. As of March 2005, the list had last been updated on October 7, 2004.[118]

Guantanamo Bay

More is known about the detention facility at the U.S. Naval Base at Guantanamo Bay than virtually any other facility. Detention operations there began in early 2002, when the U.S. military transported to "Gitmo" several hundred individuals seized primarily in Afghanistan and Pakistan.[119] Since then, Guantanamo Bay has become home to a rotating, multinational collection of detainees, including not only those seized during the Afghanistan war but also individuals seized in Bosnia, Zambia, Thailand, and elsewhere.[120]

As of March 2005, Guantanamo Bay officially housed "approximately 540 detainees."[121] According to the Defense Department, 149 detainees have been released since the facility opened, and 65 others have been returned into the "control" of their home country.[122]

Saifullah Paracha's family understands that he was brought to Bagram Air Force Base in July 2003. Mr. Paracha is a Pakistani citizen who came to the United States for post-college studies in 1971. He lived in the United States until the mid-1980s, when he and his family decided to move back to Pakistan. According to Mr. Paracha's wife, Mr. Paracha boarded an Air Thai plane on a business trip to Bangkok last summer, but the driver sent to collect Mr. Paracha at the Bangkok airport reported that Mr. Paracha had not deplaned. Air Thai confirmed that Mr. Paracha boarded the plane. Mr. Paracha's family received a letter from the Red Cross in August 2003, more than six weeks after he went missing, informing them that he was at Bagram. Recently released government documents indicate that Mr. Paracha was held in isolation for several months while at Bagram.[123] The family was given his prisoner number. They received additional letters from him while he was at Bagram. In September 2004, the Red Cross informed Mr. Paracha's family that he had been transferred from Bagram Air Force Base to Guantanamo Bay.[124]

News reports also indicate the existence of a CIA-run detention facility at Guantanamo Bay.[125] The CIA facility is reportedly run out of Camp Echo. It is unclear whether the CIA-run facility at Guantanamo continues to be used.[126] Camp

Echo, until recently, also housed detainees on trial before military commissions under the purview of the Defense Department, including Salim Ahmed Hamdan.[127] The Defense Department has indicated plans to build a permanent detention facility on Guantanamo.[128] The new 200-cell facility, called Camp 6, would serve portions of the detainee population currently housed in the makeshift 1000-cell Camp Delta.[129]

After a hiatus of announced prisoner transfers to Guantanamo, the Defense Department announced on September 22, 2004, the arrival of 10 new detainees from Afghanistan.[130] One of the new arrivals is believed to be Saifullah Paracha, whose family learned of his transfer from Afghanistan to Guantanamo Bay the same day as the Defense Department announcement of the transfer of 10 detainees. Mr. Paracha was originally detained at Bagram Air Force Base, following his July 2003 disappearance en route from Karachi, Pakistan to Bangkok, Thailand.[131] On September 22, 2004, Mr. Paracha's family received a call from the Red Cross informing them that Mr. Paracha had been transferred to Guantanamo Bay.[132] Mr. Paracha's wife recently filed a habeas corpus petition in U.S. federal court on her husband's behalf challenging his detention.[133]

In June 2002, I was flown to Guantanamo Bay, Cuba. In Guantanamo Bay, Cuba, I was put in a large prison with many other men. I was held in a single cell in a cellblock of 48 men. . . . In December 2003, I was moved from Camp Delta, and put in a new cell, this cell was enclosed in a house, and from that time I have not been permitted to see the sun or hear other people outside the house or talk with other people. I am alone except for the guard in the house. They allow me to exercise three times per week but only at night and not in the day. They gave me the Quran only but not other books. When I asked why I had been moved to this place no one told me anything until I asked for a translator because I do not speak English and the guard does not speak Arabic. The translator is supposed to come twice a week but the translator did not come except when I demanded urgently. . . . I am alone and I do not talk with anyone in my cell because there is no one else to talk to. . . . Being held in the cell where I am now is very hard, much harder than Camp Delta. One month is like a year here, and I have considered pleading guilty in order to get out of here.

Sworn Affidavit of Salim Ahmed Salim Hamdan, February 9, 2004, as translated by Dr. Charles P. Schmitz.

The legal status of those held at Guantanamo remains the subject of active review and dispute in an eclectic collection of military and judicial proceedings. Shortly after the first detainees' arrival in 2002, President Bush issued a blanket statement designating those detained at Guantanamo as "enemy" or "unlawful combatants," a status with unclear legal meaning.[134] In February 2002, a number of family members of the detainees filed petitions for habeas corpus in U.S. federal court, challenging the government's authority to detain prisoners indefinitely at Guantanamo Bay.[135] In late June 2004, the U.S. Supreme Court ruled that U.S. courts indeed had jurisdiction to review the habeas challenges to the legality of the detentions.[136] The cases were remanded to the federal district court in Washington, D.C. for consideration of the detainees' claims on the merits.[137] District courts hearing detainees' habeas petitions reached opposite conclusions about the detainees' rights on the merits.[138] Those decisions are now on appeal and the cases are certain to be again before the Supreme Court in the coming year. Since the Supreme Court decision, more than 60 detainees have filed habeas corpus petitions in U.S. courts raising similar challenges, arguing in some cases that they are innocent victims, being in the wrong place at the wrong time.[139]

While continuing actively to dispute the detainees' right to full habeas proceedings in the federal courts, the Defense Department responded to the Supreme Court's ruling by creating novel Combatant Status Review Tribunals (CSRTs) at Guantanamo Bay.[140] According to the Defense Department, the CSRTs determine whether detainees are in fact "enemy combatants."[141] Once the tribunal reaches a decision, the decisions are then referred to an Admiral for approval. As of March 2005, the tribunal decided on 487 cases and 71 cases are pending review by Rear Admiral J.M. McGarrah.[142] After spending several years in detention, twenty-two individuals so far have been determined not to be enemy combatants through this process.[143]

Third, and separate from the CSRTs, the Pentagon has also launched annual status review tribunals – announced by the Secretary of Defense shortly before the Supreme Court heard oral arguments in the habeas case – to revisit the status each year of those who continue to be held at Guantanamo.[144] Announced in May 2004, the annual review tribunals commenced on December 14, 2004.[145] As of December 20,

2004, the Defense Department had completed four annual review tribunals.[146]

Finally, military commission war crimes trials for a handful of detainees – first announced in November 2001 – began proceedings in four cases in August 2004.[147] Human Rights First was permitted to observe proceedings in the cases during the late summer and fall of 2004, before a federal court in Washington, D.C. stayed the trials indefinitely based on the Pentagon's failure to provide Guantanamo detainees Article 5 hearings as required by the Geneva Conventions. The federal court also cited the commissions' failure to comply with U.S. and international fair trial standards.[148] That court's decision, too, is now pending appeal.[149]

Dear Mom, Farhat, Muneeza, Mustafa and Zahra,

Assalam o Alaikum. I pray to Almighty God for your health and well being. May God always keep you safe and sound. I received your two letters dated Feb. 14 and 27. Happy Valentine's Day to you too. Here all days are same. By blessing of God my health is good, but you don't mention about your health. Please write in detail. Whenever you write place a carbon paper for your own record, I put you (sic) letters in front of me and reply, so you can also refer back to your copies in you (sic) record. I have replies (sic) Eid Activities, you must have received by now. Happy to know about kids are doing fine in their studies and other activities. Zahra's sport noted. It is good to know her participation. Zahra, keep it up! Delays in letters is not in our control, we have to live with it. But now it is getting efficient some what. . . . May God keep you happy healthy, wealthy and long life.

Allah Hafiz.
Best Regards,
Ma-Assalam

Letter of March 24, 2003 from **Saifullah Paracha** to his family, as transmitted through the International Committee of the Red Cross.

The existing patchwork of proceedings seems unlikely to produce a resolution of the legal status of the 500-plus Guantanamo detainees anytime soon. In the meantime, the three varieties of military proceedings putatively underway – the CSRTs, annual review tribunals, and military commission trials – fail to bring the United States in line with Geneva Convention requirements, or with the standards set forth by the Supreme Court in its ruling last summer. Under the Geneva Conventions, individuals captured during an armed conflict are either prisoners of war or civilians; both categories come with specific protections delineated in the Geneva Conventions.[150] Prisoners of war are entitled, for example, to be treated humanely at all times, send and receive letters, and be free from physical or mental torture in the course of interrogations.[151] Civilians who engage *directly* in combat but do not follow the laws of war are not entitled to prisoner of war protections, but are entitled to basic protections such as the right to be treated humanely; they may be prosecuted for crimes under the domestic laws of the captor, or for war crimes under international law.[152] If there is any doubt as to the status to which a detainee is entitled, he must be afforded an Article 5 hearing (referring to Article 5 of the Third Geneva Convention) to determine, on an individual basis, the rights to which he is entitled.[153]

None of the detainees currently held at Guantanamo has been afforded a standard Article 5 hearing. The CSRTs, which Human Rights First became the first independent non-governmental organization to observe this past November, are held in many cases almost three years after the initial detention, making it close to impossible for detainees to advance witnesses and evidence in support of their positions. The annual review tribunals recently began meeting. And the military commission trials – which have been plagued by translation problems, the removal of several panel members for the appearance of bias, and unequal rules for prosecution and defense – have now been suspended in part because of the same failure to hold Article 5 hearings.[154]

Finally, while the Red Cross continues to be afforded access to those held in military custody at Guantanamo Bay, it has issued at least one confidential report to the U.S. Government expressing serious concerns about interrogation techniques used for some of those detained.[155] According to press accounts of a confidential June 2004 Red Cross report, the Red Cross expressed concern that detainees had been subject to treatment that was "tantamount to torture." The treatment detailed in press accounts of the confidential report included prolonged solitary confinement, exposure to loud and persistent noise, prolonged cold, and beatings.[156] The account also indicated that medical personnel at Guantanamo aided military interrogations by releasing prisoners' medical records to the interrogators.[157] Immediately following press accounts of the Red Cross report, General Myers, the chairman of the Joint Chiefs of Staff, rejected concerns that interroga-

tion tactics used at Guantanamo were "tantamount to torture."[158]

At the same time, there still does not appear to be an official family notification policy for detainees held at Guantanamo Bay.[159] Rear Admiral J.M. McGarrah, Director of the Combatant Status Review Tribunals at Guantanamo Bay, refused to confirm or deny whether Saifullah Paracha was detained at Guantanamo Bay when asked by Mr. Paracha's lawyer.[160] The Red Cross has largely played the role of informing families of detainees. In Mr. Paracha's case, his wife was informed of her husband's transfer from Bagram Air Force Base to Guantanamo Bay by the Red Cross.[161]

U.S. policy on communication between family members and detainees has compounded families' fears for the health of their loved ones. Lawyers for Guantanamo detainees report that communications from detainees to family members take almost six months.[162] Incoming and outgoing mail are reportedly blocked for detainees determined to be recalcitrant.[163] Family members cite to communication with detainees as essential; the family of Fawzi al-Odah, a detainee at Guantanamo, reports that the messages from their son give them "an indication that [their] son is still alive."[164]

Jordan

Following the release of *Ending Secret Detentions* in June describing a U.S. detention facility in Jordan,[165] a Jordanian government spokeswoman, Asma Khader, flatly denied the report, stating that "[t]here are no American detention centers in Jordan."[166] CENTCOM likewise denies any knowledge of U.S.-run detention facilities in Jordan,[167] and the CIA has not responded to Human Rights First's requests that it clarify whether there is a CIA-run facility in Jordan. Despite this, Yossi Melman, a well-known military and security reporter, in an October 2004 article in *Ha'aretz* described the CIA's holding of 11 high-level Al Qaeda prisoners at a CIA-run interrogation facility in Jordan.[168] And investigative reporters who identified the Al Jafr Prison in the southern Jordanian desert as a CIA interrogation facility continue to stand by their story.[169]

Pakistan

Nine months ago, Human Rights First documented the existence of detention facilities in the border region between Pakistan and Afghanistan. At the time, the report identified two facilities — one in Kohat and the other in Alizai — both near the Pakistani city of Peshawar. The Department of Defense and the CIA refused to confirm or deny the existence of these facilities. Yet at least one recently released report from the U.S. Army Criminal Investigation Command (received by Human Rights First in response to a FOIA request), reflects the existence of a U.S. detention facility in Peshawar, Pakistan, as late as July 2002.[170] The report describes an inquiry into the abuse of an Afghan while in U.S. custody in Peshawar. The detainee alleged that he was beaten on his hands, feet and chest by U.S. forces while he was incarcerated in the Peshawar detention facility.[171] Army investigators could not subsequently locate the detainee to verify his story, and the investigation was closed as inconclusive.[172]

United States

Of the three known individuals held by the U.S. Government as "enemy combatants" on U.S. soil last June, two remain in military custody at the U.S. Naval Consolidated Brig in Charleston, South Carolina: U.S. citizen Jose Padilla and Qatari national Ali Saleh Kahlah al-Marri.[173] The third designated "enemy combatant" held in Charleston, U.S. citizen Yaser Esam Hamdi, was released to Saudi Arabia after negotiations between his lawyer and the U.S. Government spurred by a U.S. Supreme Court decision (discussed below) against the Government in late June 2004.[174]

Both Mr. Padilla and Mr. al-Marri were abruptly removed from the U.S. criminal justice system – Mr. Padilla from the Metropolitan Correctional Center in New York and Mr. al-Marri from the custody of U.S. Marshals at a federal prison in Peoria, Illinois – to military custody in June 2002 and June 2003, respectively.[175] Jose Padilla was originally provided a public defense attorney, and his case entered into the U.S. criminal justice system. While proceedings were pending, the President declared Mr. Padilla an "enemy combatant" and ordered him transported to a military brig in South Carolina – without informing his lawyer.[176] Mr. al-Marri was originally detained as a material witness, later charged with credit card fraud in Illinois, and declared an "enemy combatant" shortly before his criminal case was to come to trial in U.S. courts.[177]

The designation "enemy combatant" continues to have unclear meaning in law. In addressing

the Government's use of the term in the cases of Messrs. Padilla and Hamdi late last June, the Supreme Court stated that "[t]here is some debate as to the proper scope of ["enemy combatant"], and the Government has never provided any court with the full criteria that it uses in classifying individuals as such."[178] In the case of Mr. Padilla, the Supreme Court failed to reach the merits of his claim challenging the legality of his detention; the Court ruled instead on the technical ground that his lawyers should have filed their case in South Carolina, not New York.[179] A similar result was reached in the case of Mr. al-Marri, and his lawyers filed a habeas petition on his behalf in July 2004 in South Carolina.[180] In February 2005, the federal court in South Carolina hearing Mr. Padilla's case ordered the Government to bring criminal charges against Padilla, hold him as a material witness, or release him within 45 days.[181]

In the case of Mr. Hamdi, the Supreme Court held by a vote of 8-1 that U.S. citizens seized in Afghanistan have some due process rights to challenge the factual basis for their detention before a "neutral" official.[182] The negotiated release of Mr. Hamdi followed soon after this ruling was handed down. Under his signed release agreement, Mr. Hamdi was required to renounce his U.S. citizenship and is restricted from visiting Afghanistan, Pakistan, Iraq, Israel, Syria, the Gaza Strip, or the West Bank.[183] In addition, he is restricted from traveling to the United States for ten years.[184]

Mr. Padilla's ability to communicate with the outside world improved somewhat as his case made its way through the courts. After almost two years in incommunicado detention, Mr. Padilla was granted a visit with his lawyers in March 2004 (following the Supreme Court's decision to hear his case).[185] Since then, Mr. Padilla has had limited meetings with his counsel, and the U.S. Government continues to permit Mr. Padilla access to his lawyers only on a discretionary basis.[186] The government has also afforded the Red Cross access to Mr. Padilla.[187]

Following his removal from the criminal justice system, Mr. al-Marri was denied access to his lawyer from May 29, 2003, until October 14, 2004.[188] Mr. al-Marri's lawyer was required to sign an agreement allowing the government to electronically monitor all meetings, review all mail, and restrict telephone access.[189] The first meeting with Mr. al-Marri was electronically monitored, and two military personnel were present in the room the entire time.[190] The Red Cross has also been granted access to Mr. al-Marri.[191]

There appears to be no clear procedure for the Government to inform families that their loved one has been designated an "enemy combatant." Both Mr. Padilla's and Mr. al-Marri's lawyers informed their respective families of their detention while they were still in the criminal justice system.[192] As far as lawyers for Mr. Padilla and Mr. al-Marri are aware, the U.S. Government did not officially inform their respective families.[193]

Other Suspected Locations

In June 2004, Human Rights First reported that detainees were suspected to have been held by the United States in locations on the island of Diego Garcia[194] and on U.S. ships, particularly the USS Peleliu and the USS Bataan.[195] In early 2002, at least eight known detainees were held on the USS Bataan.[196] The whereabouts of the majority of those detainees remains unknown. In January 2004, the U.S. Navy seized vessels carrying drugs, including one with fifteen individuals "with possible links to Al Qaeda," and reportedly held "ten of the individuals … [seized in]…a secure, undisclosed location for further questioning by U.S. officials."[197]

Recent news reports support the existence of a CIA-run facility on Diego Garcia.[198] There is also growing evidence of U.S. officials using Thailand as a way station for high-level detainees en route to undisclosed locations.[199] Despite these new reports, the U.S. Government has provided no additional information on these sites since June 2004. The Defense Department continues to evade questions regarding the existence of these facilities. For example, when asked last July following the release of the *Ending Secret Detentions* report whether there were detainees held on Diego Garcia, Lawrence DiRita, Deputy Assistant Secretary of Defense for Public Affairs, stated: "I don't know. I simply don't know."[200]

III. The Law

[There] may be instances arising in the future where persons are wrongfully detained in places unknown to those who would apply for habeas corpus on their behalf. . . . These dangers may seem unreal in the United States. But the experience of less fortunate countries should serve as a warning.

Ahrens v. Clark, 335 U.S. 188 (1948) (Rutledge, J., dissenting)

In its recently released Country Reports on human rights conditions abroad, the U.S. Department of State once again criticized the practice of holding individuals incommunicado in secret detention facilities.[201] For a nation founded on the principle of limited government, the reason for the criticism is not difficult to understand. As one federal court put it, rejecting efforts to secretly deport individuals from the United States: "The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors."[202]

For this reason, the major international treaties that govern the use of detention by the United States recognize the fundamental necessity of maintaining openness in government detention – whether of civilians or of prisoners of war, and whether they are detained in the course of international armed conflict or not. Longstanding U.S. law and policy reflect adherence to these obligations.

Under the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified more than a decade ago, makes clear that all state parties have a duty to institute procedures that will minimize the risk of torture.[203] At the top of the list of required procedures are: maintaining officially recognized places of detention, keeping registers of all in custody, and disclosing the names of all individuals detained to their families and friends.[204]

> To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings.[205]

Such requirements are imposed because prisoners are "particularly vulnerable persons," who can easily become subject to abuse. In fact, incommunicado detention, especially by denying individuals contact with family and friends, violates the ICCPR obligation to treat prisoners with humanity.[206] States are thus required to implement provisions "against incommunicado detention" that deter violations and ensure accountability.[207]

The Human Rights Committee (HRC), the independent ICCPR monitoring body (whose members are human rights experts elected by state parties), has consistently recognized the import of these obligations. For example, in *El-Megreisi v. Libya*, the HRC found that the Libyan government in detaining an individual for six years, the last three of which were incommunicado and at an unknown location, had violated the ICCPR's prohibition of torture and its requirement that prisoners be treated with dignity.[208] This, despite the fact that the family

knew that the detainee was alive and his wife had been allowed to visit him once. The HRC nonetheless found that the detainee's prolonged incommunicado imprisonment, as well as the government's refusal to disclose El-Megreisi's whereabouts, amounted both to arbitrary detention and to a state failure to minimize the risks of torture.[209]

Under the Geneva Conventions

The Geneva Conventions of 1949, which the United States has also signed and ratified, are the primary instruments of international humanitarian law protecting all those caught up in the course of armed conflict. The U.S. Government has generally taken the position that the Geneva Conventions apply in the U.S. armed conflict in Iraq.[210] Since the transfer of power to the Interim Government of Iraq, former Secretary of State Colin Powell has asserted the continuing application of the Geneva Conventions to the actions of U.S. forces in Iraq.[211] Despite this, both conflicting public statements, discussed in Chapter 2, and internal Administration dispute over the applicability of these treaties, have left the Conventions' role in these conflicts deeply unclear.[212]

The Administration's position regarding the applicability of the Geneva regime in Afghanistan has been even less clear. In press statements in early January 2002, Defense Secretary Donald Rumsfeld stated that as a matter of policy, but not of legal obligation, the United States intended to treat detainees from Afghanistan in a manner "reasonably consistent with the Geneva Conventions," and would "generally" follow the Geneva Conventions, though only to "the extent that they are appropriate," as "technically unlawful combatants do not have any rights under the Geneva Convention."[213] Following an internal review of this position at the urging of former Secretary of State Colin Powell (concerned about the potential effect on U.S. forces of a blanket renunciation of the Geneva Conventions), the Administration modified its position slightly.[214] On February 7, 2002, White House Spokesman Ari Fleischer announced President Bush's decision "that the Geneva Convention applies to members of the Taliban militia, but not to members of the international al-Qaida terrorist network."[215] Despite the stated application of the Conventions, however, the Administration determined that Taliban fighters were not eligible for prisoner of war status because the government had violated international humanitarian law; this allegation had never previously stopped the United States from affording enemy government forces prisoner-of-war protections.

The U.S. obligation to record and account for all wartime detainees is clear. Under the Third Geneva Convention, prisoners of war are to be documented, and their whereabouts and health conditions made available to family members and to the country of origin of the prisoner.[216] The Fourth Geneva Convention (governing the treatment of civilians) establishes virtually identical procedures for the documentation and disclosure of information concerning civilian detainees.[217] These procedures are meant to ensure that "[i]nternment . . . is not a measure of punishment and so the persons interned must not be held incommunicado."[218]

The disclosure required by the Geneva Conventions is done in the first instance through a system of capture cards. "Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or another camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card . . . informing his relatives of his *capture, address and state of health*. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner."[219] The United States' failure to observe the capture card system in Iraq was the subject of Red Cross criticism in its 2004 report.[220]

The Central Agency described in Article 123 is a body meant to be established in a neutral country whose purpose is "to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend."[221] The Red Cross has historically established the Central Agency and "[w]henever a conflict has occurred since the Second World War, the International Committee has placed the Agency at the disposal of the belligerents, and the latter have accepted its services."[222]

U.S. Domestic Law and Policy

[T]he Secretary shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the

House of Representatives a report for the preceding 12-months containing the following . . . (A) The best estimate of the Secretary of Defense of the total number of detainees in the custody of the Department as of the date of the report. (B) The best estimate of the Secretary of Defense of the total number of detainees released from the custody of the Department during the period covered by the report. (C) An aggregate summary of the number of persons detained as enemy prisoners of war, civilian internees, and unlawful combatants, including information regarding the average length of detention for persons in each category. (D) An aggregate summary of the nationality of persons detained. (E) Aggregate information as to the transfer of detainees to the jurisdiction of other countries, and the countries to which transferred.

Ronald W. Reagan National Defense Authorization Act, Pub. L. No. 108-375, § 1093(c)
Enacted October 28, 2004

U.S. domestic law and policy have long required clear accounting and processing of detainees captured by U.S. Armed Forces, as well as the provision of Red Cross access to prisoners, in order to ensure that U.S. Geneva Convention obligations have been fulfilled. These principles are enshrined in binding military regulations and field manuals dating back half a century. In addition, in response to revelations of a disturbing pattern of noncompliance with these principles in U.S. global detention operations since September 11, the past nine months have seen both Congress and the U.S. Army take steps to reaffirm these obligations. Detainee accounting and reporting requirements are clear.

Army regulations in place before the start of the war in Afghanistan provide detailed procedures for accounting for detainees in U.S. custody. Defense Department Directive 2310.1 – currently in force – affirms the United States' obligation to comply with the Geneva Conventions and establishes a framework for information disclosure.[223] Under this Directive, the Secretary of the Army must develop plans for "the treatment, care, accountability, legal status, and administrative procedures to be followed about personnel captured or detained by, or transferred from the care, custody, and control of, the U.S. Military Services."[224] In particular, the Secretary of the Army is required to plan and operate a prisoner-of-war and civilian internment information center to comply with the United States' Geneva Convention obligations (described above), and "serve to account for all persons who pass through the care, custody, and control of the U.S. Military Services."[225] The Undersecretary of Defense for Policy (a position currently held by Douglas Feith) has "primary staff responsibility" for overseeing the detainee program.[226]

To implement its obligations under Article 122 of the Third Geneva Convention, requiring each detaining power to establish a national information bureau,[227] and to fulfill Directive 2310.1, the Army established the National Prisoner of War Information Center (NPWIC).[228] According to binding Army Regulation 190-8, the NPWIC is charged with maintaining records for both POWs and detained civilians.[229] The center functioned during the 1991 Gulf War, and has been used in subsequent U.S. military operations. As an information processor, the NPWIC ensures full accounting of persons who fall into U.S. hands. It does not make decisions regarding whether an individual is entitled to prisoner of war or other legal status.[230]

In April 2003, W. Hays Parks, Special Assistant to the Army JAG, maintained that the NPWIC would be employed in Iraq: "Once the theater processing is accomplished, those reports are sent back here to the National Prisoner of War Information Center, which is run under the Army Operations Center. Those lists are all collated, put together and we ensure that we have proper identification, the best information we can get from that. And thereafter, that information is forwarded by the United States government to the International Committee of the Red Cross."[231]

But in his investigative report, Major General Antonio Taguba noted that such regulations had not been fully complied with, since the reporting systems – such as the National Detainee Reporting System (NDRS) and the Biometric Automated Toolset System (BATS) – which traditionally provide information to the NPWIC were "underutilized and often [did] not give a 'real time' accurate picture of the detainee population due to untimely updating."[232] An investigative report into prisoner abuse in Iraq by former Secretary of Defense James Schlesinger also found that the failure to implement a comprehensive detainee collection database created a large backlog where "some detainees had been held 90 days before being

interrogated for the first time."[233] In some cases, the release of innocent detainees took significantly longer because of inadequate accounting systems and general backlogs.[234]

More than a year after military operations began in Iraq, on July 16, 2004, the Pentagon announced the creation of an Office of Detainee Affairs (ODA) within the Office of the Undersecretary of Defense for Policy to advise the Secretary of Defense on policy and strategy in the area.[235] The ODA is charged with correcting such basic operational problems for detainees, working with policy makers on torture and interrogation policy, and building relationships with Congress, other countries, and non-governmental organizations. According to an ODA official, the ODA has instituted new policies and procedures for addressing concerns raised in Red Cross reports to higher levels of the Defense Department.[236] The effectiveness of these new procedures is now being tested.

In addition, in the wake of rising counterinsurgency activities in Iraq, the U.S. Army published a new, interim field manual on counterinsurgency operations in October 2004.[237] The interim manual explains that it "establishes doctrine (fundamental principles and [tactics, techniques, and procedures]) for military operations in a counterinsurgency environment. It is based on existing doctrine and lessons learned from recent combat operations."[238] Among other things, the interim manual affirms the obligation to account for all in U.S. custody – whatever their legal status. "Detaining personnel carries with it the responsibility to guard, protect, and *account* for them."[239] For this and other purposes, the interim manual specifies as "critical" the need for "[c]learly documenting the details surrounding the initial detention and preserving evidence."[240] Documentation to be recorded must be "detailed and answer the six W's – who, what, when, where, why, and witnesses."[241]

Congress also took action in October 2004, enacting as part of the Ronald W. Reagan National Defense Authorization Act provisions requiring the Secretary of Defense to report to Congress on U.S. compliance with these basic standards. The statute requires the Secretary, by the end of March 2005, to prescribe detailed regulations for Defense Department personnel, including contractors, to ensure that all detainees held in Defense Department custody receive humane treatment in accordance with U.S. and international law. Among other things, the regulations must provide for training in the applicable law of war, including the Geneva Conventions; establish standard operating procedures for detainee treatment; ensure that all detainees receive information in their own language regarding the protections due them under the Geneva Conventions; and provide for periodic announced and unannounced inspections of detention facilities.[242] The new law also requires the Secretary to provide to the Senate and House Armed Services Committees, by July 28, 2005, and annually thereafter, a report disclosing investigations into violations of domestic or international law regarding detainee treatment; and general information on foreign national detainees in Defense Department custody, including the numbers, nationalities, and average length of detention of such detainees, as well as information regarding detainees who have been released during the year and detainees transferred to the jurisdiction of other countries.[243]

Finally, since 1956, the Army's field manual has explicitly recognized the Red Cross's right to detainee information and access, and its special role in ensuring Geneva Conventions compliance. The manual stipulates: "The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times."[244] The Navy's operations handbook likewise authorizes the Red Cross to monitor "the treatment of prisoners of war, interned civilians, and the inhabitants of occupied territory."[245] It describes the Red Cross's special status and access to detainees:

> [The Red Cross's] principal purpose is to provide protection and assistance to the victims of armed conflict. The Geneva Conventions recognize the special status of the Red Cross and have assigned specific tasks for it to perform, including visiting and interviewing prisoners of war, providing relief to the civilian population of occupied territories, searching for information concerning missing persons, and offering its "good offices" to facilitate the establishment of hospital and safety zones.[246]

Army regulations make even more explicit the rights of detainees, both civilians and combatants, to contact the Red Cross and ensure adequate access and disclosure. With respect to detained combatants, prisoner representatives have the right to correspond with the Red Cross.[247] Similar internee committees representing detained civilians also have rights to unlimited correspondence with the Red Cross.

"Members of the Internee Committee will be accorded postal and telegraphic facilities for communicating with . . . the International Committee of the Red Cross and its Delegates. . . . These communications will be unlimited."[248]

IV. The Purpose Behind the Law

It will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.

Former Secretary of State Colin Powell
Internal Memo on Disregarding Geneva Conventions in Afghanistan
January 26, 2002

The U.S. global detention practices described above have undermined both the protection of human rights, and the U.S. interest in national security. The United States has failed to meet its obligation to keep registers of all in custody, and to disclose the names of all individuals detained to their families and friends.[249] The United States has also failed to fulfill its obligation under longstanding U.S. policy and law to afford the Red Cross access to all detainees held in the course of armed conflict.[250] And the United States has failed to afford every individual in its custody some recognized legal status – some human rights – under law.[251]

The laws requiring these protections were enacted in part to meet essential policy interests – and our failure to adhere to them has jeopardized these interests. The revelations of torture at Abu Ghraib and elsewhere in Iraq and Afghanistan have made clear anew, for example, that unregulated and unmonitored detention and interrogation practices invite torture and abuse. Moreover, as military leaders have emphasized in the wake of these revelations, these abuses put the United States' own forces abroad at greater risk of suffering abuses even more serious than those they already face at the hands of a violent enemy. Perhaps most important to U.S. national security, the secrecy surrounding the U.S. global detention system and the abuses it has produced have also seriously undermined the United States' ability to "win the hearts and minds" of the global community – a goal essential to effective intelligence gathering in the short term, and to defeating terrorism over the long term. This chapter discusses these policy interests that underlie the law on detention.

Current Practice Sets Conditions for Torture & Abuse

The U.S. government and military capitalizes on the dubious status [as sovereign states] of Afghanistan, Diego Garcia, Guantanamo Bay, Iraq and aircraft carriers, to avoid certain legal questions about rough interrogations. Whatever humanitarian pronouncements a state such as ours may make about torture, states don't perform interrogations, individual people do. What's going to stop an impatient soldier, in a supralegal location, from whacking one nameless, dehumanized shopkeeper among many?

Unnamed U.S. Intelligence Officer, as quoted in *Newsweek*
May 17, 2004

When governments cloak detention in a veil of secrecy, by holding prisoners incommunicado or at undisclosed locations, the democratic system of public accountability cannot function. As former UN Special Rapporteur on Torture Nigel Rodley has written, the more hidden detention practices there are, the more likely that "all legal and moral constraint on official behavior [will be] removed."[252]

These concerns produced a series of international standards governing detention, expressed in the UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules) and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles). In order to maintain public accountability and minimize the chance for abuse, international law requires families to be notified of both arrest and detainee whereabouts.[253] For the same reason, governments must hold detainees only in publicly recognized detention centers and maintain updated registers of all prisoners.[254] By ensuring that state detention practices are subject to public scrutiny, these disclosure requirements constrain state violence and provide basic safeguards for prisoner treatment.

Without these protections, the safety and dignity of prisoners are left exclusively to the discretion of the detaining power – circumstances that have repeatedly produced brutal consequences. For instance, during Saddam Hussein's rule of Iraq, secrecy was an essential component of detention practices. Individuals were arbitrarily arrested; tracing their whereabouts was a virtual impossibility. As Amnesty International reported in 1994: "Usually families of the 'disappeared' remain[ed] ignorant of their fate until they [were] either released or confirmed to have been executed."[255] Thus, in the March 1991 uprising after the first Gulf War, "opposition forces broke into prisons and detentions centres" across northern and southern Iraq and released hundreds of prisoners "held in secret underground detention centres with no entrance or exit visible."[256]

The United States' own recent experiences provide a more apt case in point. U.S. detention officials have used various unlawful interrogation techniques on Iraqi, Afghan, and Guantanamo prisoners, including severe beatings, humiliation, nudity, manipulating detainees' diets, imposing prolonged isolation, military dogs for intimidation, exposure to extreme temperatures, sensory deprivation, and forcing detainees to maintain "stress positions" for prolonged periods.[257] More than 130 U.S. soldiers have been charged or punished in cases involving abuse of prisoners in Iraq, Afghanistan or Guantanamo Bay, with scores of allegations still under investigation.[258] The Red Cross reported in June 2004 that detention and interrogation practices at Guantanamo Bay were "tantamount to torture."[259] Through FOIA litigation, the public has gained access to hundreds of documents detailing abuses including food deprivation, gagging, and sexual abuse from as recently as July 2004.[260] In a number of documented instances, joint task forces comprising different military branches and government agencies have threatened military members who sought to report or document abuses.[261]

Policies of secrecy and non-disclosure have also made subsequent investigations into wrong-doing – and efforts to hold violators accountable – more difficult. Investigations into reports of abuse and even deaths of detainees in custody have been scattered and insufficient.[262] For example, the *New York Times* reported on two deaths in U.S. custody at Bagram Air Force that occurred in December 2002; according to the *Times*, the Army pathologist's report indicated the cause of death was "homicide," a result of "blunt force injuries to lower extremities complicating coronary artery disease."[263] The U.S. Army Criminal Investigation Command completed its investigations into the deaths almost two years after the deaths occurred.[264] The investigation identified 28 military personnel with possible culpability. As of March 2005, only two U.S. soldiers had been charged for the death of the two men in U.S. custody.[265] And none of the released investigations has examined the role the CIA played in detention operations.[266]

The limits on oversight by the Red Cross also help set conditions for torture and abuse. The Red Cross meets with detainees and monitors general prison conditions, bringing to the attention of senior officials conditions or treatment that violate U.S. legal obligations. The Red Cross specifically alerted military authorities in Iraq to the abusive treatment of detainees, indicating the role military intelligence played in the abuses in Abu Ghraib.[267] This notification led to some of the military's first disciplinary actions regarding detainee treatment. Limiting Red Cross access to detainees increases the likelihood that mistreatment will continue.

Such experiences underscore the urgency of adhering to disclosure requirements regarding detention practices. They also make the reticence of the United States to disclose detainees' whereabouts or numbers particularly disconcerting. By keeping its practices hidden from view, the United States creates conditions ripe for the torture and abuse now in evidence.

Current Practice Undermines Protections for Americans Abroad

It is critical to realize that the Red Cross and the Geneva Conventions do not endanger American soldiers, they protect them. Our soldiers enter battle with the knowledge that should they be taken prisoner, there are laws intended to protect them and impartial international observers to inquire after them.

> Senator John McCain
> *Wall Street Journal* Commentary
> June 1, 2004

The United States' official compliance with the Geneva Conventions since World War II has been animated by several powerful concerns that remain equally important in the struggle against terror. First and foremost is the belief that American observance of rule-of-law protections drives our enemies to reciprocate in their treatment of American troops and civilians caught up in conflicts overseas. As the U.S. Senate recognized in ratifying the Conventions:

> If the end result [of ratification] is only to obtain for Americans caught in the maelstrom of war a treatment which is 10 percent less vicious than what they would receive without these conventions, if only a few score of lives are preserved because of the efforts at Geneva, then the patience and laborious work of all who contributed to that goal will not have been in vain.[268]

Secretary of State John Foster Dulles agreed that American "participation is needed to . . . enable us to invoke [the Geneva Conventions] for the protection of our nationals."[269] And Senator Mike Mansfield added that while American "standards are already high:"

> The conventions point the way to other governments. Without any real cost to us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people.[270]

The fundamental self-interest behind ratification of the Geneva Conventions has proven salient in conflicts preceding the "war on terrorism." General Eisenhower, for example, explained that the Western Allies treated German prisoners in accordance with the principles of international humanitarian law because "the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing."[271]

During the Vietnam War, North Vietnam publicly asserted that all American prisoners of war were war criminals, and thus not entitled to the protections of the Geneva Conventions.[272] Still, the United States applied the Geneva Conventions' principles to all enemy prisoners of war – both North Vietnamese regulars and Viet Cong – in part to try to ensure "reciprocal benefits for American captives."[273] U.S. military experts have made clear their belief that American adherence to the Geneva Conventions in Vietnam saved American lives:

> [A]pplying the benefits of the Convention to those combat captives held in South Vietnam did enhance the opportunity for survival of U.S. service members held by the Viet Cong and North Vietnamese. While the enemy never officially acknowledged the applicability of the Geneva Convention, and treatment of American POWs continued to be brutal, more U.S. troops were surviving capture. Gone were the days when an American advisor was beheaded, and his head displayed on a pole by the Viet Cong. On the contrary, the humane treatment afforded Viet Cong and North Vietnamese Army prisoners exerted constant pressure on the enemy to reciprocate, and the American POWs who came home in 1973 survived, at least in part, because of [that].[274]

The U.S. government's allegiance to basic international law obligations continued during the 1991 Gulf War, in which the U.S. Armed Forces readily afforded full protection under the Geneva Conventions to the more than 86,000 Iraqi prisoners in its custody.[275]

It is in large measure for the Conventions' role in protecting America's own that many former American prisoners of war today support the U.S. government's adherence to the principles of the Geneva Conventions. As Senator (and former prisoner of war) John McCain has explained:

> The Geneva Conventions and the Red Cross were created in response to the stark recognition of the true horrors of unbounded

> war. And I thank God for that. I am thankful for those of us whose dignity, health and lives have been protected by the Conventions . . . . I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war.[276]

Even in the context of the recent violence, Senator McCain reaffirmed this belief that our failure to abide by our own obligations puts our troops in danger abroad: "While our intelligence personnel in Abu Ghraib may have believed that they were protecting U.S. lives by roughing up detainees to extract information, they have had the opposite effect. Their actions have increased the danger to American soldiers, in this conflict and in future wars."[277]

Commenting on recent events in the "war on terrorism," former U.S. Ambassador to Vietnam (and former prisoner of war) Pete Peterson agreed, explaining: "There can be no doubt that the Vietnamese while consistently denying any responsibility for carrying out the provisions of the Geneva Accords, nevertheless tended to follow those rules which resulted in many more of us returning home than would have otherwise been the case."[278]

Current Practice Undermines U.S. Intelligence and Counterinsurgency Efforts

The abuses at Abu Ghraib are unforgiveable not just because they were cruel, but because they set us back. The more a prisoner hates America, the harder he will be to break. The more a population hates America, the less likely its citizens will be to lead us to a suspect.

> Chris Mackey (pseudonym), U.S. Army Interrogator in Afghanistan
> *The Interrogators*
> 2004

The Interim Field Manual on mounting a counterinsurgency published by the U.S. Army in October 2004 highlights the detrimental effect of perceived lawlessness on efforts to quell an insurgency: "Those who conduct counterinsurgency operations while intentionally or negligently breaking the law defeat their own purpose and lose the confidence and respect of the community in which they operate."[279] Indeed, few would argue that obtaining intelligence is essential to a successful counterinsurgency operation, and cultivating strong ties in a local population helps secure that intelligence.

Yet the effect of the secrecy and uncertainty surrounding U.S. detention operations has been to deeply undermine these efforts. As Brigadier General Mark Kimmitt, spokesman for the U.S. military in Iraq, acknowledged last May: "The evidence of abuse inside Abu Ghraib has shaken public opinion in Iraq to the point where it may be more difficult than ever to secure cooperation against the insurgency, that winning over Iraqis before the planned handover of some sovereign powers next month had been made considerably harder by the photos."[280] For the thousands who have been held in U.S. custody and then released, for their families and communities, the conduct of detention operations is inconsistent with this security interest.

For the detainees themselves, many of whom are eventually released back into the general population, it has been long understood by U.S. courts and psychiatric experts that indefinite detention and prolonged isolation can produce devastating mental and physical health effects. Experience in both criminal punishment and wartime internment over the past two centuries has shown that prolonged solitary confinement can produce confusion, paranoia, and hallucinations, as well as severe agitation and impulsive violence (including suicide) – effects that can be long term.[281] Uncertainty while awaiting punishment, and the mental anxiety that accompanies an indeterminate fate, can be similarly destructive.[282] It was for precisely this reason – the effectiveness of indefinite detention in provoking anxiety and psychiatric instability – that the CIA included them among its principal techniques of coercion in now repudiated manuals on interrogation from the 1960s.[283]

Many released detainees claim to continue to suffer from severe psychological symptoms due to their imprisonment.[284] Detainees released from Guantanamo Bay also report debilitating physical conditions, including chronic pain in the knees and back due to treatment while in detention.[285] Released British detainee, Rhuhel Ahmed, suffers from "permanent deterioration of his eyesight."[286]

The effects of such detention on the families of those held have been similarly severe. For example, the *New York Times* reported of some of the families of Iraqi detainees:

> Sabrea Kudi cannot find her son. He was taken by American soldiers nearly nine months ago, and there has been no trace of him since. "I'm afraid he's dead," Ms. Kudi said. Lara Waad cannot find her husband. He was arrested in a raid, too. "I had God – and I had him," she said. "Now I am alone." … Ms. Kudi, whose son, Muhammad, was detained nearly nine months ago, has been to Abu Ghraib more than 20 times. The huge prison is the center of her continuing odyssey through military bases, jails, assistance centers, hospitals and morgues. She said she had been shoved by soldiers and chased by dogs. "If they want to kill me, kill me," Ms. Kudi said. "Just give me my son."[287]

Indeed, the Army Inspector General concluded late last year that the lack of a central system for detainee information had exacerbated families' difficulty in trying to locate their relatives and hindered U.S. efforts to obtain information from the detainees.[288]

For a conflict in which winning the trust of the local population is a critical security imperative, the phenomena of prolonged detention and disappeared family members are catastrophic for U.S. security interests.

Current Practice Weakens American "Soft Power" in the World

We are a nation of laws. And to the extent that people say,"Well, America is no longer a nation of laws," that does hurt our reputation. But I think it's an unfair criticism.

> President George W. Bush,
> quoted in *The Washington Post*
> December 21, 2004

The final report of the National Commission on Terrorist Attacks Upon the United States emphasized that military power is only one of a set of critical tools in the nation's toolbox to reduce the chances of more terrorist attacks on U.S. soil.[289] Other means – what some have called "soft power" – include diplomatic and economic measures, cultural and educational exchange, and the ability to credibly leverage moral and popular authority.[290] Former Secretaries of State James Baker and Warren Christopher wrote together to highlight the security relevance of these tools in the *Washington Post*: "[A]ctivities such as economic development and democratization abroad are not simply good things to do as members of the international community; they are strategic imperatives that address the link between a failed state and our own country's vulnerability to foreign threats."[291]

And indeed, the United States has devoted substantial resources to so-called public diplomacy in Muslim-majority countries thought to be strategically important in the "war on terrorism." Since September 11, 2001, both the State Department and the U.S. Broadcasting Board of Governors (BBG) – the agency responsible for non-military U.S. international broadcasting – have expanded their efforts in the Middle East. BBG's budget for fiscal year 2004, for example, includes more than $42 million for radio and television broadcasting to the Middle East. Since 1999, the BBG has reduced the scope of operations of more than 25 language services and reallocated about $19.7 million toward Central Asia and the Middle East, including $8 million for Radio Farda service to Iran.[292]

The United States' ability to deploy these tools effectively depends critically on visible demonstration that the United States' deeds match its words in supporting democracy and human rights. Responding to the State Department's recently released human rights country reports, China, Russia, Venezuela, and Mexico all questioned the United States' standing to criticize other countries in light of the torture and abuse in U.S. detention facilities.[293] In Indonesia, a spokesman for the Foreign Affairs Ministry stated: "The U.S. government does not have the moral authority to assess or act as a judge of other countries, including Indonesia, on human rights, especially after the abuse scandal at Iraq's Abu Ghraib prison."[294] The extent to which the United States' detention practices represent a failure in this regard is also painfully evident when one compares the Administration's statements to revelations about acts of torture by U.S. personnel:

- On March 23, 2003, after American soldiers were captured and abused in Iraq, the United States condemned Iraqi treatment of American prisoners as violating the Geneva Conventions and contrasted it to the United States' own treatment of prisoners it had taken. President Bush

demanded that American prisoners "be treated humanely . . . just like we're treating the prisoners that we have captured humanely."[295]

- On June 26, 2003, President Bush affirmed the United States' commitment not to torture security suspects or interrogate them in a manner that would constitute "cruel and unusual punishment."[296] In June 2004, the Red Cross reported that U.S. treatment of some detainees at Guantanamo Bay was "tantamount to torture."[297]
- On April 28, 2004, Supreme Court Justice Ruth Bader Ginsburg asked U.S. Deputy Solicitor General Paul Clement how the Court could be sure that government interrogators were not torturing detainees in U.S. custody. Clement insisted that the Court would just have to "trust the executive to make the kind of quintessential military judgments that are involved in things like that."[298] That evening, CBS News aired the first photographs of torture from Abu Ghraib.
- On June 22, 2004, then White House Counsel, Alberto Gonzales reiterated at a press conference that "in the war against al Qaeda and its supporters, the United States will follow its treaty obligations and U.S. law, both of which prohibit the use of torture. And this has been firm U.S. policy since the outset of this administration and it remains our policy today."[299] At Mr. Gonzales' confirmation hearings for his nomination to be Attorney General, he refused to acknowledge that the President was invariably bound by federal laws banning torture and other cruel treatment.[300]

Unsurprisingly, U.S. detention operations appear to be inflaming those whose aid we most need. As a CATO Institute military analyst explained, "[a]fter Abu Ghraib, [the U.S.] do[es not] have a level of trust and credibility with many people inside the Arabic and Islamic world. This certainly doesn't help us make our case with them."[301] Polling in Iraq last summer confirms this, finding that U.S. detention practices have helped galvanize public opinion in Iraq against U.S. efforts there.[302] Muslim clerics have railed against the United States for the abuse of Iraqi captives at Abu Ghraib prison. As one Muslim preacher was quoted saying: "No one can ask them what they are doing, because they are protected by their freedom... No one can punish them, whether in our country or their country. The worst thing is what was discovered in the course of time: abusing women, children, men, and the old men and women whom they arrested randomly and without any guilt. They expressed the freedom of rape, the freedom of nudity and the freedom of humiliation."[303] And our enemies are perhaps more emboldened than ever. The Pakistani Sunni extremist group Lashkar-e-Tayba has used the internet to call for sending holy warriors to Iraq to take revenge for the torture at Abu Ghraib.[304]

Instead of being able to deploy U.S. power to promote democracy abroad, U.S. policies that promote secrecy and lack of accountability have encouraged authoritarian regimes around the globe to commit abuses in the name of counter-terrorism – abuses that undermine efforts to promote democracy and human rights. These regimes self-consciously invoke the very language the United States uses to justify such security policies in order to suppress lawful dissent and quell political opposition in their own countries. To cite a few examples:

- In Georgia (where Former President of Georgia, Eduard Shevardnadze stated in December 2002, after coming under criticism for colluding with Russia in the violation of the human rights of Chechens, that "international human rights commitments might become pale in comparison with the importance of the anti-terrorist campaign");[305]
- In Colombia (where the government of President Alvaro Uribe has stated that its struggle against guerrilla forces is "working to the same ends" as the U.S.- led global war on terrorism. President Uribe has accused human rights defenders of "serving terrorism and hiding in a cowardly manner behind the human rights flag");[306]
- In Malaysia (where in September 2003, Justice Minister Dr. Rais Yatim, justified the detention of more than 100 alleged terrorists held without trial by citing the U.S. government's detention of individuals at Guantanamo Bay);[307]
- In Zimbabwe (where President Robert Mugabe, voicing agreement with the Bush Administration's policies in the "war on terrorism," declared foreign journalists and others critical of his regime "terrorists" and suppressed their work);[308] and

- In Eritrea (where the governing party arrested 11 political opponents, has held them incommunicado and without charge, and defended its actions as being consistent with United States' actions after September 11).[309]

That we are now used as an example of unchecked government power by the most repressive regimes in the world does not make the United States responsible for those regimes' repression. But it is one of the surest signs that the United States is losing the critical moral high ground that is essential to achieving success against terrorism. And all the advertising dollars in the world will not be able to restore our moral authority once it is lost.

V. Recommendations

The past nine months have revealed a fair amount about U.S. policy and practice of detention and interrogation in the "war on terrorism." Despite a number of positive steps taken by the U.S. Government, there remain outstanding questions regarding the status of those held in U.S. detention facilities around the world. The U.S. Government needs to provide a baseline accounting to the Red Cross and the families of those detained of the number, nationality, legal status, and general location of all those the United States currently holds. And it must establish the legal basis for continuing to hold the thousands detained, and identify and protect those detainees' rights under law.

Human Rights First thus calls on the Bush Administration to take the following steps:

1. Disclose to Congress as required under recently enacted legislation the location of all U.S.-controlled detention facilities worldwide, and provide a full and regular accounting of the number of detainees, their nationality, and the legal basis on which they are being held.

2. Order a thorough, comprehensive, and independent investigation of all U.S.- controlled detention facilities, and submit the findings of the investigation to Congress.

3. Take all necessary steps to inform the immediate families of those detained of their loved ones' capture, location, legal status, and condition of health.

4. Immediately grant the Red Cross access to all detainees being held by the United States in the course of the "global war on terrorism."

5. Publicly reject suggestions by Administration lawyers that domestic and international prohibitions on torture and cruelty do not apply to the President in the exercise of his commander-in-chief authority.

6. Investigate and prosecute all those who carried out acts of torture and other cruel, inhuman or degrading treatment in violation of U.S. and international law, as well as those officials who ordered, approved or tolerated these acts.

7. Publicly disclose the status of all pending investigations into allegations of mistreatment of detainees and detainee deaths in custody.

IV: Partial List of Letters

Since June 2004

8. January 4, 2005, Human Rights First letter to Gordon England, Secretary of the Navy, re: 'know your rights' habeas notification to Guantanamo detainees.

9. October 5, 2004, Human Rights letter to Gordon England, Secretary of the Navy, re: access to Combatant Status Review Tribunals.

10. July 26, 2004, Human Rights First letter to Paul Wolfowitz, Deputy Secretary of Defense, re: need to address systemic problems at U.S.-controlled detention and interrogation facilities.

11. July 19, 2004, Human Rights First letter to Donald H. Rumsfeld, Secretary of Defense, re: U.S. security detainees, especially ICRC access, family notification and Department of Defense information-sharing with Congress.

12. July 9, 2004, Human Rights First letter to Sen. John Warner, Senate Armed Services Committee, urging conferees to retain amendment to the National Defense Authorization Act reaffirming U.S. commitment to abide by its obligations under the Convention Against Torture.

13. July 9, 2004, Human Rights First letter to Sen. Carl Levin, Senate Armed Services Committee, urging conferees to retain amendment to the National Defense Authorization Act reaffirming U.S. commitment to abide by its obligations under the Convention Against Torture.

14. July 7, 2004, Human Rights First letter to Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority, Office of Military Commissions, Dep't of Defense, Office of General Counsel at the Pentagon, re: access to observe proposed military commissions at Guantanamo Bay.

15. July 7, 2004, Human Rights First letter to Major General John T. Altenburg, Jr., Appointing Authority, Office of Military Commissions, Dep't of Defense, Office of General Counsel at the Pentagon, re: access to observe proposed military commissions at Guantanamo Bay.

16. July 7, 2004, Human Rights First letter to Major Lt. Colonel John Hall, re: access to observe proposed military commissions at Guantanamo Bay.

Endnotes

[1] For example in January 2004, military personnel denied the Red Cross access to eight prisoners in the interrogation section of the Abu Ghraib detention facility. *See* Maj. Gen. George R. Fay, AR 15-6 INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB, Aug. 25, 2004, at 66 [hereinafter FAY REPORT].

[2] Carlotta Gall and Mark Lander, *A Nation Challenged: The Captives*, N.Y. TIMES, Jan. 5, 2002, at A5; Roy Gutman, Christopher Dickey and Sami Yousafzai, *Guantanamo Justice?*, NEWSWEEK, July 8, 2003, *available at* http://www.cageprisoners.com/pr_articles.php?aid=41 (accessed Jan. 20, 2005).

[3] Yossi Melman, *CIA Holding Al-Qaida Suspects in Secret Jordanian Lockup*, HAARETZ, Oct. 13, 2004, *available at* http://www.informationclearinghouse.info/article7066.htm (accessed Jan. 19, 2005); David Kaplan and Ilana Ozernoy, *Al Qaeda's Desert Inn*, U.S. NEWS AND WORLD REP., June 2, 2003, at 22-3.

[4] *See* Expeditionary Strike Force One, U.S. Naval Special Operations Command Office of Public Affairs, *ESG 1 Strikes From the Sea*, Jan. 5, 2004 (reporting coalition force "takedowns" of vessels carrying drugs, including one with 15 individuals "with possible links to Al Qaeda," and reporting: "Ten of the individuals from . . . two takedowns have been transferred to a secure, undisclosed location for further questioning by U.S. officials."), *available at* http://www.navsoc.navy.mil/esg1/pdf/dhowtakedown.pdf (accessed Jan. 20, 2005); Grant Holloway, *Australia to Question al Qaeda Fighter*, CNN.COM, Dec. 19, 2001, *available at* http://www.cnn.com/2001/WORLD/asiapcf/auspac/12/19/aust.talbandit20.12/ (accessed Jan. 20, 2005); *Australian Taliban Fighter Handed Over to U.S. Military Forces in Afghanistan*, ASSOC. PRESS, Dec. 17, 2001, *available at* http://multimedia.belointeractive.com/attack/military/1217australia.html (accessed Jan. 20, 2005); *Walker Arrives in U.S. to Face Charges Thursday*, CNN.COM, Jan. 23, 2002, http://archives.cnn.com/2002/US/01/23/ret.walker.transfer/ (accessed Jan. 20, 2005).

[5] Int'l Comm. of the Red Cross, *U.S. Detention Related to the Events of 11 Sept. 2001 and its Aftermath*, Nov. 5, 2004 [hereinafter Red Cross statement], *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList454/593709C3D0B1296DC1256F430044235D (accessed Nov. 16, 2004).

[6] Memorandum from Secretary of Defense Donald Rumsfeld to All Dep't of Defense Agencies (Sept. 16, 2004), *available at* http://www.fas.org/sgp/bush/secdef091604.pdf (accessed Jan. 20, 2005). The memo acknowledged that information cannot be classified "to conceal violations of law" or "to prevent embarrassment to a person, organization or agency." The Secretary's memorandum followed charges by the Federation of American Scientists that General Taguba's Abu Ghraib report had been inappropriately classified. Letter from Federation of American Scientist to Director J. William Leonard, Information Security Oversight Office (May 6, 2004) *available at* http://www.fas.org/sgp/news/2004/05/sa050604.pdf (accessed Jan. 20, 2005).

[7] Human Rights First included this list in a request for information sent to Secretary of Defense Donald Rumsfeld on May 13, 2004. Letter from Human Rights First to Secretary of Defense Donald Rumsfeld (May 13, 2004) *available at* http://www.humanrightsfirst.org/iraq/posner_let_dod_051304.pdf (accessed Jan. 20, 2005). To date, Human Rights First has received no response to its inquiry.

[8] FINAL REPORT OF THE INDEP. PANEL TO REVIEW DOD DETENTION OPERATIONS, August 2004 [hereinafter SCHLESINGER REPORT], at 11.

[9] E-mail from LTC Pamela Keeton, Public Affairs Officer, Combined Forces Command to Priti Patel, Human Rights First (Oct. 25, 2004, 10:51 EST) (on file with Human Rights First) [hereinafter Email Interview with CFC-1].

[10] Email Interview with CFC-1, *supra* note 9; E-mail from LTC Michele Dewerth, Combined Forces Command to Priti Patel, Human Rights First (June 9, 2004, 13:36 EST) (on file with Human Rights First). The facility at Kandahar was initially conceived of as a short-term holding facility, but in the immediate aftermath of the war in Afghanistan it became quickly overcrowded. It has since been re-envisioned as an intermediate site, and more recently as a main holding facility.

[11] *See* Dana Priest and Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons is Coming to Light*, WASH. POST, May 11, 2004, at A1; CHRIS MACKEY AND GREG MILLER, THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL QAEDA 149 (2004); Human Rights Watch, ENDURING FREEDOM: ABUSES BY U.S. FORCES IN AFGHANISTAN 3, 30-1 (2004) [hereinafter ENDURING FREEDOM REPORT], *available at* http://hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf (accessed Jan. 20, 2005); Dana Priest and Scott Higham, *At Guantanamo, a Prison Within a Prison*, WASH. POST, Dec. 17,

2004, at A1; Dana Priest, *Long-Term Plan Sought For Terror Suspects*, WASH. POST, Jan. 2, 2005, at A1; Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, WASH. POST, Mar. 3, 2005, at A1.

[12] MACKEY AND MILLER, *supra* note 11, at 149.

[13] Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, WASH. POST, Mar. 3, 2005, at A1.

[14] *Id.*

[15] Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51.

[16] Email Interview with CFC-1, *supra* note 9; *See also*, Report of the Independent Expert of the Commission on Human Rights on the Situation of Human Rights in Afghanistan, Sept. 21, 2004, A/59/370, at 9(b) *available at* http://ap.ohchr.org/documents/dpage_e.aspx?c=2&su=14 (accessed Jan. 20, 2005).

[17] Email Interview with CFC-1, *supra* note 9.

[18] *U.S. Military to Allow Red Cross to Visit Second Afghan Prison*, ASSOC. PRESS, June 9, 2004, *available at* http://news.bostonherald.com/international/view.bg?articleid=31223&format= (accessed Jan. 20, 2005); *Prisoner Abuse Claim Emerges in Afghanistan*, AGENCE FRANCE PRESSE, July 6, 2004, *available at* http://www.aljazeerah.info/News%20archives/2004%20News%20archives/July/4%20n/Prisoner%20Abuse%20Claim%20Emerges%20in%20Afghanistan.htm (accessed Nov. 17, 2004); Other news sources list the number of outlying facilities to be 30. *See* Declan Walsh, *Frustrated US Forces Fail to Win Hearts and Minds: Troops Hunting Taliban Run into Wall of Silence*, GUARDIAN, Sept. 23, 2004, *available at* http://www.guardian.co.uk/afghanistan/story/0,1284,1310564,00.html (accessed Jan. 20, 2005).

[19] Reports indicate that at least one detainee was killed at the detention facility near Asadabad. *See* Priest and Stephens, *supra* note 11.

[20] DEP'T OF THE ARMY, THE INSPECTOR GEN., DETAINEE OPERATIONS INSPECTION, July 21, 2004 [hereinafter DAIG REPORT], at Appendix C; Carlotta Gall, *Afghan Man's Death at U.S. Outpost is Investigated*, N.Y. TIMES, July 5, 2004, at A9.

[21] ENDURING FREEDOM REPORT, *supra* note 11, at 3.

[22] Larry Neumeister, *Army Destroyed Mock Execution Pictures*, ASSOC. PRESS, Feb. 18, 2005 *available at* http://abcnews.go.com/Politics/wireStory?id=511104 (accessed Mar. 7, 2005).

[23] Priest and Stephens, *supra* note 11; John Daniszewski, *Afghans Report Abuse in Jails*, L.A. TIMES, May 23, 2004, at A10; DAIG REPORT, *supra* note 20, at 73; Interview with released Afghan detainee-1 in Kabul, Afghanistan (Aug. 16, 2004) [hereinafter Interview with detainee 1]; Interview with released Afghan detainee-2 in Kabul, Afghanistan (Aug. 18, 2004) [hereinafter Interview with detainee 2]; Interview with released Afghan detainee-3 in Kabul, Afghanistan (Aug. 18, 2004) [hereinafter Interview with detainee 3].

[24] *See* Laura King, *Warlords Battle for Strategic Town, Driving Home Fears of Widespread Factional Fighting*, ASSOC. PRESS, Jan. 31, 2002, *available at* http://63.147.65.31/socal/terrorist/0202/01/terror05.asp (accessed Jan. 20, 2005); *Checkpoint Near US Base Attacked in Eastern Afghanistan*, AGENCE FRANCE PRESSE, March 9, 2002, *available at* LEXIS, News Library.

[25] *See generally* DAIG REPORT, *supra* note 20, at 28; Interview with detainee 1, *supra* note 23; Interview with detainee 2, *supra* note 23.

[26] Interview with detainee 1, *supra* note 23; Interview with detainee 2, *supra* note 23.

[27] Interview with detainee 1, *supra* note 23; Interview with detainee 3, *supra* note 23.

[28] Telephone Interview with Afghanistan Human Rights Commission, Gardez (Dec. 16, 2004).

[29] *Id.*

[30] Stephen Graham, *Official: Dead Afghan Wasn't Mistreated*, ASSOC. PRESS, Jan. 3, 2004, *available at* http://www.sacbee.com/24hour/world/story/1965967p-9960739c.html (accessed Jan. 5, 2005).

[31] *Id.*

[32] Telephone Interview with Afghanistan Human Rights Commission, Gardez, Afghanistan (Dec. 16, 2004).

[33] DAIG REPORT, *supra* note 20, at 30.

[34] E-mail from LTC Pamela Keeton, Combined Forces Command Press Center to Priti Patel, Human Rights First (Oct. 25, 2004, 11:13 EST) (on file with Human Rights First) [hereinafter Email Interview with CFC-2].

[35] E-mail from Dan Philbin, Office of the Ass't Sec'y of Defense, Public Affairs, to Priti Patel, Human Rights First (March 27, 2004, 2:30 EST) (on file with Human Rights First).

[36] Telephone Interview with Dep't of Defense, Press Office (June 7, 2004); *see also* Priest and Stephens, *supra* note 11.

[37] Sayed Salahuddin, *U.S. Military to Allow ICRC to Visit Afghan Jail*, REUTERS, June 9, 2004, *available at* http://afghannews.net/index.php?action=show&type=news&id=491 (accessed Jan. 21, 2005).

[38] Email Interview with CFC-1, *supra* note 9.

[39] *See U.S. Taking Fewer Prisoners in Afghanistan*, ASSOC. PRESS, Jan. 3, 2005, *available at* http://www.nytimes.com/aponline/international/AP-Afghan-US-Prisoner-Abuse.html?pagewanted=print&position= (accessed

Jan. 3, 2005); *see also* E-mail from LTC Pamela Keeton, Public Affairs Officer, Combined Forces Command to Priti Patel, Human Rights First (Jan. 6, 2005 1:00 EST) (on file with Human Rights First).

[40] Email from Col. Tom MacKenzie, CFC-A Public Affairs Office, to Priti Patel, Human Rights First (March 7, 2005, 9:40 EST) (on file with Human Rights First) [hereinafter Email from MacKenzie]

[41] *Id.*

[42] DAIG REPORT, *supra* note 20, at 52.

[43] *Id.*

[44] Red Cross statement, *supra* note 5; Email Interview with CFC-2, *supra* note 34.

[45] Salahuddin, *supra* note 37.

[46] *Red Cross Afghan Jail Abuse Probe*, BBC NEWS, June 9, 2004, *available at* http://news.bbc.co.uk/2/hi/south_asia/3791683.stm (accessed Jan. 21, 2005).

[47] Salahuddin, *supra* note 37.

[48] Email Interview with CFC-1, *supra* note 9; Email Interview with CFC-2, *supra* note 34.

[49] DAIG REPORT, *supra* note 20, at 28; Interviews by Human Rights First found mistreatment (including beatings, stress and duress techniques, and sensory deprivation) in 'transient facilities' during first weeks of detention. Interview with detainee-1, *supra* note 23; Interview with detainee-3, *supra* note 23.

[50] Craig Pyes and Mark Mazzetti, *U.S. Probing Alleged Abuse of Afghans*, L.A. TIMES, Sept. 21, 2004, *available at* http://www.commondreams.org/headlines04/0921-27.htm (accessed Jan. 21, 2005).

[51] DAIG REPORT, *supra* note 20, at 30; Red Cross statement, *supra* note 5.

[52] Red Cross statement, *supra* note 5.

[53] SCHLESINGER REPORT, *supra* note 8, at 80.

[54] *Id.* at 6.

[55] *Id.*; Memorandum from President George W. Bush to Vice President Richard Cheney et al. (Feb. 7, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/dir_20020207_Bush_Det.pdf (accessed Jan. 21, 2005).

[56] SCHLESINGER REPORT, *supra* note 8, at 81.

[57] DAIG REPORT, *supra* note 20, at 14; A number of reports indicate that early in the war in Afghanistan, from November 2001 until mid-2002, there were two categories of detainees: Persons under U.S. Control (PUC) and the amorphous "detainee." *See* MACKEY and MILLER, *supra* note 11, at 250-1; Center for Law and Military Operations, *Legal Lessons Learned From Afghanistan and Iraq*, at 54-5, *available at* http://www.globalsecurity.org/military/library/report/2004/oef_oif_volume_1.pdf (accessed Jan. 21, 2005).

[58] DAIG REPORT, *supra* note 20, at 30.

[59] SCHLESINGER REPORT, *supra* note 8, at 81.

[60] Email from MacKenzie, *supra* note 40.

[61] *Id.*

[62] Telephone Interview with Family of Saifullah Paracha (June 9, 2004) [hereinafter "Paracha Interview"]; *See generally*, ENDURING FREEDOM REPORT, *supra*, note 11.

[63] Paracha Interview, *supra* note 62.

[64] Petition for Writ of Habeas Corpus, Begg v. Bush, et al., No. 04 Civ. 1137, ¶ 24 (D.D.C. filed July 2, 2004), *available at* http://www.ccr-ny.org/v2/legal/docs/DC%20Dist%20Begg%20Petition%207%202%2004.pdf (accessed Jan. 21, 2005).

[65] Email Interview with CFC-2, *supra* note 34.

[66] DAIG REPORT, *supra* note 20, at 56; Army Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, § 1-7(b) (1997) [hereinafter Army Reg.].

[67] Army Reg, *supra* note 66, at § 1-7(b)(17).

[68] Telephone Interview with LTC Wallace, CENTCOM Public Affairs Office (Dec. 10, 2004).

[69] DAIG REPORT, *supra* note 20, at 46, 56-8.

[70] Telephone Interview with Lt. Col. Barry Johnson, Detainee Operations, Multi-National Forces (Oct. 20, 2004) [hereinafter Phone Interview with Johnson].

[71] *Id.*.

[72] *Id.*

[73] *Id.*

[74] Bradley Graham, *Offensives Create Surge of Detainees*, WASH. POST, Nov. 27, 2004, at A1.

[75] *Id.* Eight days after Maj. Gen. Miller's statement, the number of detainees at Camp Bucca and Abu Ghraib rose to 4,900 and 2,200 respectively. Detainees held in the custody of field commanders was 950. Telephone Interview with Lt. Col. Barry Johnson, Detainee Operations, Multi-National Forces (Dec. 10, 2004).

[76] Edward Wong, *American Jails in Iraq Are Bursting with Detainees*, N.Y. TIMES, Mar. 4, 2005, *available at* http://www.nytimes.com/2005/03/04/international/middleeast/04detain.html?pagewanted=all&position= (accessed March 7, 2005)

[77] *Id.*

[78] Telephone Interview with Lt. Col. Barry Johnson, Detainee Operations, Multi-National Forces (Dec. 10, 2004).

[79] *Id.*

[80] News Transcript, Dep't of Defense, Briefing on Geneva Convention, EPW's and War Crimes (Apr. 7, 2003), *available at* http://www.defenselink.mil/transcripts/2003/t04072003_t407genv.html (accessed Jan. 21, 2005).

[81] News Release, Dep't of Defense, Enemy Prisoner of War Briefing from Kuwait City (May 8, 2003), *available at* http://www.defenselink.mil/transcripts/2003/tr20030508-0160.html (accessed Jan. 21, 2005); *see also* SCHLESINGER REPORT, *supra* note 8, at 6; Memorandum from President George W. Bush to Vice President Richard Cheney et al., *supra* note 55.

[82] *US Holding 4,000 'Extra' Detainees*, DAWN, Sept. 17, 2003, *available at* http://dawn.com/2003/09/17/int6.htm (accessed Jan. 21, 2005) (Dawn is a leading English language newspaper in Pakistan).

[83] DAIG REPORT, *supra* note 20, at 45.

[84] *See* Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, 75 U.N.T.S. 135, arts 42, 43, 69-76, 78 [hereinafter Fourth Geneva Convention].

[85] DAIG REPORT, *supra* note 20, at 45-46; News Transcript, Dep't of Defense, Coalition Provisional Authority Briefing from Baghdad (Jan. 8, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040108-1121.html (accessed Jan. 21, 2005).

[86] DAIG REPORT, *supra* note 20, at 45-46.

[87] Douglas Jehl, *U.S. Sees No Basis to Prosecute Iranian Opposition 'Terror' Group Being Held in Iraq*, N.Y. TIMES, July 27, 2004, at A8.

[88] Telephone Interview with Coalition Press Information Center (June 9, 2004).

[89] Jehl, *supra* note 87.

[90] According to the Department of Defense Public Affairs Office, MEK detainees remain generally protected persons. Telephone Interview with Maj. Michael Shavers, Department of Defense, Public Affairs Office (Dec. 9, 2004). There are approximately 3,800 MEK detainees currently held by the United States. Telephone Interview with Lt. Col. Barry Johnson, Detainee Operations, Multi-National Forces (Dec. 10, 2004).

[91] *See* Memorandum from Assistant Attorney General, Jack L. Goldsmith for Alberto R. Gonzales, Counsel to the President, (Mar. 19, 2004), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20040319_Golds_Gonz.pdf (accessed Jan. 21, 2005); *see also* Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq Practice Called Serious Breach of Geneva Conventions*, WASH. POST, Oct. 25, 2004, at A1; Douglas Jehl, *U.S. Action Bars Right of Some Captured in Iraq*, N.Y. TIMES, Oct. 26, 2004, at A1.

[92] Priest, *supra* note 91 ("Some specialists in international law say the opinion amounts to a reinterpretation of one of the most basic rights of Article 49 of the Fourth Geneva Convention, which protects civilians during wartime and occupation, including insurgents who were not part of Iraq's military. The treaty prohibits the '[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory... regardless of their motive.')

[93] Jehl, *supra* note 87.

[94] *See* SCHLESINGER REPORT, *supra* note 8, at 87; *Rumsfeld Ordered Prisoner Hidden*, CBS NEWS, June 17, 2004, at http://www.cbsnews.com/stories/2004/06/17/iraq/main624411.shtml (accessed Jan. 21, 2005); Priest, *supra* note 91.

[95] *Rumsfeld Ordered Prisoner Hidden*, *supra* note 94.

[96] Douglas Jehl and Neil A. Lewis, *U.S. Said to Hold More Foreigners in Iraq Fighting*, N.Y. TIMES, Jan. 8, 2005, at A1.

[97] *Id.*

[98] S.C. Res. 1546, U.N. SCOR, 4987th meeting, ¶ 10, U.N. Doc. S/RES/1546 (2004), *available at* http://www.un.org/Docs/sc/unsc_resolutions04.html (accessed Jan. 21, 2005) [hereinafter SCR 1546].

[99] *Letter from former Secretary of State Colin Powell to President of the Security Council, Lauro Baja, Jr.*, June 5, 2004, U.N. SCOR, 4987th meeting, Annex, at 10 [hereinafter Letter from Powell] (emphasis added).

[100] *Id.*

[101] E-mail from Lt. Col. Barry Johnson to Ayumi Kusafuka, Human Rights First (July 15, 2004, 19:05 EST).

[102] *Id.*

[103] *See* Fourth Geneva Convention, *supra* note 84; *see also* Int'l Comm. of the Red Cross, *Iraq Post 28 June 2004: Protecting Persons Deprived of Freedom Remains a Priority* (Aug. 5, 2004), http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/69060107D77D7299C1256EE7005200E8 (accessed Jan. 21, 2005).

[104] *See* Maj. Gen. Antonio Taguba, AR 15-6, INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, Feb. 2004 (stating the "320th MP Battalion... held a handful of 'ghost detainees'...that they moved around within the facility to hide them from a visiting International Committee of the Red Cross (ICRC) survey team."), at ¶ 33, *available at* http://www.humanrightsfirst.org/us_law/800th_MP_Brigade_MASTER14_Mar_04-dc.pdf (accessed Jan. 21, 2005) [hereinafter TAGUBA REPORT]; *see also* FAY REPORT, *supra* note 1, at 66.

[105] *Rumsfeld Ordered Prisoner Hidden*, *supra* note 94.

[106] *Rumsfeld Ordered Prisoner Hidden*, *supra* note 94; *Investigation of the 205th Military Intelligence Brigade At Abu Ghraib Prison: Hearing Before the Senate Armed Services Comm.*, 108th Cong. (2004) (statement of Gen. Paul Kern, Commanding General, United States Army Material Command).

[107] Press Briefing, Dep't of Army, Transcript of Detainee Operations Update (Feb. 24, 2005) *available at* http://www4.army.mil/ocpa/read.php?story_id_key=6913 (accessed Mar. 11, 2005).

[108] *Id.*

[109] Interview with Office for Detainee Affairs, in Washington D.C. (Sept. 17, 2004).

[110] Phone Interview with Johnson, *supra* note 70.

[111] Int'l Comm. of the Red Cross, Report On The Treatment By The Coalition Forces Of Prisoners Of War And Other Protected Persons By The Geneva Conventions In Iraq During Arrest, Internment And Interrogation (Feb. 2004), at §1.1.9, *available at* http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm (accessed Jan. 21, 2005) [hereinafter ICRC Iraq Report].

[112] *Id*, at § 1.1; DAIG REPORT, *supra* note 20, at 56-58; SCHLESINGER REPORT, *supra* note 8, at 60-61.

[113] Report of High Commissioner: The Present Situation of Human Rights in Iraq (advanced edited version), Submission from the United States of America: Treatment of Persons in Detention in Iraq, Annex II, *available at* http://www.unhchr.ch/html/nchr/docs/annexII.doc (accessed Jan. 21, 2005); ICRC Iraq Report, *supra* note 111, at § 1.1; Hannah Allam, *Missing Iraqis Believed to be Lost in Abu Ghraib Prison*, KNIGHT RIDDER, June 11, 2004, *at* http://www.kansascity.com/mld/kansascity/news/world/8891600.htm?1c (accessed Jan. 21, 2005).

[114] SCHLESINGER REPORT, *supra* note 8, at 60-61.

[115] SCHLESINGER REPORT, *supra* note 8, at 60-61, 73; DAIG REPORT, *supra* note 20, at 56-58.

[116] Phone Interview with Johnson, *supra* note 70.

[117] *Id.*

[118] Telephone Interview with Lt. Col. Barry Johnson, Detainee Operations, Multi-National Forces (Dec. 10, 2004). The list of detainees in coalition facilities can be found at http://www.iac-baghdad.org/documents_english.htm (accessed Mar. 7, 2005).

[119] Press Briefing, White House (Jan. 9, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/20020109-5.html (accessed Jan. 21, 2005).

[120] *See* Vikram Dodd, *The UK Businessmen Trapped in Guantánamo*, GUARDIAN, July 11, 2003, *available at* http://www.guardian.co.uk/alqaida/story/0,12469,995989,00.html (accessed Jan. 21, 2005); Helen Barnes, *Family Fears for Life of Terror Suspect*, GUARDIAN, July 18, 2003, *available at* http://www.thisislocallondon.co.uk/news/business/display.var.394421.0.0.php (accessed Jan. 21, 2005); Michael Isikoff and Mark Hosenball, *America's Secret Prisoners*, NEWSWEEK ONLINE, June 18, 2003, *available at* http://www.msnbc.com/news/928428.asp (accessed Jan. 21, 2005); *Detainees Sue U.S. Government*, ASSOC. PRESS, July 14, 2004, *available at* http://www.heraldsun.news.com.au/common/story_page/0,5478,10134022%255E1702,00.html (accessed Jan. 21, 2005).

[121] News Release, Dep't of Defense, Detainee Transfer Announced (Mar. 12, 2005), *available at* http://www.defenselink.mil/releases/2005/nr20050312-2226.html (accessed Mar. 12, 2005).

[122] *Id.* Those transferred to the control of other governments include twenty-nine to Pakistan, four to Saudi Arabia, seven to Russia, five to Morocco, nine to Great Britain, seven to France, and one each to Spain, Sweden, Australia, and Kuwait.

[123] Memorandum from FBI Counterterrorism, Bagram, Afghanistan to Counterterrorism, Islamabad and New York (May 2, 2004), *available at* http://www.aclu.org/torturefoia/released/f493_3496.pdf (accessed Jan. 21, 2005).

[124] Letter from Farhat Paracha, *supra* note 132; Petition for Habeas Corpus, Paracha v. Bush et al., No. 04 Civ. 2022 PLF (D.D.C filed Nov. 17, 2004).

[125] Priest and Higham, *supra* note 11.

[126] Dana Priest, *Long-Term Plan Sought For Terror Suspects*, WASH. POST, Jan. 2, 2005, at A1.

[127] *Hamdan v. Rumsfeld*, No. 04-1519, 2004 U.S. Dist. LEXIS 22724, at *4 (D.D.C. Nov. 8, 2004).

[128] Carol Rosenberg, *Permanent Jail Set for Guantanamo*, MIAMI HERALD, Dec. 9, 2004, *available at* http://www.miami.com/mld/miamiherald/news/nation/10372662.htm (accessed Jan. 21, 2005).

[129] *Id.*; Dana Priest, *Long-Term Plan Sought For Terror Suspects*, WASH. POST, Jan. 2, 2005, at A1.

[130] News Release, Dep't of Defense, Transfer of Detainees Completed (Sept. 22, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040922-1310.html (accessed Jan. 21, 2005).

[131] Petition for Habeas Corpus, Paracha v. Bush et al., No. 04 Civ. 2022 PLF (D.D.C filed Nov. 17, 2004).

[132] Letter from Farhat Paracha, wife of Saifullah Paracha to Priti Patel, attorney at Human Rights First (Sept. 22, 2004) [hereinafter Letter from Farhat Paracha] (on file with Human Rights First).

[133] Petition for Habeas Corpus, Paracha v. Bush et al., No. 04 Civ. 2022 PLF (D.D.C filed Nov. 17, 2004).

[134] News Briefing, Dep't of Defense, Secretary Rumsfeld and Gen. Myers (Jan. 11, 2002), *available at* http://www.defenselink.mil/news/Jan2002/t01112002_t0111sd.html (accessed Jan. 21, 2005); *see also* Order of Deputy Secretary of Defense, Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba § 1.A (May 11, 2004), *available at* http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf (accessed Jan. 21, 2005).

[135] Rasul v. Bush, 215 F.Supp.2d. 55, 57 (D.D.C. 2002).

[136] Rasul v. Bush, 542 U.S. ___, 124 S. Ct. 2686, 2699 (2004).

[137] *Id. See* Khalid et al. v. Bush et al., 04-1142 (Jan. 19, 2005 D.D.C.), *available at* http://www.dcd.uscourts.gov/04-1142.pdf (accessed Jan. 21, 2005) (holding that detainees did not have a substantive right to challenge the legality of their detention, making a technical distinction between the right to file a claim in court and the right to have the claim heard); In Re Guantanamo Detainee Cases, 02-0299 (Jan. 31, 2005), *available at* http://www.dcd.uscourts.gov/02-299b.pdf (accessed Jan. 31, 2005) (holding that the due process requirement of the Fifth Amendment of the U.S. Constitution applies to detainees at Guantanamo Bay and rejecting that the Combatant Status Review Tribunals meet due process requirements.)

[138] *See In Re* Guantanamo Detainees, No. 02 Civ. 0299 (D.D.C. Jan. 31, 2005); *see also* Khalid et al v Bush et al, No. 04 Civ. 1142 (D.D.C. Jan. 21, 2005).

[139] United States District Court for the District of Columbia, Resolution of the Executive Session, September 15, 2004, *available at* http://www.dcd.uscourts.gov/GuantanamoResolution.pdf (accessed Jan. 21, 2005); *see also* Carol Leonnig, *U.S. Defends Detentions*, WASH. POST, Oct. 5, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A7587-2004Oct5.html (accessed Jan. 21, 2005); *See* Petition for a Writ of Habeas Corpus, Boumediene v Bush et al., No. 04 Civ. 1166 (D.D.C. filed July 8, 2004), *available at* http://www.ccr-ny.org/v2/legal/september_11th/docs/Boumediene%20_HabeasPetitionDCDist_7_9_04.pdf (arguing he was an aid worker in Bosnia) (accessed Jan. 21, 2005); *Lawsuits by Foreign Guantanamo Detainees*, ASSOC. PRESS, Dec. 29, 2004, *available at* http://www.lancasteronline.com/pages/news/ap/4/detainees_lawsuits (accessed Jan. 21, 2005).

[140] News Release, Dep't of Defense, Combatant Status Review Tribunal Order Issued (July 7, 2004) *available at* http://www.defenselink.mil/releases/2004/nr20040707-0992.html (accessed Jan. 21, 2005); Background Briefing, Dep't of Defense, Defense Department Background Briefing on Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040707-0981.html (accessed Jan. 21, 2005).

[141] News Release, Dept' of Defense, Combatant Status Review Tribunal Order Issued (July 7, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040707-0992.html (accessed Jan. 21, 2005).

[142] News Release, Dep't of Defense, Combatant Status Review Tribunal Summary (Mar. 2005), *available at* http://www.defenselink.mil/news/Mar2005/d20050301csrt.pdf (accessed Mar. 7, 2005).

[143] *Id.*

[144] Press Release, Dep't of Defense, Transfer of Detainees Completed (Sept. 18, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040918-1363.html (accessed Jan. 21, 2005).

[145] *Officials Set Up Review Procedure for Guantanamo Detainees*, ARMS FORCES PRESS SERVICE, May 19, 2004) *available at* http://www.defenselink.mil/srch/docView?c=A38245203F9EBEC5FC8C306E4AAF152F&dk=http://www.defenselink.mil/news/May2004/n05192004_200405194.html&q=annual+%3Cand%3E+review+%3Cand%3E+board+%3Cand%3E+guantanamo&p=Simple (accessed Jan. 21, 2005); News Release, Dep't of Defense, Defense Department Conducts First Administrative Review Board (Dec. 14, 2004), *available at* http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/releases/2004/nr20041214-1830.html (accessed Jan. 21, 2005).

[146] Press Briefing by Secretary of the Navy, Gordon England, Dep't of Defense, Special Defense Dep't Briefing on Status of Military Tribunals (Dec. 20, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20041220-1841.html (accessed Jan. 21, 2005).

[147] *See* Charging Statement for David Matthews Hicks, *United States v. Hicks*, *available at* http://www.humanrightsfirst.org/us_law/PDF/detainees/hicks-charges.pdf (accessed Jan. 21, 2005); *see also* Charging Statement for Ibrahim Ahmed Mahmoud al Qosi, *United States v. al Qosi*, *available at* http://www.humanrightsfirst.org/us_law/PDF/detainees/al_Qosi_referral.pdf (accessed Jan. 21, 2005); Charging Statement for Ali Hamza Ahmad Sulayman al Bahlul, *United States v. al Bahlul*, http://www.humanrightsfirst.org/us_law/PDF/detainees/al_Bahlul_referral.pdf (accessed Jan. 21, 2005); Charging Statement Salim Ahmed Hamdan, *United States v. Hamdan*, http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf (accessed Jan. 21, 2005).

[148] *Hamdan v. Rumsfeld*, No. 04-1519, 2004 U.S. Dist. LEXIS 22724, at *13-53 (D.D.C. Nov. 8, 2004).

[149] On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals For the District of Columbia Circuit, Hamdan v. Rumsfeld, (No. 04 Civ. 702) (U.S. 2004); Order, Hamdan v. Rumsfeld (No. 04 Civ. 1519) (D.C. Cir. 2004) (granting the Government's motion for expedition of appeal).

[150] THE GENEVA CONVENTIONS OF AUG. 12, 1949: COMMENTARY IV GENEVA CONVENTION 51 (Jean Pictet ed. 1994).

[151] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, 75 U.N.T.S. 135, arts. 13, 17, 71, *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68 (accessed Jan. 21, 2005) [hereinafter Third Geneva Convention].

[152] THE GENEVA CONVENTION OF AUG. 12, 1949: COMMENTARY IV, *supra* note 150, at 57-58.

[153] Third Geneva Convention, *supra* note 151, at art. 5.

[154] *See* Posting of Deborah Pearlstein, Human Rights First, observations of military commissions, Aug. 23-27, 2004, *at* http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm (accessed Jan. 21, 2005); *see also* Posting of Ken Hurwitz, Human Rights First, observations of military commissions, Nov. 1-3, 2004, *at* http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary_02.htm (accessed Dec. 9, 2004); Posting of Avi Cover, Human Rights First, observations of military commissions, Nov. 8, 2004, *at* http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary_03.htm#day1 (accessed Jan. 21, 2005); *Hamdan v. Rumsfeld*, No. 04-1519, 2004 U.S. Dist. LEXIS 22724, at *34 (D.D.C. Nov. 8, 2004); *See generally*, HUMAN RIGHTS FIRST, TRIALS UNDER MILITARY ORDER: A GUIDE TO THE FINAL RULES FOR MILITARY COMMISSIONS (2004), *available at* http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf (accessed Jan. 21, 2005).

[155] Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1.

[156] *Id.*

[157] *Id.*

[158] Jon Murray, *Gen. Myers: No Torture at Guantanamo Bay*, INDIANAPOLIS STAR, Nov. 30, 2004, *available at* http://scoop.agonist.org/story/2004/11/29/215637/05 (accessed Jan. 21, 2005).

[159] Human Rights First was unable to ascertain whether an official family notification policy exists for detainees at Guantanamo despite repeated attempts. Telephone interview with Department of Defense Public Affairs Office (Dec. 9, 2004); Telephone interview with SOUTHCOM Public Affairs office (Dec. 9, 2004).

[160] Letter from Rear Admiral J.M. McGarrah, Director of Combatant Status Review Tribunal to Gaillard Hunt, lawyer for Saifullah Paracha (Oct. 27, 2004). A copy of the letter is at Petition for Habeas Corpus, Paracha v. Bush et al., No. 04 Civ. 2022 PLF (D.D.C filed Nov. 17, 2004), at Ex. D.

[161] Letter from Farhat Paracha, *supra* note 132.

[162] Interview with attorneys for Guantanamo detainee (December 14, 2004).

[163] *See* Interview with Bernhard Docke (Apr. 28, 2004), *available at* www.cageprisoners.com/interviews.php?aid=2547 (accessed Jan. 21, 2005).

[164] On-line Chat Session with Khalid al-Odah, father of Fawzi al-Odah, Washingtonpost.com, Nov. 22, 2004.

[165] Human Rights First, ENDING SECRET DETENTIONS 16 (June 2004), *available at* http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf (accessed Dec. 9, 2004); Letter from Farhat Paracha, *supra* note 132.

[166] *Jordan Denies It Has US Prisons On Its Territory*, AGENCE FRANCE PRESSE, June 18, 2004, *available at* http://www.keepmedia.com/ShowItemDetails.do?item_id=491220&extID=10026 (accessed Jan. 21, 2005).

[167] Telephone Interview with CENTCOM Public Affairs Office, Florida, USA (Nov. 15, 2004).

[168] Melman, *supra* note 3.

[169] David Kaplan and Ilana Ozernoy, *Al Qaeda's Desert Inn*, U.S. NEWS AND WORLD REPORT, June 2, 2003, at 22-23.

[170] Memorandum from Dep't of Army, U.S. Army Crim. Investigation Command, Afghanistan (July 2, 2004), re: CID Report of Investigation – Final (C)/SSI – 0061-2004-CID369-69277-5C1J (on file with Human Rights First)

[171] *Id.*

[172] *Id.*

[173] *See generally* Memorandum in Support of Motion for Unmonitored Attorney-Client Meetings and Correspondence Between Petitioner and Counsel, Al-Marri v. Hanft, No. 04 Civ. 2257 (D.S.C. Oct. 28, 2004), *available at* http://www.scd.uscourts.gov/Noteworthy/AlMarri/docket.asp (accessed Jan. 21, 2005); Petitioner's Memorandum of Law in Support of Motion for Summary Judgment, Padilla v. Hanft, No. 04 Civ. 2221 (D.S.C. Oct. 20, 2004), *available at* http://www.scd.uscourts.gov/Padilla/docket.asp (accessed Jan. 21, 2005); Rumsfeld v. Padilla, 542 U.S. ___, 124 S.Ct. 2711 (2004).

[174] Press Release, Dep't of Defense, Transfer of Detainee Control Completed (Oct. 11, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20041011-1371.html (accessed Jan. 21, 2005).

[175] *Padilla*, 142 S.Ct. at 2730; Petition for Writ of Habeas Corpus, Al-Marri v. Hanft, No. 04 Civ. 2257 ¶¶ 28-29 (D.S.C. filed July 8, 2004), *available at* http://www.scd.uscourts.gov/Noteworthy/AlMarri/docket.asp (accessed Jan. 21, 2005).

[176] *Padilla*, 142 S.Ct. at 2730.

[177] Petition for Writ of Habeas Corpus, Al-Marri v. Hanft, No. 04 Civ. 2257 ¶¶ 20-29(D.S.C. filed July 8, 2004), *available at* http://www.scd.uscourts.gov/Noteworthy/AlMarri/docket.asp (accessed Jan. 21, 2005).

[178] Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2639 (2004).

[179] *Padilla*, 124 S.Ct. at 2714.

[180] *See* Petition for Writ of Habeas Corpus, Al-Marri v. Hanft, No. 04 Civ. 2257 (D.S.C. filed July 8, 2004), *available at* http://www.scd.uscourts.gov/Noteworthy/AlMarri/docket.asp (accessed Jan. 21, 2005).

[181] Padilla v Hanft, No. 2:04-2221-26AJ (S.C. Feb. 28, 2005)

[182] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2634(2004) (O'Connor J., plurality).

[183] Settlement Agreement, Hamdi v Rumsfeld, September 17, 2004, ¶ 10, *available at* http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt3.html (accessed Jan. 21, 2005) [hereinafter Settlement Agreement].

[184] *Id.* at ¶ 10.

[185] Stevenson Swanson, *Padilla Gets to Talk with His Lawyers*, CHICAGO TRIB., Mar. 4, 2004, at 1; Jerry Markon, *Terror Suspect, Attorneys Meet for 1st Time*, WASH. POST, Feb. 4, 2004, at B3.

[186] Petition for Writ of Habeas Corpus, Padilla v. Hanft, No. 04 Civ. 2221, ¶ 14 (D.S.C. filed July 2, 2004), *available at* http://www.scd.uscourts.gov/Padilla/docket.asp (accessed Jan. 21, 2005).

[187] E-mail from Andrew Patel, Lawyer for Jose Padilla, to Human Rights First (June 11, 2004, 10:50 EST) [hereinafter Email from Patel]; E-mail from Mark Berman, Lawyer for Ali Saleh Kahleh Al-Marri, Gibbons Del Deo, to Priti Patel, Human Rights First (Nov. 1, 2004, 16:04 EST) [hereinafter Email from Berman].

[188] Petition for Writ of Habeas Corpus, Al-Marri v. Hanft, No. 04 Civ. 2257, ¶ 15 (D.S.C. filed July 8, 2004), *available at* http://www.scd.uscourts.gov/Noteworthy/AlMarri/docket.asp (accessed Jan. 21, 2005); Memorandum in Support of Motion for Unmonitored Attorney-Client Meetings and Correspondence Between Petitioner and Counsel, Al-Marri v. Hanft, No. 04 Civ. 2257, 2 (D.S.C. filed Oct. 28, 2004), *available at* http://www.scd.uscourts.gov/Noteworthy/AlMarri/docket.asp (accessed Jan. 21, 2005).

[189] Email from Berman, *supra* note 187.

[190] Memorandum in Support of Motion for Unmonitored Attorney-Client Meetings and Correspondence Between Petitioner and Counsel, Al-Marri v. Hanft, No. 04 Civ. 2257, 2 (D.S.C. filed Oct. 28, 2004), *available at* http://www.scd.uscourts.gov/Noteworthy/AlMarri/docket.asp (accessed Jan. 21, 2005).

[191] Email from Patel, *supra* note 187; E-mail from Berman, *supra* note 187.

[192] E-mail from Patel, *supra* note 187; E-mail from Mark Berman, Lawyer for Ali Saleh Kahleh Al Marri, Gibbons Del Deo to Priti Patel, Human Rights First (June 11, 2004, 11:21 EST).

[193] Email from Patel, *supra* note 187; E-mail from Mark Berman, Lawyer for Ali Saleh Kahleh Al Marri, Gibbons Del Deo to Priti Patel, Human Rights First (June 11, 2004, 11:21 EST).

[194] Gadi Dechter, *Britain: No U.S. Interrogations on Our Soil*, UPI, May 19, 2004, *available at* LEXIS, News Library; Hansard Parliamentary Debates, Jan. 8, 2003, Col. 1020, *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld1999/ldhansrd/pdvn/lds03/text/30108-04.htm (accessed Jan. 21, 2005); Hansard Parliamentary Debates, March 3, 2003, Col. 603, *available at* http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030303/debtext/30303-11.htm#30303-11_spnew0 (accessed Jan. 21, 2005); Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26 2002, at A1; Mark Seddon, *Is There Another Guantanamo Bay on British Soil*, INDEPENDENT (LONDON), Dec. 13, 2003, at 21; Dana Priest, *Long-Term Plan Sought For Terror Suspects*, WASH. POST, Jan. 2, 2005, at A1.

[195] *See generally*, ENDING SECRET DETENTIONS, *supra* note 165; Trista Talton, *Marines Finish Mission, Wait For Next Assignment*, MORNING STAR (Wilmington, NC), Jan. 3, 2002, at 5A; Krista Hughes and Denis Peters, *Aussie Al-Qaeda Fighter Moved To Another Ship*, DAILY TELEGRAPH (AUS.), Jan. 3, 2002, at 11; Government's Opposition to Defendant's Motion to Compel Discovery of Documents In Camera, U.S. v Lindh, No. 02 Crim. 37A, (E.D.Va. filed Mar. 29, 2002), *available at* http://news.findlaw.com/cnn/docs/terrorism/us032902opp2lcmot.pdf (accessed Jan. 21, 2005); Grant Holloway, *Australia to Question al Qaeda Fighter*, CNN.COM, Dec. 19, 2001, *available at* http://archives.cnn.com/2001/WORLD/asiapcf/auspac/12/19/aust.talbandit20.12/ (accessed Jan. 21, 2005); *Australian Taliban Fighter Handed Over to U.S. Military Forces In Afghanistan*, ASSOC. PRESS, Dec. 17, 2001, *available at* http://multimedia.belointeractive.com/attack/military/1217australia.html (accessed Jan. 21, 2005); *Hicks' Ship Docks In Fremantle On Rest Visit*, AAP NEWSFEED, Jan. 27, 2002, *available at* LEXIS, News Library; *Walker Arrives In U.S. To Face Charges Thursday*, CNN.COM, Jan. 23, 2002, *available at* http://www.cnn.com/2002/US/01/23/ret.walker.transfer/ (accessed Jan. 21, 2005); Dana Priest, *Long-Term Plan Sought For Terror Suspects*, WASH. POST, Jan. 2, 2005, at A1.

[196] ENDING SECRET DETENTIONS, *supra* note 165, at 17.

[197] Expeditionary Strike Force One, U.S. Naval Special Operations Command Office of Public Affairs, *supra* note 5.

[198] Priest and Higham, *supra* note 11.

[199] *See Thailand PM: Hambali Was Plotting*, CBSNEWS.COM, Aug. 16, 2003, at http://www.cbsnews.com/stories/2003/08/17/attack/main568735.shtml (accessed Jan. 30, 2005) (reporting the detention of Hambali, the alleged Bali bomber, by CIA and Thai authorities in Thailand and his subsequent transfer to an undisclosed location after at least one day in U.S. custody in Thailand); Don Van Natta, *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1 (reporting the detention of Ramzi bin al-Shibh in a secret CIA facility in Thailand); Human Rights Watch, THE UNITED STATES' DISAPPEARED: THE CIA'S LONG-TERM GHOST DETAINEES 31 (Oct. 2004), *available at* http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf (accessed Jan. 30, 2005); Saifullah Paracha is believed to have been captured by U.S. officials while flying from Karachi to Bangkok, Thailand.

[200] News Release, Dep't of Defense, Defense Department Operational Update Briefing (July 14, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040714-1002.html (accessed Jan. 21, 2005).

[201] *See, e.g.*, U.S. STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SYRIA (2004), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41732.htm (accessed Mar. 7, 2005); U.S. STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SRI LANKA (2001), *available at* http://www.state.gov/r/pa/ei/rls/c2671.htm (accessed Jan. 20, 2004) (criticizing Sri Lanka for not closing all secret detention centers and for holding individuals for short periods of time in transit locations for interrogation before "transferring them to declared places of detention."); *See also* U.S. STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SRI LANKA (1993), *available at* http://www.state.gov/r/pa/ei/rls/c2671.htm (accessed Jan. 20, 2004); U.S. STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SRI LANKA (1994), *available at* http://www.state.gov/r/pa/ei/rls/c2671.htm (accessed Jan. 20, 2004).

[202] Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

[203] International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, art. 7, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *available at* http://www.unhchr.ch/html//menu3/b/a_ccpr.htm (accessed Jan. 20, 2005) [hereinafter ICCPR] ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

[204] UN Human Rights Comm., General Comment No. 20, Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7), at ¶ 11, U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument (accessed Jan. 20, 2005) [hereinafter ICCPR General Comment 20].

[205] *Id.*

[206] Estrella V. Uruguay, Comm. No. 74/1980, U.N. GAOR Hum. Rts. Comm., 18th Sess., U.N. Doc. CCPR/C/18/D/74/1980 (1980), at ¶ 9.2, (the HRC held that "prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by correspondence as well as by receiving mail.")

[207] ICCPR General Comment 20, *supra* note 204, at ¶ 11.

[208] El-Megreisi v. Libya, Comm. No. 440/1990, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/440/1990 (1994); ICCPR, *supra* note 203, at arts. 7, 10. Paragraph 1 of Article 10 reads, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." The HRC has also held that incommunicado detention of longer than eight months amounts to inhumane treatment that breaches Article 7. Shaw v. Jamaica, Comm. No. 704/1996, U.N. GAOR Hum. Rts. Comm., 62nd Sess., U.N. Doc. CCPR/C/62/D/704/1996 (1998).

[209] Likewise, the HRC has found that because the state had failed to take disclosure measures that would have prevented the disappearance of the victim, the Comm. would assume a strong likelihood that torture or ill-treatment had occurred. "The State party has not denied that Rafael Mojica (a) has in fact disappeared and remains unaccounted for; ... and (b) that his disappearance was caused by individuals belonging to the Government's security forces." Mojica v. Dominican Republic, Comm. No. 449/1991, U.N. GAOR Hum. Rts. Comm., 51st Sess., U.N. Doc. CCPR/C/51/D/449/1991 (1994), at ¶ 5.6.

[210] On April 7, 2003, W. Hays Parks, Special Assistant to the Army JAG, remarked: "We are providing and will continue to provide captured Iraqi combatants with the protections of the Geneva conventions and other pertinent international laws. In addition, arrangements are in place to allow for representatives from the International Committee of the Red Cross to met [sic] with Iraqi prisoners of war." News Transcript, Dep't of Defense, Briefing on Geneva Convention, EPWs and War Crimes (Apr. 7, 2003), *available at* http://www.defenselink.mil/transcripts/2003/t04072003_t407genv.html (accessed Jan. 20, 2005). More recently, during a background briefing, a senior military official reiterated the applicability of the Conventions. "From the very beginning of the conflict, the Geneva Conventions have been fully applicable. There's never been any dispute about that, never any doubt." News Transcript, Dep't of Defense, Defense Department Background Briefing (May 14, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040514-0752.html (accessed Jan. 20, 2005).

[211] Letter from Colin Powell, *supra* note 99.

[212] In September 2003, Brig. Gen. Karpinski said that the United States was holding thousands of prisoners in Iraq who did not "fit into any category," and that "We got an order from the secretary of defence (Donald Rumsfeld) to categorise" them. As a result, the label of "security detainee" was created. *U.S. Holding 4,000 'Extra' Detainees*, AGENCE FRANCE-PRESSE, Sept. 16, 2003, *available at* http://dawn.com/2003/09/17/int6.htm (accessed Jan. 15, 2005). According to the AFP, "Asked if they had any rights or had access to their families or legal help while they were being 'secured,' she said: 'It's not that they don't have rights ... They have fewer rights than EPWs (enemy prisoners of war).' *Id.*

[213] News Briefing, Dep't of Defense, Secretary Rumsfeld and Gen. Myers (Jan. 11, 2002), *available at* http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html (accessed Jan. 15, 2005).

[214] David E. Sanger, *Prisoners Straddle an Ideological Chasm*, N.Y. TIMES, Jan. 27, 2002, at A16.

[215] News Release, U.S. Embassy, Islamabad, Bush Says Geneva Conventions Applies to Taliban not al-Qaida (Feb. 8, 2002), *available at* http://usembassy.state.gov/islamabad/wwwh02020803.html (accessed Jan. 20, 2005).

[216] Third Geneva Convention, *supra* note 151, at art. 70.

[217] Fourth Geneva Convention, *supra* note 84, at art. 106.

[218] THE GENEVA CONVENTIONS OF AUG. 12, 1949: COMMENTARY IV GENEVA CONVENTION 446-47 (Jean Pictet ed. 1994).

[219] Third Geneva Convention, *supra* note 151, at art. 70 (emphasis added).

[220] ICRC Iraq Report, *supra*, note 111, at § 1.1.9, (discussing the U.S. government's failure to adequately maintain the system of capture cards).

[221] Third Geneva Convention, *supra* note 151, art. 143.

[222] THE GENEVA CONVENTIONS OF AUG. 12, 1949: COMMENTARY III GENEVA CONVENTION 583 (Jean Pictet ed. 1994).

[223] Dep't of Defense, Directive No. 2310.1, Department of Defense Program for Enemy Prisoners of War and Other Detainees (Aug. 18, 1994), *available at* http://www.dtic.mil/whs/directives/corres/text/d23101p.txt (accessed Jan. 20, 2005).

[224] *Id.* at § 4.2.1.

[225] *Id.*, at §§ 4.2.3, 4.2.4. The Secretary is also required to report to the Defense Secretary, the Chairman of the Joint Chiefs of Staff, other U.S. Government Agencies, and the ICRC on compliance with the Geneva Conventions. *Id.* at § 4.2.5.

[226] *Id.* at § 4.1.1.

[227] Third Geneva Convention, *supra* note 151, at art. 122.

[228] Dep't of Defense, Directive No. 2310.1, *supra* note 223, at § 4.2.4.

[229] Army Reg., *supra* note 66, at § 1-7.

[230] *National Prisoner of War Information Center, (NWPIC)*, JUDGE ADVOC. NEWSL., (Staff Judge Advoc., Washington D.C.) Dec. 2001, *available at* http://sja.hqmc.usmc.mil/newsletter/2001/12_01/12_01.htm#NATIONAL%20PRISONER%20OF%20WAR%20INFORMATION%20CENTER%20 (accessed Jan. 20, 2005).

[231] News Briefing, Dep't of Defense, Geneva Convention, EPWs and War Crimes (Apr. 7, 2003), *available at* http://www.defenselink.mil/advisories/2003/p04062003_p028-03.html (accessed Jan. 20, 2005).

[232] TAGUBA REPORT, *supra* note 104.

[233] SCHESLINGER REPORT, *supra* note 8, at 29.

[234] DAIG REPORT, *supra* note 20, at 30.

[235] News Transcript, Dep't of Defense, Special Defense Department Briefing on the International Committee of The Red Cross's Report on Detainees (July 16, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040716-1005.html (accessed Jan. 21, 2005).

[236] Matthew Waxman, Deputy Assistant Sec'y for Detainee Affairs, Remarks at OSCE Human Rights Implementation Meeting (Oct. 5, 2004), *available at* http://www.usosce.rpo.at/archive/2004/10/Treatment_of_Detainees_HDIM_2004.pdf (accessed Dec. 10, 2004)

[237] Dep't of the Army, Field Manual – Interim 3-07.22: Counterinsurgency Operations, I-4 (Oct. 2004), *available at* http://www.fas.org/irp/doddir/army/fmi3-07-22.pdf (accessed Jan. 20, 2005) [hereinafter Field Manual-Interim].

[238] *Id.* at iv.

[239] *Id.* at I-4 (emphasis added)..

[240] *Id.* at I-3.

[241] *Id.*

[242] Ronald W. Reagan National Defense Authorization Act, Pub. L. No. 108-375, § 1092, 118 Stat. 2069-70 (2004).

[243] *Id.* at § 1093(c), 118 Stat. 2070-71.

[244] Dep't of the Army, Field Manual 27-10: The Law of Land Warfare 3-18, ¶ 207 (1956), *available at* http://www.nimj.org/documents/AR-27-10-Military-Justice.pdf (accessed Jan. 20, 2005).

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http://www.cageprisoners.com/interviews.php?aid=125; Interview by CagePrisoners with Maha Habib, wife of Guantanamo detainee, *available at* http://www.cageprisoners.com/interviews.php?aid=1948; Human Rights First, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES (2003) *available at* http://www.humanrightsfirst.org/us_law/loss/assessing/assessingnewnormal.htm; ICRC Iraq Report, *supra* note 10; Report of High Commissioner: The Present Situation of Human Rights in Iraq (advanced edited version), Submission from the United States of America: Treatment of Persons in Detention in Iraq, Annex II, *available at* http://www.unhchr.ch/html//hchr/docs/annexII.doc; Hannah Allam, *Missing Iraqis Believed to be Lost in Abu Ghraib Prison*, KNIGHT RIDDER, June 11, 2004; Interview with CIA Public Affairs Officer (June 11, 2004); Interview with Duty Officer, DOD Press Office (June 11, 2004); Interview with Molly Hale, CIA Public Affairs Officer (June 11, 2004).

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[252] NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 244 (2nd ed., Oxford 1999).

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[284] *See* Complaint at ¶¶ 139-40, Rasul v. Rumsfeld, No. 04-1864 (D.D.C. filed Oct. 27, 2004).

[285] *Id.* at ¶ 141.

[286] *Id.* at ¶ 140.

[287] Jeffrey Gettleman, *The Struggle for Iraq: The Detainees*, N.Y. TIMES, Mar. 9, 2004, at A1.

[288] DAIG REPORT, *supra* note 20, at 46, 56-8.

[289] *See, e.g.*, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 363-64 (July 22, 2004) ("[L]ong-term success [in efforts to pursue al Qaeda] demands the use of all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense. . . . [W]hen people lose hope, when societies break down, when countries fragment, the breeding grounds for terrorism are created. . . . Economic and political liberties tend to be linked.").

[290] *See, e.g.*, JOSEPH S. NYE, SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS (2004).

[291] James A. Baker III and Warren Christopher, *More Ways to Stay Safe*, WASH. POST, Dec. 17, 2004, at A33.

[292] U.S. Government Accountability Office, *U.S. Public Diplomacy: State Department and Broadcasting Board of Governors Expand Post- 9/11 Efforts but Challenges Remain*, GAO-04-1061T (Aug. 23, 2004), *available at* http://www.gao.gov/new.items/d0410611.pdf (accessed Jan. 20, 2005).

[293] Edward Cody, *China, Others Criticize U.S. Report on Rights*, WASH. POST, Mar. 4, 2005, at A14.

[294] Shawn Donnan, *US Faces Questions After Bali Bomb Trial*, FIN. TIMES, Mar. 3, 2005, *available at* http://news.ft.com/cms/s/ee1c7dba-8c1e-11d9-a895-00000e2511c8,dwp_uuid=46d6f5a8-d260-11d8-b661-00000e2511c8.html (accessed Mar. 7, 2005).

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[300] *See* Transcript of Confirmation Hearings of Alberto Gonzales before the Senate Judiciary Committee (Jan. 6, 2005), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/statements/gonz_testimony_010604.htm (accessed Feb. 16, 2005).

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[302] Edward Cody, *Iraqis Put Contempt for Troops on Display*, WASH. POST, June 12, 2004, at A1 (quoting Sheik Mohammed Bashir at the Sunni Muslim mosque, Um al-Oura).

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[305] Human Rights First, DEFENDING SECURITY: THE RIGHT TO DEFEND RIGHTS IN AN AGE OF TERRORISM (PRELIM. DRAFT) iv (March 2004), *available at* http://www.humanrightsfirst.org/defenders/hrd_global/Defending_Security_Draft.pdf (accessed Jan. 21, 2005).

[306] *Id.*

[307] *Id.* at 8.

[308] *Id.*

[309] *Id.*

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Getting to Ground Truth

Investigating U.S. Abuses in the "War on Terror"

September 2004

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Introduction

> *I can assure you that no stone will be left unturned to make sure that justice is done and to make sure that nothing like this ever happens again.*
>
> Secretary of State Colin Powell
> Remarks at the United Nations
> May 4, 2004

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

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

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

Among other things, these inquiries have revealed a problem far greater in scope than that reflected in the pictures of a handful of U.S. soldiers torturing detainees at Abu Ghraib. Since the fall of 2001, there have been approximately 300 reported alleged instances of torture or other abuse by U.S. troops in Afghanistan, Iraq, and at the U.S. detention facility at Guantanamo Bay, Cuba.[2] To date, about two-thirds of these have been investigated by the military, which thus far has verified 66 cases of detainee abuse by U.S. forces (three in Afghanistan, eight at

Guantanamo, and 55 in Iraq).[3] There are still nearly 30 pending investigations into detainee deaths in U.S. custody; the military has determined thus far that five of these were the result of torture or other abuse. [4] (Many more than 30 detainees have died in U.S. custody, but the military reports the additional deaths were the result of natural causes or enemy attacks.[5])

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

Each one of the major investigations to date, as discussed in this report, has suffered from both structural and particular failings that have prevented either full identification of the widespread abuses, or meaningful recommendations to address them. For example, the scope of the investigative reports by Lt. Gen. Anthony Jones, and Maj. Gens. Antonio Taguba and George Fay, were circumscribed narrowly. Maj. Gen. Taguba's report looked only at the role of U.S. military police at Abu Ghraib. Maj. Gen. Fay's report looked only at the role of military intelligence forces at that facility. And Lt. Gen. Jones was tasked only with looking at "organizations or personnel" involved in events at Abu Ghraib "higher than the 205th Military Intelligence Brigade chain of command."[7]

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

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

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

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

Equally important, an independent commission is *independent*. As a group of distinguished, retired military officers recently wrote in a letter to President Bush urging the creation of such a commission: "Americans have never thought it wise or fair for one branch of government to police itself." Such a commission need not be constrained by hierarchies internal to the organization it is reviewing, or the limits of departmental or institutional divisions of labor. It is able to operate with a level of objectivity that those closer to events and institutions cannot achieve. Critically, it can be designed to avoid either the reality or appearance of partiality or institutional protection.

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

Michael Posner and Deborah Pearlstein
September 8, 2004

The Investigations to Date

> *Each of us has had a strong interest in getting the facts out to the American people. We want you to know the facts. I want you to have all the documentation and the data you require.*
>
> Secretary of Defense Donald H. Rumsfeld
> Testimony to the Senate and House Armed Services Committees
> May 7, 2004

Of the hundreds of inquiries launched so far into torture and other forms of abuse in U.S. custody, the majority are investigations aimed at assessing wrongdoing by particular individuals. This category thus includes, for example, the military justice prosecutions of seven low-ranking members of the 800th Military Police Brigade at Abu Ghraib – many of whom appeared in the photos that were so widely publicized.[10] It also includes charges recently brought against four Navy Special Forces personnel for abusing an Iraqi detainee who later died at Abu Ghraib.[11] It includes criminal investigations opened by the Justice Department into the actions of civilian personnel at U.S. detention facilities.[12] And it will include the case investigations of some two dozen soldiers who Army criminal investigators say will face criminal or administrative punishment related to the deaths of two U.S.-held prisoners in Afghanistan in December 2002.[13]

These individual investigations – whether through the military justice system or through civilian federal prosecution – are essential both to ensure that those responsible for wrongdoing are held accountable, and to ensure that U.S. military and civilian personnel still working in detention and interrogation operations understand the limits of lawful conduct. Because proper handling of serious and complex crimes becomes more difficult with the passage of time – as witnesses become harder to track down and evidence trails grow cold – it is essential that these cases move forward promptly. It is thus a significant failure that it has taken almost two years for individual

charges to be brought following the homicides of two detainees at the U.S. Air Force Base in Bagram, Afghanistan.

The bulk of public attention, however, has appropriately focused on the broader assessments and reports undertaken by the Pentagon itself. According to the Defense Department, it had launched more than 50 investigations, reviews, inspections and assessments (in addition to more than 220 criminal investigations) as of August 13, 2004.[14] Most significant among these are the following:

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

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

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

Flawed and Confusing Policy and Practice

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

conditions that included policing a detainee population of 7,000 with just 92 military police, a 75:1 ratio.[19]

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

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

A great variety of interrogation techniques deviating from military doctrine proliferated after September 11, 2001, with policies in different theatres of operation, and agencies and military units often contradicting one another, causing serious confusion for troops on the ground.[24] Standards for interrogating prisoners were in a state of constant flux, with officials including Secretary Donald Rumsfeld and Lt. Gen. Ricardo Sanchez authorizing techniques viewed as impermissible by both military manuals and international law.[25] Many interrogators were not trained in these additional techniques and operated in units without the proper command policy in effect. Units were often unaware of the applicable interrogation standards and policies.[26]

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

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

Inadequate Detention Facilities and System for Detainee Classification

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

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

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

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

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

Inadequate Military Training

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

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

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

Problematic Use of Civilian Contractors

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

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

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

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

The Gaps That Remain

> *Based on this inspection . . . we were unable to identify system failures that resulted in incidents of abuse.*
>
> Detainee Operations Inspection of the U.S. Army
> Inspector General
> July 21, 2004

> *[L]eader responsibility and command responsibility, systemic problems and issues also contributed to the volatile environment in which the abuse occurred.*
>
> Maj. Gen. George R. Fay
> Investigation of Abu Ghraib Detention Facility
> and 205th Military Intelligence Brigade
> August 25, 2004

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

- narrowly circumscribed investigative charges;
- a failure to investigate all relevant agencies and personnel;
- cumulative reporting;

- contradictory conclusions;
- questionable use of classified label to withhold information;
- a failure to address senior military and civilian command responsibility;
- a failure to provide a game plan for corrective action.

This chapter reviews those failings.

Narrowly Circumscribed Investigative Charges

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

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

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

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

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

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

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

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

Failure to Investigate All Relevant Agencies and Personnel

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

Troops. A number of reports indicate that investigators may have failed to contact – or failed to inquire after – individual soldiers and officials who were in a position to witness events at Abu Ghraib first hand. For example, Ken Davis, a reservist Army Sergeant described to the press, senior officers, and members of Congress witnessing several brutal scenes of abuse at Abu Ghraib. In particular, Davis identified four intelligence officers in one of the October 2003 photos taken at Abu Ghraib. But Davis says no one from the Fay or Jones teams spoke with him for the report.[52] Sgt. Samuel Provance, who served at Abu Ghraib, was interviewed, but was told by his commanders in May that his security clearance was being pulled for disobeying orders to remain quiet about events there after Provance spoke to ABC News about the alleged abuse at the prison.[53] Provance told ABC that he was concerned the military was covering up the extent of the abuse at Abu Ghraib.[54] Finally, one non-commissioned officer has told Human Rights First that Fay investigators also never spoke to the soldiers who comprised a key Abu Ghraib security detail, soldiers who escorted detainees to interrogation booths and often watched the interrogations take place.

Other Agencies and Actors. Most of the reports make reference on multiple occasions to the involvement of other agencies or actors in the detention and interrogation operations that are the subject of their investigation. But no investigation to date has explored the involvement or even

interviewed many of the Army and non-Army actors involved, including not only military intelligence and military police brigades, but also special operations forces, officials from the CIA and other participants in Joint Task Force 121 (responsible for locating former government members in Iraq), members of the Iraqi Survey Group (tasked with seeking out so-called "weapons of mass destruction" in Iraq), civilian contractors, JAG officers, medical personnel, Justice and Defense Department officials, and any White House officials involved in advising detention and interrogation leadership on operational limitations under the law.[55]

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

While universally recognizing the problem – indeed, the Jones Report describes the ghost detainee practice as "well known" among military intelligence and police at Abu Ghraib – none of the investigations thus far have been able to determine "the audit trail of personnel responsible for capturing, medically screening, safeguarding and properly interrogating" these individuals.[58] At the Pentagon press conference releasing the Fay and Jones reports, its authors made clear that they were unable to address the ghost detainee issue fully because it was beyond the scope of their investigation.[59]

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

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

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

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

While additional reports may be produced – Fay has recommended the Army "review" the role of civilian contractors,[71] Schlesinger has recommended further study of the role of the CIA,[72] and a separate report is underway on the role of detainee operations in Afghanistan[73] – it is critical that *one* outside investigator look at the *interaction* between these agencies in the field, both to understand what really happened, and to prevent the temptation every organization naturally feels to shift blame from one set of actors to another.

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

Cumulative Reporting

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

However, some of the investigations rely on prior investigative findings *to the exclusion* of necessary original research or investigation – a practice that presents a high risk of perpetuating any errors or omissions made by previous investigators. Perhaps the worst example of this is the Schlesinger panel report. In part, this failing is a function, again, of its specific charge – namely, to review other "completed and pending" investigations by the Department of Defense.[77] Likewise, while this panel was able to interview key civilian leadership in the Defense Department, "[i]ssues of personal accountability" were expressly excluded from its purview.[78]

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

Contradictory Conclusions

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

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

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

Does command responsibility for the abuses at Abu Ghraib rest with leaders in Iraq or can it be attributed to command actions and omissions in Washington, D.C.? Maj. Gen. Miller believed that abuses at Abu Ghraib were caused by "a small number of leadership and small number of soldiers who violated regulations and procedures and committed criminal acts."[85] The Army Inspector General to some extent agreed: "These incidents of abuse resulted from the failures of individuals to follow known standards of discipline . . . and, in some cases, the failures of a few leaders to enforce those standards of discipline."[86] Yet the Schlesinger panel reached

essentially the opposite conclusion: "The abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels."[87]

Questionable Use of Classification to Withhold Information

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

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

Classified information from the redacted sections subsequently published in the *New York Times* and *Washington Post* – specifically describing a September 14, 2003 cable from Lt. Gen. Sanchez outlining his plans for more aggressive interrogation techniques including the use of dogs – calls this relatively exculpatory public account into question. The *Times* reported that "[c]lassified parts of the report by three Army generals on the abuses at Abu Ghraib prison say Lt. Gen. Ricardo S. Sanchez, the former top commander in Iraq, approved the use in Iraq of some severe interrogation practices intended to be limited to captives held in Guantánamo Bay, Cuba, and Afghanistan."[90]

Failure to Investigate Senior Military and Civilian Command Responsibility

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

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

individual acts of their subordinates. But it does apply to hold leaders responsible for failing to recognize and resolve systemic illegalities within their control.

Only two inquiries interviewed military or civilian officials above the brigade level: Jones and Schlesinger. The Jones inquiry, tasked with investigating whether "organizations or personnel higher than the 205th Military Intelligence Brigade chain of command," or individuals outside its chain of command, were involved in detainee abuse at Abu Ghraib, reports conducting all of two interviews.[94] It is true that both Lt. Gen. Sanchez, Commander of Combined Joint Task Force-7 in Iraq, and his senior intelligence officer, Maj. Gen. Barbara Fast, were "personnel higher" than the brigade level. But the military intelligence chain of command comprises other individuals, including General John Abizaid, Commander of U.S. Central Command and Lt. Gen. Lance L. Smith, Deputy Commander of Central Command. More important, the chain of command and individuals all of the reports and congressional testimony have revealed to be directly involved in military intelligence decision-making include, at a minimum, Maj. Gen. Miller, Lt. Gen. Boykin, Undersecretary of Defense for Policy Douglas Feith, Undersecretary of Defense for Intelligence Stephen A. Cambone, and Defense Secretary Donald Rumsfeld. Jones provides no explanation for why his investigation, so narrowly tasked to begin with, included such a limited survey of command officials.

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

Schlesinger's finding of "no evidence that organizations above the 800th MP Brigade or the 205th MI Brigade-level were directly involved in the incidents at Abu Ghraib"[97] is incomplete – leaving open the question of "indirect" involvement, or involvement with abuse at other facilities. More significant, the finding is not credible in light of evidence documented by the reports Schlesinger reviewed and broadly available to the public in the months before the report's release. For example, the Schlesinger report recognizes that "Secretary Rumsfeld publicly declared he directed one detainee be held secretly at the request of the Director of Central Intelligence."[98] This practice occurred at Abu Ghraib and is a violation of U.S. and international law.[99] Similarly, the White House released a series of memoranda and a slide indicating certain interrogation techniques that had been authorized for use by the Secretary of Defense. These included "removal of clothing" and "using detainees' individual phobias (such as fear of dogs) to induce stress."[100] These techniques are also barred by both international and domestic laws.[101] Yet Secretary Rumsfeld was aware that these techniques were used on at least one detainee.[102]

Finally, all of the reports find Defense Department policies promulgated during the relevant period to varying degrees, "vague and lacking,"[103] "inconsistent," and "confusing."[104] This is certainly true. But it is unlikely that serious harm would have resulted from soldiers confused between two or three equally *lawful* policies. The "confusion" over interrogation policies

contributed to abuse because some of the policies at various times authorized conduct that *was not lawful*.[105] Under these circumstances, civilian command responsibility seems apparent.

Failure to Present Game Plan for Corrective Action

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

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

The Inspector General's report is admirably clear in finding that the Army Staff Director should be responsible for assigning staff to implement the report's recommendations.[108] And each recommendation is targeted at an identified agency or individual (e.g. "Commanders," "TRADOC," "CJTF-7," etc.).[109] But its recommendations are substantively inconsistent with its findings on the facts. For example, the Inspector General reports that "[o]nly 25% (4 of 16) facilities inspected maintained copies of the Geneva Conventions in the detainees' language. No facilities in Afghanistan complied with this Geneva requirement, while only 4 facilities in Iraq were compliant."[110] But the report does not then recommend, for example, that commanders obtain and provide translated copies of the detainees' rights. Instead, it recommends that "[c]ommanders continue to stress the importance of humane treatment of detainees and continue to supervise and train Soldiers on their responsibility to treat detainees humanely and their responsibility to report abuse."[111]

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

A similar example is found on the issue of civilian contract linguists and interrogators. The Inspector General's report, the Fay report, and the Schlesinger report all recognize that there are significant problems arising from the use of such contract employees.[115] The Schlesinger report in particular notes that "[o]versight of contractor personnel and activities was not sufficient to

ensure intelligence operations fell within the law and the authorized chain of command."[116] The Fay report puts it more plainly: "The contracting system failed to ensure that properly trained and vetted linguist and interrogator personnel were hired to support operations at Abu Ghraib."[117]

Yet despite this conclusion – and the apparent continuing presence of contractors in U.S. detention facilities overseas – none of the reports recommends a moratorium on the use of such contract employees until reforms can be implemented. Instead, the Schlesinger report states, without explanation, that "some use of contractors in detention operations must continue into the foreseeable future," and suggests contracts going forward include training requirements and be written in clearer terms.[118] The Fay report recommends that the Army review (evidently, beyond the reviews already completed) the use of contract interrogators, and then consider implementing standards and training requirements.[119] The Inspector General agrees, suggesting that civilian interrogators receive formal training in current military interrogation policy and doctrine.[120] These recommendations all make some sense. But there is no indication that protections such as these or of any kind have yet been put in place in the field to address the problem that exists.

A Way Forward

> *We came into this process with strong opinions about what would work. All of us have had to pause, reflect, and sometimes change our minds as we studied these problems and considered the views of others. We hope our report will encourage our fellow citizens to study, reflect and act.*
>
> Thomas H. Kean and Lee H. Hamilton
> Final Report of the National Commission on Terrorist Attacks Upon the United States

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

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

Which memoranda, and which parts of memoranda, produced by administration lawyers in the Pentagon, the White House, and the Department of Justice – arguing that the Geneva Conventions do not apply to U.S.-held prisoners, and construing torture to require pain equivalent to "organ failure" – are still operative? Do the Geneva Conventions apply to all those captured in Iraq? Is

it U.S. policy to deny the International Red Cross access to some subset of prisoners it is detaining? Which interrogation techniques are permitted in which locations? Is the Army Field Manual on Intelligence Interrogation from 1992 current policy?

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

Perhaps the most important conclusion to be drawn from the investigations to date is that the current piecemeal approach will not get us where we need to go in order to expunge what both President Bush and Deputy Secretary of State Richard Armitage have called a "stain" on America's honor and soul.[121] There is only one way to accomplish that: an independent investigative body with expert staff, subpoena power, and the power to take testimony under oath, charged with determining all the facts and circumstances, and the scope and nature of abuses committed in U.S. detention and interrogation. Such a body must determine why these abuses happened, and how U.S. policy can be corrected to ensure they do not recur.

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

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

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

Endnotes

[1] This number is Human Rights First's estimated tally of all completed and ongoing investigations into matters relating to abuses in Iraq, Afghanistan, and Guantanamo Bay. Sources for this information include: INT'L COMM. OF THE RED CROSS, REPORT ON THE TREATMENT BY COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION, February 2004; Maj. Gen. Antonio Taguba, AR 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, February 2004 [hereinafter TAGUBA REPORT]; REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND FOLLOW-UP TO THE WORLD CONFERENCE ON HUMAN RIGHTS, THE PRESENT SITUATION OF HUMAN RIGHTS IN IRAQ, June 9, 2004; DEP'T OF THE ARMY, THE INSPECTOR GEN., DETAINEE OPERATIONS INSPECTION, July 21, 2004 [hereinafter DAIG REPORT]; Lt. Gen. Anthony R. Jones and Maj. Gen. George R. Fay, AR 15-6 INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB, August 25, 2004; FINAL REPORT OF THE INDEP. PANEL TO REVIEW DOD DETENTION OPERATIONS, August 2004 [hereinafter SCHLESINGER REPORT]; Dep't of Interior Inspector Gen. Memorandum, Review of 12 Procurements Placed Under Gen. Servs. Admin. Fed. Supply Schedules 70 and 871 by the Nat'l Bus. Center (Assignment No. W-EV-OSS-0075-2004), July 16, 2004, *available at* http://www.oig.doi.gov/ (accessed Sept. 6, 2004); Dep't of Defense Background Briefing on Investigations at Abu Ghraib, Aug. 25, 2004, *available at* http://www.defense.gov/transcripts/2004/tr20040825-1222.html (accessed Sept. 3, 2004); Dep't of Defense Global War on Terror Detention Operations Review Briefing to Congressional Staff, Aug. 24, 2004 (on file with Human Rights First); Thomas Ricks, *Abuse Inquiry Cites 26 Soldiers; 2 Deaths in Afghanistan Led to Army Probe*, WASH. POST, Sept. 1, 2004, at A1; Douglas Jehl and David Johnston, *C.I.A. Expands Its Inquiry Into Interrogation Tactics*, N.Y. TIMES, Aug. 29, 2004, at A10; Ellen McCarthy, *Interior Dept. Inquiry Faults Procurement*, WASH. POST, July 17, 2004, at E03; David Phinney, *Firm's Work at Guantanamo Prison Under Review*, FederalTimes.com, July 19, 2004, *at* http://federaltimes.com/index.php?S=260835 (accessed Sept. 5, 2004); *ISOO Will Investigate Secrecy of Torture Report*, SECRECY NEWS (FAS), May 7, 2004, *at* http://www.fas.org/sgp/news/secrecy/2004/05/050704.html (accessed Sept. 4, 2004); *Detainee Begged for Death*, CBSNews.com, June 25, 2004, *at* http://www.cbsnews.com/stories/2004/06/30/iraq/main626834.shtml (accessed Sept. 6, 2004); Tom Bowman, *Army Report Points to Training Flaws at Prison*, BALT. SUN, May 4, 2004, at 12A. Human Rights First has submitted 13 Freedom of Information Act (FOIA) requests for information and records concerning various investigations into government agency and military abuses in Iraq, Afghanistan, and Guantanamo Bay. To date, the government has produced no documents in response. The CIA determined that it would not provide any records relating to investigations by the CIA Inspector General of the deaths of detainees in Iraq and Afghanistan in 2003. FOIA letters are on file with Human Rights First.

[2] Dep't of Defense Global War on Terror Detention Operations Review Briefing to Congressional Staff, Aug. 24, 2004 ; SCHLESINGER REPORT, *supra*, note 1, at 5.

[3] SCHLESINGER REPORT, *supra*, note 1, at 12-13.

[4] *Id.*

[5] *Id.*

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

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

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

[9] DAIG REPORT, *supra*, note 1, at i.

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

[11] Eric Schmitt, *4 Navy Commandos Are Charged With Abuse*, N.Y. TIMES, Sept. 4, 2004, at A6.

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

[13] Eric Schmitt and David Rohde, *About 2 Dozen G.I.'s to Face Trial or Other Punishment in Deaths of 2 Afghan Prisoners*, N.Y. TIMES, Sept. 2, 2004, at A8.

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

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

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

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

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

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

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

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

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

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

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

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

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

[27] FAY REPORT, *supra*, note 15, at 52-55, 118-119; SCHLESINGER REPORT, *supra*, note 1, at 70.

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

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

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

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

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

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

[34] SCHLESINGER REPORT, *supra*, note 1, at 61; [34] DAIG REPORT, *supra*, note 1, at 46.

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

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

[37] *Id.*

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

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

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

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

[42] FAY REPORT, *supra*, note 15, at 47-52; Dep't of Interior Inspector Gen. Memorandum, Review of 12 Procurements Placed Under Gen. Servs. Admin. Fed. Supply Schedules 70 and 871 by the Nat'l Bus. Center (Assignment No. W-EV-OSS-0075-2004) (July 16, 2004), *available at* http://www.oig.doi.gov/ (accessed September 6, 2004); Ellen McCarthy, *Interior Dept. Inquiry Faults Procurement*, WASH. POST, July 17, 2004, at E03; David Phinney, *Firm's Work at Guantanamo Prison Under Review*, FederalTimes.com, July 19, 2004, *at* http://federaltimes.com/index.php?S=260835 (accessed Sept. 5, 2004).

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

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

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

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

[47] *Id.* at i.

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

[49] *Id.* at 6.

[50] *Id.* at 25.

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

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

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

[54] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

[67] FAY REPORT, supra, note 15, at 136.

[68] *Id.* at 25; *see also* Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, 75 U.N.T.S. 135, arts. 3, 13, 14, 17, 27, 87, 89, and 130 (prohibiting coercive measures and mandating humane treatment of prisoners of war) [hereinafter Third Geneva Convention], *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68

(accessed Sept. 7, 2004); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949, 75 U.N.T.S. 287, arts. 3, 5, 27, 31, 32, 33, and 147 130 (prohibiting coercive measures and mandating humane treatment of captured civilians) [hereinafter Fourth Geneva Convention], *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5 (accessed Sept. 7, 2004).

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

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

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

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

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

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

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

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

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

[78] *Id.*

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

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

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

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

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

[84] FAY REPORT, supra, note 15, at 8.

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

[86] DAIG REPORT, *supra*, note 1, at Foreword.

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

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

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

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

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

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

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

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

[95] SCHLESINGER REPORT, *supra*, note 1, at 43.

[96] *Id.* at 43-46.

[97] *Id.* at 43.

[98] *Id.* at 87.

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

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

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

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

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

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

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

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

[107] *Id.*

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

[109] *Id.* at 93-97.

[110] *Id.* at 15.

[111] *Id.*

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

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

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

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

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

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

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

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

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

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

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UNITED STATES OF AMERICA

Guantánamo and beyond: The continuing pursuit of unchecked executive power

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I used to think that America had respect for human rights when it came to prison.
Mohammed Nechle, extrajudicially removed from Bosnia and Herzegovina by US agents[1]

My husband is a tall man with black hair and black eyes ... He is now imprisoned in Guantánamo. We don't know why.
Wife of Mohammed Nechle, Algerian national, 2004[2]

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[1] Mohammed Nechle, 19 October 2004. *Nechle v. Bush*. Unclassified records of Combatant Status Review Tribunal, In the US District Court for the District of Columbia.
[2] *Ibid*. The name of the detainee's wife is redacted.

1. Summary: The pursuit of unfettered executive power

It seems rather contrary to an idea of a Constitution with three branches that the executive would be free to do whatever they want, whatever they want without a check.
US Supreme Court Justice Stephen Breyer, 20 April 2004[3]

In late December 2001, a memorandum was sent from the United States Justice Department to the Department of Defense.[4] It advised the Pentagon that no US District Court could "properly entertain" appeals from "enemy aliens" detained at the US Naval Base in Guantánamo Bay, Cuba. Because Cuba has "ultimate sovereignty" over Guantánamo, the memorandum asserted, US Supreme Court jurisprudence meant that a foreign national in custody in the naval base should not have access to the US courts. The first "war on terror" detainees were transferred to the base two weeks later. The memorandum remained secret until it was leaked to the media in mid-2004 in the wake of the Abu Ghraib torture scandal.

Not long after this leak, on 28 June 2004, the US Supreme Court ruled, in *Rasul v. Bush*, that the federal courts in fact do have jurisdiction to hear appeals from foreign nationals detained in Guantánamo Bay.[5] Yet almost a year later, none of the more than 500 detainees of some 35 nationalities still held in the base – believed to include at least three people, from Canada, Chad and Saudi Arabia, who were minors at the time of being taken into custody – has had the lawfulness of his detention judicially reviewed. The US administration continues to argue in the courts to block any judicial review of the detentions or to keep any such review as limited as possible and as far from a judicial process as possible. Its actions are ensuring that the detainees are kept in their legal limbo, denied a right that serves as a basic safeguard against arbitrary detention, "disappearance" and torture or other cruel, inhuman or degrading treatment. Amnesty International believes, as explained in Section 3, that all those currently held in Guantánamo are arbitrarily and unlawfully detained.

The administration responded to the *Rasul* decision by setting up Combatant Status Review Tribunals (CSRTs), panels of three military officers, to determine if each detainee was an "enemy combatant" as labelled. The detainee has no access to secret evidence used against him in this process or to legal counsel to assist him. The CSRT, meanwhile, can draw on evidence extracted under torture or other ill-treatment in making its determinations. The CSRTs began in July 2004 and were completed for the current detainee population in January 2005, with the final decisions issued in late March 2005. In 93 per cent of the 558 cases, the CSRT affirmed the detainee's "enemy combatant" status. Eighty-four per cent of the 38 cases where the detainee was found not to be an "enemy combatant" were decided later than 31 January 2005, when a federal judge, District Judge Joyce Hens Green, found that the CSRT process was unlawful, but before the government's appeal against her ruling was heard (see Sections 7 and 8, and Appendix 2).

At the end of April 2005, three years and three months after "war on terror" detentions in Guantánamo Bay began, the government filed a brief in the US Court of Appeals arguing that Judge Green's opinion should be overturned and that the purely executive CSRT process should be accepted as a substitute for judicial review. The government emphasised the CSRT's "findings in favor of 38 detainees" as a sign of a constitutionally fair system. The brief did not point out – or explain if it was pure coincidence – that all but six of these 38 cases had been decided after Judge Green's ruling. In any event,

[3] *Rasul v. Bush*, oral argument, US Supreme Court, 20 April 2004.
[4] Memorandum for William J. Haynes, II, General Counsel, Department of Defense, *Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba*. From Patrick F. Philbin, Deputy Assistant Attorney General and John C. Yoo, Deputy Assistant Attorney General. 28 December 2001. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf.
[5] *Rasul v. Bush*, 000 U.S. 03-334, decided 28 June 2004.

the appeal brief shows an administration in unapologetic mood, in continuing pursuit of unfettered executive authority under the President's war powers as Commander-in-Chief of the Armed Forces, and maintaining a disregard for international law and standards. Among the arguments in the legal brief are that:

- The US Constitution's Fifth Amendment prohibition on the deprivation of liberty without due process of law "is inapplicable to aliens captured abroad and held at Guantanamo Bay." This, the government argues, repeating its pre-*Rasul* position, is because the "United States is not sovereign over Guantanamo Bay". In addition, "if the courts were to second-guess an Executive-Branch determination regarding who is sovereign over a particular foreign territory, they would not only undermine the President's lead role in foreign policy, but also compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments."
- Even if the Fifth Amendment did apply to foreign nationals held at Guantánamo, the brief argues, the CSRT procedures would exceed whatever process was due in the case of these detainees. The need for deference to the executive on the question of the withholding of classified information and legal counsel from the detainees is "greatly magnified here, where the issue is not the administration of domestic prisons, but the Executive Branch carrying out incidents of its war-making function."
- According to the administration, "the determination of who are enemy combatants is a quintessentially military judgment entrusted primarily to the Executive Branch." The executive, the executive argues, "has a unique institutional capacity to determine enemy combatant status and a unique constitutional authority to prosecute armed conflict abroad and to protect the Nation from further terrorist attacks. By contrast, the judiciary lacks the institutional competence, experience, or accountability to make such military judgments at the core of the war-making powers."
- On the question of the Geneva Conventions, the brief argues, Judge Green's contention that Taleban detainees picked up in Afghanistan should have been presumed to have prisoner of war status is "inconsistent with the deference owed to the President as Commander-in-Chief" who had unilaterally decided otherwise.[6]

This brief is perhaps an unsurprising response from an administration whose outgoing Attorney General decried what he characterized as "intrusive judicial oversight and second-guessing of presidential determinations";[7] whose Justice Department formulated the position, accepted by the White House Counsel, that the President – who apparently believes that there are people who are "not legally entitled" to humane treatment[8] – could override the national and international prohibition on torture;[9] and whose Secretary of Defense has authorized interrogation techniques that violate international law and standards.[10] This is an administration that has sought unchecked power throughout the "war on terror" and shown a

[6] *Al Odah et al. v. USA et al.* Opening brief for the United States. In the US Court of Appeals for the District of Columbia Circuit, 27 April 2005 (internal quotation marks omitted).
[7] See, for example, *Ashcroft criticizes judicial oversight*, Associated Press, 13 November 2004.
[8] President George W. Bush. Subject: Humane treatment of al Qaeda and Taliban detainees. The White House, 7 February 2002. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf.
[9] Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A., Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002, http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.
[10] Action memo. For Secretary of Defense, from William J. Haynes, General Counsel. Counter-Resistance Techniques. 27 November 2002. Approved by Secretary of Defense Donald Rumsfeld, 2 December 2002. http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf.

chilling disregard for international law. The USA's policies and practices have led to serious human rights violations and have set a dangerous precedent internationally.

USA's "war on terror" detainees, April 2005 (approximate totals/estimates)[11]	
USA: Naval Brig, Charleston, South Carolina	2 "enemy combatants"
Cuba: Guantánamo Bay naval base	520 (234 releases/transfers)
Afghanistan: Bagram air base	300
Afghanistan: Kandahar air base	250
Afghanistan: other US facilities (forward operating bases)	Unknown: estimated at scores of detainees
Iraq: Camp Bucca	6,300
Iraq: Abu Ghraib prison	3,500
Iraq: Camp Cropper	110
Iraq: Other US facilities	1,300
Worldwide: CIA facilities, undisclosed locations	Unknown: estimated at 40 detainees
Worldwide: In custody of other governments at behest of USA	Unknown: estimated at several thousand detainees
Worldwide: Secret transfers of detainees to third countries	Unknown: estimated at 100 to 150 detainees
Foreign nationals held outside the USA and charged for trial	4
Trials of foreign nationals held in US custody outside the USA	0
Total number of detainees held outside the USA by the US during "war on terror"	70,000

Section 5 of the report points to an overarching war mentality adopted by the US administration since 11 September 2001 which has led it to manipulate or jettison basic human rights protections for detainees, including instances of the USA refusing to recognize that United Nations human rights experts have the mandate to raise concerns about US actions in the "war on terror". For example, UN Special Rapporteurs have raised allegations of extrajudicial executions by US forces, only to have the US reject such concerns out of hand. In April 2005, the mandate of the UN Independent Expert on the Situation of Human Rights in Afghanistan was not renewed. This is alleged to have been the result of US government pressure. The former postholder has said that he believes the non-renewal of his mandate was due to the USA's dislike of his insistence that he should be allowed to visit detainees in US custody in Afghanistan, particularly in light of allegations of torture and ill-treatment of such detainees.

Over a year after the Abu Ghraib torture scandal broke, and as evidence of torture and other cruel, inhuman or degrading treatment by US forces in the "war on terror" continues to mount, not one US agent has been charged with "war crimes" or "torture" under US law (see Section 12). In over 70 per cent of announced official actions taken in response to substantiated allegations of abuse, the punishment has been non-judicial or administrative. While a small

[11] Sources: *US to expand prison facilities in Iraq*, Washington Post, 9 May 2005; *Detainee transfer announced*, Department of Defense News Release, 26 April 2005; *ICRC operational update*, International Committee of the Red Cross, 29 March 2005; Department of Defense Briefing on Detention Operations and Interrogation Techniques, US Department of Defense, 10 March 2005; *Rule change lets CIA freely send suspects abroad to jails*, New York Times, 6 March 2005.

number of mainly low-ranking soldiers have been subjected to courts-martial, members of the administration, who from the outset have claimed that the USA treats all detainees humanely and that any abuses have been the actions of a few aberrant soldiers, have remained free of independent investigation despite possible criminal responsibility in abuses. Congress has failed to initiate an independent commission of inquiry, as Amnesty International has sought. The current Attorney General, like his predecessor possibly involved in a conspiracy to immunize US agents from criminal liability for torture and war crimes under US law, has not appointed a special prosecutor to pursue this matter as Amnesty International and others have urged.

As the culture of impunity and military leniency grows, including in cases in which Afghan and Iraqi detainees have died as a result of abuses by US agents (see Section 13 and Appendix 1), the administration continues to seek to try members of the "enemy" for war crimes in front of military commissions – executive bodies, not independent or impartial courts. It has appealed a federal court ruling that the military commission procedures are unlawful because the defendant can be excluded from proceedings. In Section 10, Amnesty International reiterates its total opposition to the military commissions, which violate international fair trial standards in numerous ways.

Only foreign nationals can be tried by military commissions, violating the international rule that "all persons shall be equal before the courts and tribunals".[12] However, the administration is also violating fundamental human rights at home. As described in Section 16, a US "enemy combatant", José Padilla, will soon enter his fourth year in untried executive detention on the US mainland. The administration has appealed a recent federal court ruling that he should be released. A court decision is awaited in the case of a Qatari national who remains in military custody in South Carolina nearly two years after he was removed from the ordinary criminal justice system by President Bush who designated him as an "enemy combatant". Ali Saleh Kahlah al-Marri has now been detained for almost three and a half years, all in solitary confinement, raising serious concerns for his well-being and providing further evidence of the US administration's willingness to violate human rights in the name of national security. Meanwhile, the administration is continuing to seek the execution of Zacarias Moussaoui, so far the only person charged in the USA in relation to the attacks of 11 September 2001. The case of this French national is described in Section 11.

Thousands of detainees remain in US custody in Iraq – a country which President Bush repeated on 12 April 2005 has become "a central front in the war on terror" since the US-led invasion in March 2003.[13] Hundreds remain in US custody in Afghanistan, with some in Bagram air base having been detained without trial and virtually incommunicado for more than a year. The International Committee of the Red Cross (ICRC), the only international organization with access to some of the detainees in Afghanistan, reiterated on 29 March 2005 that it was "increasingly concerned by the fact that the US authorities have not resolved the question of their legal status and of the applicable legal framework".[14] In addition, the USA is holding an unknown number of detainees in secret incommunicado custody in unknown locations and unknown conditions in cases that may amount to "disappearance". Evidence that the US authorities have "outsourced" torture via secret detainee transfers to other countries continues to come to light, as described in Section 14.

Now, as it faces possible further setbacks in the courts, the administration is said to be intending to outsource some of its Guantánamo detentions to other countries. In late March 2005, a federal court issued an order directing the government to give 30 days' notice before

[12] Article 14(1), International Covenant on Civil and Political Rights, ratified by the USA in 1992.
[13] *President discusses war on terror*, Fort Hood, Texas, 12 April 2005.
[14] ICRC operational update, 29 March 2005.

transferring any one of 13 Yemeni detainees. Other judges have issued similar orders, but on 14 April 2005, a federal judge refused to issue such an order in the case of six Bahraini nationals, and a week later another judge did the same. Section 15 of this report highlights the question of transfers from Guantánamo, and also describes the recent case of a US national held in Saudi Arabia, Ahmed Abu Ali. His is alleged to have been a case of an outsourced detention, during which he was allegedly subjected to torture and ill-treatment. It appears to have been only the threat of US court action forcing the administration to reveal information on the case that secured the detainee's return to the USA. In the "war on terror", it seems, the USA is prepared to have countries it annually criticizes in its State Department human rights reports do its dirty work for it. The judiciary and the legislature must do all they can to assert a check on the executive.

On 6 May 2005, three and a half years late, the USA submitted its Second Periodic Report to the Committee against Torture, the expert body established by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to oversee implementation of that treaty. The USA's Initial Report to the Committee had been submitted in October 1999, with the Committee's findings and recommendations made in May 2000.[15] On 21 May 2004, a few weeks after the Abu Ghraib scandal became public, the Committee had asked the USA to provide it with updated information on US detentions in Iraq as part of its Second Periodic Report. In an Annex to this report just filed, which covers the period up to 1 March 2005, the US government provides information on detentions in Iraq, Afghanistan and Guantánamo Bay, including the post-*Rasul* legal framework. The US administration prefaces this information with the following:

> "*Since the Initial Report, with the attacks against the United States of September 11, 2001, global terrorism has fundamentally altered our world. In fighting terrorism, the US remains committed to respecting the rule of law, including the US Constitution, federal statutes, and international treaty obligations, including the Torture Convention.*"[16]

The USA's report makes the welcome assertion, using the words of Article 2 of the CAT, that the "United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the US Government". This latter sentence serves as a reminder that words alone can never be enough and that torture must be condemned in deed as well as in word. For, at least between August 2002 and June 2004, a Justice Department memorandum to the White House narrowing the definition of torture, arguing that the President could authorize torture, suggesting defences for those accused of torture, and promoting acts that amount to cruel, inhuman or degrading treatment, represented the position of the US administration, albeit in secret. The USA's Second Periodic Report notes that "concerns have been generated" by the 1 August 2002 memorandum, which was withdrawn on 22 June 2004, two months after the Abu Ghraib torture evidence became public. The USA's report to the Committee against Torture notes that the 2002 memorandum was replaced in late December 2004. As Amnesty International points out in Section 12 below, the replacement Justice Department memorandum, while undoubtedly an improvement on its

[15] UN Doc. A/55/44. See USA: A briefing for the UN Committee against Torture, AI Index: AMR 51/56/2000, 4 May 2000, http://web.amnesty.org/library/Index/ENGAMR510562000, and *USA: A call to action by the UN Committee against Torture*, AI Index: AMR 51/107/2000, 1 July 2000, http://web.amnesty.org/library/Index/ENGAMR511072000.

[16] Second Periodic Report of the United States of America to the Committee against Torture, submitted, 6 May 2005. http://www.state.gov/g/drl/rls/45738.htm. The report had been due in November 2001.

now infamous predecessor, has left numerous concerns unanswered and left the door open to possible future abuses.

It is clear from the Second Periodic Report that the USA intends to adhere to its long-standing pick-and-choose approach to international law and standards. In its May 2000 recommendations, for example, the Committee against Torture had urged the USA to withdraw all the conditions it had attached to its ratification of CAT in 1994. This included the USA's reservation to Article 16 of the treaty which calls on the State Party to prevent cruel, inhuman or degrading treatment "in any territory under its jurisdiction". Upon ratification, the USA had said that would be bound by Article 16 only to the extent that it already was so bound under the US Constitution. In its 6 May 2005 submission to the Committee against Torture, the US administration stated that it would not withdraw this or any other conditions attached to its ratification of the CAT, as the Committee had requested, because "there have been no developments in the interim which have caused the United States to revise its view of the continuing validity and necessity of the[se] conditions".

However, there have been developments on this issue, with the USA's reservation to Article 16 being linked to abuses that have been authorized and alleged in the "war on terror", as Amnesty International pointed out in its report, *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, issued in October 2004.[17] Indeed, in January 2005, the then nominee for US Attorney General, Alberto Gonzales, wrote the following among his responses to a US Senator concerned about the nominee's possible responsibility for human rights violations in the "war on terror" and his earlier refusal to given an unequivocal answer to the question of whether or not it was legally permissible for US personnel to engage in cruel, inhuman or degrading treatment "that does not rise to the level of torture":

> "[T*he only legal prohibition on cruel, inhuman or degrading treatment comes from the international legal obligation created by the CAT itself. The Senate's reservation, however, limited Article 16 to requiring the United States to prevent conduct already prohibited by the Fifth, Eighth, and Fourteenth Amendments. Those amendments, moreover, are themselves limited in application. The Fourteenth Amendment* [right to equality before the law] *does not apply to the federal government, but rather to the States. The Eighth Amendment* [prohibition on cruel and unusual punishments] *has long been held by the Supreme Court to apply solely to punishment imposed in the criminal justice system. Finally, the Supreme Court has squarely held that the Fifth Amendment* [right to due process] *does not provide rights for aliens unconnected to the United States who are overseas. Thus, as a direct result of the reservation the Senate attached to the CAT, the Department of Justice has concluded that under Article 16 there is no legal obligation under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas*".[18]

The USA's May 2005 submission to the Committee against Torture also paints a picture of the US judicial system reasserting itself over the detentions in Guantánamo. It notes that the *habeas corpus* petitions filed in federal court involve detainees from many countries, including Yemen, Saudi Arabia, Kuwait, Morocco, Algeria, Bahrain, Tunisia, Jordan, Sudan, Syria, Mauritania, China, Egypt, Libya, Palestine, Chad, Qatar, Kazakhstan, Tajikistan, Uganda, Iraq, Australia, Canada, Somalia, Turkey, Afghanistan, Pakistan and Ethiopia. It notes that the courts have access to the CSRT records from Guantánamo, that lawyers have

[17] See pages 170-172, *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, AMR 51/145/2004, 27 October 2004, http://web.amnesty.org/library/Index/ENGAMR511452004.
[18] Responses of Alberto R. Gonzales, Nominee to be Attorney General, to the written questions of Senator Dianne Feinstein, January 2005.

been able to visit detainees in Guantánamo,[19] and that the courts "may address allegations of mistreatment that have arisen with respect to Guantanamo Bay."

The picture the administration provides to the Committee is far from full, however. It does not portray the extent to which the government is resisting due process every step of the way. By seeking the narrowest possible interpretation of the *Rasul* decision, and by appealing every court ruling that goes against it, it is ensuring that the detainees remain in their legal vacuum. Although the government's report to the Committee notes that about 55 *habeas corpus* petitions involving 153 detainees had been filed by 27 April 2005[20], it did not explain that one reason why only about a third of those still held in Guantánamo had had petitions filed on their behalf was because the government has placed obstacles in the way of detainees finding lawyers to represent them and in the way of lawyers identifying the detainees who want representation. As described in Section 6 below, there is also evidence that Guantánamo interrogators have adopted ploys to undermine detainee/lawyer relationships in those cases where legal representation has been initiated.

On the question of the treatment of detainees, the USA's report to the Committee paints a similarly one-sided picture. All "enemy combatants", it claims, "get state-of-the-art medical and dental care". Yet, as detailed further below, numerous detainees have alleged that the medical and dental care provided has been slow and on some occasions withheld as part of a punitive and coercive regime. The USA insists to the Committee that "detainees write to and receive mail from their families and friends". Yet, throughout the detentions, there has been evidence that this system of communications has been slow, over-censored, and even manipulated by the authorities to punish or coerce detainees. US *habeas* lawyers for some Yemeni detainees in Guantánamo have recently revealed that their "clients report that mail from their relatives arrives months later, if at all, and is very heavily redacted. Often the only part that they can read is the greeting, conclusion, and signature… In December 2004, [Abd Al Malik Abd Al Wahab] reported that his last piece of mail he received had been five months ago – a letter that had taken ten months to reach him. [Fellow detainee] Jamal Mar'i receives one out of every ten letters sent to him by his family. A recent letter from his seven-year-old daughter referred to many other letters that he never received." The USA's report to the Committee against Torture goes on to assert that "enemy combatants at Guantanamo may worship as desired and in accordance with their beliefs". As Amnesty International has detailed elsewhere, and updates in Section 12 of this current report, there is evidence that detainees have been subjected to religious intolerance by their captors, and to interrogation techniques that play on their particular religious sensitivities.[21]

In this report, illustrated with cases throughout, Amnesty International concludes that hypocrisy, an overarching war mentality, and a disregard for basic human rights principles and international legal obligations continue to mark the USA's "war on terror". Serious human rights violations, affecting thousands of detainees and their families, have been the result. The rule of law, and therefore, ultimately, security, is being undermined, as is any moral credibility the USA claims to have in seeking to advance human rights in the world. Indeed, the USA's conduct threatens to legitimize repressive conduct by other governments. With this report, the latest in a series of papers on US conduct in the "war on terror", Amnesty International continues to campaign for the USA to change course and bring its policies and practices into line with international law and standards.

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[19] As of late April 2005, according to the US submission to the Committee, only 74 out of more than 500 detainees, including some since released, had been seen by lawyers.
[20] By 3 May 2005, this had risen to 168 detainees (not all nationalities known) named in 61 petitions.
[21] See, for example, pages 30-36, *USA: Human dignity denied, supra*, note 17.

2. Violating human rights erodes security and trust in government

The United States strengthens its national security when it promotes... a world in which states have governments that are responsible and obey, as it were, the rules of the road.
US Under Secretary of Defense, February 2005[22]

The Department of Defense recently published on its website a six-page unclassified document giving information about the Guantánamo detainees.[23] Even providing the minimal information contained in it was an unusual step for an administration that has been highly secretive about those held in the naval base. The document begins with the following:

> "*The US Government currently maintains custody of approximately 550 enemy combatants in the Global War on Terrorism at Guantanamo Bay, Cuba.*[24] *Many of these enemy combatants are highly trained, dangerous members of al-Qaida, its related terrorist networks, and the former Taliban regime. More than 4,000 reports capture information provided by these detainees, much of it corroborated by other intelligence reporting. This unprecedented body of information has expanded our understanding of al-Qaida and other terrorist organizations and continues to prove valuable...*
>
> *The Joint Task Force, Guantanamo Bay (JTF-GTMO) remains the single best repository of al-Qaida information in the Department of Defense... GTMO is currently the only DoD strategic interrogation center and will remain useful as long as the war on terrorism is underway and new enemy combatants are captured and sent there. The lessons learned at GTMO have advanced both the operational art of intelligence, and the development of strategic interrogations doctrine.*"

The document claims that the detainees in Guantánamo, despite most of them having been held for more than three years, continue to provide "useful information" to support ongoing military operations in Afghanistan. It states that the detainees have "provided information on individuals connected to al-Qaida's pursuit of chemical, biological, and nuclear weapons". It claims that detainees have also provided "information about al-Qaida operatives who remain at large as well as numerous al-Qaida, Taliban, and anti-coalition militia members who remain active in Central Asia, Europe, and the United States." In addition, it says that detainees "provide information that helps sort out legitimate financial activity from illegitimate terrorist financing information". It gives details of the sort of skills and training that individual detainees allegedly possess:

- "Many detainees have been implicated in using, constructing, or being trained to construct IEDs [improvised explosive devices]".
- "Over 25 GTMO detainees have been identified by other detainees as being facilitators who provided money, documentation, travel, or safe houses".
- "More than 10 percent of the detainees possess college degrees or obtained other higher education, often at western colleges, many in the United States. Among these educated detainees are medical doctors, airplane pilots, aviation specialists, engineers, divers, translators, and lawyers."

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[22] Douglas J. Feith, Under Secretary of Defense for Policy, Speech to the Council of Foreign Relations, 17 February 2005.
[23] JTF-GTMO Information on Detainees.
http://www.defenselink.mil/news/Mar2005/d20050304info.pdf
[24] By 26 April 2005, according to the Pentagon, "approximately 520" detainees remained in Guantánamo, following the release that day of two detainees "to the control of the Belgian government".

In addition, the Pentagon document asserts that "we know of several former detainees from JTF-GTMO that have rejoined the fight against coalition forces. We have been able to identify at least ten by name… Several former GTMO detainees have been killed in combat with US soldiers and Coalition forces." The document also lists some alleged statements and actions by detainees which "provide valuable insights into the mindset of these terrorists and the continuing threat they pose to the United States and the rest of the world". It provides as an example a case of a detainee who, when informed about the Combatant Status Review Tribunal process (see below), is alleged to have responded, "Not only am I thinking about threatening the American public, but the whole world". Another detainee has allegedly repeatedly stated that "the United States government is criminals". The document concludes with some "contrasting detainee comments", such as from a detainee who allegedly said: "If people say there is mistreatment in Cuba with the detainees, those type speaking are wrong, they treat us like a Muslim not a detainee".

It is, of course, impossible to verify the claims made in the Pentagon's document, precisely because of the secrecy and rejection of judicial or other independent scrutiny that has marked the US administration's detention policies and practices. It should further be noted that the document has been issued at a time when the administration is doing all it can to persuade the US courts to leave this policy broadly free of judicial scrutiny. In addition, Amnesty International would make a number of points in response to the Pentagon document.

- The USA and other countries face serious security threats, including those posed by groups determined to pursue their fight by abusing fundamental human rights without restraint. Governments have a duty to protect people's rights from such threats. In so doing, however, governments must not lose sight of other human rights and of their obligation to respect them;
- Respect for human rights is the route to security not an obstacle to it. This is recognized by the USA's own National Security Strategy, which devotes an entire chapter to asserting that in its pursuit of security, the USA will "stand firmly for the non-negotiable demands of human dignity", including the rule of law. Likewise, the USA's National Strategy for Combating Terrorism concludes that "a world in which these values are embraced as standards, not exceptions, will be the best antidote to the spread of terrorism";
- There have been massive failures in US intelligence-gathering, both prior to the attacks of 11 September 2001 and in the context of the stated reasons for invading Iraq. Using detainees held indefinitely outside the rule of law in order to attempt to make up for past intelligence failures through prolonged interrogation is immoral, unlawful, unreliable and counter-productive;
- Throughout the "war on terror", senior members of the US administration have shown contempt for the presumption of innocence by collectively labelling the Guantánamo detainees as "terrorists" and "killers". The Pentagon document persists in this attitude. This repeated contravention of a basic principle is also dangerous for the detainees. To be labelled as a "terrorist" is no small thing, and can put a detainee at future risk when eventually released. Mohammad Neehle, seized by US agents in Bosnia and Herzegovina in January 2002 and transported to Guantánamo Bay where he remains more than three years later, has summed it up thus: "*In the end the way that this happened, the way I was brought here and the accusations that brought*

against me, I feel that my future has been destroyed. A person does not even know what to say to their kids now. That's a really big thing."[25]

- Prior to the publication of this document, scores of people had been released from Guantánamo without charge or trial. They, too, had been labelled by the administration as "enemy combatants" and "terrorists". On return to their countries, the vast majority have been released. Their home governments evidently either believed that there was no evidence against the detainees, or that any evidence was inadequate, unreliable or inadmissible.

Yet, still, the Pentagon document asks the reader to take its claims on trust. The problem faced by the US administration is that its record in relation to detentions in the "war on terror" has undermined the credibility of its assertions, whether those assertions take the form of a stated commitment to human rights, or claims of threats averted due to intelligence gathered through interrogation. The administration has sought, and continues to seek, unchecked power for itself. As it has done so, violations of fundamental human rights have occurred or been proposed, including prolonged incommunicado, secret and arbitrary detentions, torture and other cruel, inhuman or degrading treatment, unfair trial proceedings, detainee transfers without protections, and denial of and resistance to judicial review.

In a recent report to the UN General Assembly, Secretary General Kofi Annan wrote:

"*The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability. No security agenda and no drive for development will be successful unless they are based on the sure foundation of respect for human dignity...*

I strongly believe that every nation that proclaims the rule of law at home must respect it abroad and that every nation that insists on it abroad must enforce it at home...

It would be a mistake to treat human rights as though there were a trade-off to be made between human rights and such goals as security or development. We only weaken our hand in fighting the horrors of extreme poverty or terrorism if, in our efforts to do so, we deny the very human rights that these scourges take away from citizens. Strategies based on the protection of human rights are vital for both our moral standing and the practical effectiveness of our actions."[26]

A much repeated but so far hollow promise of President Bush's administration has been that the USA will adhere to fundamental principles of human dignity and the rule of law, including in the context of the "war on terror". The USA cannot have it both ways. It cannot speak the language of human rights while at the same time violating human rights and disregarding international law. Either it is for human rights in deed as well as in word, or it will continue to be denounced as a human rights violator and, especially given its power, reach and influence in the world, a global threat to the rule of law and security.

Whatever the truth about the identities, motivations, associations, previous activities of and threats posed by the detainees in US custody, none of them fall outside the protections of international law as the US administration's policies and practices would suggest.

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[25] *Nechle v. Bush*. Unclassified records of Combatant Status Review Tribunal, In the US District Court for the District of Columbia.

[26] *In larger freedom: towards development, security and human rights for all.* Report of the Secretary General, UN Doc. A/9/2005, 21 March 2005, paras. 128, 133 and 140.

3. Guantánamo detainees – the international legal framework

Conformity with international human rights and humanitarian law is not a weakness in the fight against terrorism but a weapon, ensuring the widest international support for actions and avoiding situations which could provoke misplaced sympathy for terrorists or their causes... [T]he Assembly considers that the US Government has betrayed its own highest principles in the zeal with which it has attempted to pursue the "war on terror". These errors have perhaps been most manifest in relation to Guantánamo Bay.

Parliamentary Assembly of the Council of Europe, 26 April 2005[27]

The international armed conflict in Afghanistan ended in June 2002.[28] When that armed conflict ended, those who were captured by the USA during hostilities[29] - and who the USA was obliged to treat as prisoners of war in the absence of a determination "by a competent tribunal" that they were not[30] - were required to be released, unless charged with criminal offences.[31]

Civilians detained in that conflict were entitled to have their detention ("internment") reviewed "as soon as possible" by a "court or administrative board."[32] They too were required, when that conflict ended, to be released, unless charged with recognized criminal offences.[33]

Those detained later in Afghanistan, for reasons related to the subsequent non-international armed conflict there[34] and transferred to Guantánamo were required, as a minimum, to have their detention promptly, and thereafter periodically, reviewed.[35]

Those detained in countries outside of the zones of armed conflict and transferred to Guantánamo should always have been treated as criminal suspects, therefore subject to international human rights law, including the right to a prompt judicial review of the lawfulness of their detention and to release if that detention is deemed unlawful, and if prosecuted to be tried in proceedings which meet international standards of fairness (see below).[36]

The USA has applied none of the above-mentioned provisions of international humanitarian law and international human rights law in determining the status of the Guantánamo detainees:

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[27] *Lawfulness of detentions by the United States in Guantánamo Bay*, Resolution 1433 (2005) http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1433.htm

[28] The conflict is deemed to have ended with the conclusion of the Emergency Loya Jirga and the establishment of a Transitional Authority on 19 June 2002.

[29] Geneva Convention III, Art. 4 uses the term "persons [belonging to certain categories]... who have fallen into the power of the enemy".

[30] Geneva Convention III, Art. 5.

[31] Geneva Convention III, Part III, Part IV Section II.

[32] Geneva Convention IV, Art. 43.

[33] Geneva Convention IV, Art. 133.

[34] The current conflict in Afghanistan is a non-international armed conflict, to which an international legal framework applies that is different from an international one, mainly Article 3 Common to the Geneva Conventions, rules of customary international law and international human rights law.

[35] Under rules of customary international law applicable to non-international armed conflict, comprising also of relevant rules of international law human rights law. See, for instance, The International Committee of the Red Cross (Jean-Marie Henckaerts and Louise Doswald-Beck, eds.), *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge: Cambridge University Press, 2005), pp. 347-352.

[36] See for instance International Covenant on Civil and Political Rights, Articles 9(3) and 9(4).

- it has not treated those captured during the international armed conflict in Afghanistan initially as prisoners of war, pending determination of their status by a court;
- it has not convened a court to determine whether or not persons captured during the international armed conflict in Afghanistan are entitled to prisoner of war status;
- it has not reviewed promptly the detention of those captured during the subsequent non-international armed conflict in Afghanistan;
- it has not brought the detention of civilians promptly under judicial review, tried or released them;
- it did not, at the close of international hostilites, release the detainees captured during hostilities, with the exception of those against whom criminal procedures had been initiated – in fact, the USA initiated no such procedures.

More than 200 people have been released or transferred from the base, but the USA was expressly acting, in this as well as in other matters, in pursuit of it own perceived interests, rather than in compliance with its international legal obligations. As noted further below, the USA has denied having any such obligations regarding the detainees in Guantánamo.

In view of the above, Amnesty International believes that all those currently held in Guantánamo are arbitrarily and unlawfully detained. It continues to call on the USA to either:

- Release and repatriate the Guantánamo detainees, subject to international law and standards, including the prohibition of returning or transferring a person to a country where he or she faces a risk of torture, other ill-treatment, unfair trial, "disappearance", arbitrary detention or the death penalty;

or:

- Prosecute those suspected of committing internationally recognizable criminal offences[37] in proceedings that meet international standards of fairness, and which do not include the imposition of the death penalty.

Fair trial standards

Any trials, whatever the status of the person being tried, must be carried out in proceedings that meet international standards of fairness.[38] These standards include:

- All persons must be equal before the courts and tribunals;
- Charges must be for internationally recognisable criminal offences;
- Trials must commence within a reasonable time;
- All persons are entitled to a fair and public[39] hearing by a competent, independent and impartial tribunal established by law;[40]

[37] Prisoners of wars cannot be charged in connection with their lawful conduct of hostilities.

[38] See especially Article 14 of the ICCPR, Articles 1, 2(2), 15 and 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

[39] According to Article 14(1) of the ICCPR, "*The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except*

- All persons must be presumed innocent until proven guilty;
- All persons must have full access to legal counsel of their own choosing, and have adequate time to prepare their defence;
- All persons must be informed promptly and in detail in a language which they understand of the nature and cause of the charge against them;
- All persons must be tried in their presence;
- All persons must be able to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
- No persons must be compelled to testify against themselves or to confess guilt;
- Statements or any other material obtained by torture or by cruel, inhuman or degrading treatment or punishment must not be admissible as evidence (except as evidence that such treatment took place);
- All persons convicted of a crime must have the right to have their conviction and sentence reviewed by a higher tribunal according to law. Reviews must be made by competent, independent and impartial tribunals, be genuine and go beyond formal verifications of procedural requirements.

Amnesty International believes that the death penalty must never be imposed, as it violates the right to life and is the ultimate cruel, inhuman and degrading punishment.

4. Hypocrisy vs. human rights

Societies that respect the rule of law do not provide the executive a blanket authority even in dealing with exceptional situations. They embrace the vital roles of the judiciary and the legislature in ensuring that governments take a balanced and lawful approach to complex issues of national interest.

United Nations High Commissioner for Human Rights, 2004[41]

On or around 29 November 2003, an unidentified shepherd was taken into custody by US soldiers near Husaybah in Iraq. A year later, documents obtained under a freedom of information lawsuit filed by the American Civil Liberties Union (ACLU) and others revealed that about an hour after the man was detained, one of the soldiers had made a video recording described as "his own version of the MTV show 'Jackass'".[42] A little under a minute in length, the video begins with the handcuffed detainee being asked to wave to the camera. The soldier then turns to the camera and states, "I am going to punch this guy in the stomach, this is Jackass Iraq". He goes to punch the detainee who manages to avoid a direct hit, causing the

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where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

[40] Principle 5 of the UN Basic Principles on the Independence of the Judiciary states: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals". Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[41] *Security under the rule of law*. Keynote address of Louise Arbour, UN High Commissioner for Human Rights. Biennial Conference of the International Commission of Jurists, Berlin, 27 August 2004.

[42] In the MTV series *Jackass*, consenting adults are filmed engaged in dangerous and puerile stunts.

soldier to respond, "oh, he moved, hold up, he's a trickster, we need a camera man". The video then shows "an elbow com[ing] straight down in between the detainee's shoulder blade [sic]". It "shows the detainee's face and what appears to be an expression of pain as he is going down to the ground…The detainee is helped back up by [a soldier] lifting him by the flexi cuffs on his wrists… His face is noticeably distressed…"[43]

The film, variously called "Jackass Iraq", "Our first Iraqi prisoner" and "Our Prisoner (The Smash)", was then shown widely on digital camera and laptop computers to other soldiers. An army investigation found that "none of the soldiers took it seriously", rejecting the notion that the detainee was being abused. Neither of the soldiers directly involved in making the video "thought that anything they were doing was wrong."[44] Neither, it would seem, does the US administration believe that it has done anything fundamentally wrong in its "war on terror" detention and interrogation policies and practices.

In the build-up to declaring war on Iraq, the US administration cited the Iraqi government's disregard for UN Security Council resolutions as well as findings by UN bodies that the government of Saddam Hussein had committed human rights violations.[45] In an address to the UN General Assembly on 12 September 2002, President George W. Bush asked: "Are Security Council resolutions to be honoured and enforced, or cast aside without consequence?" He continued: "We want the United Nations to be effective, and respected, and successful. We want the resolutions of the world's most important multilateral body to be enforced. And right now those resolutions are being unilaterally subverted by the Iraqi regime."

The USA must look to its own conduct. Both before and since the invasion of Iraq in March 2003, which itself was premised on flawed intelligence[46] as well as information allegedly extracted under torture or ill-treatment,[47] the US administration's own policies and practices in the "war on terror" have contravened Security Council resolutions as well as recommendations of UN experts and bodies. For example, in Resolution 1456, adopted two months before the US-led invasion of Iraq, the United Nations Security Council declared that

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[43] Department of the Army. Headquarters and Headquarters Company, 187th Infantry Regiment. Memorandum for Col [Redacted]. Subject: Commander's inquiry. Dated: 10 May 2004. This was released to the American Civil Liberties Union pursuant to a Freedom of Information Act request (see below and see www.aclu.org. www.aclu.org.

[44] *Ibid.* Nevertheless, the army investigation concluded, "the fact that this incident was done as entertainment…does not change the fact that a detainee under US military custody was abused and publicly humiliated". Amnesty International does not know what action, if any, was taken against the soldiers involved.

[45] *A Decade of Deception and Defiance. Saddam Hussein's Defiance of the United Nations.* The White House, 12 September 2002. http://www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf.

[46] "We conclude that the Intelligence Community was dead wrong in almost all of its pre-war judgments about Iraq's weapons of mass destruction. This was a major intelligence failure". Letter to President George W. Bush from the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, transmitting the Commission's final report. 31 March 2005.

[47] Secretary of State Colin Powell told the UN Security Council in February 2003 that a "senior terrorist operative" had provided information that the government of Iraq had offered chemical and biological weapons training to *al-Qa'ida*. This is believed to refer to Ibn al-Shaikh al-Libi, a Libyan national who was arrested in Pakistan in November 2001 and transferred to secret US custody in January 2002. According to a former FBI officer, the CIA and FBI vied with each other for control of the detainee. The CIA eventually gained the upper hand, and was given permission to use "enhanced interrogation techniques" against "high-value" detainees. Al-Libi was reportedly later transferred to Egypt for interrogation. Al-Libi is said to have since recanted this information. See, for example, *Torture: The dirty business.* Dispatches, Channel 4 TV (UK), 1 March 2005. Al-Libi's whereabouts remain unknown, although it has been reported that he was eventually taken to Guantánamo Bay.

"States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law".[48] Further resolutions adopted by the Security Council and the General Assembly since then have reminded states of this obligation.[49] The USA has failed to amend its conduct accordingly. At the same time, it has continued to promote itself as a global human rights champion. According to the US State Department, launching its latest report on human rights in countries other than the USA, "Promoting human rights is not just an element of our foreign policy – it is the bedrock of our policy, and our foremost concern".[50]

For the past three years, the entry on Bosnia and Herzegovina in the US State Department's annual Country Reports on Human Rights Practices has, under the heading "arbitrary arrest, detention or exile", reported developments in the case of "six Algerian terrorism suspects" who were transferred "to the custody of a foreign government" in January 2002.[51] The transfer bypassed the courts and an order of the Human Rights Chamber of Bosnia and Herzegovina, and violated international law.[52] The US State Department reported that in 2002 and 2003, the Human Rights Chamber ruled that the treatment of the men had violated their treaty-based human rights, including the right not to be arbitrarily deported in the absence of a fair procedure. In its latest report, issued on 28 February 2005, the State Department noted that the families of the men "transferred to a foreign government's custody" had not yet been paid the compensation ordered by the Human Rights Chamber.

What the State Department has so far failed to point out is that the mysterious "foreign government" in question is that of the United States of America. It fails to report that the men in question, extrajudicially removed from the sovereign territory of Bosnia and Herzegovina, have for the past three years been held in virtually incommunicado executive detention without charge or trial in the US Naval Base in Guantánamo Bay in Cuba. There is no mention by the State Department of the fact that the US authorities have responded to the recent *habeas corpus* petitions of the men by asserting that they have no rights under treaty or customary international law to be able to challenge the lawfulness of their detention. It failed to reveal that in hearings in 2004 the men were instead given a purely executive review of their detention for which they were allowed neither legal counsel nor access to classified evidence. At his so-called Combatant Status Review Tribunal (CSRT) hearing in October 2004 one of the six men, Mohammed Neehle, said:

> "*We were surprised that we were handed over to the American forces that are present in Bosnia. We were bound by our hands and our feet, and we were treated the worst treatment. For 36 hours without food, sleep, water or anything and we were treated*

[48] UN Doc. S/RES/1456 (2003), 20 January 2003.
[49] UN Doc. S/RES/1535 (2004); UN Doc. S/RES/1566 (2004); UN Doc. A/RES/58/187, 22 March 2004.
[50] Remarks upon the State Department's release of its Country Reports on Human Rights Practices for 2004, Paula J. Dobriansky, Under Secretary of State for Global Affairs, Washington, 28 February 2005.
[51] Country Reports on Human Rights Practices 2004. Bureau of Democracy, Human Rights and Labor, US Department of State. Issued on 28 February 2005. For the reports and entries cited in this paper, see http://www.state.gov/g/drl/hr/c1470.htm.
[52] Under the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords), the Human Rights Chamber was vested with the authority to issue decisions binding on both entities as well as the state authorities of Bosnia and Herzegovina (BiH). The Human Rights Chamber closed down in December 2003. A special Human Rights Commission within the BiH Constitutional Court has been established with the task of dealing with the backlog of cases registered with the Human Rights Chamber before its closure.

the worst treatment... I used to think that America had respect for human rights when it came to prison." [53]

The State Department also failed to report that another of the men, Mustafa Ait Idir, alleged at his CSRT hearing in 2004 that he has been subjected to torture or ill-treatment at Guantánamo. A lawsuit filed in US court in April 2005 alleges that the following occurred against him during a cell search:

"*The guards secured his hands behind his back and, while he was so restrained, the guards picked him up and slammed his body and his head into the steel bunk in his cell. They then threw him on the floor and continued to pound his body and bang his head into the floor. The guards picked him up again and banged his head on the toilet in his cell. The guards picked him up again, stuffed Mr Ait Idir's face in the toilet and repeatedly pressed the flush button. Mr Ait Idir was starting to suffocate, and he feared he would drown. The guards then carried Mr Ait Idir outside the cell and threw him on the ground. His hands still were manacled behind his back. They held him down and pushed a garden hose into his mouth. They opened the spigot. As the water rushed in, Mr Ait Idir began to choke. The water was coming out of his mouth and nose. He could not breathe, and he could not yell to stop or for help. The guards then took the hose out of his mouth and held it approximately 6 to 10 inches in front of his face. He was still being restrained. The water ran full force into his face; he could not breathe.*"

On another occasion, it is alleged that members of an Immediate Response Force (IRF) at Guantánamo assaulted him:

"*While Mr Ait Idir sat on the floor as instructed, the officer sprayed chemical irritant directly into Mr Ait Idir's face. Two or three guards immediately entered the cell while he was lying on the floor. One forced Mr Ait Idir's body onto the steel floor of the cell and jumped on his back, using his knees to pound Mr Ait Idir's body into the floor. The second guard did the same thing. While they had Mr Ait Idir pinned, the guards secured his hands behind his back. He was carried out and thrown onto the crushed stones that surround the cell building. While Mr Ait Idir was lying bound on the stones, an IRF member jumped onto the side of Mr Ait Idir's head with his full body weight, causing extreme pain. Another IRF member climbed onto Mr Ait Idir's back, and while on his back, the IRF members twisted his middle finger and thumb on his right hand almost to the point of breaking. Two of his knuckles were dislocated, and he screamed in pain. His middle finger has almost no strength now. He requested and was refused any medical treatment for the permanent injuries inflicted by the guards.*

Upon information and belief, as a result of that beating, Mr Aid Idir suffered a stroke. Shortly after that incident, one half of his face became paralyzed. He was in pain. He could not eat normally; food and drink leaked from his non-functioning mouth. Guards teased him because of his condition. Despite visible impairment and his request to go to the hospital, he did not receive medical treatment for ten days."[54]

The six men of Algerian origin had been arrested in October 2001 by the Bosnian Federation police on suspicion of involvement in an alleged plot to bomb the US Embassy in

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[53] *Nechle v. Bush*. Unclassified records of Combatant Status Review Tribunal, In the US District Court for the District of Columbia.

[54] *Oleskey v. US Department of Defense and Department of Justice*. Complaint. US District Court, District of Massachusetts. The lawsuit is seeking enforcement of a Freedom of Information Act request for the government to release any photographic, medical or other evidence on the cases.

Sarajevo. On 17 January 2002, the Investigative Judge of the Federation Supreme Court ordered their release on the basis that there were no further grounds for their detention. Although the US Embassy had indicated that it had evidence linking the men to *al-Qa'ida* networks and substantiating the allegations of planning the embassy attacks, the US authorities did not submit any such evidence to the Supreme Court. One of the men, Boudella Al Haji, questioned about the alleged bombing conspiracy at his CSRT hearing in Guantánamo on 18 October 2004, said:

> "*I've been here for three years and these accusations were just told to me. Nobody or any interrogator ever mentioned any of these accusations you are talking to me about now. I've been here for three years, been through many interrogations and no interrogator ever mentioned any of these accusations, so how did they come up just now?*"[55]

Another of the six men told Sabir Lahmar said the same thing at his CSRT hearing on 8 October 2004:

> "*From my first day in Cuba, I asked the interrogators to question me regarding the bombing of the Embassy. They tried to avoid asking me questions regarding that matter. On occasion, they told me they knew I didn't attempt to blow up the Embassy; they only brought me to Cuba for information. They told me if I gave them information, they would let me go. I refused to talk to them until they addressed the accusation of the bombing of the Embassy. This lasted for eight months before they gave up on me talking. I was punished and placed in solitary confinement for three months.*"[56]

In similar vein, Mohammad Nechle told the CSRT on 19 October 2004:

> "*We came to this place so they could interrogate us. Now I have been here three years. Unfortunately I thought the case was about an American embassy and up until now, no one has directed one question towards me regarding this case. Believe me, I came to this place as a mistake and I think that I was wronged. It was unfair to me... I have a clear conscience that I am not part of these terrorist organizations. I am not afraid of anything because I am not a terrorist. If you interrogated me for 20 years you would find that I am Mohammed Nechle...*"

In March 2005, the Bosnia and Herzegovina Council of Ministers sent an official request to the USA calling for the release of the detainees. The US Secretary of State reportedly responded in a letter indicating that the men would not be released as the US authorities needed to investigate them further. It remains to be seen how the State Department will report on these developments in its next human rights publication.

As this case suggests, three and a half years into its broadly-defined "war on terror", the United States administration is still seeking – and assuming – *carte blanche* to detain without judicial review any foreign national it broadly defines as an "enemy combatant", regardless of where outside the USA the detention takes place, and regardless of whether the person seized was directly involved in any armed hostilities. According to the administration, such a detainee can be detained without charge or trial until it, the executive, determines that he or she has no "intelligence value" or poses no threat to the USA or its allies, or until the end of the "war", which, even if recognized, could occur after a detainee's natural lifespan.

Meanwhile, the USA criticizes other countries for their failure to comply with international human rights law and standards. For example, the State Department's latest

[55] *Al Haji v. Bush*, Factual return from CSRT hearings. US District Court for the District of Columbia.
[56] *Lahmar v. Bush*. CSRT unclassified factual return. US District Court for the District of Columbia.

entry on human rights in North Korea includes the following under the heading "arbitrary arrest or detention":

> "*There are no restrictions on the ability of the Government to detain and imprison persons at will and to hold them incommunicado. Family members and other concerned persons reportedly find it virtually impossible to obtain information on charges against detained persons or the length of their sentences. Judicial review of detentions does not exist in law or practice*".

Iran is likewise criticized by the USA for the lack of a time limit, in practice, on incommunicado detention and the absence of "any judicial means to determine the legality of detention". In similar vein, Myanmar (Burma) is brought to task by the US State Department for its record of arbitrary arrest and incommunicado detention facilitated by the fact that "there is no provision in the law for judicial determination of the legality of detention".

Amnesty International welcomes the State Department reports in principle. Under the Universal Declaration of Human Rights, countries are required to "promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance". A government makes a mockery of this commitment, however, when it violates the same rights it says it expects others to respect.[57] Moreover, such an approach undermines the whole system of legal protections. Why should any other government not then follow the example set, especially if that example is being set by one of the most powerful and influential countries in the world?

The US Supreme Court's ruling in *Rasul v. Bush* on 28 June 2004 that the federal courts have jurisdiction to consider *habeas corpus* appeals from foreign detainees held in Guantánamo Bay raised hopes that, at a minimum, judicial review of the lawfulness of these detentions, and eventually the detention of foreign nationals held in incommunicado or secret detention elsewhere outside US sovereign territory, would occur forthwith. These hopes have been put on hold in the face of an executive arguing for the courts to effectively empty the *Rasul* decision of any real meaning.

In January 2005, two federal judges issued the first interpretations of the *Rasul* ruling when they responded to *habeas corpus* petitions from Guantánamo detainees, some of whom by now had been held for three years without charge or trial. One of the judges ruled in favour of the government, while the other showed respect for the fundamental human rights of the detainees (see further below). The administration is appealing to have the conflict between the two rulings resolved in its favour. Its refusal to recognize international law and standards relating to detention is keeping the detainees in their legal limbo and their families in distress. Even if the government eventually loses again in the US Supreme Court, such a ruling may not occur until some time in 2006, and only then would judicial review on the merits begin.

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[57] The State Department reports do not include an entry on the USA. In the context of the "war on terror", this has led to bizarre gaps in reporting on the countries that the USA has invaded. So, for example, the entry on human rights in Iraq in 2003 covers only up to the fall of the government of Saddam Hussein on 9 April 2003. The next report published in February 2005, picks up only from 28 June 2004 when the Interim Iraqi Government took office. The gap in reporting from 10 April 2003 to 27 June 2004 covers a period when US forces were allegedly responsible for widespread abuses against detainees in Iraq, including the torture scandal at Abu Ghraib prison. The report covering 2003 describes Abu Ghraib as one of the prisons "infamous for routine mistreatment of detainees and prisoners" under Saddam Hussein. When the report was published in February 2004, the photographs of US soldiers torturing and ill-treating detainees in Abu Ghraib had not been leaked, although the US authorities already had them in their possession. However, even in the latest report, no reference to this scandal was made.

Judicial review of the lawfulness of detentions is a fundamental safeguard against arbitrary detention, torture and ill-treatment, and "disappearance". Unsurprisingly, then, with the US courts having been kept out of reviewing the cases for more than three years, there is evidence that all these categories of abuse have occurred at the hands of US authorities in the "war on terror". Indeed, Amnesty International believes that abuses have been the result of official policies and policy failures and linked to the executive decision to leave detainees unprotected by not only the courts, but also by the prohibition on torture and other cruel, inhuman or degrading treatment as defined under international humanitarian and human rights treaties binding on the USA. The US administration still does not believe itself legally bound by the Geneva Conventions in relation to the detainees in Guantánamo, Afghanistan and in secret locations, by customary international law, or by the human rights treaty prohibition on the use of cruel, inhuman or degrading treatment in the case of foreign detainees in US custody held outside of US sovereign territory. Nor has it expressly abandoned the notion that the President may in times of war ignore all the USA's international legal obligations and order torture, or that torturers may be exempted from criminal liability by entering a plea of "necessity" or "self-defence" (see below).

Neither, apparently, does the administration consider itself bound by the international prohibition against transferring or returning anyone to a country where they may face torture or other cruel, inhuman or degrading treatment. Indeed, there is evidence that the USA has turned this prohibition on its head and "outsourced" torture. It is alleged that countries with a record of torture – as documented by the US State Department annually – have been specifically selected to receive certain "war on terror" detainees for interrogation. A recent report quotes a former counterterrorism agent as saying that after 11 September 2001, "Egypt, Jordan, Malaysia, Thailand, Indonesia, Pakistan, Uzbekistan and even Syria were all asked to make their detention facilities and expert interrogators available to the US".[58]

Numerous detainees are alleged to have been threatened by US interrogators that they will be sent to such countries. For example, Yemeni Guantánamo detainee Abd Al Malik Al Wahab has allegedly been threatened with transfer to Egypt or Jordan where, he says he was told by interrogators, "they will torture you".[59] A Bahraini detainee in Guantánamo has alleged that he was told that he would be "sent to a prison where he would be raped", and another Bahraini alleged that he was threatened with being sent to a prison that "would turn him into a woman".[60] Threatening to transfer a detainee to a third country that he is "likely to fear would subject him to torture or death" is one of the interrogation techniques recommended by the Pentagon's Working Group report on interrogations in the "war on terror", dated April 2003, which remains operational.[61] Set along side this, the State Department annual report risks becoming a dual-purpose manual – promoting human rights on the one hand, while providing ideas for US interrogators on how to abuse them on the other. An FBI document from December 2004, originally classified as secret for 25 years but released under a freedom of information request in early 2005, included reference to the following observation by FBI agents in Guantánamo Bay: "Agents have seen documentary evidence that a detainee was told that his family had been taken into custody and would be moved to Morocco for interrogation if he did not begin to talk" (see section 12 below).

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[58] *'One huge US jail'*. The Guardian Weekend (UK), 19 March 2005.

[59] He also claims to have been interrogated in Guantánamo by Jordanian intelligence agents, one of whom allegedly whipped him with a belt.

[60] See *Almurburti et al. v. Bush et al.* Memorandum Opinion. United States District Court for the District of Columbia, 14 April 2005.

[61] *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 4 April 2003. http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf.

The latest State Department report entry on Sweden notes that "the 2001 repatriation of two Egyptians gained attention during the year as the result of allegations that the deportees were subjected to torture in Egypt". It further notes "calls for a parliamentary inquiry into the legality of the deportations…and alleged improper cooperation with a foreign country in the deportations". What the State Department again fails to record is that the "foreign country" in question was the USA.

The two Egyptians were seized by Swedish security police in Stockholm on 18 December 2001, handed to CIA agents at Bromma airport and flown to Egypt on board a US-registered Gulfstream jet. According to a Swedish police officer who was present at the deportations, "the Americans they were running the whole situation".[62] The detainees had their clothes cut from them by the masked US agents, were reportedly drugged, made to wear diapers and overalls, and were handcuffed, shackled, hooded, and strapped to mattresses on the plane. The alleged torture they subsequently faced in Egypt included electric shocks. While the State Department's entry on Sweden notes that a parliamentary investigation into these events was opened in 2004, its entries on other European countries fail to record that similar investigations were being conducted elsewhere. In Italy and Germany, for example, officials were investigating allegations that individuals were seized and secretly flown by US agents to Egypt and Afghanistan where they were allegedly subjected to torture and other cruel, inhuman or degrading treatment (see Section 14).

Next year, in its report on human rights in 2005, the State Department will be able to report that on 22 March 2005, the Chief Parliamentary Ombudsman in Sweden, having reviewed the Swedish government's role in the transfer to Egypt of the two detainees, concluded that the treatment of the two men by the US agents "must be considered to have been inhuman and thus unacceptable". He was highly critical of the home authorities, saying that "the Swedish Security Police lost control of the situation at the airport and during the transport to Egypt. The American security personnel took charge… Such total surrender of power to exercise public authority on Swedish territory is clearly contrary to Swedish law".[63] His words are echoed in those of a Guantánamo detainee taken from Gambia by US agents in late 2002 and still in the US Naval Base in Cuba more than two years later. He told his Combatant Status Review Tribunal in September 2004, "in Gambia, the Americans were running the show…The US was there and in charge from day one. They were not very respectful to the Gambians".[64]

International complicity in apparently unlawful activities in the context of the "war on terror" has had other manifestations. In November 2002, for example, with Yemen's cooperation, the USA killed six people in a car in Yemen in what appear to have been extrajudicial executions (see also Section 5).[65] They were targeted because Abu Ali al-Harithi and the other five occupants of the car were alleged members of *al-Qa'ida*.[66] A little over a year earlier, the US State Department had said of Israel's resort to targeted killings:

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[62] Paul Forell, Police Inspector, Bromma Airport, Sweden. Interviewed for *Torture: The dirty business*. Dispatches, Channel 4 TV (UK), 1 March 2005.

[63] *Expulsion to Egypt – a review of the execution by the Security Police of a Government decision to expel two Egyptian citizens*. The Parliamentary Ombudsman, 22 March 2005, http://www.jo.se/Page.aspx?Language=en&ObjectClass=DynamX_Document&Id=1625.

[64] *El-Banna et al. v. Bush et al.* CSRT unclassified factual returns for Bisher al-Rawi (see below).

[65] Amnesty International wrote to President Bush about the killings. It has never received a reply. See: *Yemen/USA: government must not sanction extra-judicial executions*, AI Index: AMR 51/168/2002, 8 November 2002, http://web.amnesty.org/library/Index/ENGAMR511682002.

[66] Although what we now know about the quality of intelligence that the USA has relied upon to detain individuals in the "war on terror" (see, for example, the case of Murat Kurnaz, below), as well as to invade Iraq, all such claims must be treated with caution.

"We remain opposed to targeted killings. We think Israel needs to understand that targeted killings of Palestinians don't end the violence.."[67] *"We have long made very clear – we have made known the US Government's opposition to the policy and practice of targeted killings, and we are going to continue to urge the Israelis to desist from this policy."*[68]

The killing of the six people in Yemen was not mentioned in the Yemen entry in the State Department's human rights report covering 2002 (or 2003 or 2004). Rather than ordering a thorough, prompt and impartial investigation into the killings, as required under international standards,[69] senior US officials instead adopted a celebratory stance. US Deputy Secretary of Defense Paul Wolfowitz described the killings as "a very successful tactical operation, and one hopes each time you get a success like that, not only have you gotten rid of somebody dangerous, but to have imposed changes in their tactics and operations and procedures".[70] Secretary Rumsfeld responded to questions about the attack by saying that "it would be a very good thing if [Abu Ali al-Harithi] were out of business".[71] Today, the White House website notes the killings under "accomplishments" in "waging and winning the war on terror". [72] A few weeks after the killings, President Bush later said "you can't hide from the United States of America. You may hide for a brief period of time, but pretty soon we're going to put the spotlight on you, and we'll bring you to justice… We're working with friends and allies around the world. And we're hauling them in, one by one. Some have met their fate by sudden justice; some are now answering questions at Guantánamo Bay. In either case, they're no longer a problem to the United States of America and our friends."[73]

In the "war on terror", allies and enemies have been defined in broad and malleable terms by the USA.[74] One of those held under the catch-all label of "enemy combatant" in Guantánamo is Omar Deghayes, who was born in Libya but fled to the United Kingdom (UK) as a child refugee after his father was allegedly tortured and killed. He has alleged that at least four other governments have been involved in his detention, torture or ill-treatment. He was detained in Pakistan in April 2002, and alleges that the authorities there told him he was being held at the behest of the USA. He has said that he was tortured and ill-treated by government agents in Pakistan, including by "systematic beatings", having his head pushed under water "until I was almost drowned", stress positions, being subjected to electric shocks from a hand-held device, possibly a stun weapon, and being put in a room which was "all painted black and white, with dim lights" in which there were "very large snakes in glass boxes". He said that he was threatened with being left in the room with the snakes let out of the boxes. He has also alleged that he was interrogated by British and US intelligence officers in Pakistan during a period when he was further ill-treated. He has stated that, once transferred to US custody in Afghanistan, he was subjected to food deprivation, stripping, beatings, hooding,

[67] Richard Boucher, State Department Daily Press Briefing, 27 August 2001.
[68] Phillip Reeker, State Department Daily Press Briefing, 21 August 2001.
[69] Principle 9, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.
[70] Deputy Secretary Wolfowitz interview with CNN International, 5 November 2002, Department of Defense news transcript.
[71] Department of Defense news briefing, 4 November 2002.
[72] "In November 2002, Yemeni authorities allowed a US Predator drone to kill six al Qaeda operatives in Yemen, including senior al Qaeda leader Abu Ali al-Harithi". *Waging and winning the war on terror:* The White House.
[73] *President Rallies Troops at Fort Hood.* Fort Hood, Texas, 3 January 2003. White House transcript.
[74] See, for instance, *Official pariah Sudan valuable to America's war on terrorism.* Los Angeles Times, 29 April 2005.

shackling, and forced kneeling, and in Guantánamo that he was subjected to solitary confinement and brutal cell extractions (see Section 12).[75]

Omar Deghayes has also claimed that he was twice interrogated by Libyan agents in Guantánamo, on 9 and 11 September 2004. He alleged that the US military authorities took him to an interrogation room with the air-conditioning on maximum and left him there for several hours, shackled and freezing cold. Eventually, at around midnight on 9 September 2004, four Libyan agents and three US personnel in civilian clothes entered the room. He was interrogated for around three hours by the Libyan agents, and again two days later. The agents allegedly made veiled threats of violence and death against him if he should ever be returned to Libya, and showed him pictures of severely beaten Libyan dissidents.

Amnesty International has since been informed that on 8 September 2004, the day before Omar Deghayes says he was first interrogated by Libyan agents, a US-registered Gulfstream jet, registration N8068V, flew direct from Tripoli in Libya to Guantánamo Bay. The same plane has allegedly been used in secret transfers of detainees, including the above case of the two Egyptians deported from Sweden in December 2001 to alleged torture in Egypt (also see Section 14). Was it carrying Libyan agents this time? Did such agents interrogate other Libyan nationals held in Guantánamo, of whom there are at least two?

The State Department's latest human rights report notes that allegations of torture in Libya "were difficult to corroborate because many prisoners were held incommunicado"; so, too, in the case of detainees in US custody in Guantánamo, Afghanistan and elsewhere (Omar Deghayes' allegations have only emerged since a lawyer gained access to him in 2005). In May 2004, Amnesty International raised allegations that a Chinese government delegation had visited Guantánamo in September 2002 and participated in interrogations of Chinese ethnic Uighur detainees held there. It is alleged that during this time, the detainees were subjected to intimidation and threats, and to interrogation techniques such as environmental (temperature) manipulation, forced sitting for many hours, and sleep deprivation, some of which was on the instruction of the Chinese delegation.[76] There has been no satisfactory response to these allegations from the US government, whose State Department annually criticizes the Chinese authorities for failing to take "sufficient measures to end [torture and ill-treatment]".

Amnesty International and other international human rights organizations continue to be denied access to the detainees in Guantánamo, exactly what the US State Department criticizes the Chinese authorities for. In its latest report, the Department noted that the UN Working Group on Arbitrary Detention was given access to some detention facilities in China during 2004. Not so in the case of the USA, which has denied the Working Group and other UN experts access to its "war on terror" detainees and has rejected their criticisms of the USA's treatment of the detainees (see below).

While torture and ill-treatment are facilitated by the absence of external scrutiny that characterizes secret or incommunicado detention, such conditions can in themselves amount to such treatment and also be used to coerce detainees into making "confessions" or other statements against themselves or others. Evidence extracted under torture or other coercion – the reliability of which will always be suspect – can be admitted by the Combatant Status Review Tribunals and Administrative Review Boards – executive bodies that, respectively, determine whether each Guantánamo detainee is an "enemy combatant" and then, annually, whether he remains a security risk or of intelligence value.

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[75] Unclassified information on Omar Deghayes, dated 30 March 2005.

[76] Amnesty International Urgent Action. Further information on UA 356/03. AI Index: AMR 51/090/2004, 25 May 2004. http://web.amnesty.org/library/Index/ENGAMR510902004.

Similarly, the rules for US military commissions – set up under a presidential Military Order to "try" only foreign nationals – do not exclude the use of evidence extracted under torture or other coercion, in violation of international standards against torture and ill-treatment and for fair trial.[77] These military commissions are executive bodies – not independent or impartial courts – whose rules are determined by the executive, whose personnel are selected by the executive, and whose final decisions the executive vets, including whether a condemned defendant lives or dies. Time spent in executive detention as an "enemy combatant", however long, is not to be considered as time already served if an individual is sentenced to a term of imprisonment by a military commission. In the event of an acquittal, it is the executive who will decide whether to release the detainee or place him or her back in indefinite detention as an "enemy combatant".

President George W. Bush – under whose "wartime" powers as Commander-in-Chief of the Armed Forces all this is being justified – said of the Guantánamo detainees shortly after making six of them the first to be eligible for trial by military commission that "the only thing I know for certain is that these are bad people".[78] It seems that, according to this administration, "bad people", as determined by the President, have no rights. Thus, the Military Order under which the commissions are set up states that no one held under it will "be privileged to seek any remedy or maintain any proceeding" in any US, foreign, or international court. It states that it "is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies or other entities, its officers or employees, or any other person".[79] This is repeated in the instructions for the military commissions themselves, which also add that: "alleged non-compliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person."[80] As the American College of Trial Lawyers wrote in March 2003: "It appears that the content of the [Military] Order and the [military commission] Procedures, particularly the exclusion of US citizens from their reach and the placement of the detainees at Guantanamo, were carefully designed to evade judicial scrutiny and to test the limits of the President's constitutional authority."[81] More than two years later, the administration is still engaged in this bid for unchecked executive power.

Surely such executive excess would be condemned by the USA if it were happening in another country? In its latest human rights report, for example, the State Department's entry on Syria contains the following under "Denial of Fair Public Trial":

> "*The Constitution provides for an independent judiciary; however, the Supreme State Security Court (SSSC), in dealing with cases of alleged national security violations, was not independent of executive branch control... The SSSC did not observe the constitutional provisions safeguarding defendants' rights... In April 2001, the UN Commission on Human Rights stated that the procedures of the SSSC are*

[77] See Article 15 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the USA is a state party. See also Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/I/Rev.1 at 30 (1994), para. 12; CCPR General Comment 13: the right to a fair trial and public hearing by an independent court-established by law (Art. 14), UN Doc. A/39/40 (1984), para. 14.

[78] Press conference of President Bush and Prime Minister Tony Blair, White House, 17 July 2003.

[79] Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001.

[80] Department of Defense, Military Commission Instruction No. 1, 30 April 2003.

[81] *Report on Military Commissions for the Trial of Terrorists*, American College of Lawyers, March 2003.

incompatible with the provisions of the International Covenant on Civil and Political Rights, to which the country is a party".

The USA has also been criticized by the UN for its plans for trials by military commissions which would violate fair trial rights under international standards.[82] The criticism has not only been international. In November 2004, a US federal judge ruled that, at least in one respect, the rules of the US military commissions were unlawful. Specifically, he noted, "The accused himself may be excluded from proceedings… and evidence may be adduced that he will never see." The judge pointed out that "such a dramatic deviation" from the US constitutional right to a fair trial "could not be countenanced in any American court", and added that the right to trial "in one's presence" is "established as a matter of international humanitarian and human rights law".[83]

In its most recent human rights report, as in previous reports, the State Department criticized Libya's special revolutionary or national security courts, such as the People's Court, noting that trials in these bodies "often are held in secret or even in the absence of the accused." The State Department will be able to report next year that, in a historic ruling on 12 January 2005, Libya's parliament abolished the People's Court. Amnesty International has welcomed this development as an important step forward for human rights in Libya. There has been no such move on the USA's military commissions, however. The administration has appealed the judge's ruling, which it has characterized as "an extraordinary intrusion into the Executive's power".[84]

It was the case of a Libyan national held in Guantánamo Bay, Faren Gherebi, which led the US Court of Appeals for the Ninth Circuit to issue the following rejection of the US administration's theory that it possesses "unchecked authority". The court said that "even in times of national emergency – indeed, particularly in such times – it is the obligation of the Judicial Branch…to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike". It continued:

> "*Under the government's theory, it is free to imprison Gherebi indefinitely along with hundreds of other citizens of foreign countries, friendly nations among them, and to do with Gherebi and these detainees as it will, when it pleases, without any compliance with any rule of law of any kind... Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or it was summarily executing the detainees. To our knowledge, prior to the current detention at Guantanamo, the US government has never before asserted such a grave and startling proposition.*"[85]

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[82] On 7 July 2003, after President Bush made six foreign nationals eligible for trial by military commission, the UN Special Rapporteur on the independence of judges and lawyers expressed "alarm" at a move he said violated UN General Assembly and Security Council resolutions. He recalled his 16 November 2001 urgent appeal to the USA concerning President Bush's Military Order of 13 November which allows for trial by military commission. The Special Rapporteur expressed his concerns over a number of issues, including "the rule of law and equality before the law; fair trial procedures…; the selection and composition of those who sit on the commission, and appeal procedures which violate fundamental principles of judicial independence." See *United Nations rights expert 'alarmed' over United States implementation of Military Order*. UN Press Release, 7 July 2003.More than two and a half years later, the USA had still not replied to his appeal.

[83] *Hamdan v Rumsfeld*, Memorandum Opinion, US District Court for the District of Columbia, 8 November 2004.

[84] *Hamdan v. Rumsfeld*, Brief for appellants. In the US Court of Appeals for the District of Columbia Circuit, 8 December 2004.

[85] *Gherebi v. Bush*, US Court of Appeals for the Ninth Circuit, opinion filed 18 December 2003, amended 8 July 2004.

By the end of April 2005, Faren Gherebi remained in custody in Guantánamo Bay in essentially unchanged conditions.[86] Despite the US Supreme Court's *Rasul* ruling, and widespread international condemnation, including from its allies as well as from UN experts and bodies, the US administration continues to cling to policies that deny fundamental human rights. It has not expressly and for all agencies rejected interrogation techniques that violate the prohibition on torture or ill-treatment. It has not rejected the use of secret or incommunicado detention. It has not rejected the use of military commissions. It maintains its attachment to the denial of the full rights of *habeas corpus* to hundreds of foreign detainees.

Indeed the administration appears to view its problem as one of presentation rather than substance. In 2002, the White House announced that it would set up the Office of Global Communications in part to counter perceptions around the world that that "the United States is arrogant, hypocritical, self-absorbed, self-indulgent, and contemptuous of others".[87] Amnesty International pointed out that in the area of human rights, at least, the US administration would need to "move beyond public relations and into substantive change if it wished to improve its reputation abroad."[88] Two and a half years later, the organization regrets that the same advice is still valid.

The Director of the Defense Intelligence Agency pointed out to the Senate Armed Services Committee in March 2005 that: "Multiple polls show favourable ratings for the United States in the Muslim world at all-time lows. A large majority of Jordanians oppose the War on Terrorism, and believe Iraqis will be 'worse off' in the long term... Across the Middle East, surveys report suspicion over US motivation for the War on Terrorism. Overwhelming majorities in Morocco, Jordan, and Saudi Arabia believe the US has a negative policy toward the Arab world."[89]

The US State Department has said that "it's obvious that the American image in the world has suffered", and has pointed to the need for "a more effective portrayal of the United States".[90] On 14 March 2005, announcing the nomination of Karen Hughes as Under Secretary of State for Public Diplomacy and Public Affairs, Secretary of State Condoleezza Rice noted that "too few in the world... know of the value we place on international institutions and the rule of law". The nominee herself stated her commitment to "share our country's good heart and our idealism and our values with the world", and to "always do my

[86] A CSRT determined that he was an "enemy combatant" on 27 September 2004. The detainee did not attend the hearing. The CSRT panel of three military officers relied on classified and unclassified evidence in reaching their unanimous decision on the same day as the hearing.
[87] *Public diplomacy: A strategy for reform.* A report of an Independent Task Force on Public Diplomacy sponsored by the Council on Foreign Relations. 30 July 2002.
[88] *USA: Human rights v. public relations*, AI Index: AMR 51/140/2002, August 2002, http://web.amnesty.org/library/Index/ENGAMR511402002.
[89] *Current and Projected National Security Threats to the United States.* Vice Admiral Lowell E. Jacoby, US Navy, Director, Defense Intelligence Agency. Statement for the Record, Senate Armed Services Committee, 17 March 2005. A Pentagon taskforce noted in September 2004 that there is "widespread animosity toward the United States and its policies. A year and a half after going to war in Iraq, Arab/Muslim anger has intensified...The war has increased mistrust of America in Europe, weakened support for the war on terrorism, and undermined US credibility worldwide." The taskforce stated that "nothing shapes US policies and global perceptions of US foreign and national security objectives more powerfully than the President's statements and actions, and those of senior officials... Policies will not succeed unless they are communicated to global and domestic audiences in ways that are credible... Words in tone and substance should avoid offence where possible; messages should seek to reduce, not increase, perceptions of arrogance, opportunism, and double standards." Report of the Defense Science Board Task Force on Strategic Communication. Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, Washington, DC. September 2004.
[90] Richard Boucher, State Department Daily Press Briefing, 14 March 2005.

best to stand for what President Bush has called the non-negotiable demands of human dignity", including "the rule of law", "limits on the power of the state", and "equal justice".[91] She faces an uphill task in the absence of substantive change in her government's policies, which tell a different story.

The State Department's annual criticisms of the human rights records of other countries will inevitably lead to accusations of double standards and be drained of moral power as long as the USA fails to put its own house in order. Why, for example, should the Cuban authorities respond constructively to the State Department's criticism that in 2004 Cuba "did not permit independent monitoring of prison conditions by international or national human rights monitoring groups", or that members of the Cuban security forces "sometimes beat and otherwise abused" detainees and prisoners? After all, in the southeast corner of Cuba, the US government continues to operate a military detention camp in which detainees have been kept virtually incommunicado without charge or judicial review for more than three years. With international human rights monitors denied access, evidence that detainees held in the base have been subjected to torture and ill-treatment continues to mount.

As the new Under Secretary of State for Public Diplomacy and Public Affairs pointed out, President Bush has repeatedly professed the USA's commitment to the "non-negotiable demands of human dignity", including the rule of law, limits on the power of the state, and equal justice. Such promises, however, have been rendered meaningless by the USA's conduct towards detainees held in the "war on terror". The executive must change its policies, not the way that it presents them. At the same time, the judiciary and the legislature must provide the necessary check on the executive.

> "*The rule of law and separation of powers not only constitute the pillars of the system of democracy but also open the way to an administration of justice that provides guarantees of independence, impartiality and transparency... [Judicial] monitoring should not be perceived as part of an institutional rivalry between the judicial, executive and legislative powers, but acts as a means of containing any authoritarian excesses and ensuring the supremacy of the law under all circumstances... [T]he desire to restrict or even suspend this judicial power would be tantamount to impairing the independence of justice*".[92]

5. Human rights law rejected by a war mentality

America is a nation at war... At the direction of the President, we will defeat adversaries at the time, place, and in the manner of our choosing... Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.

US National Defense Strategy, March 2005[93]

In the early hours of 10 December 2003, human rights day, a 20-year-old Iraqi youth heard a knock on the door of his home in Mosul. He later recalled through an interpreter:

> "*I was studying in the morning because I am a student. It was around 05.00. It was a Wednesday. There was a knock at my door so I answered it. American soldiers came in and took me outside and arrested me. They told me they were there for my father.*

[91] Announcement of nominations of Karen P. Hughes as Under Secretary of State for Public Diplomacy and Public Affairs and Dina Powell as Assistant Secretary of State for Educational and Cultural Affairs. Benjamin Franklin Room, State Department, Washington, DC. 14 March 2005. State Department transcript.

[92] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2004/60, 31 December 2003, paras. 28 and 29.

[93] The National Defense Strategy of the United States of America, March 2005.

They also arrested my brother and my father. I complained because my father is old and my brother is sick. My brother has many physical problems. My mother was crying."

In a handwritten statement, among documents released under the ACLU's freedom of information lawsuit, he told army investigators how he came to have a broken lower jaw:

"*After that, they tied my brother and father and my hands and took us to their quarters. There, they put bags on our heads and took us to a room which contains a vocal device (so big recorder) and rised its voice so loudly and started torturing us with many kinds of torture like stand and sit down, pour cold water on our bodies at night and beat us during the day and didn't give us food and even water except one time for two days. (The period of our torture).*

During the time of torture, the bag was on my head, when one of the soldiers drew me till I came near the wall, then he kicked me a very strong kick on my face even my teeth were broken. Also my down jaw broke (several fractures). After I've injured, they took me to another room and told me to say that I've fallen down and no one beated me. Then they transferred me from Mosul to Baghdad without treatment of my wounds."

An army investigator concluded that the detainee's jaw had been broken as the result of an "intentional act". A factor that contributed to the injury was a detention regime in the US facility where abuses were systematic – detainees were physically exercised to the point of exhaustion, subjected to sleep deprivation, physical assault, loud music blasted from metre-high loudspeakers, and hooding. "There is evidence", the investigator wrote, that military intelligence personnel and/or translators "engaged in physical torture of the detainees".[94]

In its October 2004 report on torture and accountability in the "war on terror", Amnesty International concluded that senior US military and civilian officials had set a climate, both through words and actions, conducive to torture and ill-treatment.[95] Indeed, one of the members of the Independent Panel to Review Department of Defense Detention Operations (Schlesinger Panel), which reported in August 2004, suggested that a degree of responsibility "for the confusion about permissible interrogation techniques extend[s] all the way up the chain of command to include the Joint Chiefs of Staff and the Office of the Secretary of Defense".[96] Evidence of a permissive climate contributing to abuses is provided among documents released in April 2005 to the ACLU.

In November 2003, a US army Staff Sergeant received a letter of reprimand for failing to "properly supervise detainee interrogation operations" at a US detention facility in Tikrit, Iraq, in which detainees had been abused.[97] In rebutting the reprimand, the Staff Sergeant suggested that at least one of the soldiers in question had committed abuses believing that such actions would be approved of by those higher up the chain of command:

"*I firmly believe that* [redacted] *took the actions he did, partially, due to his perception of the command climate of the division as a whole. Comments made by senior leaders regarding detainees such as 'They are not EPWs* [enemy prisoners of war]. *They are terrorists and will be treated as such' have caused a great deal of*

[94] Memorandum for Record. AR 15-6 investigation into the broken jaw injury of [redacted]. Department of the Army, Office of the Staff Judge Advocate, Mosul, Iraq, 31 December 2003.
[95] *USA: Human dignity denied: supra*, note 17.
[96] Dr Harold Brown, former US Secretary of Defense, written testimony to Senate Armed Services Committee, 9 September 2004.
[97] Memorandum for Staff Sergeant [redacted], 104th Military Intelligence Battalion, 4th Infantry Division (Mechanized), Tikrit, Iraq. Subject: Written Reprimand. Date: 6 November 2003.

> *confusion as to the status of the detainees. Additionally, personnel at the* [Interrogation Control Element] *regularly see detainees who are, in essence, hostages. They are normally arrested by Coalition Forces because they are family members of individuals who have been targeted by a brigade based on accusations that may or may not be true, to be released, supposedly, when and if the targeted individual surrenders himself... I know that* [redacted] *has himself witnessed senior leaders at briefings, reporting that they have taken such detainees, with the command giving their tacit approval. In hindsight, it seems clear that, considering the seeming approval of these and other tactics by the senior command, it is a short jump of the imagination that allows actions such as those committed by* [redacted], *to become not only tolerated, but encouraged. This situation is made worse with messages from higher echelons soliciting lists of alternative interrogation techniques and the usage of phrases such as '... the gloves are coming off'.* [98]

Such a tone has been set by senior US officials. Members of the administration, including the President as Commander-in-Chief, have repeatedly referred to detainees as "terrorists" and "killers". This stance has been adopted throughout the military chain of command, and throughout the "war on terror". [99] Other officials have referred to "the gloves coming off". [100]

Meanwhile, hostage-taking by US troops in Iraq reportedly occured a year and a half after the Staff Sergeant wrote the above reference to such abuses. On 2 April 2005, two Iraqi women, Salima al-Batawi and her daughter Aliya al-Batawi, were allegedly taken hostage by US soldiers who were looking for their male relatives. The two women were held for six days without charge in a US detention facility after being seized at their home in Baghdad. A note allegedly left on the gate of their home by the soldiers threatened that the women would remain in detention unless a male relative gave himself up. Although military personnel claimed that the women were detained as suspected insurgents in their own right, after her release Salima al-Batawi was quoted as saying that she had been told that she would be

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[98] Memorandum for Commander, 104th Military Intelligence Battalion, 4th Infantry Division (Mechanized), Tikrit, Iraq. Subject: Rebuttal of [redacted] to written reprimand. Date: 9 November 2003. The solicitation of "alternative interrogation techniques", referred to by the Staff Sergeant, led to the development and e-mail circulation of "wish lists" of techniques developed by military interrogators in Iraq. One such list included the following: "Open Hand Strikes (face and midsection)(no distance greater than 24 inches)"; "Pressure Point Manipulation"; "Close Quarter Confinement"; "White Noise Exposure"; "Sleep Deprivation"; "Stimulus Deprivation". On this list was also suggested a number of other "coercive techniques that may be employed that cause no permanent harm to the subject. These techniques, however, often call for medical personnel to be on call for unforeseen complications. They include but are not limited to the following: "Phone Book Strikes" [i.e. hitting with a telephone directory]; "Low Voltage Electrocution"; "Closed-Fist Strikes"; "Muscle Fatigue Inducement". Alternative Interrogation Techniques (Wish List), 4th Infantry Division [Tikrit, Iraq).

[99] "These killers – these are killers…. These are killers. These are terrorists." President George Bush 28 January 2002. "Remember, these are – the ones in Guantánamo Bay are killers. They don't share the same values we share". President Bush, 20 March 2002. The Guantánamo detainees are "terrorists, enemies of the United States of America". Army Brigadier General Jay Hood, commander of Joint Task Force Guantanamo, 21 March 2005.

[100] On 26 September 2002, the former chief of the CIA's Counterterrorist Center, Cofer Black, told the Senate and House Intelligence Committees that the only detail he would give of the "highly classified area" of "operational flexibility" was that "there was before 9/11 and after 9/11" and that "after 9/11 the gloves come off". It is alleged that the General Counsel of the Department of Defense authorized US detainee John Walker Lindh's interrogator to "take the gloves off" during his interrogation in late 2001 in Afghanistan. *Prison interrogators' gloves came off before Abu Ghraib*, New York Times, 9 June 2004.

detained until her sons gave themselves up.[101] International humanitarian and human rights law prohibits the taking of hostages and arbitrary detentions.[102]

In a keynote address to the International Summit on Democracy, Terrorism and Security, in Madrid, Spain, on 10 March 2005, UN Secretary General Kofi Annan pointed out that "international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently adopting to counter terrorism infringe on human rights and fundamental freedoms." He continued:

> "*Human rights law makes ample provision for counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element*".[103]

A month earlier, on 4 February 2005, six United Nations human rights experts – whose mandates include torture, "disappearances", arbitrary detention, the independence of judges and lawyers, and health, had expressed "serious concerns" about the USA's "war on terror" detainees. and reiterated that:

> "*the right and duty of all States to use all lawful means to protect their citizens against death and destruction brought about by terrorists must be exercised in conformity with international law, lest the whole cause of the international fight against terrorism by compromised*".[104]

In his report of March 2005, the UN's Independent Expert on the Situation of Human Rights in Afghanistan, M. Cherif Bassiouni, wrote of the reports of abuses by Coalition forces in Afghanistan that he had received from victims, the Afghan Independent Human Rights Commission and others. The alleged abuses include: "forced entry into homes, arrest and detention of nationals and foreigners without legal authority or judicial review, sometimes for extended periods of time, forced nudity, hooding and sensory deprivation, sleep and food deprivation, forced squatting and standing for long periods of time in stress positions, sexual abuse, beatings, torture and use of force resulting in death".[105] The UN Independent Expert continued:

> "*When these forces directly engage in practices that violate or ignore international human rights and international humanitarian law, they undermine the national*

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[101] *US accused of seizing Iraqi women to force fugitive relatives to give up*. The Guardian (UK), 11 April 2005.

[102] Common Article 3 to the Geneva Conventions (see further below) and Article 9.1 of the International Covenant on Civil and Political Rights.

[103] *A global strategy for fighting terrorism*. Secretary-General Kofi Annan's keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security. Madrid, Spain, 10 March 2005.

[104] *UN rights experts raise 'serious concerns' over detainees at US naval base*. UN News Centre, 4 February 2005. The six experts are: Leïla Zerrougui, Chairperson-Rapporteur of the Working Group on Arbitrary Detention; Stephen J. Troope, Chairperson-Rapporteur of the Working Group on Enforced or Involuntary Disappearances; Manfred Nowak, Special Rapporteur on torture; Paul Hunt, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Leandro Despouy, Special Rapporteur on the independence of judges and lawyers; and Cherif Bassiouni, Independent Expert appointed by Secretary-General on the situation of human rights in Afghanistan.

[105] UN Doc: E/CN.4/2005/122, 11 March 2005, para. 44.

project of establishing a legal basis for the use of force. The impact of abusive practices and the failure to rectify potential problems create a dangerous and negative political environment that threatens the success of the peace process and overall national reconstruction."[106]

Professor Bassiouni's mandate as UN independent expert on Afghanistan was not renewed at the UN Commission for Human Rights in April 2005. In an interview with the BBC on 25 April, he suggested that one reason for this was because of his "insistence that I should be allowed to go to the Bagram and Kandahar military bases as well as the 14 other firebases in which the US by its own regulations detains people for up to 14 days without even allowing the ICRC to see them." He reiterated that he had "interviewed a number of persons who have indicated that they had been arbitrarily arrested, that they had been tortured" by US forces in Afghanistan. The reason his mandate had not been renewed, he suggested, was not because "anybody felt the job was done", but because of US government pressure not to renew. The interview continued:

Q. *Let's be clear about this, what you are suggesting is that an independent human rights monitor mandated by the UN in Afghanistan has been prevented from doing that job because, you say, the Americans didn't want you, to put it bluntly, poking your nose into what they were getting up to in various camps where they were holding detainees.*

A. *That is correct. In fact what my report does not contain is an exchange of correspondence I've had with the US ambassador to Geneva... in which he basically says the United Nations mandate does not include going into areas where American bases are. He takes the position that the American bases there are above and beyond the reach of the law.*[107]

Whether or not it was US pressure that led to the UN expert's mandate not being renewed – at the time of writing, information received by Amnesty International indicates that it was – an overarching war mentality adopted by the US administration since 11 September 2001 has led it to manipulate or jettison basic human rights protections for detainees. As noted further below, this has included instances of the USA refusing to recognize that UN human rights experts have the mandate to raise concerns about US actions in the "war on terror" on the grounds that the detentions are controlled by the law of armed conflict rather than human rights law. At the same time, the US administration has adopted its own unilateral interpretation of international humanitarian law.

Indeed, "following the events of September 11, 2001, a new category of detainee, enemy combatant (EC), was created for personnel who are not granted or entitled to the privileges of the Geneva Convention [sic]".[108] In its broadly-defined global "war", the administration has defined "enemy combatant" broadly:

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[106] *Ibid*, para. 43. The independent expert has recommended that the Afghan Government establish a formal Status of Forces Agreement with the Coalition forces, "detailing the basis for arrests, search and seizure and detentions and specifying that these activities must be in accordance with international human rights and humanitarian law. Detentions must take place in accordance with the United Nations Standard Minimum Rules for the Treatment of Prisoners, and Coalition forces should be required to abide by basic human rights standards contained in relevant United Nations instruments. In addition, detainees should be provided with some form of judicial supervision to ensure that no one is held without a legal valid basis." (para. 88).

[107] *The World Tonight*. Interview with Robin Lustig. BBC Radio 4, 25 April 2005.

[108] Joint Doctrine for Detainee Operations. Joint Publication 3-63. Final Coordination. Joint Chiefs of Staff, US Department of Defense, 23 March 2005. This notes that "enemy combatants" may be sub-

> "*Any person that US or allied forces could properly detain under the laws and customs of war. For purposes of the war on terror an enemy combatant includes, but is not necessarily limited to, a member or agent of Al Qaeda, Taliban, or another international terrorist organization against which the United States is engaged in an armed conflict.*"[109]

Not only are these so-called "enemy combatants" denied the protections of the Geneva Conventions, they are also denied the protections of international human rights law because the US administration considers that they are held exclusively under "the laws and customs of war", regardless of where in the world they were taken into custody.

The leading authority on provisions of international humanitarian law, or the law of war, is the ICRC which has stated:

> "*Irrespective of the motives of their perpetrators, terrorist acts committed outside of armed conflict should be addressed by means of domestic or international law enforcement, but not by application of the laws of war... 'Terrorism' is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted 'fight against terrorism' rather than a 'war on terrorism'... What is important to know is that no person captured in the fight against terrorism can be considered outside the law. There is no such thing as a 'black hole' in terms of legal protection.*"[110]

Yet, in seeking to have the post-*Rasul habeas corpus* petitions of Guantánamo detainees dismissed, the executive has rejected the notion that the detainees have any rights under human rights treaty law or customary international law:

> "*Customary law is constantly evolving, thus implying that states can modify their practices to adapt to new or unanticipated circumstances or challenges... Even if customary international law proscribed 'prolonged arbitrary detention', it is not at all clear that petitioners' detention fall within this rubric. The detention here is not arbitrary, but based on the Military's determination that petitioners are enemy combatants. The treaties cited by petitioners as evidence of customary international law do not appear to deal with wartime detentions of this type, but rather with criminal-like matters, and petitioners cite no clear evidence of a consistent and widespread norm, followed as a matter of legal obligation, that detention of enemy combatants in a worldwide war against a terrorist organization is improper.*"[111]

Such an argument, if accepted, would give a government – any government – a blank cheque to ignore its obligations under international law for any situation that it defined as a "war", "new" or "unanticipated" or for any person that it defined as the "enemy". In this case, it follows President Bush's assertion that the "war against terrorism ushers in a new paradigm [which] requires new thinking in the law of war".[112] As revealed by a series of previously

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categorized into "Low Level Enemy Combatant (LLEC)", "High Value Detainee (HVD)", "Criminal Detainee"; "High Value Criminal (HVC)"; "Security Detainee".

[109] Deputy Secretary of Defense global screening criteria, 20 February 2004. Cited in Joint Doctrine for Detainee Operations, 23 March 2005, *ibid.*

[110] *International humanitarian law and terrorism: questions and answers.* International Committee of the Red Cross, 5 May 2004.

[111] Respondents reply memorandum in support of motion to dismiss or for judgment as a matter of law. *In re Guantanamo Detainee Cases.* In the United States District Court for the District of Columbia, 16 November 2004.

[112] President George W. Bush. Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, the Chief of Staff to the President, the Director of Central

secret government documents, the thinking that has been done has been of a sort that looks to manipulate and bypass the USA's fundamental international legal obligations. Thus, whatever "new thinking" has been done, the result has been old abuses, abuses which when committed by other countries warrant an entry in the US State Department annual human rights report.

For itself, the US administration maintains that the President's war powers as Commander-in-Chief of the Armed Forces provide the executive with a clear mandate to run this broadly-defined "war on terror" without judicial interference or external scrutiny. Whatever the case may be under the US Constitution – the administration has sought to rely on US jurisprudence restricting the applicability of the Constitution in the case of federal government actions outside the USA concerning foreign nationals[113] – the fact is that there is no such potential leeway under international law.[114]

The administration is even still engaged in an attempt to extend presidential authority to seizing US citizens in civilian settings on US soil and subjecting them to indefinite military detention without criminal charge or trial.[115] José Padilla, a US citizen arrested at Chicago airport in 2002 on the suspicion of planning to detonate a radioactive "dirty" bomb in the United States, was removed from the criminal justice system a month later under an executive order signed by President Bush labelling Padilla as an "enemy combatant". Since then he has been held in indefinite military custody without charge or trial (see further below). On 28 February 2005, a federal judge ruled in José Padilla's case, concluding that "this is a law enforcement matter, not a military matter". The judge said that "[t]here were no impediments whatsoever to the Government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing." He continued:

Intelligence, the Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff. Subject: Humane treatment of al Qaeda and Taliban detainees. The White House, 7 February 2002. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf.

[113] For example, see US Supreme Court decisions *Johnson v. Eisentrager*, 339 US 763 (1950) and *United States v. Verdugo-Urquidez*, 494 US 259 (1990).

[114] Any situation or individual is covered or protected by existing international human rights law or international humanitarian law (in case of armed conflicts). Human rights are inherent in the human person, as recognized by the Universal Declaration of Human Rights. Human rights treaty law applies to everyone within the territory or subject to the jurisdiction of the state concerned, except to the extent that treaty provisions have been (permissibly) derogated from, in times of emergency, or a provision of another body of law, specifically international humanitarian law, justifiably supplants it. Provisions for the most fundamental human rights, including the right to life, freedom from torture or ill-treatment and basic fair trial rights, cannot be derogated from in any circumstances. Since both bodies of law aim at protecting the individual, they should be interpreted in a way that gives the greatest possible protection to the individual. A recent study by the International Committee of the Red Cross notes that: "international human rights law continues to apply during armed conflicts, as expressly stated in the human rights treaties themselves, although some provisions may, subject to certain conditions, by derogated from in time of public emergency. The continued applicability of human rights law during armed conflict has been confirmed on numerous occasions in State practice and by human rights bodies and the International Court of Justice." Jean-Marie Henckaerts, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*. International Review of the Red Cross, Volume 87, Number 857, March 2005. The study states that the "general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public."

[115] At the time of writing, the US Supreme Court was being asked to consider the question: "Does the President have the power to seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge or trial? *Padilla v. Hanft*, Brief of petitioner for writ of *certiorari* before judgment. In the Supreme Court of the United States, 7 April 2005.

> "*The civilian authorities captured [Padilla] just as they should have. At the time that [Padilla] was arrested... any alleged terrorist plans that he harbored were thwarted. From then on, he was available to be questioned – and was indeed questioned – just like any other citizen accused of criminal conduct. This is as it should be. There can be no debate that this country's laws amply provide for the investigation, detention and prosecution of citizen and non-citizen terrorists alike.*"[116]

The executive disagreed, and immediately annouced its intention to appeal the order to release José Padilla from military custody. The administration appears to lack confidence in both its laws and its courts. At the same time, it is showing scant regard for international law and standards in its "war on terror".

The UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman, wrote in his recent report to the UN Commission on Human Rights: "However States conceive of the struggle against terrorism, it is both legally and conceptually important that acts of terrorism not be invariably conflated with acts of war". He continued:

> "*If committed during an armed conflict, such acts may constitute war crimes. However, when such acts take place during peacetime or an emergency not involving hostilities, as is frequently the case, they simply do not constitute war crimes, and their perpetrators should not be labelled, tried or targeted as combatants. Such situations are governed not by international humanitarian law, but by international human rights law, domestic law and, perhaps, international criminal law...*
>
> *Human rights law does not cease to apply when the struggle against terrorism involves armed conflict. Rather, it applies cumulatively with international humanitarian law... Despite their different origins, international human rights law and humanitarian law share a common purpose of upholding human life and dignity.*"[117]

Human dignity has fallen victim to the USA's "war on terror" detention and interrogation regime, as the administration has not only rejected international human rights law, but also adopted a selective disregard for international humanitarian law, despite being a state party to the principle treaties of both strands of law, and thereby obliged to apply their provisions. This was made clear as the first prisoners arrived at Guantánamo Bay on 11 January 2002, when Secretary of Defense Donald Rumsfeld said: "We have indicated that we do plan to, *for the most part*, treat [the prisoners] in a manner that is *reasonably consistent* with the Geneva Conventions, *to the extent they are appropriate*, and that is exactly what we have been doing." [emphasis added].[118] Such a policy is clearly "vague and lacking", to use the words of the panel appointed by Secretary Rumsfeld to revew the Pentagon's detention operations.[119]

Such vagueness opens the door, whether inadvertently or by design, to torture and other cruel, inhuman or degrading treatment. For example, the Third and Fourth Geneva Conventions allow a maximum of 30 days isolation of a detainee *as punishment* for a disciplinary offence. The US authorities, including as authorized by Secretary Rumsfeld, have

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[116] *Padilla v. Hanft*, Memorandum opinion and order. US District Court for the District of South Carolina, 28 February 2005.

[117] Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman. UN Doc. E/CN.4/2005/103, 7 February 2005, para. 17 and 23.

[118] Department of Defense news briefing, 11 January 2002.

[119] Final Report of the Independent Panel to Review Department of Defense Detention Operations [The Schlesinger Report], August 2004.

used isolation as an *interrogation technique* across its theatres of operation. In Afghanistan, techniques included "isolating people for long periods of time".[120] The ICRC found that the US authorities were using "excessive isolation" in Guantánamo for not cooperating in interrogations.[121] In at least two cases of Guantánamo detainees, Salim Ahmed Hamdan and Moazzam Begg, the isolation was for a year or more. Yet Major General Geoffrey Miller, former commander of Guantánamo detentions, has said: "We're enormously proud of what we had done at Guantánamo, to be able to set that kind of environment where we were focused on gaining the maximum amount of intelligence. But we detained the people in a humane manner, in accordance with the Third and Fourth Geneva Conventions."[122] This is not the case. Indeed, even in Iraq, where the USA held that it was adhering to the Geneva Conventions, interrogators resorted to the systematic use of isolation to obtain detainee co-operation.[123]

On 7 February 2002, it was announced that President Bush had determined that the Geneva Conventions applied to the conflict with the Taleban. However, at the same time it was made clear that no detainee, whether a suspected member of the Taleban or of *al-Qa'ida*, would be granted prisoner of war status or in cases of doubt presumed to be prisoners of war unless or until a "competent tribunal" determined otherwise, as required by Article 5 of the Third Geneva Convention.[124] In a unilateral executive decision, the President had determined that there would be no doubt in any case. This decision followed advice that not applying the Geneva Conventions would make future prosecutions of US agents for war crimes less likely.[125] Allegations of torture and ill-treatment in secret and incommunicado detention have followed. No US agent has so far been charged with war crimes or torture under the USA's War Crimes Act or Anti-Torture Act.

President Bush's memorandum of 7 February 2002, originally classified as secret for 10 years, was made public on 22 June 2004 in the wake of the revelations about torture and ill-treatment of detainees in US custody in Abu Ghraib prison in Iraq. In this memorandum, not only did the President determine that neither Taleban nor *al-Qa'ida* detainees captured in the international armed conflict in Afghanistan would be eligible for prisoner of war status, but also that common Article 3 to the Geneva Conventions – which prohibits, among other things, torture, cruel, humiliating and degrading treatment – did not apply to either category of detainee. The protections of common Article 3 "constitute a minimum yardstick" reflecting "elementary considerations of humanity", according to the International Court of Justice[126],

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[120] *Ibid.*

[121] *USA: Human dignity denied, supra*, note 17, pages 122-123..

[122] Detainee Operations Briefing, 4 May 2004, Department of Defense transcript.

[123] Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation. February 2004.

[124] The ICRC, the authority on the provisions of the Geneva Conventions disagreed with the US decision (see for instance ICRC press release, 9 February 2002), as did the USA's closest ally in the "war on terror", the UK government. The latter regarded "all personnel captured in Afghanistan as protected by the Geneva Conventions", adding that "the US authorities have not shared [this] view…". *The handling of detainees by UK intelligence personnel in Afghanistan*, Guantanamo Bay and Iraq. The UK Intelligence and Security Committee. March 2005, paras 8-9.

[125] Memorandum for the President from Alberto R. Gonzales. Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban. Draft 25 January 2002. http://msnbc.msn.com/id/4999148/site/newsweek/.

[126] Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits, Judgment of 27 June 1986, ICJ Rep., para. 218. The ICJ considered that the minimum rules applicable to international and non-international conflicts were identical and that the obligation to ensure respect for them in all circumstances derived not only from the Geneva

and "are generally accepted throughout the world as customary international law," according to the USA's bi-partisan Congressional commission into the attacks of 11 September 2001.[127] However, the current administration takes a dismissive approach to customary international law, which it believes is not binding on the President in the context of the "war on terror".[128] This would appear even to contradict the USA's own March 2005 National Defense Strategy, which asserts that states "must exercise their sovereignty responsibly, in conformity with the customary principles of international law".[129]

Trials by military commissions – executive bodies viewed within the administration as "entirely the creatures of the President's authority as Commander-in-Chief"[130] – are currently on hold following the decision of a federal judge. In *Hamdan v. Rumsfeld* in November 2004, Judge James Robertson examined President Bush's 7 February 2002 decision on the non-applicability of the Geneva Conventions to detainees picked up in Afghanistan. Judge Robertson rejected the administration's assertion that the presidential determination was "not reviewable":

> "*Notwithstanding the President's view that the United States was engaged in two separate conflicts in Afghanistan (the common public understanding is to the contrary), the government's attempt to separate the Taliban from al Qaeda for Geneva Conventions purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not the particular faction a fighter is associated with. Thus at some level – whether as a prisoner-of-war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3 – the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there*".[131]

The government had also argued to Judge Robertson that even if the Third Geneva Convention could theoretically apply to an individual captured in Afghanistan, members of *al-Qa'ida* did not fulfil the criteria for prisoner of war status under Article 4 of the treaty because of their failure to carry arms openly or operate according to the laws and customs of war. The President had determined that this was the case, and such determinations are due "extraordinary deference", according to the government. However, Judge Robertson said that the President is not a "tribunal". Moreover, the Combatant Status Review Tribunal (see

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Conventions themselves, "but from the general principles of humanitarian law to which the Conventions merely give expression". *Ibid*, para. 220.

[127] Final Report of the National Commission on Terrorist Attacks Upon the United States (the 9-11 Commission Report). August 2004. http://www.9-11commission.gov/report/index.htm.

[128] "[W]e concluded that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of al Qaeda or Taliban prisoners. We also conclude that customary international law has no binding legal effect on either the President or the military…". John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel. *Application of Treaties and Laws to al Qaeda and Taliban Detainees.* Memorandum for William J. Haynes II, General Counsel, Department of Defense. 9 January 2002. "Although not consistent with US views, some international commentators maintain that various human rights conventions and declarations (including the Geneva Conventions) represent 'customary international law' binding on the United States." *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 4 April 2003. http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf.

[129] National Defense Strategy of the United States of America, March 2005, page 1.

[130] Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, US Department of Justice, 26 February 2002.

[131] *Hamdan v. Rumsfeld*, Memorandum Opinion, US District Court for the District of Columbia, 8 November 2004.

further below) was not established to address the issue of prisoner of war status, and was therefore not the "competent tribunal" envisaged by the Third Geneva Convention. Until or unless such a tribunal decides otherwise, Judge Robertson wrote, the Guantánamo detainee whose petition was before him should be presumed to be a prisoner of war and treated as such.[132]

Judge Robertson rejected the government's argument that common Article 3 to the Geneva Conventions does not apply, citing among other things the International Court of Justice's opinion (above). He continued that the government's position was one "that can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad". Judge Robertson noted evidence that other governments had already begun to use the example being set by the USA's Guantánamo policy to justify their own repressive conduct.

Finally, the government had argued that any provisions of the Geneva Conventions were not enforceable in US court as the treaty was not "self-executing", that is that does not give rise to private cause of action in the US courts in the absence of specific implementing legislation. However, Judge Robertson took issue with this:

> "*Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.*"

The government responded that Judge Robertson's decision "should not be followed because it not only failed to accord the deference that is due to the President's interpretation of the Conventions, it cannot withstand scrutiny".[133] The administration is seeking to have the ruling overturned by a higher court.

The US administration is not only resisting domestic judicial scrutiny of its actions in Guantánamo, but is rejecting the findings of international expert bodies. In 2002, the UN Working Group on Arbitrary Detention challenged President Bush's 7 February 2002 prisoner of war determinations. The Working Group pointed out that the authority competent to make such determinations "is not the executive power but the judicial power". It went on to assert that in cases where POW status was not recognized by a competent tribunal, the "situation of the detainees would be governed by the relevant provisions of the [International] Covenant [on Civil and Political Rights] and in particular by articles 9 and 14 thereof, the first of which guarantees that the lawfulness of a detention shall be reviewed by a competent court, and the second of which guarantees the right to a fair trial".[134]

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[132] In her ruling on the Guantánamo detainees in January 2005, Judge Joyce Hens Green concluded that President Bush's determination that Taleban detainees captured during the armed conflict in Afghanistan were not entitled to prisoner of war status was wrong. A presidential determination, she wrote, cannot substitute for a "competent tribunal" determination of status in cases where there is doubt about prisoner of war status, as Article 5 of the Third Geneva Convention requires.

[133] *In re Guantanamo detainee cases*. Respondents' reply memorandum in support of motion to dismiss or for judgment as a matter of law. In the US District Court for the District of Columbia, 16 November 2004.

[134] Report of the Working Group on Arbitrary Detention. UN Doc. E/CN.4/2003/8, 16 December 2002, para. 64.

The USA responded that the Working Group did not have the mandate to consider whether the Guantánamo detentions were arbitrary, on the grounds that the detentions were controlled by the laws of armed conflict and not human rights law.[135] The USA further asserted to the Working Group on Arbitrary Detention that "enemy combatants are not entitled to be released or to have access to court or counsel".[136] The Working Group responded that it was concerned that the "war on terror" was being "invoked to set aside certain norms of international law, particularly those on the guarantees available to supected terrorists in detention". It continued:

> "*The Working Group is even more concerned that, in the context of the fight against terrorism, classified information and the protection of national security are often put forward as grounds for refusing to cooperate, and that its competence to judge the lawfulness of the detention of suspected terrorists is challenged on the pretext that the Group's mandate does not cover situations of armed conflict...*
>
> *The Working Group stresses that it attaches particular importance to the existence and effectiveness of international controls over the legality of detention. In its experience, the right to challenge the legality of detention is one of the most effective means of preventing and combating arbitrary detention. As such, it should be regarded not as a mere element in the right to a fair trial but, in a country governed by the rule of law, as a personal right which cannot be derogated from even in a state of emergency.*"[137]

The Chairperson-Rapporteur of the Working Group on Arbitrary Detention is one of the four UN experts for whom access to US "war on terror" detainees has been requested by the UN. A joint statement issued by a group of UN experts on 25 June 2004 noted "recent developments that have seriously alarmed the international community with regard to the status, conditions of detention and treatment of prisoners in specific places of detention". The statement called for four UN experts to be allowed to visit detainees held in Iraq, Afghanistan and Guantánamo Bay.[138] On 9 November 2004, the US government responded that it was unable to grant the request. Instead it offered to provide the UN experts with a briefing in Washington, DC. The experts only agreed to such a briefing, in Geneva, to the extent that it would be a preliminary step in preparation for their requested access to the detainees.[139] On 4 April 2005, a meeting took place in Geneva between US officials and three UN Special Rapporteurs.[140]

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[135] At the same time, the USA was in disagreement on this issue with the International Committee of the Red Cross, the authority on the provisions of the Geneva Conventions.

[136] Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights. UN Doc. E/CN.4/2003/G/73, 7 April 2003.

[137] Report of the Working Group on Arbitrary Detention. UN Doc. E/CN.4/2004/3, 15 December 2003, paras. 57, 63.

[138] *Joint statement on the protection of human rights and fundamental freedoms in the context of anti-terrorism measures.* United Nations press release, 25 June 2004. The other three experts for whom access to the detainees was requested are the Special Rapporteur on the Independence of Judges and Lawyers, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

[139] See: UN Doc. E/CN.4/2005/6, para. 33. UN Doc. E/CN.4/2005/51/Add.1, para 79. UN Doc. E/CN.4/2005/62, para. 6.

[140] The USA reported that the meeting had been "very positive" and "we agreed with the Special Rapporteurs that they would provide the United States with further information for us to get a better understanding of the scope of the activities in which they wish to engage. We look forward to receiving additional information from the Special Rapporteurs and to continuing to engage with them on this

While the executive has assumed sweeping powers to detain, interrogate, charge or try suspected "terrorists" or their associates, at the same time its "war" scenario has also brought with it a disturbing attitude to the use of torture and other cruel, inhuman or degrading treatment (see Section 12) as well as to the use of lethal force.[141] The relatively low value that appears to have been placed by the US administration on the lives of Afghanistan and Iraq citizens killed by US forces in the past three years – as demonstrated by the failure to thoroughly investigate or even quantify such casualties – is exemplified by an incident in Yemen on 3 November 2002, when six men were killed in a car, blown up by missiles fired from a CIA-controlled Predator unmanned aerial vehicle.[142] One of the people in the car was alleged to be a senior member of *al-Qa'ida*, Abu Ali al-Harithi, and the strike was carried out with the cooperation of the Government of Yemen. In Amnesty International's view, the USA and Yemen should have cooperated to try to arrest the suspects in the car rather than kill them. Rather than opting for killing them by remote control, lethal force should have been used only as a last resort.[143] To the extent that the US authorities deliberately decided to kill, rather than attempt to arrest these men, their killing would amount to extrajudicial executions.

> "*Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any public emergency many not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.*"[144]

On 17 September 2001, President Bush is reported to have signed an executive order giving the CIA broad new authorities, including the use of lethal force, in the "war on terror".[145] In January 2003, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions described the CIA killings in Yemen as "truly disturbing" and "an alarming precedent", adding that in her opinion "the attack in Yemen constitutes a clear case of extrajudicial killing".[146] In April 2003, the US authorities responded to the UN Special

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matter, in order to facilitate the requested visits to Guantanamo." *Statement by Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper on Meeting with UN Special Rapporteurs Regarding Guantanamo*. 20 April 2005. http://www.humanrights-usa.net/2005/0422ProsperGuantanamo.htm.

[141] On 5 May 2005, the Joint Staff Director of Operations, Lieutenant General James T. Conway, describing the USA's operations against *al-Qa'ida* suspects, said: "We will hunt you to your dying days and either capture you, or kill you if you resist." Defense Department regular briefing.

[142] For Amnesty International's early concerns about the USA's failure to conduct appropriate investigation into killings by US forces in Afghanistan, see pages 17-21 of *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AI Index: AMR 51/053/2002, April 2002, http://web.amnesty.org/library/Index/ENGAMR510532002.

[143] UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principles 4 and 5.

[144] UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principles 1 and 9.

[145] See pages 107-109, *USA: Human dignity denied*, note 17, *supra*.

[146] Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Asma Jahangir, UN Doc. E/CN.4/2003/3, 13 January 2003, paras. 37, 39.

Rapporteur, disagreeing that "military operations against enemy combatants could be regarded as extrajudicial executions", and adding that the "conduct of a government in legitimate military operations, whether against Al Qaida operatives or any other legitimate military target, would be governed by the international law of armed conflict." It concluded that "enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat", and that any "Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attacks in appropriate circumstances". It stated that the mandate of the Special Rapporteur does not extend to "allegations stemming from any military operations conducted during the course of an armed conflict with Al Qaida", and that both the Special Rapporteur and the UN Commission on Human Rights lack competence "to address issues of this nature arising under the law of armed conflict".[147]

In December 2004, the new Special Rapporteur on extrajudicial, summary or arbitrary executions followed up on this issue. He stated:

> "*Empowering Governments to identify and kill "known terrorists" places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted. While it is portrayed as a limited 'exception' to international norms, it actually creates the potential for an endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others. And it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal acts under either humanitarian or human rights law.*"[148]

An earlier case of a possible extrajudicial killing left unpunished occurred on 28 August 2002, when US soldiers shot dead an Afghan man near Lwara, southeast of Kabul. The soldiers involved claimed that Mohammad Sayari was shot after he lunged for a weapon. The case remained out of the public domain until redacted documents were released in late 2004 under a freedom of information request (see Section 12). These reveal that an investigator, who in August 2002 had only recently arrived at the US base at Lwara, was called upon to respond to the shooting. In a sworn statement given to investigators with the US Army Criminal Investigation Command (CID) on 9 October 2002, he described finding Mohammad Sayari's body:

> "*His right hand and arm were near his head and in his right hand, clenched in a fist, were prayer beads...*[149] *There was massive trauma to his head that appeared to be the exit wound caused by a bullet... Th[e] splatter pattern, I felt, was consistent with the person laying in the prone and the bullet path coming from an angle that was slightly behind and from the left side of the body. Additionally, I noticed approximately 5 small bullet entry holes on the back of the shirt... I became nervous at this time realizing that the man had been shot in the back...*"

The investigator said that during his subsequent time in Lwara, he would "hear small pieces of information that described the attitudes" of the Special Forces unit implicated in the case, which he concluded to be a unit "operating without any oversight". He said that the unit was described as the "door kicker types", and recalled how one of its members described to

[147] UN Doc: E/CN.4/2003/G/80, 22 April 2003.

[148] Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Philip Alston, UN Doc: E/CN.4.2005/7, 22 December 2004, para. 41.

[149] An interpreter told investigators that "when an Afghan national is holding beads in their right hand, they are offering themselves in peaceful mode and would not have reached for a weapon or acted aggressively".

him how to use mock executions as an interrogation technique when detaining groups of people. The investigator also said that he heard comments that led him to believe that one of the soldiers implicated in the shooting "wanted to kill a local Afghan before he left Afghanistan to return to the US". The investigator further alleged to the CID investigators that he was told by an officer with the Special Forces unit to delete certain photographs that he had taken at the scene of the shooting. The investigator said that "it was obvious to me that he didn't want the pictures to exist". He also feared reprisals for his investigation, concluding from the unit's "actions...that they would not threaten me, they would kill me". His sworn statement contains the following exchange with CID investigators:

> Q: *What do you think were the circumstances of Sayari's death?*
>
> A: *I believe Sayari to have been executed.*
>
> Q: *Why do you think they executed Sayari?*
>
> A: *How do you say just for the fun of it? I think that members of the team felt that the Afghan life was less than human.*

The CID investigation into the killing, completed in May 2003, concluded that there was probable cause to believe that five soldiers had committed crimes, and recommended their prosecution for conspiracy, murder, dereliction of duty and obstruction of justice. Their recommendations were forwarded to the US Army Special Forces Command in Fort Bragg, North Carolina. There, the decision was taken not to prosecute. One of the soldiers received a letter of reprimand and no action was taken against the other four.[150]

The Special Rapporteur on extrajudicial, summary or arbitrary executions noted that the USA's position in response to the November 2002 Yemen killings (and again when the USA rejected the Special Rapporteur's concerns about reports of the use of excessive force against civilians in Iraq)[151] would appear to suggest that (i) extrajudicial, summary or arbitrary executions, falling within the Special Rapporteur's mandate, can take place only in situations where international human rights law applies; and (ii) where humanitarian law is applicable, it operates to exclude human rights law. The Special Rapporteur pointed out that such an analysis is not supported by general principles of international law:

> "*It is now well recognized that the protection offered by international human rights law and international humanitarian law are coextensive, and that both bodies of law apply simultaneously unless there is a conflict between them. In the case of a conflict, the lex specialis should be applied but only to the extent that the situation at hand involves a conflict between the principles applicable under the two international legal regimes.*"[152]

Thus, the Special Rapporteur concluded, echoing the language of the Human Rights Committee, "the two bodies of law are in fact complementary and not mutually exclusive".[153]

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[150] Army criminal investigators outline 27 confirmed or suspected detainee homicides for Operation Iraqi Freedom, Operation Enduring Freedom. US Army Criminal Investigation Command, 25 March 2005. http://www.cid.army.mil/Documents/OIF-OEF%20Homicides.pdf.

[151] On 12 May 2003, the Special Rapporteur wrote to the US government about incidents in Fallujah, Iraq, in which a number of civilians were allegedly shot dead by US forces during demonstrations in unclear circumstances. In a response dated 8 April 2004, the US authorities said that inquiries relating to military operations in Iraq did not fall within the Special Rapporteur's mandate.

[152] UN Doc: E/CN.4.2005/7, 22 December 2004, para. 50.

[153] In an authoritative interpretation of the International Covenant on Civil and Political Rights (ICCPR) handed down in 2004, the UN Human Rights Committee stated: "*The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be*

He stressed that "efforts to eradicate terrorism must be undertaken within a framework clearly governed by human rights law as well as international humanitarian law, and that executions occurring in the context of armed conflict that violate that framework fall squarely within the remit of the Special Rapporteur".

The fact that it was a CIA-controlled Predator drone that was used to blow up the vehicle in Yemen can now be set against what has since been learned about the CIA's role in torture and ill-treatment of "war on terror" detainees, and what appears to have been efforts within the administration from early in the "war on terror" to immunize CIA personnel from possible future prosecutions for torture and war crimes (see below). It has recently been alleged that under a series of "findings" and executive orders signed by President Bush, the Pentagon's role in covert military activities will be expanded and the CIA's role downgraded. Under this scenario, it is alleged, congressional oversight of military covert operations will be minimal or absent. A former high-level intelligence official is quoted as saying: "The Pentagon doesn't feel obligated to report any of this to Congress. They don't even call it 'covert ops' – it's too close to the CIA phrase. In their view, it's 'black reconnaissance'... Do you remember the right-wing execution squads in El Salvador? We founded them and we financed them. The objective now is to recruit locals in any area we want. And we aren't going to tell Congress about it." Avoiding congressional oversight, according to comments attributed to a Pentagon adviser, "give[s] power to Rumsfeld – giving him the right to act swiftly, decisively, and lethally. It's a global free-fire zone".[154]

Responding to an earlier article (which he said he had not read), Secretary of Defense Donald Rumsfeld described the allegations about the "Salvador Option" as "nonsense" and "simply fanciful".[155] Amnesty International is not in a position to substantiate the allegations or dismiss them. However, it points out that the record of the US administration during the "war on terror" means that its assurances must be treated with caution. On 26 June 2003, for example, President George W. Bush proclaimed to the world that "the United States is committed to the worldwide elimination of torture and we are leading this fight by example". At the time he made this proclamation, a now notorious 1 August 2002 Justice Department memorandum had been the US administration's position, albeit in secret, for almost a year and would be so for another year. This memorandum advised on how US interrogators could escape criminal liability for torture, on how to narrow the definition of torture, on how officials could get away with using cruel, inhuman or degrading treatment that purportedly fell short of torture, and on how the President could override international or national prohibitions on torture.[156]

Another administration document originally classified for 10 years, but made public in June 2004 in the wake of the Abu Ghraib scandal, is the Pentagon *Working Group Report on Detainee Interrogations in the Global War on Terrorism*, dated 4 April 2003 and believed

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specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive". UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004. Human Rights Committee, General Comment 31. The nature of the general legal obligation imposed on States Parties to the Covenant, adopted on 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11. The Human Rights Committee is the expert body established under the ICCPR to oversee implementation of that treaty. The USA ratified the ICCPR in 1992.

[154] *The coming wars*. By Seymour M. Hersh. The New Yorker, 24 and 31 January 2005.

[155] Secretary Rumsfeld was speaking at a news briefing on 11 January 2005. The article in question was *'The Salvador Option'*, by Michael Hirsh and John Barry, Newsweek, 8 January 2005.

[156] "That memo represented the position of the executive branch at the time it was issued"; and: "It represented the administrative branch position". "I accepted the August 1, 2002, memo". Alberto Gonzales, White House Counsel, in response to oral questions from Senator Patrick Leahy and Senator Edward Kennedy and written questions from Senator Richard Durbin during the US Attorney General nomination hearings before the Senate Judiciary Committee, January 2005.

to still be operational, states: "The United States has maintained consistently that the Covenant does not apply outside the United States or is special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict".[157]

The International Court of Justice (ICJ) has explicitly rejected the notion that the International Covenant on Civil and Political Rights (ICCPR) only applies in peacetime:

> "... [T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 [derogation in a time of national emergency]. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."[158]

The ICJ has recently restated this, namely that "the protection offered by human rights conventions does not cease in case of armed conflict…"[159]

In 2001, the Human Rights Committee, the expert body established by the ICCPR to oversee its implementation, issued an authoritative interpretation of rights under states of emergency (General Comment 29).[160] Under Article 4 of the treaty, states may derogate from certain obligations under certain very strict and narrow conditions (the USA, which ratified the ICCPR in 1992, has not announced any such derogation). The Committee stressed that "even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation"[161] – in other words, human rights law applies during times of armed conflict even though rules of international humanitarian law become applicable at such a time.

Article 4.2 of the ICCPR states that, in any event, there can be no derogation from certain provisions, including Article 6 (right to life) and Article 7 (prohibition on torture or other cruel, inhuman or degrading treatment or punishment). In its General Comment 29, the Human Rights Committee stressed that the category of peremptory norms extends beyond the list of non-derogable provisions contained in Article 4, including the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. The Committee further stated that

> "*the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court do decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.*"[162]

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[157] *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations*, 4 April 2003. http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf.
[158] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996), para. 25.
[159] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 106.
[160] Human Rights Committee. General Comment 29. States of Emergency (Article 4). CCPR/C/21/Rev.1/Add 11, 31 August 2001.
[161] *Ibid.*, para. 3.
[162] *Ibid.*, para. 7.

Within months of the Human Rights Committee's comment, the USA had transferred the first detainees to Guantánamo in conditions of transfer and detention that shocked international opinion and violated the prohibition on cruel, inhuman or degrading treatment. Judicial review was denied, with the USA arguing that foreign nationals captured and held outside US sovereign territory had no rights. Secret memorandums were drafted within the US administration arguing that torture could be authorized by the President and that a wide array of interrogation techniques that amounted at least to cruel, inhuman or degrading treatment could be used without making the interrogator criminally liable under US law. In violation of the presumption of innocence, detainees were repeatedly labelled as "killers" and "terrorists" by the US administration. President Bush signed a military order providing for trials by military commissions – not independent and impartial courts of law, but executive bodies. This is serial international law-breaking.

Three months before the US Supreme Court handed down its ruling that the federal courts could consider appeals from the Guantánamo detainees, the Human Rights Committee issued its authoritative interpretation of the general obligations that the ICCPR imposes on states which are party to it (General Comment 31).[163] It made clear that the obligations of the ICCPR are "binding on every State Party as a whole" including all branches of government – executive, legislative and judicial – and all levels of government – national, regional or local.[164] It emphasised that each State Party must respect and ensure the rights in the Covenant to anyone "within the power or effective control of that State Party, even if not situated within the territory of that State Party".[165] Where there are inconsistencies between domestic law and the ICCPR, the domestic law must be changed "to meet the standards imposed by the Covenant's substantive guarantees". No domestic political, social, cultural or economic considerations can be used to justify failure to comply with this obligation.[166]

General Comment 31 shows that the US administration was ignoring its international obligations when it argued to the US Supreme Court in the *Rasul* case that "the ICCPR is inapplicable to conduct by the United States *outside* its sovereign territory".[167] Yet some 10 months after the Supreme Court decision, the US administration is still attempting to keep its detention regime in Guantánamo and elsewhere as free from judicial or other external scrutiny as it can on the basis that foreign nationals captured and held outside sovereign US territory have no rights under national or international law.

6. Seeking to render the *Rasul* decision meaningless

Petitioners could not be more wrong. On a fundamental level, petitioners' objection to the Executive's power to capture and detain alien enemy combatants in foreign territory during ongoing hostilities is flatly inconsistent with the historical understanding of the President's role as Commander in Chief of the Armed Forces

US Justice Department, legal brief, October 2004[168]

It has been said that a week is a long time in politics.[169] It seems that the same could be said about the law, or at least judicial interpretations of it. In the space of two weeks in January

[163] General Comment 31. The nature of the general legal obligation imposed on States Parties to the Covenant. Adopted on 29 March 2004. UN Doc. CCPR/C/21/Rev.1/ Add.13, 26 May 2004.
[164] *Ibid.*, para. 4.
[165] *Ibid.*, para. 10.
[166] *Ibid.*, para. 13.
[167] *Rasul v. Bush*, Brief for the Respondents in Opposition, In the Supreme Court of the United States, October 2003.
[168] *Hicks v. Bush*. Response to petitions for writ of habeas corpus and motion to dismiss or for judgment as a matter of law and memorandum in support. In the US District Court for the District of Columbia, 4 October 2004.

2005, two diametrically opposed responses to the same question of law were handed down by judges on the same federal court in Washington, DC. The first displayed a troubling degree of deference to the executive's attempts to ignore its human rights obligations, while the second showed a welcome respect for human rights. The US administration supports the former ruling and rejects the latter. It should change direction.

Each of the two judges in question – Judge Richard Leon and Judge Joyce Hens Green of the District Court for the District of Columbia – was faced with petitions from detainees labelled as "enemy combatants" and held in indefinite executive detention in Guantánamo. The petitions were asking the judges to issue writs of *habeas corpus* so that the detainees could challenge the lawfulness of their detention, a basic protection under international law against arbitrary arrest, torture and "disappearance", also explicitly provided in the US Constitution (Article 1, Section 9)[170]. The petitions had been filed following the US Supreme Court's decision of 28 June 2004, *Rasul v. Bush*, which held that the federal courts "have jurisdiction to consider challenges to the legality of the detentions of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay".[171] The decision was widely welcomed as a first step to restoring the rule of law to Guantánamo, but the US administration has sought to drain it of real meaning, and to keep any review of the detentions as narrow and as far from a judicial process as possible.[172]

For this, the US Supreme Court bears some responsibility. Judge Green, for one, "would have welcomed a clearer declaration in the *Rasul* opinion regarding the specific constitutional and other substantive rights" of the detainees.[173] However, the executive is not forced to adopt a regressive interpretation of narrowly-defined Supreme Court opinions. A government, not least one which promotes itself as a progressive force for human rights, should do all it can to ensure that its conduct conforms to domestic and international law without waiting for the courts to order it to do so. Regrettably, in its "war on terror" detention policy, the US administration has opted for executive fiat over the rule of law and hypocrisy over human rights. Even the current Attorney General has admitted that the US administration's post-*Rasul* stance would be unlikely to "meet international scrutiny".[174]

In a press release issued immediately after the *Rasul* ruling, the US Justice Department interpreted it as holding that "individuals detained by the United States as enemy combatants have certain procedural rights to contest their detention".[175] The Department's use

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[169] Saying attributed to Harold Wilson, United Kingdom Prime Minister in the 1960s and 1970s.

[170] In addition widely considered to be provided elsewhere within the Constitution, for instance in the requirement of "due process of law" in the Fifth and Fourteenth Amendments.

[171] *Rasul v. Bush*, 000 U.S. 03-334 (2004).

[172] For example, at a press conference in Geneva on 10 December 2004, the UN High Commissioner for Human Rights expressed relief at the Supreme Court's decision, noting that the US courts had historically played a leadership role in the protection of civil liberties. The UN Working Group on Arbitrary Detention also welcomed the ruling. UN Doc. E/CN.4/2005/6, 1 December 2004, para. 64.

[173] *In re Guantanamo detainee cases*. Memorandum opinion denying in part and granting in part respondents' motion to dismiss or for judgment as a matter of law. US District Court for the District of Columbia. 31 January 2005. Unclassified version.

[174] During oral questioning by the Senate Judiciary Committee in January 2005 in relation to his nomination to the post of Attorney General, Alberto Gonzales was asked by Senator Graham whether he thought that now that "the Supreme Court decided that Gitmo was not Mars..., you're confident that [the Pentagon] is going to come up with some due process standards that will meet international scrutiny?" Alberto Gonzales responded: "Well, I'm not sure it'll meet international scrutiny... What I can say is...what is in place now at Guantánamo should meet our legal obligations as described in the recent Supreme Court cases."

[175] *Statement of Mark Corallo, Director of Public Affairs, regarding the enemy combatant cases*. Department of Justice news release, 28 June 2004.

of the word "procedural", rather than "substantive", is telling. It would later argue in the DC District Court that the Guantánamo detainees had no grounds under constitutional, federal or international law on which to challenge the lawfulness of their detention. In other words, according to the administration's Kafkaesque vision for Guantánamo, the *Rasul* ruling should be interpreted as mandating no more than a purely procedural right – the detainees could file *habeas corpus* petitions, but only in order to have them necessarily dismissed. Any further action would be an "unprecedented judicial intervention into the conduct of war operations, based on the extraordinary, and unfounded, proposition that aliens captured outside this country's borders and detained outside the territorial sovereignty of the United States can claim rights under the US Constitution".[176] This was the same position the administration had adopted before the *Rasul* ruling.

At the same time, the administration has done nothing to facilitate the Guantánamo detainees' access to legal counsel so that they can file petitions to challenge the lawfulness of their detention. Efforts by US lawyers to gain access to, or information about, the detainees in order to be able to assist them in filing habeas *corpus* petitions if the detainee so chooses, have been stymied by the administration.[177]

Moreover, in the cases where individuals do have lawyers for their *habeas corpus* appeals, there is concern that the authorities have tried to undermine the relationships between detainees and their counsel. For example, a lawyer representing Kuwaiti detainees has alleged that the interrogators in Guantánamo "have engaged in practices to destroy the trust of the Kuwaiti nationals in us as their lawyers". During his visits to the base, at least two of the detainees have told him that interrogators have told them not to trust their lawyers, including "because they are Jewish". One of the detainees said that an interrogator had told him that he would be tortured if he was returned to Kuwait. When he replied that his lawyer had assured him that this would not happen, "the interrogator laughed and said 'don't trust your lawyers'. She also said "did you know your lawyers are Jews?'" Another of the Kuwaiti detainees said that he, too, had been told by his interrogator: "Your lawyers are Jews. How could you trust Jews?" A Yemeni detainee has reported that another detainee had a "lawyer" who made him multiple visits. The "lawyer" subsequently turned up in military uniform. Detainees are reported to have become suspicious of civilian attorneys, suspecting that they may be military personnel in disguise. Some have said that since lawyers have started visiting the base, punishments for those detainees with lawyers have increased. A Yemeni detainee has alleged that after a visit from his US *habeas* lawyer in November 2004, he was immediately subject to interrogation. Another Yemeni has alleged that after a visit, all his items were removed from his cell and he was forced to wear only shorts for a month.

In addition, it would appear that the detaining authorities have offered little or no practical advice to the detainees about how they might go about seeking a lawyer. Official advice has been limited to telling the detainees that they can file petitions in federal court (while at the same time the government has argued in court that any such petitions should be necessarily dismissed). By 3 May 2005, only 168 named detainees (including at least 11 since released or transferred out of Guantánamo) had had petitions filed on their behalf in the US courts (in 61 petitions). By that date there were approximately 520 detainees held in the base.

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[176] *Hicks v. Bush*. Response to petitions for writ of habeas corpus and motion to dismiss or for judgment as a matter of law and memorandum in support. In the US District Court for the District of Columbia, 4 October 2004.

[177] See, for example, Declaration by Attorney Barbara Olshansky. *John Does 1-570 v. Bush et. al.* In the US District Court for the District of Columbia, 9 February 2005. In 2004, Amnesty International organized a conference in Sana'a, Yemen, at which US lawyers obtained affidavits from relatives of detainees from the Gulf region held in Guantánamo. The affidavits authorized the lawyers to act on the detainees behalf. Later in the year, more such affidavits were gathered in Bahrain.

In a bid to reach all the detainees, lawyers have filed a *habeas corpus* petition for "John Does Nos 1-570" to include "every detainee being held at Guantánamo whom the United States has not officially confirmed to be in its custody by disclosing his or her identity and who has not yet filed a petition for a writ of habeas corpus", and to include detainees held by any agency.[178] At the time of writing, the government was seeking to have this petition dismissed.

In its post-*Rasul* news release, the Justice Department added that it would review the decision in order to determine how to "modify existing processes to satisfy the Court's ruling". Clearly, the administration was in no mood for a clean start if all it wanted to do was to "modify existing processes" – after all, what "process" was there to be modified for a detainee held indefinitely without charge or trial, access to legal counsel, relatives or the courts? International human rights law – under which each and every Guantánamo detainee has the right to full judicial review of his detention and to release if that detention is unlawful – demanded a U-turn in policy, not tinkering around its edges.[179]

Nevertheless, having argued for two and a half years to keep the Guantánamo detainees out of the reach of the courts, the administration was unwilling to abandon its quest. Ten days after the *Rasul* ruling, the Department of Defense announced the formation of the Combatant Status Review Tribunal (CSRT) to "serve as a forum for detainees to contest their status as enemy combatants".[180] The term "enemy combatant" – which as noted above was invented by the USA for the "war on terror" – is defined broadly for the CSRT.[181] In one of the subsequent CSRT hearings, the following exchange took place between the President of the three-military officer panel and the detainee, Bisher al-Rawi, an Iraqi national/UK resident:

> Detainee: *I still don't fully understand the actions I have committed, to be classified as an enemy combatant. I have read the definition of 'enemy combatant' several times. I find it to be very vague and to have many meanings… I would like to fully understand this, so I can defend myself.*
>
> Tribunal President: *As you have heard from the Oath we took, we are to apply our common sense, our knowledge, our sense of justice to this definition and to you, in order to come to a conclusion as to whether you have been properly classified as an enemy combatant or not. That is what we are going to do today. We are going to go over the evidence that the government provided. You are going to see the unclassified portion. I am going to make an assumption at this point that there is classified evidence you won't be able to read…*"[182]

The Pentagon asserted that the CSRT's procedures were intended to "reflect the guidance the Supreme Court provided" in *Rasul v. Bush* coupled with another ruling issued on

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[178] *John Does 1-570 v. George W. Bush*, et al. Petition for writ of habeas corpus. In the United States District Court for the District of Columbia, 10 February 2005.

[179] *USA: Restoring the rule of law: The right of Guantánamo detainees to judicial review of their detention*, AI Index: AMR 51/093/2004, June 2004, http://web.amnesty.org/library/Index/ENGAMR510932004.

[180] *Combatant Status Review Tribunal order issued*. US Department of Defense News Release, 7 July 2004.

[181] "*The term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces or partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.*" Memorandum for the Secretary of the Navy. Subject: *Order establishing Combatant Status Review Tribunal*. Signed by Paul Wolfowitz, Deputy Secretary of Defense. 7 July 2004.

[182] *El-Banna et al. v. Bush et al.* CSRT unclassified factual returns for Bisher al-Rawi. On 25 September 2004, a CSRT found unanimously that Bisher al-Rawi was an "enemy combatant".

the same day, *Hamdi v. Rumsfeld*.[183] The latter decision concerned Yaser Esam Hamdi, a US citizen captured in the armed conflict in Afghanistan and held without charge or trial as an "enemy combatant" on the US mainland (see further below). The plurality in the split *Hamdi* decision said that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker". The *Hamdi* plurality held that "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator".

With this reference to "military operations" in mind, it should be stressed that the CSRT was not devised to conduct battlefield determinations of the status of detainees. It was devised more than two years after detentions began, for use thousands of miles away from the point of capture, regardless of whether that capture occurred on the battlefield of an international conflict long since over or on the street of a city in a country not at war in the first place.

Meanwhile, in Afghanistan, were some detainees have been US custody for more than a year, not even the CSRT process is being applied. Once detainees in the custody of the US Department of Defense in Afghanistan are designated as an "enemy combatant", they have an initial review of that status by a Commander or designee within 90 days of being taken into custody. After that, "the detaining combatant commander, on an annual basis, is required to reassess the status of each detainee. Detainees assessed to be enemy combatants under this process remain under DoD control until they no longer present a threat."[184]

The administration's penchant for secrecy and disregard for the fundamental rights of detainees was again on display in the rules for the Combatant Status Review Tribunal, as Amnesty International pointed out at the time they were announced.[185] The detainees would have no access to legal counsel (only to a "personal representative" – a military officer) or to classified evidence to assist them in the CSRT process, yet the burden was on the detainee to disprove his "enemy combatant" status:

> "*Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of the evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favour of the Government's evidence*".[186]

The presumption by the CSRT that the detainee is an "enemy combatant" is clear from some of the transcripts of the hearings. For example, Bisher al-Rawi asked why he had to wear shackles for his hearing. The Tribunal President responded:

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[183] *Hamdi v. Rumsfeld*, 03-6696, decided 28 June 2004. The Pentagon said: "The Supreme Court held that the federal courts have jurisdiction to hear challenges to the legality of the detention of enemy combatants held at Guantanamo Bay. In a separate decision – involving an American citizen held in the United States (i.e. *Hamdi*) – the Court also held that due process would be satisfied by notice and an opportunity to be heard, and indicated that such process could properly be provided in the context of a hearing before a tribunal of military officers". Department of Defense, Combatant Status Review Tribunals.

[184] USA's Periodic Report to the UN Committee against Torture, 6 May 2005, *supra*, note 16, Annex 1.

[185] *USA: Administration continues to show contempt for Guantánamo detainees' rights*, AI Index: AMR 51/113/2004, 8 July 2004, http://web.amnesty.org/library/Index/ENGAMR511132004.

[186] Memorandum for the Secretary of the Navy. Subject: *Order establishing Combatant Status Review Tribunal*. Signed by Paul Wolfowitz, Deputy Secretary of Defense. 7 July 2004.

> "*You are classified as an enemy combatant against the United States until we make a determination otherwise. I treat all enemy combatants fairly but the same. I won't allow anyone in here without the shackles. I am treating you like I treat everyone else.*"[187]

The CSRT – a panel of three "neutral" military officers – was "free to consider any information it deems relevant and helpful", including "hearsay evidence, taking into account the reliability of such evidence in the circumstances". Evidence extracted under torture or other coercion was not excluded. As the Principal Deputy Associate Attorney General of the US Justice Department argued to Judge Richard Leon:

> "*If in fact information came to the CSRT's attention that was obtained through a non-traditional means, even torture by a foreign power, I don't think that there is anything in the due process clause [of the US Constitution], even assuming they were citizens, that would prevent the CSRT from crediting that information for purposes of sustaining the enemy combatant class[ification]*".[188]

The Justice Department's representative said that this would also be the case if the torture was carried out by US agents, adding that "we don't think anything qualifying remotely as torture has occurred at Guantánamo". In other words, the CSRT process would presume that "evidence" extracted under torture is genuine and accurate, and it would be up to the detainee, with no legal assistance, to refute it. Even without the allegations of torture and ill-treatment that have been raised in the context of the interrogation process in Guantánamo, as well as in Afghanistan, the totality of the detention conditions themselves – harsh, indefinite, and isolating – may amount to cruel, inhuman or degrading treatment in violation of international law. These conditions themselves may be coercive, and feed into the CSRT process. For example, the CSRT determined that Faruq Ali Ahmed was an "enemy combatant" based on the testimony of a fellow detainee who according to Faruq Ali Ahmed's "personal representative" "with some certainty... has lied about other detainees to receive preferable treatment and to cause them problems while in custody". Faruq Ali Ahmed testified to the CSRT that he was in Afghanistan to teach the Koran to children. His "personal representative" said that had the CSRT dismissed the fellow detainee's evidence as unreliable, "then the position we have taken is that a teacher of the Koran (to the Taliban's children) is an enemy combatant (partially because he slept under a Taliban roof)".[189]

The 7 July 2004 order establishing the CSRT was intended "solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States...".[190] Guantánamo began receiving "war on terror" detainees following legal advice from the Justice Department that "a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantánamo Bay Naval Base, Cuba."[191] The *Rasul* ruling showed otherwise, but the

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[187] *El-Banna et al. v. Bush et al.* CSRT unclassified factual returns for Bisher al-Rawi.
[188] *Benchellali et al v. Bush et al.* Transcript of motion hearing before the Honorable Richard J. Leon, US District Judge, in the US District Court for the District of Columbia, 2 December 2004.
[189] *Ahmed et al. v. Bush et al.* Personal representative comments regarding the record of proceedings, Ahmed factual return. In the US District Court for the District of Columbia.
[190] Memorandum for the Secretary of the Navy. Subject: *Order establishing Combatant Status Review Tribunal*. Signed by Paul Wolfowitz, Deputy Secretary of Defense. 7 July 2004.
[191] *Re: Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba.* Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, US Department of Justice, 28 December 2001. Although the memorandum

administration has refused to admit that this legal advice, like the legal advice on torture contained in other previously secret administration memorandums, disregarded international law and fundamental human rights standards. The CSRT process is an improvised minimalist response to the US Supreme Court's rulings designed to keep the lawfulness of the detentions away from judicial or other external scrutiny for as long as possible.

The CSRT Order added that nothing contained in it should be construed to "limit, impair, or otherwise affect" the President's Commander-in-Chief powers. This has been reflected in the subsequent statistics. On 29 March 2005, the authorities announced that they had completed all the CSRTs for the current detainees in Department of Defense custody in Guantánamo.

- Of the 558 CSRT decisions finalized by 29 March 2005, all but 38 (93 per cent) affirmed that the detainee was indeed an "enemy combatant" as broadly defined by the Order.
- Amnesty International's review of 60 cases filed in the DC District Court by April 2005 reveals that most were decided inside a single day, and that in all 58 cases which gave the voting details, the CSRT panel was unanimous in finding the detainee to be an "enemy combatant". These 58 cases were all finalized in late 2004.
- Eighty-four per cent of the cases (32 out of 38) where the detainee was found not to be an "enemy combatant" were decided later than 1 February 2005, after Judge Joyce Hens Green ruled that the CSRT process was inadequate and unconstitutional, but before the appeal against her decision was heard. In its 27 April 2005 brief appealing to the US Court of Appeals for the District of Columbia Circuit to overturn Judge Green's ruling, the government emphasised these 38 cases as a sign of a constitutionally fair system. The brief did not point out – or explain whether it was pure coincidence – that all but six of them had been decided after Judge Green's finding that the CSRT process was unlawful.[192]
- This sudden and marked increase in findings that a detainee was no longer an "enemy combatant" also coincided with a period during which the Pentagon was said to be looking to reduce the number of detainees held in the base in the wake of the administration's losses in the courts, including by "outsourcing" detentions to other countries (see Section 15).

Creating procedures that bypass international norms and avoiding judicial scrutiny for its actions should be unacceptable to any government which believes that fundamental human rights principles are non-negotiable, as the USA claims to. As Judge Green said in her recent ruling on the Guantánamo detainees:

> "*Of course, it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected 'enemy combatants' at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees. That, however, is not the relevant legal test... Although this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the*

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concluded that no federal court could "properly entertain" a *habeas corpus* petition from a Guantánamo detainee, it warned that there was some possibility that a court could do so.

[192] *Al Odah et al. v. USA et al.* Opening brief for the United States, et al. In the United States Court of Appeals for the District of Columbia Circuit, 27 April 2005, page 51. The USA also noted these 38 cases in its Second Periodic Report to the UN Committee against Torture, submitted on 6 May 2005, *supra*, note 16, Annex 1.

existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years."

For consistency's sake, it had been agreed to have a single judge, Judge Joyce Hens Green, a senior judge appointed to the court in 1979, resolve issues common to the Guantánamo cases.[193] Thus, when the government filed its motion to dismiss the petitions for a writ of *habeas corpus*, the motion being common to all the cases, other judges on the court transferred this issue to Judge Green. However, Judge Richard Leon declined to participate in this arrangement. He subsequently became the first judge to issue a ruling interpreting the *Rasul* decision.[194] He sided with the government and dismissed the petitions.

On 19 January 2005, just over three years after the Guantánamo detentions began, Judge Leon in essence determined that whereas under the Supreme Court ruling Guantánamo detainees have the right to petition federal courts for a *habeas corpus* writ, they nevertheless do not have the right to obtain such writs. He ruled that there was "no viable legal theory" by which he could issue writs of *habeas corpus* to foreign detainees held without charge or trial in the naval base. In Judge Leon, appointed to the court by President George W. Bush in 2002, the administration found an ally for its position that the "war on terror" is a global armed conflict and that under the President's Commander-in-Chief powers, individuals broadly defined as "enemy combatants" could be picked up by the USA anywhere in the world and be subjected to executive detention for the duration of the "war". He agreed with the government that the detainees have no rights under constitutional law to challenge the lawfulness of their detention because they are non-resident foreign nationals captured abroad and held in a naval base whose "ultimate sovereignty" was Cuba's.[195] Similarly, he concluded that they had no rights under federal or international law. He seemed satisfied to give the government the benefit of the doubt on the question of torture and ill-treatment, despite the mounting evidence of such abuses by US forces in the "war on terror". He maintained a similar blind faith in the CSRT process. Amnesty International concluded that Judge Leon placed too much trust in the executive and not enough in the rule of law and fundamental human rights principles which the USA is obliged to uphold.[196]

7. A judge with security credentials takes a more critical view

[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

US Supreme Court, *Hamdi v. Rumsfeld*, 28 June 2004

Judge Joyce Hens Green, who stressed that she had served as the Chief Judge of the United States Foreign Intelligence Surveillance Court, "the focus of which involves national security

[193] United States District Court for the District of Columbia, Resolution of the Executive Session, 15 September 2004.

[194] *Khalid v. Bush*, Memorandum opinion, US District Court for the District of Columbia, 19 January 2005. http://www.dcd.uscourts.gov/opinions/2005/Leon/2004-CV-1142~7:40:40~3-2-2005-a.pdf

[195] The USA occupies the Guantánamo base under a 1903 lease, in which "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]", while the "Republic of Cuba consents that during the period of occupation by the United States…the United States shall exercise complete jurisdiction and control over and within said areas". In 1934, the two parties entered into a treaty whereby, absent their agreement to amend or repeal the lease, it would remain in effect as long as the USA "shall not abandon the …naval station of Guantanamo".

[196] *USA: Guantánamo: Trusting the executive, prolonging the injustice*, AI Index: AMR 51/030/2005, 26 January 2005, http://web.amnesty.org/library/Index/ENGAMR510302005.

and international terrorism", cast an apparently far more critical eye over the situation.[197] Her decision, handed down on 31 January 2005, offered the detainees and their families hope that justice will yet be done and their legal limbo ended.[198]

Judge Green noted that the Guantánamo detainees seeking *habeas corpus* relief included men taken into custody as far away from Afghanistan as Gambia, Zambia, Bosnia and Thailand. She wrote that "although many of these individuals may never have been close to an actual battlefield and may never have raised conventional arms against the United States or its allies, the military nonetheless has deemed them detainable as 'enemy combatants'". She noted that the government had chosen to submit to the court as factual support for the detentions only CSRT records, despite claiming that the detainees' cases had been subjected to unspecified "multiple levels" of administrative review. The "nature and thoroughness" of these alleged multiple levels of review, she said, must be called into "serious question".[199] CSRT proceedings had only commenced from late July 2004, at which point most of the detainees had already been held for more than two years.[200]

Unlike Judge Leon, Judge Green rejected the government's argument that the detainees have no substantive rights, concluding that they must have more than just the procedural right "to file papers in the Clerk's Office". She rejected the government's notion – which lay behind its choice of Guantánamo as a location for "war on terror" detentions – that because Cuba retains "ultimate sovereignty" over Guantánamo, US Supreme Court precedent meant that the detainees have no rights under the US Constitution. On this point, she noted the irony that, while the Cuban government had claimed that the USA was violating the human rights of the Guantánamo detainees and had demanded their humane treatment, the US government "does not appear to have conceded the Cuban government's sovereignty over these matters". The executive will only point to Cuba's "sovereignty" over the base when it suits the US agenda.

In the *Rasul* ruling, the Supreme Court majority had said in a footnote: "Petitioners' allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – *unquestionably describe custody in violation of the Constitution or laws or treaties of the United States*" (emphasis added). The government argued to Judge Leon that "it is not for us to speculate…

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[197] The Foreign Intelligence Surveillance Court was created under the Foreign Intelligence Surveillance Act (FISA) of 1978. It used to have seven judges on it, but the USA PATRIOT Act of 2001 amended FISA to increase the number to 11. Among the current 11 are Judges Coleen Kollar-Kotelly and James Robertson of the DC District Court. The former ruled against the Guantánamo detainees on the question of jurisdiction which was subsequently reversed by the US Supreme Court in *Rasul v. Bush* on 28 June 2004. She noted at the time that her opinion "should not be read as stating that these aliens do not have some form of rights under international law". The ruling of the Judge Robertson in November 2004 led to suspension of trials by military commission (see further in text).

[198] *In re Guantanamo detainee cases*, Memorandum Opinion Declining in Part and Granting in Part Respondents' Motion to Dismiss or Grant for Judgment as a Matter of Law in the US District Court for the District of Columbia, 31 January 2005, http://www.dcd.uscourts.gov/opinions/2005/Green/2002-CV-299~8;57;59~3-2-2005-a.pdf.

[199] Despite the administration's claims about "multiple levels of review", it appears that numerous individuals have been detained in Guantánamo on flawed intelligence, their release only coming after many months if not years of detention. Some detainees, for example Salim Ahmed Hamdan (see below), were reportedly "sold" to the USA by individuals in Afghanistan and Pakistan – the CIA was reportedly offering US$5,000 for *al-Qa'ida* suspects.

[200] The final CSRT hearing was held on 22 January 2005.

on the basis of mood music from the [Rasul] opinion".[201] In his subsequent ruling dismissing the Guantánamo detainees' petitions, Judge Leon characterized the reliance of the petitioners on the footnote as "misplaced and unpersuasive".

Judge Green, however, adopted a different stance, writing that "it is difficult to imagine that the Justices would have remarked that the petitions 'unquestionably describe custody in violation of the Constitution or laws or treaties of the United States' unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed." Thus, Judge Green ruled, "it is clear that Guantánamo Bay must be considered the equivalent of a US territory in which fundamental constitutional rights apply." Specifically, she held that the detainees had the Fifth Amendment right not to be deprived of liberty without due process of law.

Judge Green said that a relevant factor in the Guantánamo cases is the potential length of the incarcerations. She noted that the administration was asserting the right to hold "enemy combatants" until the "war on terror" is over or the executive determines that the individual no longer poses a threat to national security. She noted that the government had been unable to inform her of how long it believed the "war on terror" might last, or even how it will determine when it has ended. She continued:

> "*At a minimum, the government has conceded that the war could last several generations, thereby making it possible, if not likely, that 'enemy combatants' will be subject to terms of life imprisonment at Guantanamo Bay. Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror – and thus the period of incarceration – will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term.*"

At the end of his Combatant Status Review Tribunal on 1 September 2004, Yemeni national Fahmi Abdullah Ahmed said:

> "*Just know that I have been here for three years and have [not] been in touch with my family. I don't think this is just and it's not right for the American legal system to not allow people to talk to their families. It is a very small right that is allowed to all detainees around the world.*"[202]

The Tribunal President responded that "we are here today to determine your enemy combatant status, and that alone is what we focus our attention on today." On that same day, the panel of three military officers unanimously decided that Fahmi Abdullah Ahmed was an "enemy combatant", as has been done in 519 other cases. He remains held without charge or trial or access to his relatives.[203]

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[201] *Benchellali et al v. Bush et al.* Transcript of motion hearing before the Honorable Richard J. Leon, US District Judge, in the US District Court for the District of Columia, 2 December 2004.

[202] *Ahmed et al. v. Bush et al.* CSRT unclassified factual returns. In the US District Court for the District of Columbia.

[203] Principle 19 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations". Rule 37 of the UN Standard Minimum Rules for the Treatment of Prisoners states: "Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits".

8. The Combatant Status Review Tribunal – no laughing matter

I hope this Tribunal is a fair one. I've already been classified as an enemy combatant but from what I know of the American justice system is that a person is innocent until they are proven guilty. Right now, I'm guilty trying to prove my innocence. This is something I haven't heard of in a justice system.

Kuwaiti detainee, CSRT hearing, Guantánamo, 1 November 2004[204]

Although the government had urged Judge Green to dismiss the petitions on the grounds that the detainees had no right to challenge the lawfulness of their detentions, it had also argued that if she did find that the detainees were entitled to due process under the Fifth Amendment of the Constitution, she should accept that the Combatant Status Review Tribunal fully met that requirement. In its legal brief to the DC District Court in October 2004, for example, the Justice Department insisted that "the enemy combatant status proceedings that the Department of Defense is completing provide all the process that petitioners are due (and then some)".[205]

Yet the CSRT is a purely administrative process claiming to be lawful under US law while disregarding international law.[206] For example, Qatar national Jarallah al-Marri chose to attend his CSRT hearing on 30 October 2004. As the hearing opened he asked "Does this Tribunal follow the law of the United States?" The Tribunal President responded that it did, to which Jarallah al-Marri responded that: "I don't understand or I don't know who makes the laws, and because of this I will require a lawyer." The Tribunal President responded that because "this is not a criminal court… it is not necessary for you to have a lawyer". From this moment on, Jarallah al-Marri responded to any question with "no comment". After the hearing, the same day, the tribunal of three military officers unanimously determined that he was an "enemy combatant".[207]

UK national Moazzam Begg had sought to have a witness from the ICRC at his CSRT hearing. The ICRC employee apparently would have testified that Moazzam Begg had been issued with a prisoner of war identity card when in US custody in Kandahar in Afghanistan. The CSRT President had initially determined that such a witness would be relevant, but later changed her mind. This followed advice from a legal advisor to the CSRT process that the CSRT did not have the discretion to determine that a detainee should have been classified as a prisoner of war, only whether the detainee falls within the US administration's own definition of "enemy combatant". Moazzam Begg, who did not attend his CSRT hearing, was found to be an "enemy combatant" by a unanimous vote of the CSRT panel. He was transferred to the UK a few weeks later, and released.

Another UK national, Feroz Abbasi, asked for a lawyer at his CSRT hearing. He was told that he could not have one because "this is not a legal proceeding". When the detainee

[204] The CSRT determined on 1 November 2004 that Omar Rajab Amin, a Kuwaiti national held in Guantánamo for more than two years without charge or trial, was an "enemy combatant". On 10 December 2004, international human rights day, this determination was confirmed by the Director of Combatant Status Review Tribunals in the Department of Defense. Unclassified CSRT records from *Amin et al v. USA et al.* In the US District Court for the District of Columbia.

[205] *Hicks v. Bush.* Response to petitions for writ of habeas corpus and motion to dismiss or for judgment as a matter of law and memorandum in support. In the US District Court for the District of Columbia, 4 October 2004.

[206] As the Pentagon itself acknowledges. The CSRT is "not a legal proceeding. This is an administrative proceeding." Special Department of Defense Briefing with Navy Secretary Gordon England, 30 July 2004, Department of Defence transcript.

[207] *Al Marri v. Bush*, CSRT unclassified factual returns, In the United States District Court for the District of Columbia.

himself tried to raise the question of the lawfulness of his detention under international law, the CSRT President replied that "international law does not apply, Geneva Conventions do not apply". When Feroz Abbasi questioned this, the CSRT President repeated,

> "*Once again, international law does not matter here. Geneva Convention does not matter here. What matters here and what I am concerned about and what I really want to get to, is your status as enemy combatant based upon the evidence that has been provided and your actions while you were in Afghanistan. If you deviate from that one more time, you will be removed from this Tribunal and we will continue to hear evidence without you being present*".

Subsequently, Feroz Abbasi made another reference to international law, which drew the following response from the Tribunal President:

> "*Mr Abbasi, your conduct is unacceptable and this is your absolute final warning I don't care about international law. I don't want to hear the words international law again. We are not concerned with international law*".

Feroz Abbasi was eventually removed from the hearing and the process continued in his absence. Abbasi had sought to have a number of witnesses and records for his CSRT hearing. For example, he had requested certain US government employees to address issues relating to his health and alleged ill-treatment at Guantánamo Bay, and for his medical records to substantiate his claims of ill-health and abuse. The CSRT President determined that such witnesses and records were not relevant to the CSRT process. Feroz Abbasi was found by a unanimous vote of the CSRT to be an "enemy combatant". He was transferred to the UK three months later and released.

Unlike Judge Leon, Judge Green rejected the notion that the CSRT process was sufficient. She found that the CSRT procedures "fail to satisfy constitutional due process requirements in several respects."

Judge Green wrote that the "fundamental deficiencies" of the CSRTs included its reliance on classified evidence to which the detainee did not have access, and the refusal to allow the detainees access to legal counsel to compensate for this. She noted that in all of the cases before her, the CSRT had "substantially relied upon classified evidence". Yet none of the detainees "was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf". As Yemeni national Ali Husayn Abdullah Al Tays his CSRT panel at his hearing in September 2004: "What can I do if the information is classified and it's all lies?"[208] Another Yemeni detainee, Saeed Ahmed Mohammed Abdullah Sarem Jarabh, expressed his nervousness at being in front of the panel unrepresented:

> Q: *You understand that nobody here in the Tribunal is forcing you to either say things or not to say things? Is that clear to you?*
>
> A: *My emotional state right now, I'm nervous. I didn't want to say anything... the story before. Even just the mental state, being in a prison, you can't say everything you want to say. I'm telling you, I'm talking to you right now and I'm scared that you might take me to Romeo Block or any of the other blocks you take people to.*[209]

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[208] *Al Tays v. Bush*, CSRT unclassified factual returns, In the US District Court for the District of Columbia.

[209] *Jarabh et al. v. Bush et al.* CSRT unclassified factual returns. In the US District Court for the District of Columbia. According to the unclassified report of a lawyer who met with Libyan national Omar Deghayes in January 2005, "Romeo Block in Camp Delta is for prisoners who they think are not cooperating properly. There are pictures of hellfire all around the block. The prisoners have all of their

Part of the evidence against Yemeni national Emad Abdalla Hassan was that he had been arrested in a house by Pakistan authorities in Faisalabad along with several others from Yemen, Saudi Arabia, Palestine, Russia and Pakistan. He agreed, explaining that he had been studying at a university and that the house where he was arrested was a "university dorm, so we have international students from all over the world, so it makes sense that we have so many different nationalities". The central accusation against him is that he travelled to Afghanistan "to fight in the Jihad". He denied ever having been to Afghanistan, apart from when he was handed over to USA by Pakistan authorities after two months detention in Pakistan and taken to Bagram and Kandahar air bases in Afghanistan prior to his removal to Guantánamo. During the CSRT hearing, the following exchange took place:

> Q: *Have you told [the interrogators] the same thing that you are telling us? You have never been to Afghanistan.*
>
> A: *Yes.*
>
> Q: *Then why do you believe you are here?*
>
> A: (Laughter) *How can you ask me this question? This question should be asked to you.*
>
> Q: *You've been here almost three years. Surely the interrogators have given you an idea of why they believe you should be here.*
>
> A: *In Bagram, they told me I was definitely going to go home. They told us we were captured by mistake. We're still under the error.*[210]

Emad Abdalla Hassan was not allowed to see the classified evidence on which the CSRT based its unanimous decision on 30 September 2004 that Emad Hassan had been in Afghanistan and was an "enemy combatant".

A number of detainees boycotted their CSRT proceedings. Yemeni national Adil Said Al Haj Obeid Al Busayss declined to participate in the CSRT on the grounds that he did not have anything with which to counter the government's brief summary of unclassified evidence against him, the only evidence he was allowed to see.[211] In the case of Khalid Bin Abdullah Mishal Thamer Al Hameydani, his "personal representative" informed the CSRT that "detainee [was] unresponsive" during a meeting prior to the scheduled CSRT hearing: "Sat in chair with head down, did not speak at any time." The CSRT decided that "because the Personal Representative fully explained the Tribunal process to the detainee, the Tribunal finds the detainee made a knowing, intelligent and voluntary decision not to participate in the Tribunal process". On 29 September 2004, the CSRT, describing the unclassified evidence on the case as "unpersuasive", relied wholly upon classified evidence to find that the detainee was an "enemy combatant".[212]

Judge Green also noted from the cases before her "the lack of any significant advantage" for a detainee to have a US military officer as his "personal representative". In the

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clothes taken away save for their shorts, in a calculated attempt to humiliate them, given the Islamic prohibition against men going naked between the knees and the navel. Omar suffered this treatment for one month between April and May 2004. The prisoners protested, and the administration responded by ordering that these prisoners be stripped naked altogether."

[210] *Hassan et al. v. Bush et al.* CSRT unclassified factual returns, In the US District Court for the District of Columbia.

[211] *Al Busayss et al. v. Bush et al.* CSRT unclassified factual returns, In the US District Court for the District of Columbia.

[212] Al Hameydani et al. v. USA. CSRT unclassified factual returns, In the US District Court for the District of Columbia.

case of Jamil Al-Banna, a Jordanian national with refugee status in the UK, the CSRT determined that he was an "enemy combatant" despite his "personal representative's position that it was unsupported by the record before the tribunal".[213] Judge Green noted that the personal representative in the CSRT process "is neither a lawyer nor an advocate"; nor is there a confidential relationship between the representative and the detainee. The former must relay to the CSRT any inculpatory information learned from the detainee.

In the case of Yemeni detainee Adnan Farhan Abdul Latif, his personal representative wrote to the CSRT panel that the detainee "rambles for long periods and does not answer questions. He has clearly been trained to ramble as a resistance technique and considered the initial [meeting] as an interrogation. This detainee is likely to be disruptive during the Tribunal." He also described him as "evasive". At the CSRT hearing, when confronted with the accusation that he was an al-Qa'ida member, he stated that he was from Orday City, "very far from the city of al Qaida". The panel said that *al-Qa'ida* was not a place but an organization. The detainee said that "whether it is a city or an organization, I am not from al Qaida. I am from Orday City." Al-Qaidah is a town in Yemen. Later, the following exchange took place:

> Detainee: *Why have I been here for three years? Why have I been away from my home and family for three years?*
>
> CSRT: *That is what we are trying to determine today.*
>
> Detainee: *Why did you come after three years? Why wasn't it done much sooner after my arrest?*
>
> CSRT: *I cannot answer to what has happened in the past...*
>
> Detainee: *Why am I not allowed freedom here?*
>
> CSRT: *Because you have been classified as an enemy combatant.*
>
> Detainee: *How can they classify me an enemy combatant? You don't have the right documents.*
>
> CSRT: *That is what we are here to determine.*
>
> Detainee: *For three years I haven't been treated very well because of wrong information. Would you let that happen to you? What will be your position if you find out what happened to me was based on wrong information and I am innocent?*
>
> CSRT: *Your current conduct is unacceptable. If you keep interrupting the proceedings, you will be removed and the hearing will continue without you.*

The CSRT also relied upon classified evidence in reaching its decision that he was an "enemy combatant".[214]

The case of another detainee, Murat Kurnaz, is further instructive. On 30 September 2004, a Combatant Status Review Tribunal consisting of two US Air Force officers and a Lieutenant Commander in the US Navy, determined "by a preponderance of the evidence" that Murat Kurnaz was an "enemy combatant", specifically finding that he "is a member of al-Qaida". Nineteen-year-old Kurnaz, a Turkish citizen who was born in Germany, was taken off a bus from Peshawar to Lahore by Pakistan police in late 2001. He was transferred to US custody in Afghanistan, before being transported to Guantánamo Bay in January 2002 where

[213] Jamil Al-Banna and Bisher Al-Rawi, an Iraqi national resident in the UK, were arrested in Gambia in November 2002, before being secretly transferred to Afghanistan and thence to Guantánamo.
[214] CSRT unclassified factual returns, In the US District Court for the District of Columbia.

he has been ever since. He is now 23. The Pentagon confirmed the CSRT's decision as final on 15 October 2004.

The CSRT reached its decision after considering unclassified information and one classified document. The unclassified evidence found that Murat Kurnaz attended a mosque in his home town of Bremen in Germany, which was moderate in its views but housed a branch of Jama'at-Al-Tabliq, a missionary organization "alleged to support terrorist organizations". Murat Kurnaz also had a friend, Selcuk Belgin, who the authorities said "is possibly the Elalanutus suicide bomber" (see below). Murat Kurnaz himself testified to the CSRT, denying that he was a member of *al-Qa'ida*, but confirming that he had gone to Pakistan in October 2001 to study the Koran on the advice of an Imam at Jama'at-Al-Tabliq. On the question of his relationship to Selcuk Belgin, he was told by the CSRT that any other information on him was classified. Murat Kurnaz responded:

> "*I am here because Selcuk Belgin had bombed somebody? I wasn't aware he had done that. My association with him is not as a terrorist. We exercised together at the gym and played sports. We both raised dogs, and because of this common interest, we became very good friends...Now I hear Jama'at-Al-Tabliq supports terrorism. I never knew that... I never supported terrorists and I still don't support terrorism. I just want peace, to be a Muslim, and pray to God. That is the reason I wanted to study Islam...*
>
> *I have never supported terrorism. I hate terrorists. I am here having lost a few years of my life because of Usama Bin Laden. His beliefs show Islam in the wrong way. I am not angry with Americans. Many Americans died on 11 September in the terrorist attack. I realize the Americans are trying to stop terrorism... I went to study in Pakistan at the wrong time... If I go back home, I will prove that I am innocent. If I learn of any terrorist groups or plots, I will notify the German authorities to show them that I don't support terrorism, so I can sleep well.*"

The CSRT, which had been informed that the German authorities had investigated Murat Kurnaz after he went to Pakistan and had concluded that there was no evidence that he had been or was involved in or associated with any criminal activity, said that it "found certain aspects of the detainee's testimony persuasive, but also turned to classified sources for further clarification".

Murat Kurnaz's case was of those one filed with Judge Joyce Hens Green. In her ruling of 31 January 2005, Judge Green pointed out that:

> "*even if all of the unclassified evidence were accepted as true, it alone would not form a constitutionally permissible basis for the indefinite detention of the prisoner... Nowhere does the CSRT express any finding based on unclassified evidence that the detainee planned to be a suicide bomber himself, took up arms against the United States, or otherwise intended to attack American interests. Thus the most reasonable interpretation of the record is that the classified document formed the most important basis for the CSRT's ultimate determination. That document, however, was never provided to the detainee, and had he received it, he would have had the opportunity to challenge its credibility and significance.*"

Judge Green's ruling subsequently had some small amendments made to the unclassified version for public release. In a sentence that was previously redacted, but is now public, Judge Green states that the classified evidence relied upon by the CSRT in Murat Kurnaz's case "fails to provide any significant details to support its conclusory allegations, does not reveal the sources for its information, and is contradicted by other evidence on the record". Thus, she said, the Court cannot at this stage of the litigation give the document the weight the CSRT afforded it. She wrote that

> "*absent other evidence, it would appear that the government is indefinitely holding the detainee – possibly for life – solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself. Such detention... would be a violation of due process. Accordingly, the detainee is entitled to fully litigate the factual basis for his detention in these habeas proceedings and to have a fair opportunity to prove that he is being detained on improper grounds*".

Since her ruling, evidence has come to light suggesting that the US authorities themselves do not believe there is a basis for holding Murat Kurnaz. Previously classified statements in his file include the following:

- "CITF [Command Information Task Force] has no definite link/evidence of detainee having an association with al-Qaida or making any specific threat toward the US."
- "The Germans confirmed that this detainee has no connection to an al-Qaida cell in Germany."
- "CITF is not aware of any evidence that Kurnaz has knowingly harboured any individual who was a member of al-Qaida or who has engaged in, aided or abetted, or conspired to commit acts of terrorism against the US, its citizens or its interests."

In addition, Selcuk Belgin, found by the CSRT possibly to have engaged in a suicide bombing, is reported to be alive and well and has never been charged with a criminal offence. German prosecutors are said to have closed their investigative file on him for lack of evidence.[215] Thus it would appear that Murat Kurnaz has been held for more than three years without charge or trial on the basis of his association with a friend who he did not know was involved in "terrorism" because, it seems, he was not. In addition, Murat Kurnaz has alleged that he has been subjected to torture and ill-treatment in US custody (see below).

Meanwhile, the Pentagon continues to defend the CSRT process. On 29 March 2005, the Secretary of the Navy, Gordon England, said:

> "*Is the system perfect? It's human beings, so obviously it's not perfect, but it is as perfect as we can make the system for the detainee while protecting America. Keep in mind we do have an obligation to protect America from terrorists. So we make this as fair as we can... So we've made it open, transparent and available, and I believe we're doing this the very best way we can.*"[216]

The administration's "very best", then, is clearly not good enough, and cries out for judicial intervention. For her part, Judge Green illustrated the "inherent lack of fairness" of the CSRT process by reprinting part of the transcript of one of the CSRT hearings. It was not one of the cases before her, but one before Judge Leon. He, it should be recalled, had said that the court's role in reviewing the executive's detention of "enemy combatants" must be "highly circumscribed", and that he would "not probe into the factual basis" for the detainees' detention. Amnesty International points out that such an approach, in the words of the US Supreme Court in its *Hamdi* decision of June 2004, "serves only to *condense* power into a single branch of government".[217]

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[215] It is not clear what the US authorities mean by the "Elalanutus suicide bomber". The Washington Post has reported that "in November 2003, an Istanbul synagogue was bombed and suspected bomber Gokhan Elaltuntas died". *Panel ignored evidence on detainee*, Washington Post, 27 March 2005.
[216] Defense Department Special Briefing on Combatant Status Review Tribunals, 29 March 2005.
[217] In *Hamdi v. Rumsfeld*, the plurality said: "we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forego any examination of the individual case

The case which Judge Leon refused to probe and which Judge Green chose to highlight involved Mustafa Ait Idir. He is one of six Algerian men who were extrajudicially removed from Bosnia and Herzegovina by US agents in January 2002 and transferred to Guantánamo.[218] At his CSRT hearing some two and a half years later, the following exchange took place after the Recorder (not a member of the tribunal) read out the allegation that: "While living in Bosnia, the detainee associated with a known Al Qaida operative":

Detainee: *Give me his name.*

Tribunal President: *I do not know.*

Detainee: *How can I respond to this*?

Tribunal President: *Did you know of anybody that was a member of Al Qaida*?

Detainee: *No, no.*

Tribunal President: *I'm sorry, what was your response*?

Detainee: *No.*

Tribunal President: *No*?

Detainee: *No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.*

Tribunal President: *We are asking you the questions and we need you to respond to what is on the unclassified summary.*

Subsequently, the Recorder read out the allegation that Mustafa Ait Idir had been arrested because of his involvement in a plan to bomb the US Embassy in Sarajevo. The detainee asked to see the evidence against him. He said that in the absence of such evidence, "to tell me I planned to bomb, I can only tell you that I did not plan". He continued:

I was hoping you have evidence that you can give me. If I was in your place – and I apologize in advance for these words – but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that.

The transcript reveals that "everyone in the Tribunal room laughs", after which the Tribunal President said to Mustafa Ait Idir: "We had to laugh, but it is okay". The detainee continued:

Why? Because these are accusations that I can't even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me what I thought, I'll just tell you that I did not. I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

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and focus exclusively on the legality of the broader detention scheme cannot be mandated in any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government."

[218] See, for example, *Unlawful detention of six men from Bosnia-Herzegovina in Guantánamo Bay*, AI Index: EUR 63/013/2003, 30 May 2003, http://web.amnesty.org/library/Index/ENGEUR630132003.

On 20 October 2004, the CSRT determined that Mustafa Ait Idir was an "enemy combatant". For her part, Judge Green wrote that "[t]he laughter in the transcript is understandable, and this exchange might have been truly humorous had the consequences of the detainee's 'enemy combatant' status not be so terribly serious and had the detainee's criticism of the process not been so piercingly accurate." She ruled that the CSRT process is unconstitutional, violating detainees' right to due process of law.

Judge Leon sided with the government, which argued that the CSRTs "provide each [detainee] with process than is more than constitutionally adequate".[219] Judge Leon said that "to the extent these non-resident detainees have rights, they are subject to both the military review process already in place and the laws Congress has passed defining the appropriate scope of military conduct towards these detainees".

The US administration reacted in predictable fashion to Judge Green's ruling on the Guantánamo detentions. The Justice Department said that Judge Leon had been correct to dismiss the petitions and that the Department would "explore options for expeditiously resolving" the conflicts between his and Judge Green's rulings.[220] On 4 February 2005, Judge Green stayed her ruling to allow the government to appeal it.

Meanwhile, the lawyers who are representing named detainees in *habeas corpus* challenges (petitioner-detainees) are being denied certain information that is redacted from the records of the CSRT hearings. Amnesty International understands, for example, that Adnan Abdul Latif is being detained on the basis of a classified document that the government has refused to show to either his *habeas* lawyer or to the DC District Court.

In late August 2004, the government had agreed to provide the CSRT records, "on a rolling basis, as CSRT proceedings for petitioner-detainees are completed". This, the government stated, would accommodate "the interests of counsel for petitioner-detainees in receiving in the coming weeks a complete statement of the factual basis for a detainee's status as an enemy combatant".[221] The government failed to meet its own schedule and on 30 September 2004, Judge Green issued an order for the government to comply with the schedule.[222] By mid-October 2004, the government had filed only around half of the CSRT returns for the petitioner-detainees, and then only the unclassified portions. At a hearing in front of Judge Green on 13 October 2004, the government pointed out that "obviously the unclassified portions of the factual returns, the CSRT records, are not as informative as the full record will be" and promised to begin filing the complete factual returns including the classified portions as soon as the system for lawyers seeing such material had been finalized. Then the government said all lawyers for petitioner-detainees "will have the benefit of the full combatant status review tribunal record". By 29 October 2004, the government still had not produced all the unclassified portions of the CSRT records. Judge Green ordered the government to file with the court, by 3 November 2004, the records in the remaining seven cases.[223] Judge Green added that "there shall be no further extensions", and pointed out that

[219] *Hicks v. Bush*. Response to petitions for writ of habeas corpus and motion to dismiss or for judgment as a matter of law and memorandum in support. In the US District Court for the District of Columbia, 4 October 2004.

[220] Statement of the Justice Department regarding today's ruling in the Guantanamo detainee cases. Department of Justice news release, 31 January 2005.

[221] Re: Guantanamo Bay Detainee Cases. Letter to The Honorable Joyce Hens Green from Thomas R. Lee, Deputy Assistant Attorney General, US Department of Justice, Civil Division, 31 August 2004.

[222] Coordination order setting filing schedule and directing the filing of correspondence previously submitted to the court. Rasul et al. v. Bush et al. and other cases, US District Court for the District of Columbia, 30 September 2004.

[223] Omar Rajab Amin, Moazzam Begg, Martin Mubanga, Mohammed Nechla, Hadj Boudella, Abdullah Majed Sayyah Hasan Alnoaimi and Salman Bin Ibrahim Bin Mohammed Bin Ali Al-Khalifa.

these detainees "were initially detained nearly three years ago and have remained in custody since that time".[224] On the same day she also ordered that complete factual returns, including unredacted classified material, to the court by 5 November 2004. Even if all the lawyers did not yet have security clearance to view the classified material, she said, "this Judge and her staff have appropriate security clearances and it is the Court's wish and responsibility to examine promptly the full, classified versions of the factual returns."[225]

On 5 November 2004, the government filed the classified CSRT records with the court. It added that the records show that each detainee had been found to be an "enemy combatant" and is "therefore, lawfully subject to detention pursuant to the President's Power as Commander in Chief or otherwise". It called again for the detainees' petitions for a writ of *habeas corpus* to be dismissed.[226] Three days later the court entered a "protective order" under which the detainees' lawyers would be able to view the classified records. The government began making redacted versions of the classified records available to the detainees' lawyers at a secure facility. The lawyers filed a motion requesting the judge to order the government to provide lawyers with security clearance access to the complete, unredacted records. The government opposed the motion. On 31 January 2005, Judge Green ruled that the classified information that the government was seeking to have withheld from the lawyers was "relevant to the merits of this litigation and that counsel for the petitioners are entitled to have access to that information", as long as they complied with the relevant security procedures.[227]

By 15 April 2005, the government had still not complied with the order. It has argued that Judge Green's decision to stay her 31 January 2005 ruling denying the government's motion to dismiss the *habeas corpus* appeals, pending the government's appeal of that decision, also puts on hold her order of 31 January for the lawyers to have access to the full CSRT records. The lawyers for the detainees are asking the court to reject the government's position and ensure that the lawyers have access to the full CSRT records, so that they can help the detainees prepare for their upcoming Administrative Review Board hearings (see below), and also to prepare for the time when, hopefully, Judge Green's stay is lifted.

The conflict between Judge Green's and Judge Leon's interpretations of the detainee's post-*Rasul* rights will have to be resolved in a higher court, either the US Court of Appeals for the District of Columbia Circuit, or possibly eventually, in the US Supreme Court. At the end of April 2005, the administration filed its opening brief in the Court of Appeals arguing that Judge Green's opinion should be overturned. Its arguments show an administration in unapologetic mood, in continuing pursuit of unfettered executive authority under the President's war powers as Commander-in-Chief, and disregarding international law and standards. Among its arguments are that:

- The due process clause of the US Constitution's Fifth Amendment "is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba." This, the government argues, repeating its pre-*Rasul* position, is because the "United States is not sovereign over Guantanamo Bay" and US Supreme Court precedent makes it clear

[224] *In re Guantanamo detainee cases*. Order setting final deadline for submission of factual returns. US District Court for the District of Columbia, 29 October 2004.
[225] *In re Guantanamo detainee cases*. Order requiring submission of classified factual returns. US District Court for the District of Columbia, 29 October 2004.
[226] *In re Guantanamo detainee cases*. Respondents' notice of in camera submission of factual returns to petitions for writ of habeas corpus under seal. In the US District Court for the District of Columbia, 5 November 2004.
[227] In re Guantanamo detainee cases. Order granting November 8, 2004 motion to designate 'protected information' and granting November 18, 2004 motion for access to unredacted factual returns. US District Court for the District of Columbia, 31 January 2005.

that the applicability of the Fifth Amendment to aliens "turns on whether the United States is sovereign, not whether it merely exercises control, over the territory at issue". Moreover, "to construe a single, oblique footnote [in the *Rasul* decision, see above] as implicitly overruling decades of settled precedent would be utterly implausible…". In addition, "if the courts were to second-guess an Executive-Branch determination regarding who is sovereign over a particular foreign territory, they would not only undermine the President's lead role in foreign policy, but also compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments."

- Even if the Fifth Amendment did apply to foreign nationals held at Guantánamo, the CSRT procedures would exceed whatever due process requirements there were. The CSRT process, the administration argues, "manifestly satisfies the requirements of due process (if any) in the unique context of ongoing armed hostilities". Moreover, the CSRT procedures criticized by Judge Green "are not constitutionally problematic". The need for deference to the executive on the question of withholding classified information and legal counsel from the detainees is "greatly magnified here, where the issue is not the administration of domestic prisons, but the Executive Branch carrying out incidents of its war-making function."
- The definition of "enemy combatant" is not overbroad, as Judge Green found. According to the administration, "although there may be difficult calls at the margin, that has been true in every war, and… the determination of who are enemy combatants is a quintessentially military judgment entrusted primarily to the Executive Branch." The executive, the executive argues, "has a unique institutional capacity to determine enemy combatant status and a unique constitutional authority to prosecute armed conflict abroad and to protect the Nation from further terrorist attacks. By contrast, the judiciary lacks the institutional competence, experience, or accountability to make such military judgments at the core of the war-making powers. These concerns are especially pronounced given the unconventional nature of the current war and enemy…".
- On the question of the Geneva Conventions, Judge Green "should have deferred to the view of the Executive as to whether the treaty was intended to grant those captured during an armed conflict judicially enforceable rights." Judge Green's contention that the Taleban detainees should have been presumed to have prisoner of war status is "inconsistent with the deference owed to the President as Commander-in-Chief."[228]

Thus, at every step, the executive continues to place obstacles in the way of the detainees having their cases subjected to judicial scrutiny. It continues to appeal every decision that goes against it. By continuing its bid for unfettered executive power, rather than heed the ever-mounting criticism, it is inflicting further damage on the rule of law, human rights principles and the international reputation of the USA. Meanwhile, the detainees are kept in a legal black hole created by the US administration. Forced to share in this limbo, their families are subjected to what may amount to cruel, inhuman or degrading treatment.[229] The situation remains a human rights scandal.

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[228] *Al Odah et al. v. USA et al.* Opening brief for the United States, et al. In the United States Court of Appeals for the District of Columbia Circuit, 27 April 2005 (internal quotation marks omitted).

[229] Amnesty International has spoken to many relatives of Guantánamo detainees who themselves are in deep distress from the lack of transparency and information about their loved ones and their inability to visit them. In other contexts, the suffering of the relatives of the "disappeared" has been found by the UN Human Rights Committee to amount to torture or cruel, inhuman or degrading treatment. Similar

9. Administrative Review Board – more of the same

There are ongoing processes to review the status of detainees. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time. The circumstances in which detainees are apprehended can be ambiguous, and many of the detainees are highly skilled in concealing the truth.
US Department of Defense, 26 April 2005[230]

For any detainee affirmed as an "enemy combatant" by the Combatant Status Review Tribunal detainee – except those pending trial by military commission (see below) – it will be up to another purely administrative process to review each case once a year to determine if the detainee should be released, transferred to the custody of another country, or continue to be detained. The Administrative Review Board (ARB) process will consist of:

> "*an administrative proceeding for consideration of all relevant and reasonably available information to determine whether the enemy combatant represents a continuing threat to the US or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters (e.g., Taliban), and whether there are other factors that could form the basis for continued detention (e.g., the enemy combatant's intelligence value and any law enforcement interest in the detainee).*"[231]

As with the CSRT, the detainee will have no access to legal counsel or to secret evidence, and there is no rule excluding evidence extracted under torture or other coercion. In the case of the CSRT, the decision is made by the panel of three military officers; for the ARB, the panel makes a recommendation to the Designated Civilian Official (DCO) overseeing the process who takes the final decision. This position is currently held by the Secretary of the Navy, Gordon England, appointed to the role of DCO by Secretary of Defense Donald Rumsfeld.[232]

According to the Pentagon, the detainees are informed of the ARB in the following way:

> "*A Combatant Status Review Tribunal (CSRT) has determined that you are an enemy combatant. Because you are an enemy combatant, the United States may continue to detain you. An Administrative Review Board (ARB) will now be held to determine whether you still pose a threat to the United State or its allies... If you believe you do not pose a threat to the United States or its allies, we recommend you immediately*

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cruelty is inflicted upon the relatives of people held in indefinite virtual incommunicado detention without charge or trial. See *Maria del Carmen Almeida de Quinteros, on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf v. Uruguay*, Communication No. 107/1981 (17 September 1981), UN GAOR Supp. No. 40 (A/38/40) at 216 (1983), para. 14. Regional human rights courts reached similar conclusions, see for instance *Velasquez Rodriguez Case*, Compensatory Damages (Art. 63(1) American Convention on Human Rights), Judgment of July 21, 1989 Inter-Am.Ct.H.R. (Ser. C) No. 7 (1990), para. 51; *Kurt v. Turkey*, Case No. 15/1997/799/1002 Judgment of 25 May 1998, paras. 133-4.

[230] Detainee transfer announced. US Department of Defense news release, 26 April 2005.

[231] Implementation of administrative review procedures for enemy combatants detained at US Naval Base Guantanamo Bay, Cuba. Department of Defense, 14 September 2004.

[232] His appointment to the position was announced by the Pentagon on 23 June 2004. Gordon England was nominated by President Bush to be Secretary of the Navy in August 2003 and confirmed by the Senate the following month. On 31 March 2005, President Bush announced his intention to nominate Gordon England to replace Paul Wolfowitz as Under Secretary of Defense. Mr Wolfowitz was nominated by President Bush to be the President of the World Bank, a nomination since accepted. Gordon England was Deputy Secretary of Homeland Security from January 2003 to September 2003.

gather any information that you believe will prove that you are no longer a threat and why you should be released from detention."

This notification offers few ideas as to how a detainee held thousands of miles from home in virtually incommunicado detention, with limited and censored communication with his family, and no legal counsel, can so gather the requisite information. The following exchanged that took place in a CSRT hearing on 26 September 2004 for Bahraini detainee Adil Kamil Abdullah Al Wadi is illustrative:

Q: *Adil, do you have any other evidence to present to this Tribunal*?

A: *I don't have any other proof or evidence. All what I have is my biography. Everybody knows me in Bahrain. I am a very correct person. I have never had any problems with the government or anything.*

Q: *Anything else*?

A: I *have no proof. I have been here for two years. I don't have anything.*

The ARB notification states that the Board will consider written statements from family members or "other persons" who can explain "why you are no longer a threat". The detainee does not have to attend the ARB hearing, which will be conducted regardless of whether the detainee is there or not. The detainee may have a US military officer to help him if he wishes – an "Assisting Military Officer" (AMO). As with the "personal representative" in the CSRT, the detainee/AMO relationship is not confidential and the AMO can discuss any meetings with the detainee at the ARB hearing.

Hearings by the ARB began in December 2004. On 5 May 2005, Amnesty International was informed that "over 90" ARB hearings had been held to that date.[233] However, the military spokesperson said that no other information was currently being made public, including any results of the hearings, whilst any litigation relating to the ARBs was pending in the US courts. The spokesperson pointed out that the authorities were anticipating running some 520 ARBs given that that was the number of people who had been determined to be "enemy combatants" by the CSRT. In at least one case, the CSRT had recommended that an ARB be held as soon as possible to consider the detainee for release. [234] In another, the CSRT had said that an ARB should consider the detainee's apparent sincerity when he said that he was not an enemy of the USA and had not engaged in any "terrorist" activity.[235] Despite these recommendations, the CSRT had still found the men to be "enemy combatants". It has been reported that in at least 40 of the ARBs so far conducted, the detainee did not attend.

The ARB process was announced shortly before the US Supreme Court decided the *Rasul* case. As such, it could be seen as having been an additional attempt to persuade the Justices to rule in the government's favour and keep the detentions away from judicial review.

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[233] Captain Beci Brenton, Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC). Telephone interview with Amnesty International, International Secretariat, London, UK. At this stage, it seems that ARBs were being run at a rate of about 10 per week, as Amnesty International was told by Captain Brenton on 22 April 2005 that the total completed to that date was "approximately 75".

[234] Mohammed Fenaitel Mohamed Al Dahaini was found to be an "enemy combatant" by a CSRT on 30 September 2004. The CSRT also recommended that "his case be reviewed by an Administrative Review Board to be considered for release as soon as possible".

[235] Boudella Al Haji, taken by the USA from Bosnia-Herzegovina to Guantánamo via Afghanistan, was found to be an "enemy combatant" on 18 October 2004. The CSRT said that he had "acquitted himself well at the hearing" and that he was "particularly respectful" and "appeared sincere".

With the Pentagon now reportedly seeking to transfer a number of detainees to other countries (see below), the ARB may be one way in which the authorities seek to do this.

In any event, neither the CSRT or ARB, whether in combination or standing alone, go any way to meeting the USA's obligation to provide judicial review of the lawfulness of the each and every detainee's detention.

10. Military commissions – yet more executive injustice

Judicial interference in Hamdan's trial would improperly intrude on the Executive's conduct of war

US Justice Department, appeal brief, December 2004[236]

In addition to labelling Guantánamo detainees as broadly-defined "enemy combatants" in a broadly-defined global "war" the end of which it can neither predict nor define, the US administration has repeatedly labelled the detainees as "killers" and "terrorists", in violation of the presumption of innocence. This label has been pinned to all detainees, including those subsequently released without any evidence made available that they had committed any wrongdoing. At the same time, the administration states that the reason that a detainee may find himself in Guantánamo Bay is not necessarily because he is guilty of any offence, but because he might commit an offence in the future or might have knowledge of or association with such unlawful activities.[237]

Military commissions, meanwhile, established under the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism signed by President Bush on 13 November 2001, provide for the prosecution of "enemy combatants who violate the laws of war". The administration sees the military commissions as "entirely creatures of the President's authority as Commander-in-Chief… and are part and parcel of the conduct of a military campaign".[238] In essence, the proposed military commissions are a case of the law being made and administered by the executive.

In the context of the "war on terror", the US administration defines both the enemy and the war very broadly. In its *Hamdi* decision of 28 June 2004, the US Supreme Court noted that "the Government has never provided any court with the full criteria that it uses in classifying individuals as ['enemy combatants']". The administration subsequently wrote the CSRT Order of 7 July 2004 which states that:

> "*the term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces or partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.*"

In her January 2005 ruling, Judge Joyce Hens Green concluded that this overbroad definition of "enemy combatant", with its use of the word "includes", showed that the government considers that it can subject to indefinite executive detention even individuals who had never committed a belligerent act or who never directly supported hostilities against the USA or its allies. This, she gleaned from the government, could include "a little old lady

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[236] *Hamdan v. Rumsfeld*, Brief for appellants. In the US Court of Appeals for the District of Columbia Circuit, 8 December 2004. Salim Ahmed Hamdan is facing trial by military commission.

[237] For example, at a military commission pre-trial hearing for Salim Ahmed Hamdan in Guantánamo Bay on 24 August 2004, the military prosecutor asked a military commission panel member, "*Do you understand that just because someone was transported to Guantánamo does not mean that they are guilty of an offence?*"

[238] Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, US Department of Justice, 26 February 2002.

in Switzerland" whose charitable donation to an orphanage in Afghanistan ends up supporting *al-Qa'ida*.[239]

As already noted, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism wrote in his recent report that: "However States conceive of the struggle against terrorism, it is both legally and conceptually important that acts of terrorism not be invariably conflated with acts of war".[240] Yet the Pentagon's instructions for the military commissions extend the concept of armed conflict to include "a single hostile act or attempted act", or conspiracy to carry out such acts, a definition so broad that it could encompass many acts that would normally fall under the jurisdiction of the ordinary criminal justice system. The instructions specifically state:

> "*This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the requirement*".[241]

Despite these broad definitions, by March 2005, only four people had been charged under the Military Order. This small number could be for any of several reasons – a dearth of evidence against the detainees even given the fact that the military commission rules allow a conviction on lesser standards of evidence than pertain in the ordinary courts; a preference on the part of the US administration for detention without trial; or official sensitivity in the face of the widespread international criticism about the military commission process, even from close allies. "We deeply value the close relationship between our two countries", US Secretary of State Condoleezza Rice said of United Kingdom (UK)/US relations on 4 February 2005, adding that "we stand together on the war on terror".[242] The military commission process publicly divides the two governments, however. The UK government has asserted that "the proposed military commissions would not provide sufficient guarantees of a fair trial according to international standards".[243]

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[239] During a hearing in her court on 1 December 2004, Judge Green had asked the government a series of hypothetical questions to ascertain how broadly it interpreted its detention powers. The government responded that it could subject to indefinite executive detention: "'A little old lady in Switzerland who writes cheques to what she thinks is a charity that helps orphans in Afghanistan, but [what] really is a front to finance al-Qaeda activities'; a person who teaches English to the son of an *al-Qa'ida* member; and a journalist who knows the location of Osama Bin Laden, but refuses to disclose it to protect her source." In front of Judge Leon, the Principal Deputy Associate Attorney General suggested that in the example of the Swiss woman, he had been misquoted and that what he had said was that "in the fog that is often the case in these situations that it would be up to the military applying its process and in going through its classification function to determine who to believe. If in fact this woman, there was some reason to believe this woman did know she was financing a terrorist operation, that would certainly merit a detention both theoretically and practically". The government's position would still be that she could be held indefinitely without charge or trial or judicial review of the merits of her case.

[240] UN Doc. E/CN.4/2005/103, 7 February 2005, para. 17.

[241] Department of Defence. Military commission instruction no.2: Crimes and elements for trials by military commission. Section 5(c).

[242] Remarks With British Foreign Secretary Jack Straw After Meeting Secretary Condoleezza Rice Foreign and Commonwealth Office, London, United Kingdom, 4 February 2005.

[243] UK Foreign and Commonwealth Office, Human Rights Report 2004, Chapter 1: Challenges and progress.

Military commission proceedings against two UK nationals were suspended following the widespread public concern in the UK that followed their naming under the Military Order in July 2003.[244] From facing the possibility of being charged with war crimes and tried by military commission with the power to sentence them to death, the two detainees in question, Feroz Abbasi and Moazzam Begg, were transferred to the UK in January 2005 and released. Their cases further illustrate how the US has detained people, indefinitely and in cruel conditions, against whom whatever evidence it has is considered by other governments to be inadequate, unreliable or inadmissible even for a simple felony, let alone war crimes. It also suggests a political as well as an additionally arbitrary aspect to the detention – namely that any detainee's treatment depends upon the response and influence of his home government.

Human rights are the "equal and inalienable rights of all members of the human family".[245] All detainees must be treated in accordance with international law and standards rather than such treatment being dependent on the relationship their government has with the detaining power. The UK government, and all other governments, regardless of whether they have nationals in Guantánamo, should press the USA to abandon military commissions. Their opposition should be based on their own respect for international law and standards of justice and commitment to see universal application of such standards. For example, governments of countries that have ratified the Geneva Conventions (currently numbering over 190) are under obligation not only to themselves "respect" them, but also to "ensure respect" for them.[246] If they believe that the military commissions do not meet Geneva Convention requirements, then they must actively oppose them, regardless of whether they have nationals facing trial by such commissions. Similarly, all states which are members of the UN are obliged under the Charter of the United Nations "to promote universal respect for, and observance of, human rights and freedoms", and must actively oppose the military commissions, as well as indefinite executive detention without trial.

The UK parliamentary Foreign Affairs Committee has concluded that the UK government's "position on the detentions at Guantánamo Bay" – namely that it will only assist UK nationals detained there, not UK residents let alone detainees of other nationalities – "does not sit easily" with its human rights commitments, not least its claim to "speak loudly and clearly on the international stage" against abuses.[247] The Foreign Affairs Committee concluded that:

> "*now that the British nationals have been released from detention at Guantánamo Bay, the Government need no longer keep its diplomacy quiet in the interests of increasing leverage over individual cases. We recommend that the Government make strong representations to the US administration about the lack of due process and*

[244] According to the Pentagon, President Bush decided on 18 July 2003 "to discuss and review potential options for the disposition of British detainee cases and not to commence any military commission proceedings against British nationals pending the outcome of those meetings [with the UK authorities]". *DoD statement on British detainee meetings*. Department of Defense news release, 23 July 2003.

[245] Universal Declaration of Human Rights, preamble. According to the US Department of State, "the protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of US foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises." http://www.state.gov/g/drl/hr/.

[246] Article 1 common to the four Geneva Conventions (1949). See similarly Article 1 of Protocol I Additional to the Geneva Conventions (1977).

[247] Human Rights Annual Report 2004. House of Commons Foreign Affairs Committee, March 2005, para 78, page 28.

oppressive conditions in Guantánamo Bay and other detention facilities controlled by the US in foreign countries".[248]

Unlike Feroz Abbasi and Moazzam Begg, the other four detainees named as eligible for trial by military commission in July 2003, were charged in 2004 by the US authorities and are facing trial by military commission. They are Yemeni nationals Salim Ahmed Hamdan and Ali Hamza Ahmed Sulayman al Bahlul; Ibrahim Ahmed Mahmoud al Qosi, a Sudanese national, and David Matthew Hicks, an Australian. Either their governments' persuasiveness over, or access to, the US authorities is less than that of the UK government, or they have no qualms about abandoning their nationals to the possibility of life imprisonment or execution following unfair trials.[249]

Amnesty International reiterates that the proposed trials by military commission – executive bodies set up to obtain the conviction of foreign nationals on lower standards of evidence than would hold in the US courts – would flagrantly violate international fair trial standards and result neither in justice being done nor being seen to be done.[250] It is particularly shocking that people could face execution after such trials.

- The commissions entirely lack independence from the executive.
- The right to counsel of choice and to an effective defence is severely restricted.
- The defendant can face secret evidence which he will be unable to rebut.
- The defendant can be excluded from certain parts of the proceedings.
- The commission rules can admit evidence extracted under torture or other coercion.
- There will be no right of appeal to an independent and impartial court.
- Only foreign nationals are eligible for such trials, violating the prohibition on the discriminatory application of fair trial rights.

A US citizen, whether soldier or civilian, charged with a similar crime would not face trial by military commission, and would have the right to appeal to higher courts of law.

As well as the four detainees already charged, another nine detainees have been determined by President Bush to be subject to the Military Order, but had not been charged by

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[248] *Ibid*, para 79.

[249] For example, the Australian government "welcomed" the news that David Hicks had been "included in the first list of detainees from Guantanamo Bay to be eligible for United States Military Commission trials. *David Hicks Eligible for US Military Commission Trial*, Joint Media Release issued by the Australian Attorney-General and Minister of Foreign Affairs, 6 July 2003. More recently, it has been reported that there is growing unease within the Australian government, although not about the military commissions *per se*. One official is quoted as saying "We are very frustrated. The process is taking much longer than people might reasonably have expected. We don't want this guy [David Hicks] in limbo forever". *Australia uneasy about US detainee case*, New York Times, 10 April 2005.

[250] *USA: Presidential order on military tribunals threatens fundamental principles of justice*, AI Index: AMR 51/165/2001, 15 November 2001, http://web.amnesty.org/library/Index/ENGAMR511652001. *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AI Index: AMR 51/053/2002, April 2002, http://web.amnesty.org/library/Index/ENGAMR510532002. *USA: The threat of a bad example - Undermining international standards as "war on terror" detentions continue*, AI Index: AMR 51/114/2003, August 2003, http://web.amnesty.org/library/Index/ENGAMR511142003. *USA: A deepening stain on US justice*, AI Index: AMR 51/130/2004, August 2004, http://web.amnesty.org/library/Index/ENGAMR511302004.

early April 2005.[251] One of these nine detainees has been transferred to his country of nationality and released.[252] His identity, or the identity of the other eight and whether they are held in Guantánamo, remain unknown. Another reason why the administration may be delaying charging them or any others is because it is waiting for resolution of the litigation over the legality of these commissions in the US federal courts. In November 2004, the post-*Rasul* petition for a writ of *habeas corpus* filed with District of Columbia District Judge James Robertson on behalf of Salim Ahmed Hamdan, challenging the lawfulness of the US administration's plans to try this Yemeni detainee, led to the suspension of the military commissions.

Judge Robertson reasoned that Salim Ahmed Hamdan, captured during the international armed conflict in Afghanistan, should have been presumed to be a prisoner of war until a "competent tribunal" determined otherwise, as required under Article 5 of the Third Geneva Convention (see above). The judge pointed out that as a presumed prisoner of war, Hamdan could not be tried by a military commission; under Article 102 of the Third Geneva Convention "a prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power". US forces would normally be tried by court martial under the Uniform Code of Military Justice (UCMJ). "The Military Commission is not such a court", stressed Judge Robertson; "Its procedures are not such procedures".

Judge Robertson ruled that, even if a "competent tribunal" determined that Salim Ahmed Hamdan was not a prisoner of war, he could not be tried by military commission because their rules were unlawful. Specifically, the treatment of classified or otherwise "protected" information did not meet the necessary standards. Judge Robertson pointed out that in front of a military commission,

> "*The accused himself may be excluded from proceedings... and evidence may be adduced that he will never see (because his lawyer will be forbidden to disclose it to him). Thus, for example, testimony may be received from a confidential informant, and Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts. The [commission authorities] may receive it in evidence if it meets the 'reasonably probative' standard but forbid it to be shown to Hamdan.*"

Judge Robertson pointed out that "such a dramatic deviation" from the US constitutional right to a fair trial "could not be countenanced in any American court", and added that the right to trial "in one's presence" is "established as a matter of international humanitarian and human rights law".[253] However, he said that he needed to look no further

[251] *Presidential military order applied to nine more combatants*. Department of Defense news release, 7 July 2004.

[252] USA's Second Periodic Report to the UN Committee against Torture, 6 May 2005, *supra*, note 16, Annex 1.

[253] Including under Article 14 of the International Covenant on Civil and Political Rights and Article 75 of Protocol Additional I to the Geneva Conventions. The latter has long been considered by the USA to reflect customary international law, but the current administration, as part of its pursuit of unfettered executive power and disregard for international law, has refused to accept the applicability of this norm. The Pentagon's *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 4 April 2003, available at http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf, states that among the international instruments not binding on the USA is Article 75 of the First Additional Protocol to the Geneva Conventions, overturning the USA's long-held recognition of the "fundamental guarantees" of Article

than to the fact that, at least in this critical respect, the rules for the military commissions were contrary to, or inconsistent with, the requirements for US courts-martial which allow the defendant to be present in all proceedings except during the panel's deliberation and vote.

Judge Robertson emphasized that this issue was far from hypothetical, pointing out that Salim Ahmed Hamdan had already been excluded from parts of the commission panel selection process and that the government had already indicated that he would be excluded from two days of his trial during which the prosecution would present evidence against him.

Judge Robertson abstained on the question of whether such a trial would violate common Article 3 of the Geneva Conventions which prohibits trials by any tribunal other than "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples". However, as Judge Robertson noted elsewhere in his opinion, the International Court of Justice has said that the protections of common Article 3 "constitute a minimum yardstick" reflecting "elementary considerations of humanity". Amnesty International would also submit that the fair trial guarantees provided in the International Covenant on Civil and Political Rights (ICCPR), ratified by 154 countries including the USA, and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratifed by 139 countries including the USA, reflect judicial guarantees "recognized as indispensable by civilized peoples". The military commission process does not meet these standards.

The question of coerced evidence is significant, both for the rights of persons being tried and for its wider implications. Fair trial standards require the exclusion as "evidence" in any proceedings of any statement where there is knowledge or belief that it has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment. While the military commission rules give the defendant the right not to testify at trial, and for no adverse inference to be drawn from such a decision, the rules also state that this "shall not preclude admission of evidence of prior statements or conduct of the accused." This violates Article 14 of the ICCPR, which provides the defendant the right "not to be compelled to testify against himself or to confess guilt". Article 15 of the of the CAT states:

> "*Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made*".

Other coercive techniques – cruel, inhuman or degrading interrogation methods or detention conditions – are also internationally illegal and statements extracted as a result of them should be inadmissible in court. Article 12 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that:

> "*Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as*

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75 as reflecting customary international law (see footnote 128 and 137 in *USA: Restoring the rule of law: The right of Guantánamo detainees to judicial review of the lawfulness of their detention*, AI Index: AMR 51/093/2004, June 2004, http://web.amnesty.org/library/Index/ENGAMR510932004. Article 75 prohibits, inter alia, physical and mental torture, outrages upon personal dignity, in particular humiliating and degrading treatment, as well as trial by any tribunal other than "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure. While not expressly referring to the right to appeal to a higher tribunal, it states that "no provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law". Consistent with the Human Rights Committee's General Comment 31, then, this would include the provisions of the ICCPR, which does include such right to appeal.

evidence against the person concerned or against any other person in any proceedings."

The Human Rights Committee has stated that "it is important for the discouragement of violations under article 7 [which prohibits torture and other cruel, inhuman or degrading treatment or punishment] that the law must prohibit the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[254] The Committee has also stated that "confessions obtained under duress should be systematically excluded from judicial proceedings".[255]

Again, this concern is more than mere speculation. Salim Ahmed Hamdan, for example, detained in Afghanistan and transferred to Guantánamo, has told his military lawyer that in US custody in Afghanistan he was "beaten, that he was held for about three days in a bound position, cold... dragged, kicked, punched." Lieutenant Commander Charles Swift, who describes the allegations as "credible", added that "two prisoners had been beaten to death and died during their interrogations. Everyone in the prison camp knew about it and decided, 'hey, not for me. I'll tell them anything they want to hear'".[256]

In Guantánamo, after being charged, Salim Ahmed Hamdan was transferred to Camp Echo, the part of the detention facility used to house detainees facing trial by military commission. The military has claimed that "detainees at Camp Echo are not in solitary confinement".[257] However, Salim Ahmed Hamdan was held for almost a year in solitary confinement in Camp Echo:

> "*Since December 2003 Mr Hamdan has been confined alone in a cell, in a house that is guarded by a single non-Arabic-speaking guard. A translator is rarely available. He receives 60 minutes of exercise outdoors three times a week, only at night... Mr Hamdan has described his moods during his period of solitary confinement as deteriorating, and as encompassing frustration, rage (although he has not been violent), loneliness, despair, depression, anxiety, and emotional outbursts. He asserted that he has considered confessing falsely to ameliorate his situation.*"[258]

Ten months after Salim Ahmed Hamdan was moved to Camp Echo, and less than one working day before his conditions of detention were to be challenged in Judge Robertson's court, the government informed the judge that the detainee had been moved out of isolation out of Camp Echo and into a pre-commission wing of Camp Delta, the main prison camp. This attempt to avoid judicial scrutiny did not stop Judge Robertson noting that the "the government is capable of repeating" its use of solitary confinement which had so far "evaded review".[259] He ordered that Salim Ahmed Hamdan be moved back to the general population

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[254] General Comment 20, para 12.

[255] Concluding Observations of the Human Rights Comité, Georgia. UN Doc: CCPR/C/79/Add.75, para. 26 (5 May 1997). Guidelines 15 and 16 of the UN Guidelines on the Role of Prosecutors state: "Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law…"; "When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods…, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice".

[256] *Is torture a good idea?* Dispatches. Channel 4 TV (UK), 28 February 2005.

[257] Fact sheet: Camp Echo and Camp Five. Updated: June 2004. JTF Public Affairs.

[258] *Swift v. Rumsfeld*, Declaration of Daryl Matthews, M.D., Ph.D., US District Court, Western District of Washington, 31 March 2004.

[259] *Hamdan v. Rumsfeld*, Memorandum Opinion, US District Court for the District of Columbia, 8 November 2004.

of detainees. It subsequently transpired that the authorities had responded by moving him into the general population wing of Camp Delta, but had removed other detainees from the cells that were within four cells of his. Under the camp rules, there can be no communication between detainees more than four cells apart from each other. In other words, the government had placed Salim Ahmed Hamdan into *de facto* isolation. His mental health reportedly began to deteriorate again. His military lawyer challenged that the government was in contempt of Judge Robertson's ruling. Although the government rejected this assertion, Salim Ahmed Hamdan was moved out of this isolation on 21 January 2005, more than two months after the judicial order.

Before this matter had come to oral argment before Judge Robertson in late October 2004, the government had refused to move Salim Ahmed Hamdan out of solitary confinment – despite "credible evidence of the risk of harm to Hamdan should his detention under these conditions continue" – on the grounds that it "would create an undue risk of destroying the environment that the military is trying to create at Guantanamo in order to facilitate intelligence gathering".[260] From this example alone, it seems clear that the US administration is willing to subject people to torture or other cruel, inhuman or degrading treatment in the name of national security, and avoid judicial scrutiny for as long as possible. It is unsurprising, then, that it has devised military commissions rules that will allow evidence extracted under torture or ill-treatment to be admitted.

Indeed, the military commission rules require the commissions to violate several provisions of international treaties to which the USA is a state party. If the commission decides that a piece of evidence would have "probative value to the reasonable person", it "shall" be admitted. In other words, if, for example, a detainee makes a statement after being subjected to the humiliation of urinating on himself while shackled for 18 hours and kept in extreme temperature conditions, and if the commission panel believes that that statement would have probative value to the reasonable person, it must be entered into evidence.

Other basic fair trial rights enshrined in Article 14 of the ICCPR include:

- **The right to equality before the courts** [Article 14.1] – only foreign nationals will face trial by military commission, in violation of the prohibition on the discriminatory application of fair trial rights. The Military Order gives no justification for restricting military commissions to foreign nationals. The Human Rights Committee has stated that "Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge…Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights".[261] Respect for human dignity and freedom from discrimination are at the heart of international human rights and humanitarian law. For example, Article 75 of Additional Protocol 1 to the Geneva Conventions, guarantees freedom from discrimination, including on the basis of race, religion or nationality.
- **The right to a fair and public hearing before a competent, independent and impartial tribunal established by law** [Article 14.1] – the military commissions will neither be, nor be seen to be, independent of the executive. The executive selects the defendant; the chief prosecutor; the chief defence counsel; the commission panel (ie,

[260] *Swift v. Rumsfeld*, Order granting motion to hold petition in abeyance. US District Court, Western District of Washington, 11 May 2004.
[261] Human Rights Committee, General Comment 15, The position of aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 18 (1994), para. 7.

the "judge" and "jury"); and the panel that reviews verdicts. The executive will make the final decision in any case, including whether a condemned defendant will live or die. The whole system is an entirely closed executive loop. Even if the defendant is acquitted, it is the executive which will determine whether he is released or sent back into potentially indefinite administrative detention as an "enemy combatant".

The fact that they are made up of members of the armed forces judging members of the presumed "enemy", under the auspices of the Commander-in-Chief of the Armed Forces, raises concerns about the commissions' impartiality.

Neither, in Amnesty International's opinion, are the commissions "competent" or properly "established by law". The right to a hearing before a competent tribunal requires that the tribunal has jurisdiction to hear the case. A competent tribunal is given this power by law: it has jurisdiction over the subject matter, territory and person, and the trial is conducted within an applicable time as prescribed by law. The US military commission is an executive body set up by presidential order. Although the Military Order cites legal references as its basis, there is no express congressional statute establishing the military commissions. Nor should there be. There is a growing international legal consensus against the use of military tribunals of any kind to try international crimes, and in any event they should not be used to try civilians (see below).

- **The right to adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing** [Article 14.3(b)] – the defendant and his lawyer may be denied access to "protected information", so broadly defined that it could exclude a wide range of documents or other evidence.[262] The commission's presiding officer, either of his or her own accord or at the request of the prosecution, can either withhold the "protected information" from documents made available to the defendant and defence counsel or substitute a summary of what has been withheld, without the defence being able to examine if the substitution was a fair representation of the withheld evidence. The principle of equality of arms, included in the concept of a fair trial under the provisions of Article 14(1) as well as other provisions of Article 14, is thus undermined. The prosecution – but not the defence – would know the details of the "protected information". This impedes the defence's ability to prepare the case and to defend against the accusation. In addition, the military commission procedures expressly authorize the military to engage in "monitoring of communications" between the defendant and his lawyers "for security or intelligence purposes", in violation of Article 14.3(b) which the Human Rights Committee has said requires "counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications".[263] Overarching this issue of the right to prepare a defence is the fact that the executive can make up new rules and procedures at any time. The possibility of new procedures and rules being introduced at any time make planning and preparing effectively for trial an almost impossible task for defence lawyers.
- **The right to a trial without undue delay** [Article 14.3(c)] – the first charges were not made until February 2004, more than two years after the first detainees arrived at

[262] Under Military Commission Order No. 1, Section 6(D)(5)(a), the Presiding Officer may issue Protective Orders, including to safeguard "Protected Information" – the latter includes information that is "classified or classifiable", "protected by law or rule"; "concerning intelligence and law enforcement sources, methods, or activities"; "concerning national security interests"; or information "the disclosure of which may endanger the physical safety of participants in Commission proceedings".
[263] General Comment 13, para. 9.

Guantánamo (they had been held elsewhere before that). For example Salim Ahmed Hamdan was taken into custody in Afghanistan in late 2001, but not charged until July 2004. As already noted, he was held in solitary, virtually incommunicado, confinement for a year. In a case from Uruguay, where a detainee was held incommunicado for four to six months (the precise dates are disputed), and his trial by military court on charges of subversive association and conspiracy to violate the constitution began after five to eight months, the Human Rights Committee held that Article 9(3) of the ICCPR had been violated "because he was not brought promptly before a judge or other officer authorized by law to exercise judicial power and because he was not tried within a reasonable time".[264]

The executive maintains complete control over the timing of the proceedings. The executive could, if it so wanted, keep an individual in untried detention for any length of time before, if ever, bringing him to trial. If convicted and sentenced to a prison term, the length of time served in administrative detention as an "enemy combatant" will not be taken into account.[265] If acquitted, the defendant could be sent back into administrative detention if the executive determined that he remained a threat or had "intelligence value".

- **The right to a lawyer of one's own choosing** [Article 14.3(d)] – even if the defendant is able to retain a US civilian lawyer with national security clearance (he will not be able to choose a non-US national, for example, a lawyer from his own country) he will still be represented by a military lawyer, even if that goes against the defendant's wishes.
- **The right to trial in one's presence** [Article 14.3(d)]. This applies even if the press and public are excluded for reasons of national security [Article 14.1]. The military commission authorities can decide to close proceedings to the defendant as well as the media, for any one of a broad range of reasons, including to protect "intelligence and law enforcement sources, methods, or activities" or "other national security interests". Only the defendant's main military lawyer will be able to attend, but he or she will not be able to disclose details to the defendant. Thus, for example, if the evidence is a statement made by the defendant under torture or ill-treatment to a CIA agent in Afghanistan, and the evidence is heard in closed session, the military lawyer will not be able to discuss it with the defendant to get his version of events. The denial of the right to trial in one's presence is what Judge Robertson found rendered the military commission procedures unlawful (see above).
- **The right to defend oneself in person** [Article 14.3(d)]. As written, the military commission procedures state that a defendant "must be represented at all relevant times" by a military lawyer. In the preliminary hearings in 2004, Ali Hamza Ahmed Sulayman al Bahlul revealed that he wished to defend himself. Whether he can or not appears to be unresolved, and is still pending with the Appointing Authority of the military commissions. However, even if he is allowed to represent himself, he presumably will not have access to closed sessions or classified evidence, and therefore be unable to defend himself properly.
- **The right to review of conviction and sentence by a higher tribunal according to law** [Article 14.5] – The Human Rights Committee has stated that this "guarantee is not confined to only the most serious offences".[266] It has said that the words

[264] *Pietraroia v. Uruguay*, (44/1979), UN Doc. A/36/40, 27 March 1981, paras. 13.2 and 17.
[265] Department of Defense, Military Commission Instruction No. 7. Sentencing. Section 3A, 30 April 2003.
[266] General Comment 13, para. 17.

"according to law" mean that, if domestic law provides for more than one instance of appeal as part of the process in criminal cases, the convicted person must be given effective access to each of these instances of appeal.[267] The Committee has also stated that the "provisions of article 14 apply to all courts and tribunals" and that proceedings must "genuinely afford the full guarantees stipulated in article 14." Under Article 14, therefore, the appeal court must likewise be a competent, independent and impartial tribunal established by law". This will not be the case for those tried by military commission, who will have their convictions and sentences reviewed by a three-member panel of military officers, or civilians commissioned as military officers. They are selected by the Secretary of Defense, and can be removed by him for "good cause", which "includes, but is not limited to, physical disability, military exigency, or other circumstances". This compares unfavourably, for example, to the judges of the Court of Appeals for the Armed Forces, who review decisions of US courts-martial. These judges are nominated by the President and confirmed by the Senate. They are civilians, and can only be removed by the President for neglect of duty, misconduct or disability. One of the three review panellists so far selected by Secretary Rumsfeld for the military commission process is someone who is described as his "good friend and sometime neighbour".[268]

As also already noted, the Human Rights Committee, in a recent authoritative comment on "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (General Comment 31) has stated that, "the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."[269] Judge Robertson noted that the common Article 3 requirement of trial before "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" has no fixed meaning. The Human Rights Committee's General Comment clarifies that the meaning should be interpreted in a way that is complementary to international human rights law. In its pursuit of unfettered executive power, the US administration would like to ignore this. The judiciary should put it right. While Amnesty International has welcomed Judge Robertson's decision, it does not believe that he went far enough on all issues.[270]

Not only must the judiciary rein in the executive, the legislature must not be tempted into compounding the executive's violations of international law. Judge Robertson noted that the government was seeking dismissal of Hamdan's claim on the grounds that the President has "untrammelled power", inherent in his role as Commander-in-Chief, to establish military commissions. Judge Robertson disagreed: "If the President does have inherent power in this area, it is quite limited." He also noted that "Congress has the power to amend those limits and could do so tomorrow". Amnesty International emphasizes that any legislative proposals must ensure compliance with international law and standards. In this regard, Amnesty International notes the following stated by the UN Special Rapporteur on the independence of judges and lawyers:

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[267] *Henry v. Jamaica*, (230/1987), 1 November 1991, Report of the HRC, UN Doc. A/47/40 (1992), p. 218, para. 8.4.

[268] For further information, see *USA: A deepening stain on US justice*, AI Index: AMR 51/130/2004, August 2004, http://web.amnesty.org/library/Index/ENGAMR511302004.

[269] Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 11.

[270] For example, Judge Robertson accepted the adequacy of the review panel appointed by the executive to review convictions and sentences.

"*Using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism poses a serious problem. This regrettably common practice runs counter to all international and regional standards and established case law. The Human Rights Committee has time and again asserted that military courts may only hear cases involving military personnel charged with crimes or offences relating to military matters. The Inter-American Court of Human Rights has established a wealth of case law in this regard and has also considered that bringing civilians before military courts is a violation of due process and the principle of the 'lawful judge'. The European Court of Human Rights has also asserted this principle: although military courts are not competent to try civilians in the European system, it has had to pronounce on the action of national security courts composed of civilian and military judges. The African Commission on Human and Peoples' Rights has held that the trial of civilians by military courts is contrary to articles 6 and 7 of the African Charter and the Basic Principles on the Independence of the Judiciary*".[271]

Principle 5 of the UN Basic Principles on the Independence of the Judiciary states:

"*Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals*".

Clearly, the US military commissions violate this principle, having been expressly devised under President Bush's 13 November 2001 Military Order to bypass "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts".[272]

It is also clear that, for whatever reason, the US administration is intending to charge and try only a small number of the foreign detainees it has in its custody outside the sovereign territory of the USA. It cannot be argued that transferring those few detainees to the jurisdiction of the ordinary court system would place any insurmountable burdens on that system. Moreover, such a transfer to an independent and transparent system would send the message that the USA is serious about justice and human rights. The military commissions, in contrast, will be widely seen as the secretive, improvised, outdated and internationally illegal response that they are. Such show trials will undermine the very values that the USA claims to be in a struggle to uphold.

It was hardly a vote of confidence in this system, when the executive's chief military commission official, the Appointing Authority, said just before the pre-trial proceedings for the first four detainee charged, "this is the first time we've done commissions in 60 years, and we'll have to wait and see what happens as to how it goes and how smoothly it goes".[273] Amnesty International was allowed to send an observer to these hearings in 2004. Her observations only further confirmed the organization's worst fears that this is a system unable to deliver a fair trial, and entirely a creature of the executive.[274] In the pre-trial commission hearings for David Hicks, for example, the commission rejected the defence counsel's attempt

[271] UN Doc. E/CN.4/2004/60, 31 December 2003, para. 60.
[272] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Section 1(f).
[273] John Altenburg, Jr., Appointing Authority for the Office of Military Commissions. Defense Department Briefing on Military Commission Hearings, 17 August 2004.
[274] *USA: Guantánamo: Military commissions Amnesty International observer's notes from proceedings, No 3,* http://web.amnesty.org/library/Index/ENGAMR511572004, *No.2,* http://web.amnesty.org/library/Index/ENGAMR511552004, and No. 1 http://web.amnesty.org/library/Index/ENGAMR511532004.

to bring in six expert witnesses to explain various aspects of international law and military law. This violates Article 8(2)(f) of the American Convention on Human Rights.[275] The prosecution asserted that the only law that binds the panel is "commission law", a set of rules and procedures drafted within the executive, with the President's Military Order as the final authority.[276]

The commission panel's ignorance of the law and the disparity of resources allocated to prosecution and defence team in a process controlled by the executive, were particularly obvious. So too was the low quality of interpreting and translation standards – on several occasions the defence had to request that proceedings be halted because the quality of interpreting was so bad. Improvements have since been made in the allocation of resources to the defence teams and in the quality of intepreting. The Pentagon has said that fixing such problems is important because "everything having to do with the military commissions process is 'like a fishbowl', being watched carefully by the media and representatives of non-governmental organizations".[277]

The office of the Appointing Authority in the Pentagon continues to work on making changes to the commission procedures. On 28 March 2005, the spokesperson for the Appointing Authority told Amnesty International that it had passed no finalized further proposals on to the administration for its consideration. The spokesperson was not willing to specify what proposals were being worked on. It has been reported that they might include giving the commission's Presiding Officer a role more akin to a judge. The Presiding Officer is currently the only commission member with any legal training, and yet all panel members can rule on questions of law. In other words each member serves as a "judge" as well as a "juror". This contravenes Principle 10 of the UN Basic Principles of the Independence of the Judiciary which states that anyone selected for judicial office shall be individuals "with appropriate training or qualifications in law". Proposals being worked on also reportedly include barring any "confession or admission that was procured from the accused by torture".[278] As reported, the proposal would still leave statements extracted under torture (however defined by the administration) from individuals other than the defendant admissible by the commissions, as well as evidence coerced from the defendant or anyone else by methods (including manipulation of conditions of detention) that amount to cruel, inhuman or degrading treatment.

In any event, partial reforms of the military commission process cannot resolve its fatal flaws. Despite claiming to be a progressive force for human rights, the US administration continues to pursue its attempt to conduct military commissions, more than half a century after it last ran such trials. The Justice Department immediately and "vigorously disagree[d]" with Judge Robertson's ruling and said that the government would "continue to defend" the President's power to wage the "war on terror" and to have the

[275] This provides for "the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts". The USA has signed the American Convention on Human Rights, thereby binding itself under international law not to undermine its object and purpose.

[276] The Pentagon's procedures for the military commissions themselves contain the caveat: "In the event of any inconsistency between the President's Military Order and… any regulations or instructions issued… the provisions of the President's Military Order shall govern." This system, invented by the executive, provides no precedents or case law to which defence lawyers can refer when devising their legal strategy.

[277] *Parties still working behind the scenes on military commissions*. American Forces Information Service, 8 March 2005.

[278] *US is examining a plan to bolster the rights of detainees*. New York Times, 27 March 2005.

military commission process "restored through appeal".[279] In its subsequent appeal brief, it argued that Judge Robertson's ruling "constitutes an extraordinary intrusion into the Executive's power to conduct military operations to defend the United States."[280] Judge Robertson's ruling should be reversed, according to the executive, on the grounds that the Geneva Conventions do not give individuals judicially enforceable rights, but are instead "a matter of state-to-state diplomatic relations". As to President Bush's decision not to apply Geneva Convention protections to detainees captured in Afghanistan, the government argues such a determination "is binding on the courts", and in such matters of foreign policy the "Executive must act without fear of judicial reversal". Oral arguments in the US Court of Appeals for the District of Columbia Circuit were held on 7 April 2005. It was anticipated that a ruling would come in May 2005. Whatever the result, it is likely that it will be appealed to the US Supreme Court.

If the US administration is allowed to proceed with its military commissions, it will set a dangerous precedent, and not just by setting an example that might be used in other countries to justify flouting international law. It will shift the balance between the state and the defendant in the USA. "Equality of arms" – the principle whereby both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case – is an essential criterion for a fair hearing, enshrined in Article 14(1) of the ICCPR.[281] The military commissions expressly tip the balance in favour of the government in order to make convictions easier. Thus, in future, if the government fails to get its way in "terrorism" cases in the ordinary domestic courts, it might turn to military commissions.

At a time when a majority of countries have turned against the death penalty, the US administration is proposing to allow military commissions to hand down death sentences against which there would be no right of appeal to any court. Under the Pentagon's procedures, the military commission is permitted "wide latitude in sentencing…The sentence determination should be made while bearing in mind that there are several principal reasons for a sentence given to those who violate the law", including punishment, protection of society, deterrence, and rehabilitation. While noting these criteria, however, the procedures stress that all sentences should be "grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general".[282] Given President Bush's widely known support the death penalty on the theory that it is a deterrent, this guideline could be read as an invitation for the death penalty.[283]

Once the President – or if he chooses, the Secretary of Defense – has made the final decision in any military commission case, the sentence "shall be carried out promptly".[284]

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[279] Statement of Mark Corollo, Director of Public Affairs, on the *Hamdan* ruling. Department of Justice news release, 8 November 2004.

[280] *Hamdan v. Rumsfeld*, Brief for appellants. In the US Court of Appeals for the District of Columbia Circuit, 8 December 2004.

[281] The Human Rights Committee stated that the concept of "fair trial" in Article 14(1) "must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings," *D. Wolf v. Panama*, Communication No. 289/1988, (Views adopted on 26 March 1992), in UN Doc. A/47/40, pp. 289-290, para. 6.6.

[282] Military Commission Instruction No. 7. Subject: Sentencing. Section 3A. US Department of Defense, 30 April 2003.

[283] Only a unanimous vote by a commission panel of seven members may pass a death sentence.

[284] Department of Defense Fact Sheet: Military commission procedures, p.3

President Bush's record on clemency in capital cases to date is also well-known and is a matter for grave concern.[285]

11. An executive in pursuit of execution – Zacarias Moussaoui

The President believes the death penalty deters crime and saves lives.
US Attorney General Alberto Gonzales, January 2005[286]

The spectre that has haunted legal proceedings against French national Zacarias Moussaoui, an alleged would-be 20th hijacker in the attacks of 11 September 2001, is that if the administration at any point was not allowed to get its way in the civilian justice system, it might decide to transfer the case by executive order to trial by military commission where the executive could play by its own rules.[287] While recent events have caused this threat to diminish, the US administration's pursuit of the death penalty in this case has come into focus instead.

On 22 April 2005, after almost four years in solitary confinement, Zacarias Moussaoui pleaded guilty in federal court in Virginia to six counts of conspiracy in the 11 September attacks.[288] Four of the counts carry the death penalty, and following the guilty plea, Attorney General Alberto Gonzales confirmed that the US Justice Department would continue to seek a death sentence against Moussaoui at his forthcoming sentencing. The Attorney General insisted that the Justice Department has "acted fairly and patiently to bring Moussaoui to justice".[289] Amnesty International believes that the case has illustrated the willingness of the US administration to violate international standards in driving an individual towards the death chamber and a failure on the part of the judiciary to stop it.

Zacarias Moussaoui was arrested in Minneapolis in August 2001 on an immigration violation after he sought training on how to fly a Boeing 747 aircraft and raised suspicion within the US intelligence community.[290] Since the 11 September 2001 attacks, the US government has stated its intention to obtain a death sentence against him, while denying him access, on national security grounds, to potentially exculpatory witness testimony from alleged senior *al-Qa'ida* members in US custody elsewhere. A District Court ruled that the government could not seek the death penalty in such a case unless the defendant was allowed access to the witnesses. However, the government appealed and the US Court of Appeals for the Fourth Circuit overturned the decision.

The Fourth Circuit ruled that the government could pursue the death sentence while not giving Moussaoui access to the "enemy combatant" witnesses, even though it agreed with the District Court that those witnesses "could provide material, favourable testimony on

[285] George W. Bush's five-year term as Governor of Texas saw 152 executions in that state, including numerous cases which violated international law or safeguards, including child offenders, the mentally impaired, the inadequately represented and those whose guilt was in doubt. President Bush's first term in the White House saw the first federal execution in the USA since 1963.
[286] Responses of Alberto R. Gonzales, nominee to be Attorney General of the United States, to written questions of Senator Richard J. Durbin.
[287] If placed under the Military Order of 13 November 2001, a foreign national could also face indefinite detention without trial or indefinite administrative detention after an acquittal.
[288] Conspiracy to: commit acts of terrorism transcending national boundaries; commit aircraft piracy; destroy aircraft; use weapons of mass destruction; murder United States employees; and destroy property. Prepared remarks of Attorney General Alberto R. Gonzales on Zacarias Moussaoui, 22 April 2005. US Department of Justice, Washington, DC. Despite his guilty plea, he has reportedly maintained that he was not part of the 9/11 conspiracy, as the prosecution alleges, but a different one.
[289] *Ibid.*
[290] See pages 273-276, of the Final Report of the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission Report), August 2004.

Moussaoui's behalf". It ruled, however that there was a "remedy adequate to protect Moussaoui's constitutional rights", namely "substitutions" – written extracts of summaries of the interrogation statements of the witnesses to present to the jury. One of the three judges dissented from the decision to allow the government to pursue a death sentence under such circumstances:

> "*This is a slim reed indeed upon which to base a jury verdict, especially where a man's life hangs in the balance... To say this is a 'remedy' must be of cold comfort to Moussaoui... The entire process is cloaked in secrecy, making if difficult, if not impossible, for the courts to ensure the provision of Moussaoui's rights... Because the majority decrees that this so-called 'remedy' will fulfil this court's obligation to protect Moussaoui's constitutional rights, today justice has taken a long stride backward... Here, the reliability of a death sentence would be significantly impaired by the limitations on the evidence available for Moussaoui's use in proving mitigating factors (if he is found guilty)... Because Moussaoui will not have access to the witnesses who could answer the question of his involvement, he should not face the ultimate penalty of death.*"[291]

Article 14.3(e) of the ICCPR states that any criminal defendant must be allowed, "in full equality", to be able "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Safeguard 5 of the UN Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty require that capital defendants must only be tried by a process "which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights". The USA is already becoming more and more isolated in a world that is inexorably moving away from the death penalty, with 120 countries currently abolitionist in law or practice.[292] With its pursuit of the execution of Zacarias Moussaoui, it is moving still further into what is increasingly seen as an unacceptable government policy.

On 21 March 2005, the US Supreme Court declined to involve itself in the case. A month later, Zacarias Moussaoui pleaded guilty despite the government not having agreed to waive pursuit of the death penalty (in the US justice system, many defendants have pleaded guilty as part of an agreement with the prosecution to waive the death penalty). There have been questions raised about Moussaoui's mental competency on numerous occasions – making a guilty plea under such circumstances raises further such questions. He is reported to have both requested the death sentence and to have vowed to fight it. At the time of writing, it was being proposed that jury selection for his sentencing trial begin on 9 January 2006, and the hearing itself to begin on 6 February 2006.[293]

As Alberto Gonzales repeated numerous times in his written responses to Senators before they confirmed his nomination to Attorney General in February 2005, President Bush

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[291] *USA v. Moussaoui*, US Court of Appeals for the Fourth Circuit, 13 September 2004, Judge Gregory, concurring in part and dissenting in part.

[292] In addition, under the Rome Statute of the International Criminal Court, the death penalty cannot be handed out for the worst crimes in the world, including genocide, war crimes, crimes against humanity and torture. In any event, the UN Safeguards guaranteeing the protection of the rights of those facing the death penalty prohibit retentionist countries from passing death sentences in any tribunal other than a "competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights".

[293] *USA v Moussaoui*. Joint position regarding trial schedule. In the US District Court for the Eastern District of Virginia, Alexandria Division, 5 May 2005.

supports capital punishment on the grounds that it is a deterrent.[294] To Amnesty International's knowledge, neither President Bush nor Attorney General Gonzales has ever cited the evidence for this assertion. Indeed, the death penalty has not been shown to have any special deterrent effect, and there is some evidence that the opposite can be true under certain circumstances. In its 1989 report on the use of capital punishment worldwide, Amnesty International, citing examples, noted that:

> "*Executions for politically motivated crimes may result in greater publicity for acts of terror, thus drawing increased public attention to the perpetrators' political agenda. Such executions may also create martyrs whose memory becomes a rallying point... For some men and women convinced of the legitimacy of their acts, the prospect of suffering the death penalty may even serve as an incentive. Far from stopping violence, executions have been used as the justification for more violence...*"[295]

At a seminar organized by Amnesty International in 1985, France's then Minister of Justice, Robert Badinter, said:

> "*...history and contemporary world events refute the simplistic notion that the death penalty can deter terrorists. Never in history has the threat of execution halted terrorism or political crime. Indeed, if there is one kind of man or woman who is not deterred by the threat of the death penalty, it is the terrorist, who frequently risks his life in action. Death has an ambiguous fascination for the terrorist, be it the death of others by one's own hand, or the risk of death for oneself. Regardless of his proclaimed ideology, his rallying cry is the fascist 'viva la muerte' [long live death]*".[296]

The USA's well-known use of the death penalty did not deter the hijackers who committed the 11 September 2001 atrocities. The pursuit of the death penalty against the only person so far charged by the US government with being a part of that conspiracy threatens to make a martyr of the defendant, regardless of the reliability of his guilty plea.

In its September 2004 ruling allowing the administration to seek the death penalty, the Fourth Circuit majority noted that the case presented it with "questions of grave significance – questions that test the commitment of this nation to an independent judiciary, to the constitutional guarantee of a fair trial even to one accused of the most heinous of crimes, and to the protection of our citizens against additional terrorist attacks. These questions do not admit of easy answers." What Zacarias Moussaoui's execution, like any execution, is guaranteed not to provide are any answers to the questions that arise from violent crimes, including the crime against humanity that was committed on 11 September 2001. An execution guarantees nothing but another dead body. It cannot guarantee relief from the suffering of the bereaved or a reduction in killing. Instead, it carries with it the potential to create more grieving relatives, diminish respect for fundamental human rights, and generate more violence.

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[294] Alberto Gonzales was legal counsel to George W. Bush for part of the latter's term as governor of Texas. As was raised during his Senate nomination hearings, Mr Gonzales' advice on clemency in Texas capital cases was disturbingly cursory and selective.

[295] *When the state kills... The death penalty: a human rights issue.* AI Index: ACT 51/07/89, Amnesty International Publications, 1989, page 19.

[296] Robert Badinter, statement at a seminar on the abolition of the death penalty and arbitrary, summary and extrajudicial executions, organized by Amnesty International at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 27 August 1985. AI Index: ACT 05/27/85, 1985. More recently, see *Execute terrorists at our own risk*, New York Times, 28 February 2001. The author of this article, Jessica Stern, served on the National Security Council from 1994 to 1995.

Another aspect of the Zacarias Moussaoui case is that the witnesses to whom he has sought access are believed to include individuals such as Khalid Sheikh Mohammed and Ramzi bin al-Shibh, who have been held in long-term secret custody, possibly amounting to "disappearance", a crime under international law.[297] They remain held without charge or trial despite the US authorities alleging their central role in criminal activity, including the attacks of 11 September 2001.[298] In addition, there are concerns that they may have been subjected to torture and other cruel, inhuman or degrading treatment during interrogations. The administration has said that it does not want to grant Zacarias Moussaoui access to such detainees on the grounds that it would disrupt their interrogations and threaten national security. Is the government concerned that bringing such detainees into the light of day might also reveal to the public how they have been treated in custody?

12. Torture and ill-treatment – the executive has a case to answer

Have any of these guys ever tried to talk to someone who's been deprived of his clothes? He's going to be ashamed, and humiliated, and cold. He'll tell you anything you want to hear to get his clothes back. There's no value in it... Brutalization doesn't work. We know that. Besides, you lose your soul.

Former FBI agent Dan Coleman[299]

On 29 March 2005, the International Committee of the Red Cross (ICRC), the only international organization with access to detainees held by the USA in Guantánamo and Afghanistan revealed that, more than three years into the "war on terror", it remained concerned that its "observations regarding certain aspects of the conditions of detention and treatment of detainees in Bagram and Guantánamo have not yet been adequately addressed".[300] It has characterized these issues as "significant problems".[301] For its part, Amnesty International is concerned that in the "war on terror" the USA has systematically violated the rights of those it has taken into custody, including the right of all detainees to be treated with respect for their human dignity and to be free from cruel, inhuman or degrading treatment. In some cases, the treatment alleged has amounted to torture.

Regardless of whether particular practices are described as torture or as cruel, inhuman or degrading treatment (ill-treatment), all forms of torture and ill-treatment are

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[297] See for instance Rome Statue of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9), entered into force 1 July 2001, Art. 7(1)(i) – "enforced disappearance of persons" is a crime against humanity in certain circumstances. Khalid Sheikh Mohammed and Ramzi bin al-Shibh were two of the 10 detainees that the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) was authorized to name as "currently being in US custody". However, this minimal information does not clarify their fate and whereabouts, and they remain outside the protection of the law. Besides, the 9/11 Commission's final report is now almost a year old. The eight other named detainees are Abu Zubaydah, Riduan Isamuddin (also known as Hambali), Abd al Rahim al Nashiri, Tawfiq bin Attash (also known as Khallad); Mohamed al-Kahtani, Ahmad Khalil Ibrahim Samir al Ani, Ali Abd al Rahman al Faqasi al Ghamdi (also known as Abu Bakr al Azdi), and Hassan Ghul. See *USA: Human dignity denied, supra*, note 17.

[298] For example, the White House describes Khalid Sheikh Mohammed as the "mastermind of the September 11th attacks" and Ramzi bin al-Shibh as "a coordinator of the September 11th attacks". *Waging and winning the war on terror*. http://www.whitehouse.gov/infocus/achievement/chap1-nrn.html.

[299] The "guys" to whom Dan Coleman was referring were the administration lawyers responsible for redefining the scope of counter-terrorism interrogations. *Outsourcing torture*. By Jane Mayer. The New Yorker, 14 February 2005.

[300] ICRC operational update, 29 March 2005.

[301] *The ICRC's work at Guantanamo Bay*, ICRC news release 30 November 2004.

strictly and equally prohibited in all circumstances, and should be prosecuted.[302] In the "war on terror", the US administration has sought to narrow the definition of torture and to suggest that practices that "only" amount to cruel, inhuman or degrading can be tolerated. There has followed a marked refusal by members of the US administration to admit that "torture" by US forces has occurred in the "war on terror", preferring the term "abuse" (and then insisting that "abuses" have been aberrational rather than systematic). This has been echoed at many different levels including, for example, the Combatant Status Review Tribunal process at Guantánamo Bay. At the CSRT hearing for Yemeni detainee Khaled Qasim in September 2004, for example, the following exchange took place between the Tribunal President (TP) and the "Personal Representative" (PR) of the detainee (Khaled Qasim did not attend the hearing himself):

> PR: [Khaled Qasim] *said he was not tortured. All he said is that he heard people crying at night, but he was not tortured.*
>
> TP: *While here in Guantanamo Bay, Cuba?*
>
> PR: *He said he was not tortured here in Guantanamo Bay.*
>
> TP: *Did he say he was not tortured in Afghanistan or did he say he was not tortured here in Guantanamo Bay?*
>
> PR: *He said he was not tortured here in Guantanamo Bay.*
>
> TP: *Did he say he was tortured in Afghanistan?*
>
> PR: *He said he was treated bad and mistreated.*
>
> TP: *But he did not say he was tortured?*
>
> PR: *He did not say he was tortured.*[303]

In an interview on 6 May 2005, US Attorney General echoed this approach when he reportedly said that much of the alleged abuse by US forces in "war on terror" falls short of the legal definition of torture. He was quoted as saying: "Torture, as a matter of prosecution, is defined by Congress as the intentional infliction of severe physical and mental pain or suffering. Congress intended a very high bar here in order to be prosecuted for engaging in torture. There may be conduct that you may find offensive that falls far short of torture".[304]

The conditions conducive to torture and ill-treatment in US custody in the "war on terror" remain, and include the use of secret and incommunicado detention. On 17 February 2005, for example, US and Iraqi military personnel detained Huda Hafez Ahmad al-Azawi. She was taken away handcuffed and blindfolded, and the detaining soldiers also allegedly beat, handcuffed and blindfolded her daughters, and took jewellery and cash from the house. By 19 April 2005, she had still not been seen by a lawyer or her relatives, but was believed to be in US custody near Baghdad Airport.[305] Huda Hafez Ahmed al-Azawi was previously

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[302] See pages 41-46, *USA: Human dignity denied*, *supra*, note 17.

[303] *Qasim v. Bush*. Unclassified CSRT factual returns, In the US District Court for the District of Columbia. The Tribunal President was a Colonel in the US Air Force. The Personal Representative was a Lieutenant Colonel in the US Army. It is not known if Khaled Qasim's allegations of ill-treatment in Afghanistan have been investigated. There is no indication in the CSRT record that it has or that the CSRT has referred the matter on to the relevant Afghan or US authorities for investigation.

[304] *Gonzales: Prisoner abuse doesn't qualify as torture*. Houston Chronicle, 7 May 2005.

[305] See update to Amnesty International Urgent Action 42/05, 19 April 2005, http://web.amnesty.org/library/Index/ENGMDE140062005.

detained by US forces for several months in 2003 and 2004, during which time she was allegedly subjected to torture or ill-treatment.[306]

Other allegations of torture and ill-treatment committed by US forces throughout the "war on terror" continue to emerge.[307] Bisher al-Rawi, an Iraqi national and UK resident seized in Gambia in late 2002 and transferred to Guantánamo via Afghanistan, told his CSRT hearing in September 2004 that "we were taken from Gambia to Kabul and then to Bagram Airbase. In Bagram, I provided information only after I was subjected to sleep deprivation, and various threats were made against me."[308] Moazzam Begg, a UK national, has revealed that he saw Bisher al-Rawi in Bagram in late 2002 and that "his face had obviously the marks and bruises of what were the remnants of a beating".[309] Moazzam Begg has alleged that he himself was tortured and ill-treated in US custody in Afghanistan and "witnessed two people get beaten so badly that I believe it caused their deaths".[310] Richard Belmar, another UK national, has said that he sustained a fractured skull as a result of being struck on the head while hooded on his way to Bagram airbase. He has further claimed that this was not the worst thing that happened to him in US custody: "The worst thing that happened to me, I can't even explain because it's too horrific, I can't, you know, I can't handle it, to speak on it".[311] At his CSRT hearing in Guantánamo in 2004, he also said that at Bagram he had seen "a lot of things they [US personnel] did to people that they thought weren't telling the truth or were withholding information. That scared me." Richard Belmar and Moazzam Begg were transferred to the UK in January 2005, almost a year after British intelligence officers had visited the UK detainees and reported that their mental health was deteriorating. They also reported that Moazzam Begg "had complained about being held in solitary confinement for over a year, not seeing daylight for four months, being denied reading material and restriction of mail."[312]

Martin Mubanga, another of the four British detainees transferred to UK custody and released a little over 24 hours later has alleged that in June 2004 he was subjected to the following treatment while shackled and lying on the floor of an interrogation room in Guantánamo:

> "*I needed the toilet and I asked the interrogator to let me go. But he just said 'you'll go when I say so'. I told him he had five minutes to get me to the toilet or I was going to go on the floor. He left the room. Finally, I squirmed across the floor and did it in the corner, trying to minimize the mess. I suppose he was watching through a one-way mirror or the CCTV camera. He comes back with a mop and dips it in the pool of urine. Then he starts covering me with my own waste, like he's using a big paint-brush, working methodically, beginning with my feet and ankles, and working his way*

[306] Page 129, *USA: Human dignity denied, supra*, note 17

[307] Interview with Channel 4 News (UK), 24 February 2005. Although not the subject of this report, it is important to add that detainees held inside the USA in the "war on terror" are also alleged to have been subjected to torture or ill-treatment. For example, in a recent decision on the case of Benamar Benatta, an Algerian national held in untried detention in US custody since 12 September 2001, the UN Working Group on Arbitrary Detention found that his incarceration amounted to arbitrary detention. The Working Group also noted that the conditions in the early part of his detention – when he was kept in incommunicado detention in a cell illuminated for 24 hours a day and woken by a guard every 30 minutes – "could be described as torture". Opinion No.18/2004, addressed to the US government on 7 May 2004. UN Doc. E/CN.4/2005/6/Add.1, 19 November 2004.

[308] *El-Banna et al. v. Bush et al.* CSRT unclassified factual returns for Bisher al-Rawi.

[309] Interview with Zubeida Malik, *Today*, BBC Radio 4, 21 April 2005.

[310] Interview with Channel 4 News (UK), 24 February 2005.

[311] *Is torture a good idea?* Dispatches, Channel 4 TV, 28 February 2005.

[312] *The handling of detainees by UK intelligence personnel in Afghanistan*, Guantanamo Bay and Iraq. The UK Intelligence and Security Committee. March 2005, para. 67.

up my legs. All the while, he's racially abusing me, cussing me: 'Oh, the poor little negro, the poor little nigger.' He seemed to think it was funny".[313]

Martin Mubanga, arrested in Zambia, transferred to Guantánamo in May 2002, and affirmed as an "enemy combatant" by the CSRT in October 2004, also described the use of temperature manipulation during interrogations, as well as isolation, withdrawal of "comfort items", beatings and other physical abuse at the detention facility.

Since the *Rasul* decision in June 2004, some Guantánamo detainees have been visited by lawyers representing them for their *habeas corpus* appeals in US courts. Some of what the detainees have said has been declassified in recent weeks, providing the first chance for their accounts of what they have been through to be made public. Unclassified details of the alleged treatment of Bahraini detainee Jum'ah Mohammad Abdul Latif Al Dossari and others are given below, as provided to Amnesty International by the lawyers for the detainees:

"*Mr Al Dossari was arrested in Pakistan and held by Pakistani authorities for several weeks. Mr Al Dossari was transferred from Pakistan to Kandahar, Afghanistan via airplane by US authorities. On the plane, he was shackled by chains on his thighs, waist and shoulders, with his hands tied behind him. The chains were so tight around his shoulders that he was forced to lean forward at an extreme angle during the entire flight. This caused great pain to Mr Al Dossari's stomach, where he had had an operation some years before. When Mr Al Dossari complained about the pain, he was hit and kicked in the stomach, causing him to vomit blood.*

Upon arriving in Kandahar, Mr Al Dossari and other detainees were put on a row on the ground in a tent. US Marines urinated on the detainees and put cigarettes out on them (Mr Al Dossari has scars that are consistent with those that would be caused by cigarette burns). A US soldier pushed Mr Al Dossari's head into the ground violently and other soldiers walked on him…"

Mohammad Al Dossari has alleged, among other things, that he was forced to walk barefoot over barbed wire and that his head was pushed to the ground on broken glass. He has alleged that US soldiers subjected him to electric shocks, death threats, assault and humiliation. He has alleged that in Guantánamo Bay, he was subjected to a violent cell extraction, possibly on 27 or 28 April 2002, in which his head was repeatedly struck against the floor by a military guard until he lost consciousness. The government of Bahrain is reported to have requested an investigation into this incident. Mohammaded Al Dossari has alleged that during interrogations he has been wrapped in Israeli and US flags, shackled to the floor ("short-shackled") for some 16 hours, and been threatened that his family in Bahrain would be killed.

Fellow Bahraini detainee Abdullah Al Noaimi has alleged that he was physically assaulted by US soldiers in Kandahar air base in Afghanistan, stripped and sexually humiliated. He says that he witnessed detainees being bitten by dogs in Kandahar. In Guantánamo, he alleged that he has been threatened with rape, injected with an unknown substance during an interrogation, subjected to sexual taunting by female personnel, and hours of being shackled in a room made freezing by air conditioning.

A number of Yemeni detainees have alleged that they and others were subjected to torture and ill-treatment in Afghanistan before their transfer to Guantánamo, where they describe the regime as abusive, punitive, slow or failing to treat medical and dental problems, and prone to violent cell extractions and religious intolerance. The latter has allegedly included repeated disrespect for the Koran, including taking detainees' copies, insulting them, wrapping them in the Israeli flag, throwing them on the ground, and stamping on them.

[313] *How I entered the hellish world of Guantánamo Bay*. The Observer (UK), 6 February 2005.

- Mohammed Mohammed Hassen has alleged that an interrogator made him run 20 laps when he refused to talk, wounding his feet as he was still shackled. After further questioning, he alleges that he was made to run again, and subsequently put in isolation for 40 days.
- Several allege that interrogators have used the air conditioning to make detainees freezing cold. Yasin Qasem Muhammad Ismail says that he has been kept under the air conditioner running full blast for 18 hours. He has alleged that when held in Bagram air base in Afghanistan, US soldiers beat him, kicked him, and stood on his back and knees.
- Abd Al Malik Abd Al Wahab alleges that he has been forced to endure many hours of cold under air conditioners, and subjected to sleep deprivation. He states that he was threatened that unless he confessed he would be taken "underground" and would never see daylight. He has said that he had his thumb broken during beatings by US soldiers in the US air base in Kandahar in Afghanistan.

Turkish national and German resident Murat Kurnaz has alleged that when he was held in the US air base in Kandahar, interrogators repeatedly forced his head into a bucket of cold water for long periods of time, as well as subjecting him to an electric shock on his feet. He has alleged that he was held for days shackled and handcuffed with his arms secured above his head. On one occasion, he claims that a military officer loaded his gun and pointed it at Murat Kurnaz's head, screaming at him to admit to being an *al-Qa'ida* associate. Murat Kurnaz also claims to have witnessed other detainee beatings, in one case that he believes may have resulted in the detainee's death. In Guantánamo, he alleges, he has been subjected to sexual humiliation and taunting by young women who entered the interrogation room where he was shackled to the floor. When of them began to caress him from behind, he jerked his head back, hitting her head. He alleges that a response team of guards in riot gear entered the room beat him and sprayed him with pepper spray, and he was taken to isolation where he was left on the floor with his hands tied behind his back for 20 hours.

The handwritten notes of a US lawyer who met with Kuwaiti detainees in Guantánamo in January 2005 make for similarly disturbing reading:

> *All indicated that they had been horribly treated, particularly in Afghanistan and Pakistan where they were first held for many months after being taken into custody (in Kandahar, Kohat, Bagram). Although the words they used were different, the stories they told were remarkably similar – terrible beatings, hung from wrists and beaten, removal of clothes, hooding, exposure naked to extreme cold, naked in front of female guards, sexual taunting by both male and female guards/interrogators, some sexual abuse (rectal intrusion), terrible uncomfortable positions for hours. All confirmed that all this treatment was by Americans...*
>
> *Several said pictures were taken of some of this abuse...Some of the pictures still exist and are still used by the interrogators. Many knew that the Americans had killed several people during the interrogations at these places.*
>
> *Several also mentioned the use of electric shocks – like ping pong paddles put under arms – some had this done; many saw it done.*
>
> *Several said they just could not believe Americans could act this way.*
>
> *Tied so tightly that hands and feet swelled to much above normal size. Forced to move and assume uncomfortable positions while tied this way. Beaten with chains when would go to the bathroom. Forced to stay in positions and to urinate and defecate on self.*

> *Were not as specific about the abuses at Guantanamo. Several indicated that the physical abuses continued at GTMO, many confirmed the use of stress positions. But most said the abuse was more subtle (that also included beatings, though, but usually types of tactics 'that would not leave marks'). All seemed more concerned by religious persecution than physical abuse. From the outset, mocked for their religion...*

As already noted in Section 4, Libyan national and UK resident Omar Deghayes has alleged that he was subjected to torture and ill-treatment in Pakistan following his arrest there. Following his transfer to US custody in Afghanistan, he has alleged that the following took place in Bagram air base where he was held for two months. According to his account recorded by a lawyer who visited him in Guantánamo in early 2005:

- "Omar went for 7-8 days without food in Bagram."
- "Omar was held in a dark room for days on end, without any access to light"
- "Omar and others were locked in boxes with no air and effectively suffocated for long periods".
- "Omar was chained to the wall, with his hands high up in the *Strappado* position. This caused extreme pain".
- "Omar was forced to live naked for long periods while he was in Bagram, as part of the humiliation process".

In Guantánamo, Omar Deghayes alleges that he was subjected to brutal extractions from his cell by the Extreme Reaction Force (ERF).[314] Among the alleged incidents related to the lawyer who visited him in Guantánamo were:

> "In March 2004, Omar was blinded in his right eye by the ERF team in Guantanamo Bay. He was being held in Oscar Isolation camp in Camp Delta. The MPs [military police] there were going to be sent to Iraq shortly afterwards and they were being trained up. They came around the cells with dogs for a search. They did a full body search on Omar. 'This is not a search, it is a sexual assault', Omar says, with disgust. 'They took us into the showers and put thei hand up my rectum'.
>
> People in the block were angry, and simply refused to have it done to them. Prisoners refused to come out of their cells. Lines of MPs came into the block, singing and laughing. The prisoners were maced, but they fought back this time. The officer standing behind the MPs kept urging them to spray more mace at Omar's eye. 'More, more!' he shouted.
>
> Then one of the MPs pushed his finger into Omar's eye. Again the officer shouted, 'More! More!' Omar was trying desperately not to scream, the pain – a mixture of mace and physical violence – was agony".

Omar Deghayes reported that this incident left him unable to see for two weeks, but that he gradually regained his sight in one eye. The other eye, which had been injured in his childhood, has remained blind and a source of continuing pain.

Omar Deghayes has alleged that during another "ERF-ing", he was punished for objecting to the authorities taking his Koran. He alleged that he was shackled and had his head put in the toilet which was then repeatedly flushed. In yet another incident he has alleged that he was shackled and subjected to high pressure water being hosed up his nose until he thought he would suffocate. He said that this was done with medical personnel present.

[314] Some detainees have called this the Immediate Reaction Force or the Internal Reaction Force (IRF).

By the time the lawyer was able to visit in January 2005, Omar Deghayes had been held in solitary confinement in Camp Five of Guantánamo's Camp Delta for eight months. This a concrete detention block, believed to be designed on "supermaximum security" prisons on the US mainland, regimes which the UN Committee against Torture has described as "excessively harsh".[315] In Camp Five, according to Omar Deghayes, the detainees are meant to remain in total silence at all times. They receive one shower per week. They are allowed no pens, paper, or communications with their families. There are reported to be some 70 to 80 detainees being held there. An Afghan national in Camp Five is reported to have been reduced to weeping much of the time.[316]

Allegations of torture and ill-treatment by US forces in the "war on terror" have not only come from detainees. In May 2005, for example, *Newsweek* cited army investigation sources had discoved that "interrogators, in an attempt to rattle suspects, flushed a *Qu'ran* down a toilet and led a detainee around with a collar and dog leash".[317] In January 2005, *Associated Press* (AP) reported that it had obtained a draft manuscript written by a translator employed at Guantánamo from December 2002 to June 2003.[318] In it, the translator alleged that female interrogators sexually humiliated male Muslim detainees in an effort to break them. AP wrote that it was not possible to independently verify his claims. However, they echo previous allegations made to Amnesty International and others by detainee and non-detainee sources.

In an interview in July 2004, for example, released Swedish detainee Mehdi Ghezali alleged to Amnesty International that women were used to "degrade us and our faith". He alleged:

> "*They used girls to tempt us to have sexual intercourse with them in order to degrade us and our faith. I don't know if these girls were prostitutes. The girl who was let into my interrogation room wore a military uniform. Other prisoners were subjected to very scantily clad girls. It only happened once that a woman came into my cell trying to seduce me. Other fellow prisoners told me about a girl who tried to have sexual intercourse with a prisoner, but he just spat on her. The guards beat the prisoner to the ground and knocked out his teeth. I also heard a story about a scantily clad girl who came into the interrogation room and smeared her menstrual blood all over him.*"[319]

A non-detainee source told Amnesty International in September 2004 that during Ramadan in 2002, female military personnel had attempted to sexually arouse detainees. In one case, it is alleged, the detainee broke down in distress when he was returned to his cell and prayed for forgiveness for having had sexual feelings. In another case, it is alleged, a Yemeni detainee was subjected to sexual insults during interrogation, including repeated and

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[315] Conclusions and recommendations of the Committee against Torture: United States of America. 15 May 2000. CAT/C/24/6.

[316] Unclassified information on Omar Deghayes. Dated 30 March 2005.

[317] *Gitmo: SouthCom showdown*. Newsweek, 9 May 2005.

[318] *Ex-G.I. writes about use of sex in Guantánamo interrogations*. AP, 28 January 2005 (the book was published in May 2005. At the time of writing, Amnesty International had not reviewed a copy).

[319] Amnesty International does not know if this is the same incident to which the authorities have admitted in which a female interrogator in early 2003 wiped red dye on a detainee's shirt and told him that it was blood. She received a verbal reprimand for this. There are alleged to have been various incidents in which female interrogators, using dye, pretended to smear menstrual blood on detainees. Detainees have alleged that they were smeared with blood. *Detainees accuse female interrogators*. Washington Post, 10 February 2005. A female interrogator who was reprimanded is reported to be now training soldiers in interrogations at the Army Intelligence School at For Huachuca in Arizona. *Interrogator disciplined over techniques now teaching soldiers*, New York Daily News, 16 March 2005.

graphic questions about whether his first sexual experience had been with a male relative.[320] Further allegations of religious abuses against Guantánamo detainees by their captors have emerged since then.[321] The executive summary of the Church report claims that there have been cases of only two female interrogators "who, on their own initiative, touched and spoke to detainees in a sexually suggestive manner in order to incur stress based on the detainees' religious beliefs." It did not mention that in December 2002 Secretary Rumsfeld authorized the interrogation technique of "inducing stress by use of detainee's fears", and that the use of female interrogators to "induce stress" had been used following this authorization.[322] According to *Newsweek*, female interrogators have told investigators that they were urged to be "creative" after Secretary Rumsfeld expressed frustration at the lack of actionable intelligence being extracted from the Guantánamo detainees.[323]

Allegations of abuse of detainees have also come from other governments' agencies. On 10 January 2002, for example, an officer with the UK Secret Intelligence Service (SIS) in Afghanistan reported back to London his concern at the treatment of a detainee in US custody that he had witnessed. What he saw has not been made public, but the response from London included the following instructions sent back to the SIS officer the next day and copied to all UK intelligence personnel in Afghanistan:

> "*It appears from your description that [the detainees in US custody] are not being treated in accordance with the appropriate standards. Given that they are not within our custody or control, the law does not require you to intervene to prevent this. That said [the UK government's] stated commitment to human rights makes it important that the Americans understand that we cannot be party to such ill treatment nor can we be seen to condone it... If circumstances allow, you should consider drawing this to the attention of a suitably senior US official locally. It is important that you do not engage in any activity yourself that involves inhumane or degrading treatment of prisoners... [Y]our actions incur criminal liability in the same way as if you were carrying out those acts in the UK*".[324]

In June 2002, the UK authorities raised with their US counterparts allegations of detainees in US custody in Afghanistan being hooded and subjected to sleep deprivation. A month later, a UK intelligence official raised with a US official in Afghanistan the inappropriateness of sleep deprivation, hooding and the use of stress positions against detainees, which the US official had said was being used to "get a detainee ready" for interrogation. The UK officer also raised with a US official in charge of a detention facility a detainee's allegations of ill-treatment, including "the use of constant bright lights".[325]

However, it seems that any such representations were unheeded by the USA. Indeed, when the "UK Government officially asked the US authorities in May 2004 if interrogation techniques such as hooding, sleep and food deprivation had been used in Guantánamo Bay and Iraq", the US administration was unapologetic in its response, confirming "that such techniques had been authorised for a limited period – in Guantanamo Bay between November

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[320] See pages 33-34 of *USA: Human dignity denied, supra*, note 17.
[321] *Guantanamo detainees accuse guards of religious abuses*. Duluth News Tribune, 5 March 2005. In *USA: Human dignity denied*, note 17, *supra*, Amnesty International reported on these and other abusive interrogation techniques and detention conditions that appeared to be targetted at the religious sensitivities of the Muslim detainees held in US custody in Guantánamo, Afghanistan and Iraq.
[322] GTMO interrogation techniques. Undated.
[323] *Torture: Bush's nominee may be 'DOA'*. Newsweek, 21 March 2005.
[324] *The handling of detainees by UK intelligence personnel in Afghanistan, Guantanamo Bay and Iraq*. UK Intelligence and Security Committee. March 2005, para. 47.
[325] Ibid. paras 54 and 55.

2002 and January 2003, and in Iraq until May 2004."[326] According to the evidence still being revealed, torture and ill-treatment has been more widespread than that message would suggest.

Concerns about abusive interrogation techniques from within the USA's own agencies appear to have been ignored. In the wake of the Abu Ghraib scandal, and the emergence of the US administration's memorandums on how US agents could avoid criminal liability for torture and other cruel, inhuman or degrading treatment, concerns within the Federal Bureau of Investigation (FBI) about techniques employed by US interrogators have come to light.[327]

FBI documents are among heavily redacted information reluctantly released by the administration pursuant to a request filed by the American Civil Liberties Union (ACLU) and others in October 2003 under the Freedom of Information Act, and a follow-up lawsuit filed in June 2004 demanding government compliance with this request. An FBI email dated 13 May 2004, for example, suggested that Major General Geoffrey Miller, who was commander of Guantánamo detentions from November 2002 to March 2004 before being made Deputy Commander for Detainee Operations in Iraq, had in Iraq "continued to support interrogation strategies we not only advised against, but questioned in terms of effectiveness... [T]he battles fought in [Guantánamo] while [General Miller] was there are on the record."[328]

An FBI email dated 22 May 2004 refers to an instruction to FBI personnel in Iraq "not to participate in interrogations by military personnel which might include techniques authorized by Executive Order but beyond the bounds of standard FBI practice". The email said that some of FBI personnel, although not themselves participating in abuse, had been "in the general vicinity of interrogations in which such tactics were being used". The email goes on to seek clarification of an instruction from the Office of General Counsel (OGC) requiring FBI personnel to report any abuse that he or she comes across:

> "*This instruction begs the question of what constitutes 'abuse'. We assume this does not include lawful interrogation techniques authorized by Executive Order. We are aware that prior to a revision in policy last week, an Executive Order signed by President Bush authorized the following interrogation techniques among others: sleep 'management', use of MWDs (military working dogs), 'stress positions' such as half squats, 'environmental manipulation' such as use of loud music, sensory deprivation through the use of hoods, etc. We assume the OGC instruction does not include the reporting of these authorized interrogation techniques, and that the use of these techniques does not constitute 'abuse'.*"

An FBI document from December 2004, originally classified as secret for 25 years, included the following prior observations by FBI agents:

> *Iraq*
>
> *A detainee hooded and draped in a shower curtain, was cuffed to a waist high rail. An MP [military policeman] was apparently subjecting the detainee to sleep deprivation, as he was observed slapping the detainee lightly, as if to keep him from falling asleep;*

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[326] *Ibid.* para 101.

[327] Following the Abu Ghraib revelations, the FBI sent a memorandum to all its divisions to remind all personnel deployed in Iraq, Afghanistan, Guantánamo, "or any other foreign location" of FBI interrogation policy. The memorandum, dated 19 May 2004, reminds its recipients that "it is the policy of the FBI that no interrogation of detainees, regardless of their status, shall be conducted using methods which could be interpreted as inherently coercive". *Treatment of prisoners and detainees.* From General Counsel, Federal Bureau of Investigation, 19 May 2004.

[328] For more on Major General Miller, see: *USA: Human dignity denied, supra*, note 17.

Guantanamo Bay

A detainee's mouth was duct taped for chanting from the Koran... military employee who applied the duct tape found it amusing;

A detainee being isolated for substantial periods of time;

Agents heard of detainees being subjected to considerable pain and very aggressive techniques during interrogations;

Agents aware of detainees being threatened... by dogs;

Agents have seen documentary evidence that a detainee was told that his family had been taken into custody and would be moved to Morocco for interrogation if he did not begin to talk.

Afghanistan

Agents are aware of detainees being subjected to interrogation techniques that would not be permitted in the United States (i.e. stress positions for extended periods of time and sleep deprivation) and to psychological techniques (i.e., loud music).

An FBI memorandum dated 14 July 2004 stated the following about the treatment of a Guantánamo detainee:

"*In September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate detainee #63 and, in November 2002, FBI agents observed Detainee #63 after he had been subject to intense isolation for over three months. During that time period, #63 was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma.*"[329]

Another undated FBI email described the following which allegedly occurred in February 2004 against a detainee in Guantánamo:

"*[H]e was yelled at for 25 minutes. [He] was short-shackled, the room temperature was significantly lowered, strobe lights were used, and possibly loud music. There were two male interrogators, one stood behind him and the other in front. They yelled at him and told him he was never leaving here... After the initial 25 minutes of yelling, [he] was left alone in the room in this condition for approximately 12 hours... During the 12 hours, [he] was not permitted to eat, pray or use the bathroom.*"

An FBI email from December 2003 referred to "torture techniques" being used by the Department of Defense (DoD) in Guantánamo, and noted the FBI's Military Liaison and Detainee Unit's "long standing and documented position against use of some of DoD's interrogation practices". The email expressed concern that DoD interrogators were impersonating FBI agents, and that "if this detainee is ever released or his story made public in any way, DoD interrogators will not be held accountable because these torture techniques were done [by] the 'FBI' interrogators". The email noted that "these tactics have produced no intelligence of a threat neutralization nature to date and...have destroyed any chance of prosecuting this detainee".[330]

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[329] *Re: Suspected mistreatment of* [Guantánamo] *detainees*. To Major General Donald J. Ryder, Department of the Army, from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, US Department of Justice, Federal Bureau of Investigation. 14 July 2004.

[330] Subject: Impersonating FBI at GTMO. 5 December 2003.

An FBI memorandum dated 10 May 2004 notes that law enforcement agencies at Guantánamo Bay "were of the opinion [that] results obtained from these interrogations were suspect at best". This memorandum recalls that the FBI had advised its agents who went to Guantánamo to "stay in line with Bureau policy and not deviate from that (as well as made them aware of some of the issues regarding DoD techniques"). The memorandum noted that the FBI and the Guantánamo military authorities had agreed to differ, and that "the Bureau has their way of doing business and DoD has their marching orders from the Sec Def [Secretary of Defense]".[331]

No one, including the Secretary of Defense, has yet been brought to account for the torture and ill-treatment FBI agents have said they witnessed in Guantánamo. The Department of Defense has provided details of the eight "minor infractions" found by Vice Admiral Church that led to disciplinary action against Guantánamo personnel.[332] None described abuses allegedly witnessed by FBI agents. The absence of a full independent inquiry and the failure of what has been a piecemeal approach to investigations – too often initiated only when media attention threatens to embarrass the authorities – was highlighted when an "internal" military investigation into the FBI allegations was announced in late December 2004. Even then, the investigating officer appointed was not high-ranking enough to be able to investigate Major General Geoffrey Miller's conduct when in charge of Guantánamo detentions during the period covered by the FBI documents.[333] It was not until two months later, and two days after media criticism that a whitewash was on the cards, that a more senior officer was appointed to take over.[334] The findings of the investigation had not been released at the time of writing, and it was not known how much would be made public and how much would remain classified.[335]

Despite the mounting evidence from multiple detainee and non-detainee sources that war crimes and other international crimes including torture, in some cases resulting in death, have been committed by US forces in the "war on terror", not a single US agent has been prosecuted for "torture" or for "war crimes" under the USA's Anti-Torture Act (18 U.S.C § 2340), War Crimes Act (18 U.S.C. § 2441), or Military Extraterritorial Jurisdiction Act (18 U.S.C. § 3261). A relatively small number of low-ranking soldiers have been court-martialled for offences under the Uniform Code of Military Justice (UCMJ).[336] As of 3 March 2005, the

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[331] *Instructions to GTMO interrogators*. From: [Redacted], to: Harrington, T.J. (Div . 13)(FBI), http://www.senate.gov/~levin/newsroom/supporting/2005/DOJ.032105.pdf. This is the version released by Senator Carl Levin. In the version of this memorandum released to the ACLU, the words "were suspect at best", and "as well as made them aware of some of the issues regarding DoD techniques", had been redacted. It seems from this that the administration's reluctance to release materials may not be entirely based on national security concerns.

[332] The more recent Church Report summary of March 2005 has revised this to seven cases of substantiated "relatively minor" abuse, three of which were said to be interrogation-related. The USA's Second Periodic Report to the UN Committee against Torture, submitted on 6 May 2005, lists "10 substantiated incidents of misconduct at Guantanamo", supra, note 16.

[333] "The investigating officer must also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person". Army Regulation 15-6.

[334] *Ex-commander of Guantánamo Bay prison eludes abuse inquiry*. International Herald Tribune, 26 February 2005. A Southern Command spokesperson was quoted as responding that "at this point, a more senior investigating officer is not required". Two days later, Southern Command appointed a more senior officer to take over. *3-star general appointed to lead investigation*. United States Southern Command News Release, 28 February 2005.

[335] Early reports suggest that the investigation has confirmed abuses. See, for example, *Inquiry finds abuses at Guantánamo Bay*, New York Times, 1 May 2005.

[336] In the highest profile case – the Abu Ghraib torture scandal revealed by photos made public in late April 2004 – seven soldiers had been convicted of abusing detainees in Abu Ghraib at the time of

total number of investigations into allegations of abuse stood at 341, of which 226 had been closed or completed. In 70 per cent of these closed investigations (159 out of 226), the allegations were not substantiated. Of those cases where abuses were substantiated, 120 actions had been taken against 109 soldiers. Of these 120 actions, more than 70 per cent involved non-judicial or administrative sanctions:

- 27 per cent (32 actions) involved courts-martial
- 47 per cent (56 actions) involved non-judicial punishments
- 27 per cent (32 actions) involved administrative actions (e.g. reprimand).[337]

On 5 May 2005, the US Army revealed that about a quarter of "adverse punishments" to date had been applied against officers, of the following ranks:

- Brigadier General – one had been demoted to colonel (see below);
- Colonel – one non-judicial punishment;
- Lieutenant Colonel – four officers: two received letters of reprimand and two had received non-judicial punishments;
- Major – three officers: three letters of reprimand, two non-judicial punishment;
- Captain – 10 officers: three courts-martial, one "other than honourable discharge", five letters of reprimand, one non judicial punishment;
- 1st Lieutenant – four officers: two courts-martial, one letter of reprimand, one non-judicial punishment;
- 2nd Lieutenant – two officers: one "other than honourable discharge" and one letter of reprimand;
- Chief Warrant Officer – two officers: two courts-martial.[338]

In addition, the Army released details of investigations by the Department of the Army Inspector General into five senior officers who had been identified in various reviews and inquiries which had been initiated following the Abu Ghraib abuse scandal. Four of the five officers were cleared:

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writing. The highest ranking among them was a Staff Sergeant. Six had pleaded guilty – five were sentenced to prison terms ranging from eight and a half years to six months, while the sixth was discharged from the army without a prison sentence. At the time of writing, only one had gone to trial (by court-martial) – Charles Graner, who was sentenced to 10 years in prison in January 2005. Another, Sabrina Harman, was awaiting trial. On 4 May 2005, a military judge threw out Private Lynndie England's guilty plea in view of doubts about its reliability.

[337] Fact Sheet. US Army News Release, 3 March 2005. See also Annex 1 to USA's Second Periodic Report to the UN Committee against Torture, 6 May 2005, *supra*, note 16. According to the recent Church Report, by 30 September 2004, there had been 70 cases of substantiated detainee abuse, 38 involving "minor abuse", 26 involving "serious abuse" and six cases involving detainee deaths. These abuse cases involved 121 victims. Disciplinary action had been taken against 115 members of the US armed forces, "including numerous non-judicial punishments", 15 summary courts-martial (which deal with minor incidents), 12 special courts-martial (which can hand down a maximum sentence of six months' confinement) and nine general courts-martial (the most serious level of military court). Unclassified executive summary of review of Department of Defense interrogation operations, conducted by the Naval Inspector General, Vice Admiral Albert T. Church, III, 10 March 2005. http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf.

[338] *Army releases findings in detainee-abuse investigations*. US Army News Release, 5 May 2005.

- Lieutenant General Ricardo Sanchez, who was Commander of the Combined Joint Task Force 7 (CJTF7), the US armed forces in Iraq, was investigated for alleged dereliction in the performance of duties pertaining to detention and interrogations, and improperly communicating interrogation policies. The allegations were found to be unsubstantiated.
- Major General Walter Wojdakowski, who was Deputy Commander of CJTF7, was investigated for alleged dereliction in the performance of duties pertaining to detention and interrogation operations. The allegations were found to be unsubstantiated.
- Major General Barbara G. Fast, who was a senior intelligence officer with CJTF7, was investigated for alleged dereliction in the performance of her duties. The allegation was found to be unsubstantiated.
- Colonel Marc Warren, who was Staff Judge Advocate for CJTF7, was the subject of a "preliminary screening inquiry" on allegations of professional impropriety under lawyers' ethics rules and dereliction in the performance of his duties. The allegations were found to be unsubstantiated.
- Brigadier General Janis Karpinski, who was Commander of the 800th Military Police Brigade (whose personnel were among those implicated in the Abu Ghraib abuses), was investigated for alleged dereliction of duty; making a material misrepresentation to an investigating team; failure to obey a lawful order; and shoplifting (in Florida). The allegations of dereliction of duty and shoplifting were found to be substantiated. On 5 May 2005, President Bush approved a recommendation to demote Brigadier General Karpinski to the rank of colonel. The investigation found that "no action or lack of action on her part contributed specifically to the abuse of detainees at Abu Ghraib".[339]

On 12 May 2005, the *Washington Post* reported that Colonel Thomas M. Pappas, in charge of interrogations at Abu Ghraib from November 2003, would not be court-martialled on two counts of dereliction of duty (for failing to ensure that subordinates were adequately informed of, trained in, and supervised with regard to interrogation procedures, and for failing to obtain the approval of superior officers before allowing the presence of dogs during an interrogation). Instead, he would reportedly receive a letter of reprimand and a fine.[340]

As Amnesty International wrote in its October 2004 report, *USA: Human dignity denied – Torture and accountability in the 'war on terror'*, as a matter of principle and across all countries, the organization takes the position that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law, such as torture, in independent and impartial civilian courts. In the report, Amnesty International raised its concern about the appearance of leniency in cases of human rights violations tried by military court-martial, including in cases where detainees have died in custody allegedly as a result of ill-treatment (see next section and Appendix 1). Signs of this continue. For example, in September 2004 a 1st Lieutenant in the US Army was referred to trial by court-martial on charges including conspiracy, aggravated assault, involuntary manslaughter and obstruction of justice under the UCMJ. The case involved incidents on 5 December 2003 in which an Iraqi detainee was forced into the Tigris River near Balad in Iraq, and on 3 January 2004 in which two Iraqi detainees were forced off a bridge into the Tigris near Samarra. One of the detainees, 19-year-old Zaidoun Hassoun, drowned in the latter incident. The Lieutenant

[339] *Ibid.*
[340] *Abu Ghraib officer gets reprimand*, Washington Post, 12 May 2005. See also pages 32 and 71, *USA: Human dignity denied*, *supra*, note 17.

was facing a maximum sentence of 29 years in prison. In the event, he was sentenced to 45 days confinement following a two-day court-martial in Fort Hood, Texas, on 14 and 15 March 2005. Based on a pre-trial agreement, the commanding authority did not pursue the manslaughter charge and the soldier pleaded guilty to assault charges instead.[341] Two days later, a US Army Captain was also sentenced to 45 days' confinement after seven military officers on a court-martial convicted him of assault in incidents involving the abuses of Iraqi detainees in mid-2003. He had faced a possible sentence of nine years in prison.[342]

In *Human dignity denied*, Amnesty International also detailed how the US government has so far failed in its obligation to ensure thorough and independent investigations into the allegations of human rights violations in the "war on terror", including arbitrary detentions, unlawful killings, "disappearances", secret detentions, torture and other cruel, inhuman and degrading treatment. One of the cases which the report raised was that of three Iraqi nationals working for *Reuters* news agency who alleged that they had been beaten and subjected to sleep deprivation, stress positions, hooding and sexual and religious humiliation in US military custody near Fallujah after their arrest in January 2004.[343] The military investigation into their allegations concluded that no misconduct had taken place. *Reuters* had called for the investigation to be reopened, describing it as "woefully inadequate". According to the news agency, the three detainees, Ahmad Muhammad Hussein al-Badrani, Salem Ureibi and Sattar Jabar al-Badrani, had not even been interviewed for the military investigation. In a letter dated 7 March 2005, *Reuters* was informed that the case would not be reopened.[344]

The USA's Second Periodic Report to the UN Committee against Torture, submitted on 6 May 2005, insists that the USA "has taken and continues to take all allegations of abuse very seriously". It states, however, that none of the "extensive investigative reports" into abuses against detainees in US custody in the "war on terror" have found that "any governmental policy directed, encouraged or condoned these abuses".[345] The reports to which it refers have generally taken a "lessons-learned" approach rather than an approach that also clarifies where responsibility for abuse lies and facilitates prosecution or disciplinary sanctions as appropriate, as international standards require.[346]

The investigations and reviews initiated and conducted by the authorities since the Abu Ghraib prison scandal broke in April 2004 are far from enough, offering only snapshots of what has occurred. For example, most consist of the military investigating itself, with military investigations mandated to look down the chain of command rather than up, and none investigating the higher echelons of the administration, or the USA's involvement in secret transfers to and secret detentions in other countries. Some cases may amount to "disappearances", crimes under international law. The involvement of the Central Intelligence Agency (CIA) in such cases, and the alleged existence of executive orders authorizing human rights violations, remain shrouded in secrecy (see Section 14).

On 10 March 2005, the US authorities released the conclusions of the latest in a series of official reviews conducted since the Abu Ghraib scandal broke in late April 2004. This

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[341] *Court-martial scheduled for Lieutenant*. Media advisory, 10 March 2005. *Court-martial verdict and sentence*. Press release, 16 March 2005. 7th Infantry Division and Fort Carson Public Affairs Office.
[342] Sentence announced in court-martial at Fort Carson. 17 March 2005. 7th Infantry Division and Fort Carson Public Affairs Office.
[343] *USA: Human dignity denied, supra*, note 17, page 143-144, and page 27.
[344] *US says won't reopen probe into Reuters staff abuse*. Reuters, 22 March 2005.
[345] Second Periodic Report to UN Committee against Torture, 6 May 2005, *supra*, note 16, Annex 1.
[346] UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by General Assembly resolution 55/89, 4 December 2000. See *USA: Human dignity denied*, pages 142-152, *supra*, note 17.

review of Department of Defense interrogation operations worldwide (the Church Report), conducted by the Naval Inspector General, Vice Admiral Albert T. Church, had been ordered by Secretary of Defense Donald Rumsfeld on 25 May 2004. Vice Admiral Church had earlier that month been directed by Secretary Rumsfeld to review detention procedures at Guantánamo Bay and at the Naval Consolidated Brig in Charleston, South Carolina, where two US "enemy combatants" were being held (see Section 16, below). Of this earlier review, Vice Admiral Church stressed that what he was being asked to do was neither an inspection nor an investigation, but rather a review that he described as a "snapshot of current existing conditions".[347] Anyone who was hoping to see a more in-depth and critical analysis from the subsequent global review will have been disappointed. The 378-page Church Report remains classified. Only the executive summary has been released, and has strengthened the conclusion among some, including Amnesty International, that the response to the allegations of detainee abuse in the "war on terror" has amounted to a whitewash of senior official accountability.

The Church investigation interviewed personnel who had served in Afghanistan, Iraq and Guantánamo Bay, as well as "senior policy makers in Washington", and reviewed "voluminous documentary material". It found "no link between approved interrogation techniques and detainee abuse".[348] The US Government has emphasised this finding in its recent report to the UN Committee against Torture, stressing that "Vice Admiral Church's investigation is the most comprehensive to date" and by, in effect, exonerating senior administration officials, was "consistent with the findings of earlier investigations".[349] Vice Admiral Church himself said that there was "no policy that condoned or authorized either abuse or torture".[350] Yet it is known from documents now in the public domain that, for one, Secretary Rumsfeld authorized numerous interrogation techniques in December 2002 for use in Guantánamo that violated the international prohibition on torture and other cruel, inhuman or degrading treatment – techniques that numerous detainees have alleged were used against them, and non-detainee sources, including FBI agents have claimed to have witnessed. The Church investigation did not interview a single detainee or former detainee.[351] Neither did it interview Secretary Rumsfeld; Vice Admiral Church said that this was because "I just had no more questions… I really had no need to go any further."[352] In Amnesty International's view, therefore, it cannot be said to have been "thorough" and "exhaustive", as described by Vice Admiral Church.[353]

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[347] Media availability with Vice Admiral Church, Department of Defense Transcript, 12 May 2004.
[348] In the case of the deaths of two detainees in the US air base in Bagram in Afghanistan in December 2002, the Church Report noted that the abuses which led to the deaths "consisted of violent assaults, rather than any authorized techniques". Nevertheless, the report noted, "in response to the investigation" of the two deaths, in late February 2003, the Bagram commander had modified or eliminated five "interrogator tactics" in February 2003 "as a precaution, out a general concern for detainee treatment". Army investigators closed the investigation into the deaths in October 2004, recommending charges against 11 military police (MP) officers and four military intelligence (MI) officers in the death of Mullah Habibullah on 4 December 2002, and against 20 MPs and seven MI officers in the death of Dilawar on 10 December 2002 (some of those implicated are named in both cases). The Church Report also noted that "medical personnel may have attempted to misrepresent the circumstances of death, possibly in an effort to disguise detainee abuse".
[349] Second Periodic Report to the Committee against Torture, 6 May 2005, *supra*, note 16, Annex 1.
[350] *Ibid.*
[351] Department of Defence media office, 16 March 2005. The military spokesperson told Amnesty International that he was "not aware of any detainees being specifically interviewed" for the Church investigation, as its purpose was to review US "policies and procedures" on interrogation.
[352] Department of Defense transcript of briefing on interrogation operations and interrogation techniques. 10 March 2005.
[353] *Ibid.*

An earlier military investigation, the Fay report, found that the sort of techniques authorized by Secretary Rumsfeld for use at Guantánamo were being used in Afghanistan where interrogators were "removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation". The regional director of the Afghan Independent Human Rights Commission in Gardez, Afghanistan, told Amnesty International on 23 March 2005 that his office has recorded some 80 complaints of abuse by US forces in the single province of Paktika over the past two years, ranging from destruction and confiscation of property to "inhuman" treatment of detainees.[354] He said that detainees taken to US-controlled facilities have alleged that they were subjected to sleep deprivation, food deprivation, strip searching and stripping, as well as to interrogations while blindfolded. The Church report said that such techniques had been "developed independently by interrogators in Afghanistan in the context of a broad reading of FM 34-52 [the US Army Field Manual on intelligence interrogation]". If by "broad reading", the Church review means a reading that tolerated techniques which violate international standards – including techniques reportedly described by the Navy's General Counsel as "unlawful and unworthy of the military services" – then it should have said so.[355] In which case it should also have said that Secretary Rumsfeld authorized abusive techniques for use at Guantánamo.

Instead, the Church investigation said that "issues of senior official accountability were addressed by the Independent Panel to Review DoD Detention Operations [the Schlesinger Panel]", also appointed by Secretary Rumsfeld.[356] In fact, the Schlesinger Panel had generally evaded this question. One of the panel members, former Secretary of Defense Harold Brown suggested that in the case of high-level administration officials, punishment of was not an option and that the matter of their accountability rested with the electorate at election time.[357] Presumably then, under his reasoning, the re-election of President Bush in late 2004, and the latter's retention of Donald Rumsfeld as Secretary of Defense, not to mention the promotion of White House Counsel Alberto Gonzales to the post of Attorney General, is enough to wipe the slate clean in terms of administration accountability.[358] Amnesty International is shocked that such a theory was again put forward on 29 April 2005 by an official Pentagon spokesperson when he said: "I suppose there's people that will always feel that more can be done. I will remind people – and the Secretary [of Defense] has spoken about this publicly; there's no reason to not repeat – that he offered to resign over the matter

[354] Nationwide in the past 18 months, the Commission is reported to have logged more than 800 allegations of abuses committed by US troops. '*One huge US jail*'. Guardian Weekend (UK), 19 March 2005.

[355] US Navy officials were reported to be outraged at the "abusive techniques" being used at Guantánamo in late 2002 that they threatened to withdraw navy interrogators from operations at the base. The Navy's General Counsel, Alberto Mora is reported to have described the techniques as "unlawful and unworthy of the military services". *Abuse outraged navy at Guantánamo Bay*. The Boston Globe, 17 March 2005. Senator Carl Levin was reported as saying that the events were recorded in the main classified Church report.

[356] See *USA: Human dignity denied*, note 17, *supra*.

[357] "To take the highest level, take the level of the Secretary of Defense, I don't think that you can punish somebody, demand resignation, on the basis of some action, an individual action, by somebody far down the chain. I think at that level, the decision has to be made on the basis of broad performance. And indeed at the very highest level, it's made at election time… The Secretary of Defense has to decide whether he's lost confidence in his under-secretaries or his assistant secretaries on the basis of their performance. And the electorate has to decide on the basis of its confidence at election time". Oral testimony to the Senate Armed Services Committee, 9 September 2004.

[358] See *USA: Open letter to US Senators as they prepare to vote on the nomination of Alberto Gonzales for Attorney General*. AI Index: AMR 51/031/2005, 1 February 2005, http://web.amnesty.org/library/Index/ENGAMR510312005 .

[Abu Ghraib]. The President didn't accept that offer, and then subsequent to that, there was was an election. And the American people had the full weight of everything that happened in the last four years and decided to rehire the President for this job. That's not bad when it comes to whether or not somebody at the very top was accountable."[359]

Earlier comments attributed to John C. Yoo, one of the Deputy Assistant Attorneys General in the US Justice Department who drafted a number of the now infamous memorandums on detention and interrogation policies in 2001 and 2002, carried the same message. According to the *New Yorker* magazine, he said that President Bush's re-election, and Alberto Gonzales' confirmation as Attorney General, was "proof that the debate is over. The issue is dying out. The public has had its referendum".[360] "It's hard to know what is most outrageous about those comments", editorialized the *New York Times*, calling for a full independent commission of inquiry: "that Mr Yoo actually believes Americans voted for torturing prisoners or that an official at the heart of this appalling mess feels secure enough to say that."[361]

The Chairman of the Schlesinger Panel, James Schlesinger, suggested that the resignation of the Secretary of Defense "would be a boon to all of America's enemies" and that "his conduct with regard to [the issue of interrogation policy] has been exemplary".[362] Yet in December 2002 Secretary Rumsfeld authorized stripping, isolation, hooding, stress positions, sensory deprivation, and the use of dogs in interrogations. In similar vein, in September 2003, modelled on the Guantánamo policy, Lieutenant General Ricardo Sanchez, the commanding officer in Iraq, authorized as an interrogation technique "the presence of military working dogs" to exploit "Arab fear of dogs".[363] Yet on 26 April 2005, the Chairman of the Joint Chiefs of Staff, General Richard Myers, noted that the Army Inspector General had cleared Lieutenant General Sanchez of any wrongdoing in relation to the abuses of detainees in Iraq, and General Myers reiterated that Lt. Gen. Sanchez "did a terrific job…he's a very attractive officer."[364]

The use of dogs in interrogations, at least, is now seen as unacceptable by the armed forces.[365] According to reports, a revised version of the 1992 military interrogation field manual (FM 34-52), which was already in final draft form in June 2004, will expressly prohibit this and other practices such as stress positions, stripping and sleep deprivation. Although it would only govern interrogations by Department of Defense personnel, and not, for example, those conducted by the CIA, it will reportedly prohibit other government

[359] Principal Deputy Assistant Secretary of Defense for Public Affairs, Larry Di Rita, Defense Department Regular Briefing, 29 April 2005.
[360] *Outsourcing torture*. By Jane Mayer. The New Yorker, 14 February 2005.
[361] *Time for an accounting*. New York Times, 19 February 2005.
[362] Press conference with members of the Independent Panel to Review Department of Defense Detention Operations (Schlesinger Panel). Department of Defense News Transcript, 24 August 2004. The other panel members, retired General Charles Horner and former member of Congress, Tillie Fowler, agreed. This was consistent with the position Tillie Fowler had taken in an interview before the panel had begun its work, in which she had made it clear that Secretary Rumsfeld was not to be the focus of their review. Referring to the Abu Ghraib revelations, she was quoted as saying: "The Secretary is an honest, decent, honourable man, who'd never condone this type of activity. This was not a tone set by the Secretary." *Wide gaps seen in US inquiries on prison abuse*. New York Times, 6 June 2004.
[363] CJTF-7 Interrogation and counter-resistance policy. Memorandum for Commander, US Central Command, 14 September 2003.
[364] Defense Department Briefing with Secretary Rumsfeld and General Myers, News Transcript, 26 April 2005.
[365] Army improving procedures for handling detainees. American Forces Information Service, 24 February 2005. See also Transcript of Detainee Operations Update, US Army, 24 February 2005.

agencies including the CIA from holding unregistered detainees (so-called "ghost detainees") at DoD-controlled facilities.[366] If such practices are to be considered abusive now, why have Secretary Rumsfeld and others not been called to account for authorizing them during the "war on terror"? In fact, even the 1992 version of FM 34-52 lists the use of stress positions – "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" – as an example of physical torture. It also lists "abnormal sleep deprivation" as an example of mental torture. No US personnel, civilian or military, have been brought to account either for authorizing or committing such techniques of torture or ill-treatment in the "war on terror".

Maintaining the official line that any abuses by US forces in the "war on terror" have been on the margins, Secretary Rumsfeld continues to insist that "not a single one of the investigations that have been conducted" have described abuses as "systemic or systematic".[367] Even this assertion is inaccurate. For example, previously secret documents of an army investigation of a US detention facility in Mosul, Iraq, concluded that the detainees there were being:

> "*systematically and intentionally mistreated (heavy metal music, bullhorn, hit with water bottles, forced to perform repetitive physical exercises until they could not stand, having cold water thrown on them, deprived of sleep, and roughly grabbed off the floor when they could no longer stand. The detainees had sand bags on their heads with "IED" [improvised explosive device] written on them, the infantry soldiers stated they felt this was done to make them angry at the detainees, and it had exactly this effect.*"

Like the Schlesinger Panel, with whom it "worked hand-in-glove"[368], the Church review was not critical of any interrogation techniques *per se*. Thus the Schlesinger Panel reported uncritically that "interrogation techniques intended only for Guantanamo came to be used in Afghanistan and Iraq. Techniques employed at Guantanamo included the use of stress positions, isolation for up to 30 days and removal of clothing. In Afghanistan techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation." It seems that a tendency not to characterize such techniques as abusive runs deep. This is illustrated by recent information that has come to light from the ACLU Freedom of Information lawsuit. In documentation released in December 2004, for example, a US Navy officer described a process by which Iraqi detainees classified as prisoners of war would be taken to an empty swimming pool, handcuffed, shackled and hooded, and left kneeling for up to 24 hours. Despite providing this description, the officer stated that he "never saw any instances of physical abuse" of the detainees.[369]

The closest the Church Report summary came to concern about interrogation techniques was noting that interrogations of two "high-value" detainees using techniques approved by Secretary Rumsfeld in December 2002 "were sufficiently aggressive that they highlighted the difficult question of precisely defining the boundaries of humane treatment of

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[366] *Army, in manual, limiting tactics in interrogation*. New York Times, 28 April 2005. The new manual, being produced by the US Army Intelligence Center (USAIC), is reported to be titled "FM 2-22.3 Human Intelligence Collector Operations", and was reported to be in Final Draft form in June 2004. *USAIC fields two new intelligence manuals*. Military Intelligence Professional Bulletin, April-June 2004.

[367] Defense Department Briefing, 29 March 2005.

[368] Department of Defense transcript of briefing on interrogation operations and interrogation techniques. 10 March 2005.

[369] *Navy Corpsman described pressure to "keep his mouth shut"*. ACLU news release. 14 December 2004.

detainees". In this regard, the Church investigation struck a similar tone to James Schlesinger, who had claimed that "in the conditions of today, aggressive interrogation would seem essential", and "what constitutes 'humane treatment' lies in the eye of the beholder".[370] The Church summary said that the "need for intelligence in the post-9/11 world, and our enemy's ability to resist interrogation, have caused our senior policy makers and military commanders to reevaluate traditional US interrogation methods and search for new and more effective interrogation techniques." The summary said that this search had been conducted "within the confines of our armed forces' obligation to treat detainees humanely." This flies in the face of what we now know was discussed within the administration on how US agents could avoid criminal responsibility for torture and ill-treatment.

Also like the Schlesinger Panel, the Church Report concluded that "the vast majority of detainees" had been treated humanely. "In those few instances where they weren't", said Vice-Admiral Church, "it's been investigated".[371] Such conclusions smack of complacency and suggest a lack of independence from the executive's position that disregards international law and standards and suggests that a few aberrant soldiers displaying "un-American values" have been responsible for abuses. Even without the scores of allegations of torture and ill-treatment by US forces made in the "war on terror", for example, the conditions of detention have been cruel, inhuman or degrading for hundreds if not thousands of detainees, held in virtually incommunicado indefinite detention without charge or trial or access to lawyers, relatives or the courts. The right to be treated with humanity and with respect for the inherent dignity for the human person has been systematically denied.

International concern continues, both over the lack of a comprehensive independent investigation and the fact that policies and practices that facilitate torture and ill-treatment remain in place. In a joint statement on 5 February 2005 on the USA's "war on terror" detentions, for example, six UN experts stressed "the need to objectively assess the allegations of torture, and other cruel, inhuman or degrading treatment or punishment, particularly in relation to methods of interrogation of detainees."[372]

A former UN Special Rapporteur on torture (2002-2004), Professor Theo van Boven, has stated on the question of the USA's involvement in torture and ill-treatment in the "war on terror" that "what we know is only the tip of an iceberg".[373] What we do know is that treaties, including the Geneva Conventions, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights (ICCPR), all of which have been ratified by the USA, have been selectively disregarded and systematically violated.

The ICCPR, for example, prohibits torture and other cruel, inhuman or degrading treatment or punishment (Article 7), as well as the arbitrary deprivation of life (Article 6), arbitrary detention (Article 9), and discrimination, including on the basis of nationality (Article 2). It also guarantees the right to judicial review of the lawfulness of one's detention (Article 9), fair trial (Article 14), and the right of any detainee to be treated with humanity and with respect for the inherent dignity of the human person (Article 10).

As noted, the Human Rights Committee has stressed that the rights enshrined in the ICCPR apply to everyone "within the power and effective control" of the State Party and that

[370] Written statement of James Schlesinger to the Senate Armed Services Committee, 9 September 2004.
[371] Department of Defense transcript of briefing on interrogation operations and interrogation techniques. 10 March 2005.
[372] *UN rights experts raise 'serious concerns' over detainees at US naval base*. UN News Centre, 4 February 2005.
[373] *Torture: The dirty business*. Dispatches, Channel 4 TV (UK), 1 March 2005.

the treaty is binding on all branches and all levels of government. There can be no excuses for failure to comply on such a scale. On the question of investigations into violations of rights enshrined in the ICCPR, the Human Rights Committee emphasised that either the failure by the State Party to investigate such allegations or its failure to bring perpetrators to justice could in and of itself give rise to a separate breach of the Covenant. The Committee continued:

> "*These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman or degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7, and 9 and, frequently 6)... Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility.*"[374]

Clearly then, the three branches of US government – executive, legislature and judiciary – must work to ensure full investigation of, and accountability for, past abuses and to bring an end to any such abuses now and prevent any recurrence. The USA prides itself on having a tripartite system of "checks and balances" to ensure fair, lawful and transparent government. As one of the current US Supreme Court Justices has pointed out: "Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty."[375] Yet in the "war on terror", the executive has assumed, and so far mostly been allowed to assume, unfettered power in detentions.

The legislature

Since May 2004, Amnesty International has been calling for US Congress to set up a full independent commission of inquiry into all aspects of the USA's "war on terror" detention and interrogation policies and practices.[376] Such a commission, composed of credible experts with all the necessary powers to be able investigate all levels and agencies of government, must be independent, impartial and non-partisan and should apply all relevant international law and standards, and would benefit from expert international input.

So far, Congress has shown little collective cross-party inclination to ensure that there are full investigations into the range of human rights violations that have occurred. Amnesty International is concerned that party politics may be overriding human rights obligations.[377]

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[374] General Comment no. 31, *supra*, note 269.

[375] *Clinton v. City of New York*, US Supreme Court, 524 U.S. 417 (1998), Justice Kennedy, concurring.

[376] See *USA: Human dignity denied*, supra, note 17, and *USA: Amnesty International calls for a commission of inquiry into 'war on terror' detentions*, AI Index: AMR 51/087/2004, 19 May 2004, http://web.amnesty.org/library/Index/ENGAMR510872004.

[377] Following the March 2005 release of the Church Report on interrogations, congressional responses to it appeared to split down party lines. See, for example, *Democrats slam Abu Ghraib report that clears Pentagon*, Financial Times, 11 March 2005. *Official declines to pin blame for blunders on interrogations*, New York Times, 11 March 2005. In February 2005, the Republican Chairman of the Senate Select Committee on Intelligence confirmed that he was reviewing a proposal from the Committee's Democrat Vice-Chairman for a formal investigation into the "full facts" behind the CIA's role in the secret detentions outside the USA and secret transfers of detainees to other countries, and "all presidential and other authorities" for such activities. It was subsequently reported that the Chairman was opposing the proposal. *Senate may open inquiry into CIA's handling of suspects*, New York Times, 13 February 2005. *Senate Intelligence Chairman opposes CIA abuse inquiry*, New York Times, 1 March 2005. By mid-March, the Committee had still failed to agree on whether to open an investigation, with all seven of the Committee's Democrats supporting such a proposal (there are eight Republicans). The Vice-Chairman described a closed session of the Committee on 15 March 2005 as "probably the least constructive meeting of the Intelligence Committee that I have ever been to". He said that the Committee was "not facing its oversight responsibilities with sufficient seriousness". *Prisoner inquiry is up in the air*, Los Angeles Times, 16 March 2005.

This is one of the reasons why Amnesty International is not calling for a bipartisan commission of inquiry made up of congresspersons, favouring instead experts entirely independent of government.[378]

Again, Amnesty International stresses that, under international law, US legislators have, alongside the executive and the judiciary, an obligation to ensure that all allegations of human rights violations are fully investigated. The UN Human Rights Committee has made it clear that, for violations of the ICCPR, which the USA ratified with the "advice and consent" of the Senate in 1992 [US Constitution Article II (2)], failures to abide by the requirements of the treaty "cannot be justified by reference to political, social, cultural or economic considerations within the State".[379] Amnesty International urges Congress not to allow party politics to interfere with their obligation to ensure full accountability for past violations and to initiate all necessary legislative and oversight measures to ensure non-repetition. In its General Comment 31, the Human Rights Committee continued that state parties must "make reparation to individuals whose rights have been violated":

> "*Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy... is not discharged... [T]he Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations*".[380]

The judiciary

In his January 2005 ruling, Judge Leon took the view that the ICCPR does not confer privately enforceable rights on individuals. The Guantánamo detainees, he said, therefore could not rely upon the ICCPR (or the UN Convention against Torture) "as a viable legal basis to support the issuance of a writ of *habeas corpus*". He was apparently willing to leave to others the question of torture and other cruel, inhuman or degrading treatment. One of the cases before him was of David Hicks, which raises concerns under numerous provisions of the ICCPR. This Australian detainee was captured in Afghanistan in December 2001, transferred to Guantánamo Bay in January 2002, made subject to President Bush's Military order in July 2003 (and transferred that month to Camp Echo), and charged for trial by military commission in June 2004. David Hicks has signed an affidavit which includes the following allegations:

> "*I have been beaten before, after, and during interrogations.*
>
> *I have been menaced and threatened, directly and indirectly, with firearms and other weapons before and during interrogations.*
>
> *I have heard beatings of other detainees occurring during interrogation, and observed detainees' injuries that were received during interrogations.*
>
> *I have been beaten while blindfolded and handcuffed.*

[378] Another reason is the long-standing reluctance, within all branches of government, consistently and fully to apply international law and standards to the USA. The 9/11 Commission's report into the attacks of 11 September 2001 has been widely praised. However, concerns have been raised about whether the Commission was truly non-partisan, independent and impartial. For example, see David Ray Griffin, *The 9/11 Commission Report: Omissions and Distortions*. Arris Books, 2005.
[379] General Comment 31. UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 14.
[380] *Ibid.*

I have been in the company of other detainees who were beaten while blindfolded and handcuffed. At one point, a group of detainees, including myself, were subjected to being randomly hit over an eight hour session while handcuffed and blindfolded.

I have been struck with hands, fists, and other objects (including rifle butts). I have also been kicked. I have been hit in the face, head, feet, and torso.

I have had my head rammed into asphalt several times (while blindfolded).

I have had handcuffs placed on me so tightly, and for so long (as much as 14-15 hours) that my hands were numb for a considerable period thereafter.

I have had medication – the identity of which was unknown to me, despite my requests for information – forced upon me against my will. I have been struck while under the influence of sedatives that were forced upon me by injection.

I have been forced to run in leg shackles that regularly ripped the skin off my ankles. Many other detainees experienced the same.

I have been deprived of sleep as a matter of policy.

I have witnessed the activities of the Internal Reaction Force (IRF), which consists of a squad of soldiers that enter a detainee's cell and brutalize him with the aid of an attack dog. The IRF invasions were so common that the term to be "IRF'ed" became part of the language of the detainees. I have seen detainee suffer serious injuries as a result of being IRF'ed. I have seen detainees IRF'ed while they were praying, or for refusing medication."[381]

Nevertheless, Judge Leon took the narrow view that alleged torture or ill-treatment, "though deplorable if true…does not render the *custody* itself unlawful". He seemed satisfied that "safeguards and mechanisms are in place to prevent such conduct and, if it occurred, to ensure it is punished." This is not good enough. The right to judicial review of the lawfulness of one's detention is itself a safeguard against torture and ill-treatment. To deny full judicial review is to allow torturers to operate unhindered. Besides, the confidence displayed by Judge Leon is misplaced. As already stated above, the investigations and reviews that have taken place so far into allegations of torture and ill-treatment have lacked scope, reach and independence. In some cases, whistleblowers have allegedly not been taken seriously or have been subjected to pressure to stay silent.[382] In other cases, evidence has been destroyed.[383]

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[381] *Rasul et al. v. Bush et al.* Affidavit in support of amended complaint and applications for injunctive relief, US District Court for the District of Columbia, 5 August 2004. Declassified in November 2004.

[382] For example, see *Military lawyers objected to interrogation methods at Guantanamo*, sources say. New York Daily News, 13 February 2005. Also, ACLU news release, 4 March 2005, reporting on newly released documents revealing that a civilian interrogator claimed he had been transferred because "I refused to conduct my interrogations inhumanely". Also, *Whitewashing torture*? By David DeBatto. Salon.com, 8 December 2004. Thirty-six hours after telling his commanding officer that he had witnessed five incidents of torture and abuse of Iraqi detainees, US Sergeant Frank Ford, a counterintelligence officer stationed in Samarra, was strapped to a gurney and flown out of Iraq on a military plane on the grounds that he was suffering delusions as a result of combat stress. He was ordered to undergo a psychiatric evaluation in Germany, despite a military psychiatrist's initial conclusion that he was stable. The case has subsequently come light via the Freedom of Information Act lawsuit filed by the ACLU. See *Soldier who reported abuse was sent to psychiatrist*, Washington Post, 5 March 2005. See also, Navy Corpsman described pressure to "keep his mouth shut". ACLU news release, 14 December 2004.

[383] A DVD called "Ramadi Madness" including scenes of soldiers kicking a handcuffed detainee who later died; degrading a dead detainee's body; and joyriding while yelling profanities at Iraqi civilians, was destroyed after the case came under investigation, according to documents released to the ACLU.

In addition, safeguards are sapped of meaning in the face of a lack of political will to enforce them or a tolerance, if not endorsement, at the highest levels for treatment that violates the international prohibition on torture and other ill-treatment. The Church Report's executive summary of March 2005 concluded that "there was a failure to react to early warning signs of abuse". What it did not mention was that early and continued warnings came from non-governmental organizations, among others, but that they were ignored. Indeed, a lawsuit recently filed in US court against Secretary of Defense Donald Rumsfeld on behalf of four Iraqi and four Afghan nationals who claim they were tortured in US custody – including by "severe and repeated beatings, cutting with knives, sexual humiliation and assault, confinement in a wooden box, forcible sleep and sensory deprivation, mock executions, death threats, and restraint in contorted and excruciating positions" – notes such NGO warnings.[384] For example, it points out that Amnesty International wrote to Secretary Rumsfeld in January 2002 and again in a 61-page memorandum in April 2002, expressing its concern about the treatment of detainees in Afghanistan and Guantánamo Bay. The organization never received substantive replies to these or any other communications which have urged full investigations into cases of torture and ill-treatment and full adherence to international legal protections for detainees. Instead, Secretary Rumsfeld later authorized interrogation techniques for use at Guantánamo which violated the international prohibition on torture or other cruel, inhuman or degrading treatment. That blanket authorization of 2 December 2002 was rescinded on 15 January 2003, with the proviso that the techniques could be requested of Secretary Rumsfeld on a case-by-case basis. Also under a 16 April 2003 memorandum authorizing certain interrogation techniques recommended by the Pentagon Working Group on Detainee Interrogations in the Global War on Terrorism, Secretary Rumsfeld may also authorize unspecified – and potentially unlimited – "additional interrogation techniques" on a case-by-case basis.[385] The 16 April 2003 memorandum "remains in effect today", according to the March 2005 executive summary of the Church report.

In her 31 January 2005 ruling, Judge Joyce Hens Green did not turn a blind eye to the evidence of torture and ill-treatment, and put it into the context of the Combatant Status Review Tribunal (CSRT). She concluded that the CSRT "did not sufficiently consider whether the evidence upon which the tribunal relied in making its 'enemy combatant' determinations was coerced from the detainees". She raised the case of Australian detainee Mamdouh Habib who has alleged that he was tortured in Egypt prior to his transfer to Guantánamo.[386] Like many others, he chose not to attend the hearing. His "Personal Representative" told the CSRT that "all the information that he has given up prior to talking

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ACLU news release, 4 March 2005. Photographs and video images depicting abuses in Afghanistan were destroyed to avoid "another public outrage" following the Abu Ghraib scandal. *Afghan photos sparked inquiry*. Los Angeles Times, 18 February 2005. See also case of the death of Nagem Sadun Hatab, in which physical evidence was destroyed. Page 149, *USA: Human dignity denied*, *supra*, note 17.

[384] *Arkan Mohammad Ali, Thahe Mohammed Sabbar, Sherzad Kamal Khalid, Ali H., Mehboob Ahmad, Said Nabi Siddiqi, Mohammed Karim Shirullah and Haji Abdul Rahman v. Donald H. Rumsfeld.* Complaint for declaratory relief and damages. In the United States District Court for the Northern District of Illinois. March 2005.

[385] "If, in your [i.e. Commander, US Southern Command's] view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee". Memorandum for Commander, US Southern Command: Counter-Resistance Techniques in the War on Terrorism. 16 April 2003, available at http://web.defenselink.mil/news/Jun2004/d20040622doc9.pdf.

[386] See, for example, *USA: Guantánamo – An icon of lawlessness*, AI Index: AMR 51/002/2005, 6 January 2005, http://web.amnesty.org/library/Index/ENGAMR510022005.

to me on 17 September 2004 was under duress". The Personal Representative also relayed that Mamdouh Habib considered that conditions in Camp 5 of Guantánamo Bay, "where the lights are on and the fans run constantly is a form of torture".[387] The CSRT determined on 22 September 2004 that he was an "enemy combatant". He was transferred to Australia four months later, on 28 January 2005, and released. Judge Green noted that "Mr Habib is not the only detainee before this Court to have alleged making confessions to interrogators as a result of torture" and that evidence had been introduced indicating that "abuse of detainees occurred during interrogations not only in foreign countries but also in Guantánamo itself". She highlighted recently revealed claims of such abuse made by an FBI agent:

> *"On a couple of occassions (sic), I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defacated (sic) on themselves and had been left there for 18, 24 hours or more. On one occassion (sic), the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MPs what was going on , I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion (sic), the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion (sic), not only was the temperature unbearably hot, but 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."*[388]

The executive

If the executive has nothing to hide and nothing to fear from a full independent investigation into the USA's policies and practices on detentions and interrogations in the "war on terror", then it should support such an inquiry.

In addition, the US Department of Justice is the executive authority with the power to initiate procedures to enforce the War Crimes Act and the Anti-Torture Act, both passed in 1996. The Attorney General is the Justice Department's chief office-holder. So far no one has been charged under these acts. The only person so far prosecuted by the Justice Department for alleged "war on terror" abuses – a civilian contractor working with the CIA charged with assaulting an Afghan detainee who died in custody – was not charged under either act. The Justice Department failed to clarify to Amnesty International why not.[389]

Amnesty International is concerned by *prima facie* evidence that senior members of the US administration, including President Bush and Secretary of Defense Rumsfeld, have authorized human rights violations including "disappearances" and torture or other cruel, inhuman or degrading treatment. In addition, senior officials, including the current and previous Attorneys General, may have been involved in a conspiracy to give immunity to US agents, most specifically members of the CIA, from prosecution for torture or war crimes under US law.[390] For example, both former Attorney General John Ashcroft and current

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[387] *Habib v. Bush*. CSRT unclassified factual returns, In the US District Court for the District of Columbia.

[388] http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf

[389] See pages 159-160, *USA: Human dignity denied*, note 17, *supra*.

[390] At the same time, the USA has an active campaign of opposing the International Criminal Court (ICC). The Bush administration has stated that it does not intend to ratify the Rome Statute of the ICC, and has been pressurizing governments around the world to enter into impunity agreements which commit them not to surrender to the ICC any US nationals accused of genocide, crimes against

Attorney General Alberto Gonzales advised President Bush that not applying Geneva Convention protections to detainees captured in Afghanistan would make future prosecutions for war crimes under US law more difficult. It is alleged also that Alberto Gonzales, in his role as White House Counsel, requested the now infamous 1 August 2002 Justice Department memorandum on torture following a request from the CIA for legal protections for its interrogators.[391] That memorandum, which Alberto Gonzales "accepted" as a "good-faith effort", represented the position of the executive branch until it was withdrawn in late June 2004.[392] If it were not for leaks, including of the Abu Ghraib torture photographs, it has to be considered likely that the memorandum would still be secret and still represent the position of the administration to this day. Instead, a replacement was issued on 30 December 2004, shortly before Alberto Gonzales was to come before the Senate Judiciary Committee to face questioning on his nomination to the post of US Attorney General.[393]

While the replacement memorandum is an undoubted improvement on its predecessor, many of the contents of the original memorandum live on in the Pentagon's Working Group Report on Detainee Interrogations in the Global War on Terrorism, dated 4 April 2003, which has not been withdrawn or replaced. In addition, the December 2004 memorandum does not address some of its predecessor's contents, such as the assertion that the President can authorize torture and that there can be various defences against criminal liability for torture. To address such questions, the new memorandum asserts, is "unnecessary", as the President has stated that the USA will not engage in torture. This omission is regrettable, as this is a time for closing all loopholes, not leaving open the possibility for future abuse. The only position consistent with the absolute prohibition in international law on torture and its status as an international crime, regardless of the rank or position of the perpetrator, would have been to state unequivocally that no one, the President included, has the right or the authority to torture detainees or to order their torture and that anyone, the President included, who does so will have committed a crime.

Instead, by relying solely on the President's words, the 2004 memorandum actually reinforces the position of its August 2002 predecessor that it is entirely up to the President to decide on these matters. The 2004 memorandum cites as an example of President Bush's opposition to torture his statement on the occasion of UN International Day in Support of Victims of Torture in June 2004, in which he stated that the USA "will not tolerate torture. We will investigate and prosecute all acts of torture." Firstly, the President made a similar statement a year earlier, at which time the August 2002 memorandum was still secret and in force. Secondly, the President apparently believes that there are people who "are not legally entitled to humane treatment", as he stated in a memorandum of 7 February 2002 which remains in force. Thirdly, as noted above, not a single person has been prosecuted for "torture" under the Anti-Torture Act, and the investigations into allegations of torture and other cruel, inhuman or degrading treatment have lacked independence, scope and reach. As

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humanity or war crimes. The US Department of Defense's March 2005 National Defense Strategy stresses that "legal arrangements should…provide legal protections for our personnel through Status of Forces Agreements and protections against transfers of US personnel to the International Criminal Court."

[391] See *USA: Human dignity denied*, note 17, *supra*.

[392] "That memo represented the position of the executive branch at the time it was issued"; and: "It represented the administrative branch position". "I accepted the August 1, 2002, memo". Alberto Gonzales, White House Counsel, in response to oral questions from Senator Patrick Leahy and Senator Edward Kennedy and written questions from Senator Richard Durbin during the US Attorney General nomination hearings before the Senate Judiciary Committee, January 2005.

[393] Daniel Levin, Acting Assistant Attorney General, Memorandum for James B. Comey, Deputy Attorney General. Re: Legal standards applicable under 18 U.S.C. §§ 2340-2340A, 30 December 2004, http://www.usdoj.gov/olc/dagmemo.pdf.

also already noted, Alberto Gonzales affirmed in January 2005 that the Justice Department does not consider itself legally bound by the Convention against Torture's prohibition (Article 16.1) on cruel, inhuman or degrading treatment in the case of non-US nationals detained outside the USA. This presumably is the reason that the December 2004 memorandum did not address the question of cruel, inhuman or degrading treatment. The August 2002 memorandum claimed that under the Convention, cruel, inhuman or degrading treatment "establishes a category of acts that are not to be committed and that states must endeavor to prevent, but that states need not criminalize, leaving those acts without the stigma of criminal penalties". However, what the August 2002 memorandum failed to note, and its successor ignored entirely, is the fact that Article 16.2 of the Convention against Torture states that:

> "*The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion*".

As Amnesty International has pointed out elsewhere, all forms of torture and ill-treatment are strictly and equally prohibited in all circumstances. For example, the International Covenant on Civil and Political Rights prohibits torture and other cruel, inhuman or degrading treatment or punishment even "in times of public emergency which threatens the life of the nation".[394] The only position consistent with the absolute prohibition in international law on cruel, inhuman or degrading treatment or punishment and their status as international crimes would have been to state unequivocally that such acts are prohibited in all circumstances and their perpetrators would be prosecuted. Instead, the Justice Department's December 2004 memorandum ignored the issue altogether.

From such a starting point, it is difficult to see how Attorney General Alberto Gonzales will live up to his pledge on "war on terror" abuses, namely that "wherever there is reason to believe that crimes may have been committed that are within the authority of the Department of Justice…, the Department under my leadership [will] investigate and, where appropriate, prosecute such crimes".[395] The question is also raised, what would he define as "crimes"? Asked whether he would agree that he should "personally be disqualified from any investigation or inquiry into detainee abuses", given that he himself was implicated in the setting of policy and practices that "appear to have contributed to detainee abuses in Afghanistan, Guantanamo Bay, and Iraq", Alberto Gonzales only replied that he would "take extremely seriously my obligation to recuse myself from any matter whenever appropriate".[396] At the same time he said that he had "no reason to believe" that a comprehensive independent commission of inquiry into the USA's "war on terror" interrogation and detention policies and practices was "advisable".[397] In February 2005, a spokesman for the Attorney General, declining to address the question of an independent commission or the appointment of a Special Counsel, neverthless said that Attorney General Gonzales did not intend to recuse himself from investigations and that this "speaks for itself".[398]

Under federal regulations, the US Attorney General "will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted" and:

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[394] *USA: Human dignity denied, supra*, note 17, pages 41-46.
[395] Written response to Senator Patrick Leahy from Alberto Gonzales, nominee Attorney General. January 2005.
[396] Written response to Senator Edward Kennedy from Alberto Gonzales, nominee Attorney General. January 2005.
[397] Written response to Senator Patrick Leahy from Alberto Gonzales, nominee Attorney General. January 2005.
[398] *ACLU urges investigation of detainee abuse*. Washington Post, 16 February 2005.

"(a) That investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and

(b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter."[399]

Amnesty International believes that these three criteria have been met. As the organization has detailed above and in its October 2004 report, *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, there is *prima facie* evidence against senior government officials supporting a determination that an investigation by an outside independent prosecutor is warranted. It is clear that the current Attorney General has a conflict of interest in this matter, and that there is a public interest in getting to the bottom of what has occurred.

The individual appointed "shall be a lawyer with a reputation for integrity and impartial decisionmaking, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies. The Special Counsel shall be selected from outside the United States Government."[400] Amnesty International, adding the proviso that the prosecutor must take proper and full account of international law and standards (Justice Department policies and advice in the "war on terror" have manifestly failed to do so), will continue to call for the appointment of a Special Counsel.[401]

Amnesty International will also continue to call for a full independent commission of inquiry, and for the facilitation of investigations by UN mechanisms such as the Special Rapporteur on Torture, and human rights organizations.

13. Deaths in custody – evidence of abuse continue to emerge

When we viewed Mowhosh's remains, he was black and blue, purple, indications that he had been beaten pretty severely

Curtis Ryan, US army criminal investigator, 2 December 2004[402]

On 28 April 2005, Sergeant Hasan Akbar of the US Army's 101st Airborne Division was sentenced to death by court-martial in Fort Bragg, North Carolina. This black Muslim soldier had been convicted of the premeditated murder of two fellow US soldiers in March 2003 in Kuwait in the first week of the Iraq invasion.[403] The prosecution depicted Sergeant Hasan as a

[399] Code of Federal Regulations 28 C.F.R. 600.1. There was previously a provision in US law for the prosecution of crimes in which the Attorney General or Justice Department had a perceived conflict of interest. This was the Independent Counsel Act, which would allow the appointment of an independent counsel by a special judicial panel. However, the Act expired in 1999, and has not been replaced.

[400] 28 C.F.R. 600.3.

[401] Under the UN Guidelines on the Role of Prosecutors, all prosecutors are to be made aware, *inter alia*, "human rights and fundamental freedoms recognized by national and international law" (Guideline 2.b). Also, "prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences" (Guideline 15).

[402] *United States v. CW2 Williams, SFC Sommer and SPC Loper*, 66th Military Intelligence Company, 3rd Squadron, 3rd Armored Cavalry Regiment. Fort Carson, Colorado. Unclassified transcript.

[403] The over-representation of ethnic and racial minorities on federal and military death row in the USA is particularly pronounced. At state level, studies have consistently shown that race is a contributory

religious fundamentalist bent on killing as many US soldiers as he could before they could kill Muslims in Iraq. The defence presented evidence that he was mentally ill. The jury of 15 US military personnel decided that he should be killed.

Sergeant Akbar's sentence is in marked contrast to those so far passed by other courts-martial for US soldiers convicted of killing Iraqis and can also be compared to cases involving deaths of Afghans or Iraqis in US custody which have not been taken to trial (see Appendix 1). For example, Private Edward Richmond was charged with the premeditated murder of Muhamad Husain Kadir, an Iraqi civilian, on 28 February 2004. The soldier allegedly shot the unarmed detainee, who was handcuffed, in the back of the head. It was alleged that Private Richmond had earlier said that he had wanted to kill an Iraqi. In August 2004, the court-martial reduced the charge to one of voluntary manslaughter and sentenced him to three years in prison, less 47 days for time served, even though that time had not been spent in confinement.[404] In turn this case contrasts to that of Sergeant Oscar Nelson, who in September 2003 was sentenced by a court-martial to seven years in prison for the involuntary manslaughter of a fellow US soldier in May 2003. Sergeant Nelson was accused of driving recklessly in a military vehicle when it overturned, killing Specialist Nathaniel Caldwell.[405]

Meanwhile, evidence of abuses and impunity continues to emerge in death-in-custody cases. In its October 2004 report, *USA: Human dignity denied – Torture and accountability in the 'war on terror'*, Amnesty International also raised the case of 'Abd Hamad Mawhoush, a major general in the Iraqi army under the former regime who died in a US detention facility in Al Qaim in northwest Baghdad on 26 November 2003, two weeks after he had handed himself in to the US military on 10 November.[406] He had died after being interrogated while allegedly being rolled back and forth with a sleeping bag over his head and body, and after one of his interrogators sat on his chest and placed his hands over his mouth. Several months later, in the wake of the Abu Ghraib scandal, four soldiers were charged with murder and dereliction of duty.[407] Evidence has since emerged that he was subjected to a brutal beating two days before his death by personnel from other agencies, including the CIA, none of whom had been charged at the time of writing.[408]

On the morning of 2 December 2004, shortly after a preliminary military hearing for three of the soldiers began in Fort Carson in Colorado, the Investigating Officer closed the entire proceedings from the public for reasons of national security.[409] However, the *Denver Post* brought a legal challenge to have the hearing opened, and proceedings were suspended on 3 December 2004 pending consideration of the issue by the US Army Court of Criminal Appeals. On 23 February 2005, the Court ruled that it had been unlawful to close the entire hearing, and that only those portions involving classified information should be closed. The

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factor in capital sentencing, particularly race of victim. Eighty per cent of the nearly 1,000 people executed in the USA since judicial killing resumed in 1977 were convicted of crimes involving white victims. Yet, African Americans and whites are the victims of murder in almost equal numbers in the USA. Such studies suggest that lives of white people are valued more highly by the system than the lives of minorities, particularly African Americans. As already pointed out above, the lives of US citizens appear to have been valued more highly by US authorities in the "war on terror" than the lives of Afghans, Iraqis and others.

[404] *USA: Human dignity denied, supra*, note 17, page 157.

[405] *Ibid.*

[406] Pages 148-149, *USA: Human dignity denied, supra*, note 17.

[407] Chief Warrant Officer Jefferson Williams, Sergeant First Class William Sommer and Specialist Jerry Loper, and Chief Warrant Officer Lewis Welshofer. A murder charge carries a maximum sentence of life imprisonment without the possibility of parole.

[408] *Iraqi General beaten two days before death.* The Denver Post, 5 April 2005.

[409] The hearing is known as an "Article 32" hearing and is conducted to determine whether those charged should be court-martialled.

appeals court ordered the army to open the remainder of the hearing as appropriate and to make public the unclassified parts of the transcript of the hearing already conducted. The hearing ended on 30 March 2005, and the transcript of the earlier part was released at that time. The unredacted parts of this transcript contain disturbing revelations.[410]

As alleged in other US detention facilities in the "war on terror", there is evidence that abusive interrogation techniques in the Al Qaim facility were routine and authorized, and that a lack of training and resources contributed to the abuses. For example, a US Army Sergeant who testified at the hearing said that "stress positions" were among the techniques approved "from higher".[411] Stress positions, he said, included "putting the detainees on their knees, making the detainee stand for the entire interrogation, holding different objects… out in front of you". The medical examiner who conducted the autopsy on General Mawhoush revealed that he had been told that "individuals would sit on his chest, abdomen, or back. And it was described to me as putting him in, quote, stress positions".[412] A military doctor who was assigned to the Al Qaim facility at the time that General Mawhoush died also testified. She revealed that in the 14 days that she was at the facility she had treated at least one other person who she was "quite sure had received some physical abuse". She recalled that that detainee "had bruising on the back of his hands. He had very severe bruising over his entire back. He complained of feet pain, and he had bruising on the bottoms of his feet. And he had bruising on the tops of his feet, as well, and some bruising on his anterior…"[413] An army investigator who testified at the hearing referred in passing to another case in which a detainee was being "roughed up".

As Amnesty International reported in *Human Dignity Denied*, the military news release which first announced 'Abd Hamad Mawhoush's death had been titled: "Iraqi General Dies of Natural Causes", claiming that he had died after complaining of not feeling well. However, at the December 2004 hearing, Curtis Ryan, an investigator with the Army's Criminal Investigation Division (CID), who testified that he had seen photos of the body sent to him by email a few hours after the death, revealed that the prisoner was covered in "bruising, pretty obvious bruising, dark purple, definitely indications to us that something had happened that required investigation". Investigator Ryan related how he and other investigators found the following marks of abuse on a subsequent examination of the body:

> "*Extensive bruising on the arms, legs, front and back of the torso… And there were some bruises that indicated that he perhaps had been struck with a long cylindrical object. And then there were some other bruises that looked like maybe they were caused by a rifle butt.*"

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[410] *United States v. CW2 Williams, SFC Sommer and SPC Loper*, 66th Military Intelligence Company, 3rd Squadron, 3rd Armored Cavalry Regiment. Fort Carson, Colorado. Unclassified transcript. All quotes taken from this transcript unless otherwise noted. All references to names and agencies other than military, e.g. the CIA and OGA are redacted.

[411] As already noted, the current US military interrogation manual, FM 34-52, lists "forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time" as an example of physical torture. Secretary Rumsfeld authorized the use of stress positions in Guantánamo in December 2002. The still operational Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism recommends the use of "prolonged standing" in "strategic interrogation facilities" against detainees who have "critical intelligence" and have been cleared by medical personnel for such an interrogation technique. See page 66, *USA: Human dignity denied*, *supra*, note 17.

[412] When more than one person is on the detainee, it is apparently called a "pig pile" or a "dog pile".

[413] It is not clear from the transcript if this is the same person as another that she was sure had been beaten: "he had worked a translator with me throughout the day and was removed, I believe for interrogation. I'm not even sure. And several hours later, I was called to see him. And he was fine when I saw him in the morning and was badly bruised when I saw him in the afternoon".

Investigator Ryan testified at the preliminary hearing that the CID investigation had found evidence that General Mawhoush had been subjected to a brutal assault on 24 November, two days prior to his death. It is reported that the CIA and other personnel in the facility at the time became involved in the Mawhoush interrogation because the soldiers were "having a hard time; they weren't getting any information out of him."[414] A "collective decision" was reached on how to proceed:

> "*... the other thing that they were going to try to do was put a bunch of people in the room, a tactic that Mr [blank] called 'fear up', I guess as a means of intimidation...*[415] *[T]hey started doing what... several other people called the 'good cop/bad cop'...*[416] *When [Mowhosh] didn't answer or provided an answer that they didn't like, at first [redacted] would slap Mowhosh*[417]*, and then after a few slaps, it turned into punches. And then from punches, it turned into [redacted] using a piece of hose... [F]rom the best we can tell, a piece of black insulation that you'd use to insulate water pipes in a house to keep them from freezing, about 3 feet long or a meter long, and he was hitting Mowhosh with that when he provided answers that they didn't like... But at some point, somebody outside of that first group of Mowhosh and [redacted] came forward, yelled something at Mowhosh. Mowhosh kicked at that person, and then a scuffle ensued, and then basically it was a free-for-all. The room collapsed on Mowhosh. Sergeant [redacted], for example, said he took out some frustrations by punching Mowhosh six or seven times. Mr [redacted] said he punched Mowhosh a couple of times and probably hit with his heel of a hand a couple of times. And that lasted for 1 or 2 minutes. Nobody can really say for sure. And then Mowhosh was let out of the room... Specialist Loper told me that he had to carry Mowhosh with the help of Sergeant Sommer and two or three other soldiers.*"

Major Michael Smith, a forensic psychologist with the US Armed Forces who conducted an autopsy on 'Abd Hamad Mawhoush at Baghdad International Airport Mortuary on 2 December 2003, was also questioned at the hearing. He revealed that the cause of death was asphyxia due to smothering and chest compression.[418] He confirmed that the bruising on the body was "a marker of significant physical violence", but that "bruises themselves did not cause death." Major Smith also revealed that General Mawhoush had suffered five broken ribs, which were "consistent with blunt force trauma, that is, either punching, kicking, or

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[414] *Iraqi General beaten two days before death*. The Denver Post, 5 April 2005. Quote from military hearing transcript.

[415] "Fear Up Harsh" and "Fear Up Mild" are interrogation techniques contained in the 1992 US interrogation manual FM 34-52. The April 2003 Pentagon Working Group report recommends that they be among the techniques approved for general use against "unlawful combatants outside the United States".

[416] This is also known as "Mutt and Jeff". The April 2003 Pentagon Working Group report recommends that they be among the techniques approved for general use against "unlawful combatants outside the United States". In a still-operational memorandum, dated 16 April 2003, Secretary Rumsfeld authorized its use at Guantánamo Bay, as long as the interrogating authorities "specifically determine that military necessity requires its use" and he, Secretary Rumsfeld is notified in advance.

[417] The still operational Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism recommends the use of "face or stomach slap" in "strategic interrogation facilities" against detainees who have "critical intelligence" and have been cleared by medical personnel for such an interrogation technique. See page 66, *USA: Human dignity denied, supra*, note 17.

[418] The autopsy notes that the "details surrounding the circumstances at the time of death remain classified". The autopsy report has recently been released under the ACLU's freedom of information lawsuit. Dated 18 December 2003, it concludes: "Significant findings of the autopsy included rib fractures and numerous contusions (bruises), some of which were patterned due to impacts of blunt object(s)... [These] support a traumatic cause of death and therefore the manner of death is best classified as homicide".

striking with an object or being thrown into an object". It has also been alleged that one of the four soldiers charged threw a heavy box at the detainee. Major Smith acknowleged that such an object "if it was thrown with significant force, if could possibly cause rib fractures". At the hearing it was also suggested that General Mawhoush had been made to do "physical training" prior to interrogation, where he was forced to carry large rocks.[419] He had reportedly fallen a number of times on the rocks.

Investigator Ryan also revealed what had been learned about the interrogation on the day of the detainee's death, when the "sleeping bag technique" was used:

> "*...they had laid Mowhosh on the floor to ask him questions and... they had rolled him from his back to his stomach and back to his back... Mowhosh was not really answering any questions. He wasn't providing any information. And then the decision was made to put Mowhosh in the sleeping bag... [A]t the guidance of Chief Warrant Officer Welshofer, Loper assisted in placing a green Army sleeping bag... over Mowhosh's head, actually the feet area over the head so that the face was covered. And then to hold the bag tight, they wrapped a length of electrical wire: not like an extension cord, but like white wire that was used to actually run the wiring in the building over there. Maybe about 20 feet long. And then they laid Mowhosh on the floor, and Specialist Loper assisted with that. And then at that point with Mowhosh on his back, he told me that Welshofer straddled Mowhosh, one foot on either side and then kind of squatted or said on Mowhosh's upper body whie he was on the floor in the sleeping bag. He said as the interrogation continued, at one point Welshofer covered Mowhosh's face with his hand, held it there for a few seconds, and then released.*[420] *He stated that he and Williams were where Mowhosh's feet were on his legs, standing on the bag so that Mowhosh wouldn't be able to kick Mr Welshofer and knock him off...*
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> *[Specialist Loper] said at one point while the general was on the floor in the sleeping bag he was on his back, he was being questioned, he still wasn't providing information. Mr Welshofer stood up, and he said everybody kind of paused for a minute, and they were looking at the general, and it looked like the general wasn't breathing. Then he said after a few seconds, the general took a long, deep breath, and then that he shook or spasmed for a couple of seconds. He said that Mr Welshofer made the statement, 'Thank God. I thought he had stopped breathing.' And then at that point they rolled Mowhosh over onto his stomach, and then Mr Welshofer sat on him again, this time on his back, and continued the interrogation.*"

Another witness, a US army interrogator, was questioned about the "sleeping bag technique" and whether she thought such a technique "can be appropriate". She replied: "Yeah, and a sleeping bag is not inherently a weapon. It's to take somebody out of their comfort zone. And I don't feel it was an inappropriate use... The sleeping bag was just placed over a detainee's head and probably to about waist level, just to make it dark and, like I said, to take them out of their comfort zone". According to this witness, the detainee could be prone, kneeling, sitting or, standing. From this and other witness testimony at the hearing, it is clear that the purpose of the sleeping bag technique is to play on detainees' claustrophobia.

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[419] The still operational Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism recommends the use of "physical training" in "strategic interrogation facilities" against detainees who have "critical intelligence" and have been cleared by medical personnel for such an interrogation technique. See page 66, *USA: Human dignity denied, supra*, note 17.

[420] This technique is apparently known as "burking", a stifling technique named after William Burke who was hanged in the UK in 1829 for murdering people whose bodies he sold for medical dissection. Major Smith testified that "burking" may leave no visible signs of trauma, and that the Mawhoush case "has elements of burking involved in his death".

For example, another soldier confirmed that he had heard of the technique being used because the "detainee said that he was scared of the dark". At the reopened preliminary hearing on 30 March 2005, another interrogator alleged that he had witnessed one of the charged soldiers subject another detainee to the sleeping bag technique, and again had sat on the detainee, slapping him, yelling at him and putting his hands over the detainee's mouth. The interrogator said that the soldier had picked up the detainee in the sleeping bag, thrown him on the concrete floor and fell with his body weight on top. The interrogator claimed that he had reported such brutality to his superiors, but had stopped doing so when nothing changed and after being accused of being "too close to the Iraqis".[421]

Other methods of using detainees' claustrophobia against them reportedly included forcing them into wall lockers and banging on the lockers with pipes.[422] At the reopened hearing on 30 March 2005, another Chief Warrant Officer who had been deployed to the Al Qaim facility reportedly stated that such methods were regularly used, and would not state that it was abusive to sit on a detainee's chest or to cover his mouth to block his breathing, saying it was a "grey" area. He reportedly testified that the interrogation of Mawhoush would have been acceptable if it had not caused "extreme distress".[423]

US Army Colonel David Teeples, whose deployment to Iraq included command over the Al Qaim facility and the four men charged, was called as one of the witnesses.[424] During his testimony, Colonel Teeples stated the following when asked to explain his earlier answer that he would not be surprised to learn that the "sleeping bag technique" used on 'Abd Hamad Mawhoush was an "authorized technique":

> "*I don't know what the approved techniques are or were. I do know that I saw people that were detainees that were kept standing for hours, just to fatigue them. And I know that, you know, sleep deprivation was a technique, and I believe that the first time I heard about the claustrophobic effect was in Chief Welshofer's rebuttal to the letter of reprimand. And, so, I could understand why the sleeping bag technique could be used as a claustrophobic technique, not intending to harm someone, not intending to kill someone, but intending to put some sort of fear into their mind. Now, I mean, the – and so – you know, and the way I answered that one question about sitting on somebody, certainly I wouldn't condone sitting on somebody until they stopped breathing. Now, just sitting on somebody – you know, may you got – make somebody afraid. That – you know, and I don't know that that's wrong.*"

When asked whether he would countenance interrogation techniques that cause "physical pain in a subject", he stated that he would not. However, he continued: "But how do you know – I mean, there's some things that we did – for instance, keep them from sleeping. And I'm assuming that that was an approved technique. But some people could say, 'Well, that caused physical pain, if you can't sleep'... I don't know what you mean exactly by 'physical pain', you know. We could sit here and argue all day about that". In reference to the "sleeping bag technique", Colonel Teeples testified that "there are some techniques of

[421] *Grim testimony at Carson hearings*. Rocky Mountain News, 31 March 2005.
[422] *Good guys? Military logic tortured*. The Denver Post, 1 April 2005.
[423] *Grim testimony at Carson hearings*. Rocky Mountain News, 31 March 2005; *Good guys? Military logic tortured*. The Denver Post, 1 April 2005; *Soldiers used proper interrogation techniques, lawyer says*, Associated Press, 1 April 2005.
[424] Colonel Teeples explained that his forces had not been given any professional interrogators and so "that's why we installed having our own interrogation team... I mean, it's like me as military governor of Alanbar. I've never been a governor any place, especially in a foreign country. So, I pick a couple of linguists and then just do the best I can." He said that during one 10-day period, they had 350 detainees in the Al Qaim detention facility, which was dubbed "Hotel Blacksmith".

interrogation that either cause a claustrophobic condition, some kind of fear. But it's not physical harm."

Colonel Teeples testified that "My thought was that the death of Mowhosh was brought about by [redacted] and then it was "unfortunate and accidental, what had happened under an interrogation by our people". He said that even if it was proved to him that the death had been caused entirely by the interrogation of the four soldiers charged with murder, "I'm not sure I would change my mind. I mean, a lot of it has to do with intent, I think. If you take away what the [redacted] did, then I think you have to look at the intent of the interrogation".

The three defendants who were the subject of the preliminary hearing have all denied wrongdoing, claiming that their actions had been sanctioned by commanders, a claim that has been repeated in other cases.[425] The fourth defendant has also issued a statement saying that he had only been using what he believed were "approved techniques", and that the information gleaned under such interrogations had "prevented further insurgent attacks, thereby saving American soldiers' lives". [426] Major Jessica Voss, head of the military intelligence unit to which the soldiers belonged has also said that she believed that the "sleeping bag" technique was authorized. Indeed, according to the hearing transcript, Major General Charles H. Swannick, a senior commander of US forces in Iraq, included the following observation with letters of reprimand to soldiers involved in the Mawhoush case: "Death was from asyphxiation. I expect better adherence to standards in the future". This surely suggests that the sleeping bag technique was not, *per se*, considered abusive among the higher ranks.

At the time of writing, the decision as to whether the cases of the four charged soldiers would go to court-martial had not been taken. The investigating officer who held the preliminary hearing will make a recommendation to the soldiers' commander at Fort Carson who takes the final decision.

Commanders – who take the decision whether to prosecute a soldier under their command – have recently decided not to take up army investigators' recommendations to prosecute 11 US soldiers for offences including negligent manslaughter and assault in the death of an Iraqi detainee who died in US custody on 9 January 2004 from "blunt force injuries and asphyxia". This is believed to be the case of Abdul Jaleel who died in the Forward Operating Rifles Base in Al Asad, five days after being taken into custody. In the initial part of his detention he had allegedly been put in isolation and shackled to a pipe that ran along the ceiling. During questioning he was allegedly beaten and kicked in the stomach and ribs. Later, because he was allegedly uncooperative and disruptive, his hands were shackled to the top of his cell door, and he was gagged. He died in this position.[427] However, commanders rejected the recommendation to prosecute, determining that the death had been the "result of a series of lawful applications of force in response to repeated aggression and misconduct by the detainee". [428]

The investigation into the death in custody in Iraq of Abdul Kareem Abdul Rutha, also known as Abu Malik Kenami, on 9 December 2003 has also left questions unanswered. Abu Malik Kenami was detained on 5 December 2003 and brought to the US detention facility at "AO [area of opeation] Glory" in Mosul. He was interrogated for the first and last time on that day. However, for the next four days, he was kept hooded with a plastic sandbag

[425] *Beating of Iraqi General alleged in army hearing*. Washington Post, 3 April 2005.
[426] *Good guys? Military logic tortured*. The Denver Post, 1 April 2005.
[427] *Brutal interrogation in Iraq*. The Denver Post, 19 May 2004.
[428] *Army criminal investigators outline 27 confirmed or suspected detainee homicides for Operation Iraqi Freedom, Operation Enduring Freedom*. United States Army Criminal Investigation Command, 25 March 2005.

and his hands were handcuffed in front of him with plastic zip ties. The rule in the facility at that time was that the detainee must not attempt to lift the hood or talk. As punishment for disobeying these rules, Abu Malik Kenami was repeatedly subjected to "ups and downs", whereby the detainee is forced to stand up and sit down rapidly, in constant motion for up to 20 minutes at a time.[429] On some occasions, he would have his hands handcuffed behind his back while forced to do this. On the morning of 9 December, he was found dead. His body was put in a refrigerated van for the next six days. No family members claimed the body and it was arranged for a local mortician to pick it up. No autopsy was conducted.

An army investigator assigned to the case said that in the absence of an autopsy, "the cause of Abu Malik Kenami's death will never be known", and that he could only "speculate" on the cause of death. He concluded that the detainee had died of a heart attack, including because "he was performing ups and downs for ten to twenty minutes several times over a two to three hour period". [430] Neither this, nor permanent hooding and handcuffing, was seen as abusive, however. A previously secret army memorandum recording the death states: "At no time was [Abu Malik Kenami] physically abused or put under any physical duress, other than regular exercise and corrective training."[431] Another of the sworn statements to the investigator states that "the detainee did have a bag over his head the entire time he was at the [detention facility]. He was also subjected to [physical training], that is: standing up and sitting down rapidly for hours on end". The statement concludes that, while the guards "do yell at the detainees to ensure they behave while in custody, [they] do not abuse them".

14. Secrecy – the executive's weapon of mass distraction

How can our State Department denounce countries for engaging in torture while the CIA secretly transfers detainees to the very same countries for interrogation? The President says he does not condone torture, but transferring detainees to other countries where they will be tortured does not absolve our government of responsibility. By outsourcing torture to these countries, we diminish our own values as a nation and lose our credibility as an advocate of human rights around the world.

US Senator Patrick Leahy, 17 March 2005[432]

In June 2002, an Amnesty International observer was due to attend a hearing in a US District Court in Virginia in the case of John Walker Lindh, a US citizen captured in the armed conflict in Afghanistan. The organization was particularly concerned at allegations that he was tortured and ill-treated in US military custody into making a "confession". The abuse to which he was allegedly subjected – stripping, blindfolding, threats, the cruel use of restraints, humiliating photography, and denial of access to legal counsel or relatives – echoed what would emerge two years later in Iraq.[433] At his court hearing, a federal judge was to consider whether his "confession" should be admitted as evidence.

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[429] Additionally, "all detainees conduct a short [physical training] session daily to keep them warm….and promote a health lifestyle". At the time of the death, the facility was holding more than 60 detainees, and was described as overcrowded.

[430] One of the medical personnel involved also suggested the possibility of hypothermia, given the low temperatures in the holding facility at that time, and the lack of action from the authorities on a request for heating made a few weeks earlier.

[431] Memorandum for Record: Death of detainee. Department of the Army, Bravo Company, 311th MI BN (2BCT), Mosul, Iraq. 9 December 2003.

[432] Statement of Senator Patrick Leahy on the Convention Against Torture Implementation Act, 17 March 2005.

[433] Amnesty International had raised the case of John Walker Lindh in its *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AI Index: AMR 51/053/2002, April 2002.

In the event, the hearing was cancelled after Lindh agreed to plead guilty to much reduced charges carrying a lesser sentence. As part of the deal, he dropped his allegations of torture and ill-treatment, signing a statement that he was "not intentionally mistreated by the US military".[434] Any breach of the plea agreement by Lindh would open him up for prosecution "to the full extent of the law" and a heavier sentence. The Justice Department reportedly insisted that the deal was only possible if John Walker Lindh agreed to it before the suppression hearing. A former attorney at the Justice Department who raised legal and ethical objections to Lindh's interrogation in Afghanistan subsequently lost her job.[435] In contrast, the Assistant Attorney General in charge of the Justice Department division which oversaw the case was in early 2005 nominated by President Bush to the position of Secretary of Homeland Security.[436]

Under international law, the US government was obliged to ensure a prompt and impartial investigation into John Walker Lindh's allegations of torture and ill-treatment.[437] Likewise any prosecutors involved in the case were under obligation not to use any evidence against the defendant which they had reasonable grounds to believe had been coerced by torture or ill-treatment and to ensure that anyone responsible for any such treatment was brought to justice.[438] Instead, the allegations of torture and ill-treatment received no more official attention. Given what we know now about the secret memorandums that were being written in 2002 within the administration about torture and ill-treatment in the "war on terror", and the widespread allegations of abuse that have emerged since, there has to be concern that Lindh's alleged ill-treatment and the pressure for a plea arrangement were, respectively, part of a wider policy and cover-up. Secrecy breeds abuse and secrecy can be used to leave abuse unpunished and unchecked.

Secrecy, or to put it another way, the denial of independent external or judicial scrutiny, has formed a central part of the USA's "war on terror" detentions. The CIA is the agency most frequently cited in this regard. For example, Vice Admiral Albert Church noted, when issuing the executive summary of his review into Department of Defense interrogation operations, that "the CIA has independent operations in Afghanistan".[439] One reported CIA detention facility was known as the Pit or the Salt Pit, an abandoned brick factory north of Kabul. In November 2002, an Afghan detainee was allegedly stripped, chained to the floor, assaulted, and left in a cell overnight without blankets, on the orders of a CIA agent. He died, with hypothermia being given as the cause of death. According to reports, he was buried by Afghan guards in an unmarked grave, his family never notified. The *Washington Post* quoted one US government officials as stating that "he just disappeared off the face of the earth".[440]

Even before the US Supreme Court's *Rasul* ruling in June 2004 punctured a central assumption of the administration's Guantánamo detention policy – namely that the "federal

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[434] See pages 91-92, *USA: Human dignity denied, supra*, note 17.

[435] The lawyer was Jesselyn Radack. See, *Lost in the Jihad, Why did the government's case against John Walker Lindh collapse*? The New Yorker, 10 March 2003. *The trials of Jesselyn Radack*. The American Lawyer, 14 July 2003.

[436] The Senate confirmed the nomination of Michael Chertoff. See *Chertoff and torture*, by Dave Lindorff. The Nation, 14 February 2005.

[437] For example, Articles 12 and 16, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[438] Guideline 16, UN Guidelines on the Role of Prosecutors.

[439] Department of Defense briefing on detention operations and interrogation techniques. 10 March 2005.

[440] *CIA avoids scrutiny of detainee treatment*, Washington Post, 3 March 2005. The Salt Pit has since reportedly been torn down, with the CIA using another facility. The death in custody was referred to the Justice Department for possible prosecution in 2004, but no one has yet been charged. The CIA officer in charge of the case was reportedly promoted.

courts lack jurisdiction over habeas petitions filed by alien detainees held outside the sovereign territory of the United States"[441] – the US authorities had not put all their eggs in the Guantánamo basket. The month after Guantánamo started receiving detainees, Deputy Secretary of Defense Paul Wolfowitz said of the administration's detainee policy, "either we detain them ourselves or we turn them over to a court in the United States, or we turn them over to another country".[442] Indeed, "only" approximately 750 people have been held in Guantánamo, of whom about 520 remained in the base by 26 April 2005. In August 2004, the UN's Independent Expert on Human Rights in Afghanistan, Professor Cherif Bassiouni, called on Coalition forces in Afghanistan to grant the national human rights commission and him access to "the main detention sites, where an estimated 300-400 persons are detained". He stressed that "the lack of transparency raises serious concerns about the legality and condition of their detention".[443] In March 2005, he called on coalition forces to provide access to all facilities to the national and international monitors, including the ICRC, UN special rapporteurs, and the Afghan government.[444] Following another visit to Afghanistan in early 2005, the UN expert issued a statement in which he expressed his grave concern "at allegations of arrest, detention and mistreatment committed by foreign forces in Afghanistan. The Independent Expert is particularly concerned at allegations of possible torture having been committed in this context".[445] As already noted above, in April 2005, the UN Independent Expert's mandate was not renewed as a result, he believes, of US pressure.

Kamal Sadat, a reporter with the BBC World Service in Afghanistan, has said that he was detained by US forces in Khost in September 2004. He says he was hooded and flown to a US base, whose location he did not know, and where there were detainees of different nationalities. He was released without explanation three days later. He has recalled:

> "*Every time I was moved within the base, I was hooded again. Every prisoner has to maintain absolute silence... Prisoners were arriving and leaving all the time. There were also cells beneath me, under the ground. It was only later I learned that I had been held in Bagram. If the BBC had not intervened, I fear I would not have got out.*"[446]

There are reported to be some 400 detainees held in Pakistan at the behest of the USA. Mohammed, a former detainee allegedly held in a facility jointly run by the Pakistan intelligence services and the CIA has said:

> "*I was questioned for four weeks in a windowless room by plain-clothed US agents. I didn't know if it was day or night. They said they could make me disappear.*"[447]

In addition, so-called "high-value detainees" – perhaps several dozen – are allegedly being held in CIA custody in secret locations in Afghanistan and elsewhere. Not even the ICRC has access to such detainees, whose fate and whereabouts remain unknown, leaving them outside the protection of the law and placing them squarely within the scope of the UN

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[441] *Re: Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba.* Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, US Department of Justice, 28 December 2001.
[442] Deputy Secretary Wolfowitz interview with Fox News Sunday, 17 February 2005. Department of Defense News Transcript.
[443] *Independent human rights expert ends visit to Afghanistan.* United Nations press release, 23 August 2004.
[444] Report of the independent expert on the situation of human rights in Afghanistan, M. Cherif Bassiouni. UN Doc. E/CN.4/2005/122, 11 March 2005, para. 89.
[445] *UN Expert on Human Rights in Afghanistan ends country visit.* UN press release, 10 February 2005.
[446] *'One huge US jail'.* The Guardian Weekend magazine (UK), 19 March 2005.
[447] *Ibid.*

Declaration on the Protection of All Persons from Enforced Disappearance. As noted above, "disappearances" are a crime under international law. Yet no one has been brought to account for these "disappearances", known in US military parlance as "ghost detainees", at least one of whom in Iraq died in custody.[448]

Tanzanian national and alleged *al-Qa'ida* operative Ahmed Khalfan Ghailani is a recent case of an individual who may have "disappeared" in US custody. He is reported to have been arrested in July 2004 in Gujrat, Pakistan, in a joint US/Pakistan operation. After his arrest, he was held at an undisclosed location and would be interrogated "to our satisfaction before handing him over to the US for the trial", according to a quote attributed to Pakistan's Interior Minister. US agents were said to be participating in the interrogation.[449] In January 2005, a Pakistani security official was quoted as saying that Ahmed Khalfan Ghailani "was turned over to our American friends months ago." Asked where the detainee had been taken, the official replied "We have no idea, and as a matter of fact we don't ask such questions."[450] Ghailani's whereabouts remain unknown.

Another recent case of someone who is alleged to have "disappeared", possibly in US custody, is that of Mohammad Naeem Noor Khan, a Pakistan national who was arrested in July 2004 in Lahore, Pakistan. He was taken into custody by the Pakistan authorities on behalf of the USA. His interrogation reportedly provided the CIA with a "rich lode of information".[451] Naeem Noor Khan's current whereabouts are unknown. Similarly, Libyan national and alleged senior *al-Qa'ida* operative Abu Faraj al Libbi, was detained in Pakistan on or around 2 May 2005 by Pakistan forces aided by US intelligence. He was reportedly being interrogated by US and Pakistan agents at an undisclosed location at the time of writing.[452] He was feared to be at risk of torture and other ill-treatment and transfer to and "disappearance" in US custody.[453]

The whereabouts of some other individuals taken into US custody, or detained with US involvement, have remained unknown for more than three years.[454] In its recent report to the UN Commission on Human Rights, the UN Working Group on Enforced or Involuntary Disappearances stated that it was "deeply concerned" by the reports of the USA's use of secret detentions.[455] It reminded the US government that secret detention facilities are "typically associated with the phenomenon of disappearance". Article 10 of the UN Declaration on the Protection of All Persons from Enforced Disappearance which states:

> "*Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention... Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been*

[448] Manadel al-Jamadi, see page 148 of *USA: Human dignity denied, supra*, note 17.
[449] *Pakistan Holds Top Al Qaeda Suspect*, Washington Post, 30 July 2004.
[450] *Al-Qaida suspect said in US custody*. Associated Press, 25 January 2005.
[451] *'One huge US jail'*. The Guardian Weekend magazine (UK), 19 March 2005.
[452] *US agents attend grilling of bin Laden lieutenant*. Reuters, 6 May 2005.
[453] Amnesty International Urgent Action, http://web.amnesty.org/library/Index/ENGASA330072005.
[454] See pages 111-114, *USA: Human dignity denied, supra*, note 17. See also, for example: *Syria: "Disappearance" of Muhammad Haydar Zammar*, AI Index: MDE 24/016/2005, 6 April 2005, http://web.amnesty.org/library/Index/ENGMDE240162005.
[455] UN Doc. E/CN.4/2005/65. Question of enforced or involuntary disappearances. Report of the Working Group on Enforced or Involuntary Disappearances, 23 December 2004, para. 364.

manifested by the persons concerned... An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention..."[456]

The Church Report summary of March 2005 concludes that "to the best of our knowledge, there were approximately 30 'ghost detainees', as compared to a total of over 50,000 detainees in the course of the Global War on Terror", as if this relatively small percentage of "ghost detainees" together with the claim that "the practice of DoD [Department of Defense] holding 'ghost detainees' has now ceased", should assuage concern.[457] It does not. Firstly, even a single case of "disappearance" is a gross violation of international law and standards. Secondly, not only are the whereabouts of numerous detainees still unknown, no one has been brought to account for past cases. For example, there has been no reason given as to why Secretary Rumseld's admitted authorization for hiding at least one such detainee in Iraq should not be considered to have been a "disappearance" or an otherwise illegal secret detention and should not lead to a criminal investigation. Yet as already stated, the Church investigation did not even question Secretary Rumsfeld and the Schlesinger Panel chair considers Secretary Rumsfeld's conduct to have been "exemplary".

Mohamedou Ould Slahi, a Mauritanian national arrested in Mauritania in December 2001, is alleged to have been secretly transferred to Jordan for interrogation before being eventually brought to Guantánamo, where he remains.[458] Jamal Mar'i, a Yemeni national, was arrested in Pakistan in late 2001. While held in Pakistan, he was allegedly interrogated several times by US intelligence agents. He was subsequently taken by plane to Jordan and held in an intelligence facility there. He has said that he was hidden from the ICRC for about a month – thus "disappearing" in custody for that period. He alleged that when the ICRC visited, he was taken down to the basement, but one time the detaining authorities forgot to take him down. The ICRC delegates were surprised to find him in the facility. His family then received a message from him via the ICRC. Jamal Mar'i was subsequently sent to Guantánamo Bay.[459] In September 2004, at his CSRT hearing in Guantánamo three years after his detention, he said:

> *"[T]hey apprehended me on September 23rd 2001. They didn't capture me, but some people simply kidnapped me while I was asleep. I was captured with a Pakistani cook. There was nobody else with us. An American interrogator interrogated me, then we were given to Pakistan... They did not release me. They turned me over to the United States. They took me from Pakistan to Jordan... The United States is the one who took me to Jordan... I am not an enemy combatant, I am a sleeping combatant because I was sleeping in my home...How can you call a person an enemy combatant when you're sleeping in your own home and somebody comes to your home and takes you somewhere and you don't know where that is?*"

Another Yemeni national, Mohammed Mohammed Hassen, was arrested with about 10 other people in a house in Faisalabad, Pakistan, near the Salafia University where he was studying. He was taken to Lahore, where he was allegedly interrogated by US agents over a period of two to three days. He was then moved to Islamabad, where he was held for two months and interrogated once by US agents. He was subsequently taken to the airport by

[456] Declaration on the Protection of All Persons from Enforced Disappearances, adopted by UN General Assembly resolution 47/133 of 18 December 1992.

[457] General Paul Kern, who oversaw the earlier Fay investigation told the Senate Armed Services Committee on 9 September 2004 that the there might have been as many as 100 "ghost detainees" in Iraq.

[458] Omar Deghayes, unclassified information, 30 March 2005. Also, see page 34, *USA: The threat of a bad example*, http://web.amnesty.org/library/Index/ENGAMR511142003.

[459] See also, *USA: Human dignity denied*, *supra*, note 17.

Pakistani agents and handed over to their US counterparts. Handcuffed and hooded, he was put on a plane and flown to Afghanistan, where he was held in Bagram and Kandahar air bases before being transferred to Guantánamo. The others with whom he was originally detained were also allegedly on the same plane to Cuba.

Reports that the CIA has operated a secret facility in Guantánamo, coupled with the Pentagon's refusal to release identities or to give anything but approximate totals for the numbers of people held in the base, raise fears of secret transfers to and from it and the possibility that there have been people held for interrogation there who would fall into the category of "disappeared" under international standards.[460] It is not known exactly how many detainees have been held in Guantánamo who were not in the custody of the Department of Defense. On 29 March 2005, the US Secretary of the Navy Gordon England announced that Combatant Status Review Tribunals had been completed "for all of the DoD detainees at Guantánamo", and was unable to give an absolute assurance that this was all the detainees held at the base.[461]

Amnesty International raised concern in November 2001 that, in the context of the "war on terror", the USA might expand its existing practice of "renditions" or secret detainee transfers.[462] In April 2002, the organization urged the US administration not to "undermine the rule of law by promoting or participating in 'renditions' of suspects" following evidence that such secret transfers had occurred.[463] In August 2003, the organization raised more cases of renditions.[464] In October 2004 it did so yet again, noting evidence that on 17 September 2001 President Bush had signed a Memorandum of Notification granting "exceptional authorities" to the CIA in the "war on terror", and also that he authorized the CIA to set up

[460] On 26 April 2005, the Pentagon announced that the transfer of two detainees to Belgium left "approximately 520" detainees in Guantánamo. This is the same figure it gave on 19 April 2005, when it announced the transfer of 18 detainees out of the base to Afghanistan and Turkey. Prior to that, on 12 March 2005, the Pentagon said that the transfer of three detainees to Afghanistan, Maldives and Pakistan left "approximately 540 detainees" in Guantánamo. This is exactly what it said five days earlier on 7 March, when announcing the transfer of three detainees to France. Prior to that, the last figure it gave was "approximately 545" when it announced on 28 January 2005 that the transfer of Mamdouh Habib to Australia left "approximately 545" detainees in the base. This was the same figure it gave a few days earlier after four British detainees were returned to the UK on 25 January. The imprecision of the Pentagon's figures, and the failure to give the identities of the detainees, allows the possibility that individual detainees could be transferred to and from the base without being reflected in the figures. See *Human Dignity Denied*, pages 101-102, *supra*, note 17.

[461] Defense Department Special Briefing on Combatant Status Review Tribunals, US Department of Defense News Transcript, 29 March 2005. Asked whether the CIA's practice of holding "ghost detainees" in Guantánamo had ended and whether the approximately 540 people officially reported as held at the base were all those currently held, the Navy Secretary said: "As far as I know, that's all the people in Guantánamo. I mean, I have no other data. As far as I know, that's the total number". The CIA's practice of holding "ghost detainees" has been so secretive that other parts of government have been kept in the dark. In Iraq, for example, the detention of three Saudi nationals as "ghost detainees" was apparently unknown even to the State Department, the US Embassy in Saudi Arabia, and Ambassador Paul Bremer, who headed the Coalition Provisional Authority at the time. See page 103, *USA: Human dignity denied, supra*, note 17.

[462] *USA: No return to execution – The US death penalty as a barrier to extradition*, AI Index: AMR 51/171/2001, November 2001, pp. 16-24, http://web.amnesty.org/library/Index/ENGAMR511712001.

[463] *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, http://web.amnesty.org/library/Index/ENGAMR510532002.

[464] See pages 29-32, *USA: The threat of a bad example - Undermining international standards as "war on terror" detentions continue*, AI Index: AMR 51/114/2003, August 2003, http://web.amnesty.org/library/Index/ENGAMR511142003.

secret detention facilities outside the USA and to use harsh interrogation techniques.[465] Amnesty International has never had a reply from the US authorities to its concerns. For example, it has yet to receive a response to the letter it sent to the CIA, President Bush, Secretary Powell, and Secretary Rumsfeld in August 2004 on the case of Khaled El-Masri, a German national allegedly transferred from Macedonia to incommunicado detention and ill-treatment in Afghanistan in early 2004. Amnesty International raised with the authorities what Khaled El-Masri had said happened to him after he had been taken off a coach on 31 December 2003 as he was travelling into Macedonia and held there for the next three weeks.

> "*On 23 January, he was told that he would be taken to the airport to fly back to Germany. Blindfolded and handcuffed, he states that he was taken to a car and driven to a location where he heard aeroplanes. He alleges that he was taken to a room, beaten and stripped of his clothes by having them cut from his body. When he refused to take off his underwear, he says he was beaten again at which point he undressed completely. He says he heard the sound of a camera taking pictures of him naked. At this point his blindfold was taken off and he says he saw six masked men dressed in black.*
>
> *Khaled El Masri states that he was given a diaper and blue track suit to wear, that his hands and feet were tied and that he was taken to a plane. In the plane, he alleges that he was thrown to the ground and tied to chains fixed at the sides of the aircraft. He states that he was blindfolded, hooded and made to wear earplugs and headphones. He claims to have been given an injection in each shoulder. He states that the plane took off at around 9pm on the evening of 23 January 2004. He says that he was given no reason for his arrest and detention at any time.*"[466]

It has since been reported by NBC News that Khaled El Masri was kept in secret detention in the "Salt Pit" in Kabul, even after the CIA realized it had the wrong man in a case of mistaken identity.[467]

Khaled El Masri's allegations mirror what has happened to others, for example, Australian national Mamdouh Habib, who was allegedly transferred from Pakistan with US involvement to Egypt where he was allegedly subjected to severe torture.[468] Similarly, in a handwritten letter to the Combatant Status Review Tribunal, dated 8 December 2004, Pakistan national Saifullah Paracha wrote of his abduction by US agents in Thailand and his transportation to Afghanistan where he was held for more than a year before being transferred to Guantánamo where he remains:

> "*I reached Bangkok International Airport on July 06, 2003 and at the airport I was illegally and immorally arrested – back hand/leg cuffed, black big mask on my head up to neck, was thrown on floor of station wagon facing down. I am heart patient / diabetic / high blood pressure / skin disorder, gout; it could have been fatal, there was no human consideration at all. From airport I was taken to unknown place for few days and kept eyes covered, ears cover, handcuffed, leg cuffed. After few day I*

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[465] The President's central policy memorandum of 7 February 2002 noting that the USA's values "call for us to treat detainees humanely, including those who are not legally entitled to such treatment" (however inadequate the protection it provided), did not apply to the CIA or other non-military personnel. See pages 107-116 of *USA: Human dignity denied, supra*, note 17..

[466] Letter to the CIA and members of the US administration from Amnesty International Secretary General Irene Khan, 20 August 2004. Letters were also sent to the authorities in Afghanistan and Macedonia.

[467] *CIA accused of detaining innocent man.* MSNBC.com, 21 April 2005.

[468] See *USA: Guantánamo – an icon of lawlessness*, AI Index: AMR 51/002/2005, 6 January 2005, http://web.amnesty.org/library/Index/ENGAMR510022005.

was transported by plane to Afghanistan, under extremely severe bad conditions. I was kept in isolation from July 2003 – September 20, 2004 and since September 20, 2004 – I am in isolation cell in Guantanamo Bay Island... Am I being considered human being or animal, or is USA my God?"[469]

At his hearing in front of the Combatant Status Review Tribunal in Guantánamo on 9 October 2004, Jordanian national and UK resident Jamil El Banna recalled his transfer from Gambia to Afghanistan in what he described as a "kidnapping" by US agents:

"*When they came and arrested and handcuffed me, they were wearing all black. They even covered their heads black... They took me, covered me, put me in a vehicle and sent me somewhere. I don't know where. It was at night. Then from there to the airport right away... We were in a room like this with about eight men. All with covered up faces... They cut off my clothes. They were pulling on my hands and my legs...They put me in an airplane and they made me wear the handcuffs that go around your body so I would not do anything on the airplane... This is all kidnapping. Yes. They took me underground in the dark. I did not see light for two weeks... Bagram, Afghanistan. Right there in the dark. They put me in the dark. I was surprised. I did not know what I did wrong or what I did. They starved me; they handcuffed me, there was no food... I was under their control. They are the ones who took me and put me there. They know what they have done. I was surprised that the Americans would do such a thing. It shocked me.*"[470]

Such descriptions also echo the recent findings of the Parliamentary Ombudsman in Sweden, Mats Melin, in another case. He investigated Swedish/US cooperation in the secret deportation of two Egyptian asylum-seekers, Ahmed Hussein Mustafa Kami 'Agiza (A) and Muhammad Muhammad Suleiman Ibrahim El-Zari (Z) from Sweden to Egypt in December 2001. They were allegedly subjected to torture in Egypt, including by electric shocks.[471] A summary of the Ombudsman Melin's findings include the following:

"A few days before December 18, 2001, the Swedish Security Police received an offer from its American counter-part, the CIA, to make use of an American airplane for the expulsion procedure. This airplane could depart in the evening of December 18 and was said to have direct access through Europe for a flight to Egypt. The Security Police, apparently after having informed the Minister of Foreign Affairs, accepted the offer.

On December 18, at lunch-time, the Security Police was informed that American security personnel would be on board the American airplane and that they wished to perform what they called a security check of A and Z. It was arranged for the check to be conducted in a police station at Bromma airport in Stockholm.

Immediately after the Government's decision in the afternoon of December 18, A and Z were apprehended by Swedish police and subsequently transported to Bromma airport. The American airplane landed shortly before 9.00 p.m. A number of American security personnel, wearing masks, conducted the security check, which consisted of at least the following elements. A and Z had their clothes cut up and removed with a pair of scissors, their bodies were searched, their hands and feet were

[469] *Paracha v. Bush*. Unclassified factual returns from CSRT process. In the US District Court for the District of Columbia.
[470] *El Banna v. Bush*. Factual returns from CSRT process. In the US District Court for the District of Columbia.
[471] *Renditions*. File on 4. BBC Radio 4, 8 February 2005. See also, *Torture: The dirty business*. Dispatches, Channel 4 TV (UK), 1 March 2005.

fettered, they were dressed in overalls and their heads were covered with loosely fitted hoods. Finally, they were taken, with bare feet, to the airplane where they were strapped to mattresses. They were kept in this position during the entire flight to Egypt. It has been alleged that A and Z also were given a sedative per rectum. This allegation has not been possible to substantiate during the investigation...

[T]he investigation shows that the Swedish Security Police lost control of the situation at the airport and during the transport to Egypt. The American security personnel took charge and were allowed to perform the security check on their own. Such total surrender of power to exercise public authority on Swedish territory is clearly contrary to Swedish law...

[A]t least some of the coercive measures taken during the security check were not in conformity with Swedish law. Moreover, the treatment of A and Z, taken as a whole, must be considered to have been inhuman and thus unacceptable..."[472]

Canadian citizen Maher Arar has said that he was flown out of the USA on a jet by a team that called themselves the "Special Removal Unit".[473] It has recently been reported that federal aviation records support his contention that he was transferred on 8 October 2002 aboard a Gulfstream jet, and that he was flown via New Jersey, Washington DC, Maine, and Rome to Jordan, from where he was driven to Syria. The Gulfstream III jet's registration number is reported to have been N829MG, records for which show that it also went to Guantánamo Bay in December 2003.[474] Evidence of three other aircraft allegedly used to carry out secret transfers has also come to light, using civil aviation records and sightings by "planespotters":

- Between June 2002 and January 2005, a Gulfstream IV jet, registration number N227SV (previously N85VM), reportedly flew to Afghanistan, Morocco, Dubai, Jordan, Italy, Japan, Switzerland and the Czech Republic, as well as stops in US air bases in Maryland and Germany, 82 stops at Dulles International Airport outside Washington DC, and 51 visits to the US Naval Base in Guantánamo Bay. On 18 February 2003, the jet was in Cairo, Egypt. That was the day after Egyptian national Osama Nasr Mostafa Hassan was abducted on a street in Milan and allegedly driven to the US air base in Aviano, Italy, interrogated, drugged and flown to Egypt, where he was allegedly tortured, including with electric shocks. He is reported to have been released in mid-2004, but rearrested shortly afterwards after he made a phone call to his wife. He is believed to remain in custody.[475]

  This Gulfstream jet has also flown to Azerbaijan. Amnesty International has been unable to establish if this was the plane used to transport Yemeni national 'Abd al-Salam al-Hiyla. As Amnesty International reported in June 2004, his family lost contact with him after he travelled to Egypt on a 15-day business trip from 9 September 2002. His family said that the Egyptian embassy in Sana'a, Yemen, told them that he had left Egypt on "a special American plane that took him to Baku,

[472] *Expulsion to Egypt – a review of the execution by the Security Police of a Government decision to expel two Egyptian citizens*. The Parliamentary Ombudsman, 22 March 2005, http://www.jo.se/Page.aspx?Language=en&ObjectClass=DynamX_Document&Id=1625.
[473] *Torture: The dirty business*. Dispatches, Channel 4 TV (UK), 1 March 2005.
[474] *Suit by detainee on transfer to Syria finds support in jet's log*. New York Times, 30 March 2005. The plane in question has since changed ownership and is now reported to have the registration number N259SK.
[475] *Jet's travels cloaked in mystery*. Chicago Tribune, 20 March 2005. See also *Italian prosecutor probing CIA's role in militant's disappearance*. Chicago Tribune, 24 February 2005.

Azerbaijan".[476] 'Abd al-Salam al-Hiyla is currently believed to be held in Guantánamo Bay, having been taken there via custody in Bagram air base in Afghanistan.

- Another Gulfstream jet, registration N379P (later changed to N8068V), was used to deport Egyptian nationals Ahmed Hussein Mustafa Kami 'Agiza and Muhammad Muhammad Suleiman Ibrahim El-Zari from Bromma airport in Sweden to Egypt in 2001 (above). The jet N379P has also been spotted in Pakistan and Gambia during other renditions, and in Luton and Glasgow airports in the UK, as well as military bases in the UK.[477] It is also reported to be the plane which transported Mohammed Hayda Zammar from Morocco in late 2001 to alleged torture in Syria, and Muhammad Saa Iqbal Madni from Indonesia to Egypt where he is reported to have died during interrogation.[478] This jet also allegedly flew Yemeni national Jamil Qasim Saeed Mohammed out of Karachi international airport on 26 October 2001.[479] Amnesty International is concerned that he has "disappeared" in US-controlled custody, possibly in Jordan. The organization first raised this case with the US authorities in November 2001 and in a letter and memorandum to President Bush and other senior adminitration officials in April 2002. The organization has never received a reply.[480]
- A Boeing 737, registration N313P and seats for 32 passengers, is reported to have made 600 flights to 40 countries since 11 September 2001, including 30 trips to Jordan, 19 to Afghanistan and 17 to Morocco. It is also reported to have landed at Guantánamo. Recent information appears to support Khaled El-Masri's allegations (above), that he was seized in Macedonia and flown to Afghanistan in January 2004. According to information published by *Newsweek*, the Boeing 737 landed in Skopje on 23 January 2004, the date Khaled El-Masri told Amnesty International in mid-2004 was the day he was flown out of Skopje.[481] The Boeing 737 has also reportedly flown to Uzbekistan.[482]

By March 2005, the *New York Times* was reporting that "one of the biggest non-secrets in Washington these days is the Central Intelligence Agency's top-secret program for sending terrorism suspects to countries where concern for human rights and the rule of law don't pose obstacles to torturing prisoners. For months, the Bush administration has refused to comment on these operations, which make the United States the partner of some of the world's most repressive regimes."[483] Based on interviews with current and former government officials, the *New York Times* reported that President Bush's directive signed in the days after the attacks of 11 September 2001 and giving the CIA expansive authority to conduct renditions without case-by-case approval from the White House, State Department, or Justice Department, remained classified. An official was quoted as saying that the "CIA

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[476] *Human rights fall victim to the "War on Terror"*, AI Index: MDE 04/002/2004, June 2004, http://web.amnesty.org/library/Index/ENGMDE040022004.
[477] *Torture: The dirty business.* Dispatches, Channel 4 TV (UK), 1 March 2005.
[478] See 'One huge US jail', Guardian Weekend (UK), 19 March 2005, and page 184 *USA: Human dignity denied, supra*, note 17.
[479] *US accused of 'torture flights'*. The Sunday Times (UK), 14 November 2004.
[480] *Memorandum to the US Attorney General – Amnesty International's concerns relating to the post 11 September investigations,* AI Index: AMR 51/170/2001, November 2001, http://web.amnesty.org/library/Index/ENGAMR511702001; *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay,* AMR 51/053/2002, http://web.amnesty.org/library/Index/ENGAMR510532002, and accompanying letter.
[481] *Aboard Air CIA*, Newsweek, 28 February 2005.
[482] *60 Minutes*. CBS Television, 6 March 2005.
[483] *Torture by proxy*, New York Times, 8 March 2005.

has existing authorities to lawfully conduct these operations". The official claimed that since 11 September 2001, the CIA had flown 100 to 150 "war on terror" suspects to various countries, including Egypt, Jordan, Pakistan, Saudi Arabia and Syria.[484] In a later report, the *Washington Post* cited evidence from current and former intelligence officers and lawyers that the system of oral assurances that the CIA relies upon from the receiving country that the detainee will not be tortured has been ineffective and impossible to monitor. One CIA officer was quoted as saying that the system of assurances was a "farce". Another official said: "It's beyond that. It's widely understood that interrogation practices that would be illegal in the US are being used." CIA Director Porter Goss said that "once [the detainees are] out of our control, there's only so much we can do". Attorney General Alberto Gonzales said "we can't fully control what [the receiving] country might do...If you're asking me, 'Does a country always comply?', I don't have an answer to that".[485]

Clearly such a system of assurances is inadequate and fails to meet the USA's international obligations. The UN Human Rights Committee, for example, has pointed out that the obligation of all countries, like the USA, that have ratified the International Covenant on Civil and Political Rights includes

> "*an obligation not to extradite, deport, expel or otherwise remove a person from their territory* [including all persons under their control], *where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant* [the rights to life and freedom from torture or other cruel, inhuman or degrading treatment or punishment], *either in the county to which removal is to be effected or in any country to which the person may subsequently be removed.*"[486]

The Committee added that "the relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters".

In its Second Periodic Report to the UN Committee against Torture, submitted on 6 May 2005, the US government states that "The United States is aware of allegations that it has transferred individuals to third countries where they have been tortured. The United States does not transfer persons to countries where the United States believes it is 'more likely than not' that they will be tortured [a higher burden on the individual than under the CAT[487]]. This policy applies to all components of the United States government. The United States obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred".[488]

In view of the absolute nature, under international law and standards, of states' obligation not to return any person to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment, Amnesty International opposes the circumvention of this absolute obligation by reliance upon diplomatic assurances in any circumstances. The organization considers diplomatic assurances to be unacceptable as evidence that no risk of torture or ill-treatment exists in the receiving state. Such "assurances" are both evasive of and erosive of the absolute legal prohibition on torture and ill-treatment in general and on *refoulement* (transferring persons to where they risk torture/ill-treatment) in particular, in

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[484] *Rule change lets CIA freely send suspects abroad to jails*. New York Times, 6 March 2005.
[485] *CIA's assurances on transferred suspects doubted*. Washington Post. 17 March 2005.
[486] General Comment 31, para 8. UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.
[487] See page 182, *USA: Human dignity denied*, *supra*, note 17.
[488] US Second Periodic Report to the Committee against Torture, 6 May 205, *supra*, note 16, para. 27.

addition to being inherently unreliable, morally questionable and in practice ineffective – as several of the above cases have illustrated.

As Amnesty International reported in its October 2004 report, the CIA's activities remain shrouded in secrecy.[489] The Schlesinger Panel report noted that it "did not have full access to information involving the role of the Central Intelligence Agency in detention operations; this is an area the Panel believes needs further investigation and review". However the CIA is not being investigated outside the office of the CIA Inspector General. In his responses to US Senators questioning him prior to his confirmation as US Attorney General, Alberto Gonzales refused to give information about the CIA saying that information about "standards for interrogation by the CIA would be classified, as would be information about any particular methods of questioning approved for use by the CIA". The Church report noted that it was beyond the scope of its investigation to look into the question of "the existence, location or policies governing detention facilities that may be exclusively operated by OGA's [other government agencies, e.g. the CIA)". It said that the CIA had cooperated with its investigation "but provided information only on activities in Iraq".[490]

There have been allegations of torture and ill-treatment by the CIA. Indeed, senior officials at the FBI were reportedly so concerned about the severity of interrogation techniques used by the CIA in the "war on terror", that they warned their operatives to stay out of interrogations of high-level detainees interrogated by the CIA.[491] The Schlesinger Panel report on Department of Defence Detention Operations, dated August 2004, noted that the "CIA was allowed to operate under different rules" from the military.[492]

The current director of the CIA, Porter J. Goss, nominated by President Bush in August 2004 and sworn in to office the following month, recently told the US Senate Armed Services Committee that the US government "does not engage in or condone torture". His written statement did not mention cruel, inhuman or degrading treatment, equally prohibited under international law.

Porter Goss told the Committee that although all current interrogation methods being used by the CIA were legal and none constituted torture, he could not vouch for techniques employed by the agency earlier in the "war on terror". The CIA public affairs office quickly put out a statement to correct the "false impression that US intelligence may have had a policy in the past of using torture against terrorists captured in the war on terror". The statement continued:

> "*All approved interrogation techniques, both past and present, are lawful and do not constitute torture. The truth is exactly what Director Goss said it was: 'We don't do torture'. CIA policies on interrogation have always followed legal guidance from the Department of Justice. If an individual violates the policy, then he or she will be held accountable. Lawful interrogation of captured terrorists is a vital tool in saving American lives. It works and it is done with Congressional oversight, in keeping with American law.*"[493]

This is hardly reassuring, given that for almost two years, "legal guidance from the Department of Justice" explicitly considered torture a legitimate – and legal – tool, to be used at the President's discretion, in the "war on terror". Questions that also arise include what

[489] See *Human dignity denied, supra*, note 17, pages 100-116 and pages 181-190.
[490] Likewise, the Schlesinger panel had not had full access to information about the CIA's detention operations or full cooperation from the agency.
[491] *Harsh CIA methods cited in top Qaeda interrogations*, New York Times, 13 May 2004.
[492] Final Report of the Independent Panel to Review Department of Defense Detention Operations, August 2004.
[493] Statement by CIA Director of Public Affairs, Jennifer Millerwise, 18 March 2005.

interrogation techniques or detention conditions does the administration consider to constitute torture, what does it consider to amount to cruel, inhuman or degrading treatment (equally and absolutely prohibited under international law), and what has been the legal guidance offered to the CIA by the Justice Department? On the first question, for example, it was shocking that in their Senate confirmation hearings to the posts of US Attorney General and US Secretary of State respectively, neither Alberto Gonzales nor Condoleezza Rice were willing to describe "water-boarding" as torture. This has been described as an interrogation technique by which a detainee's head is forced under water to the point where he believes he will drown. The Church Report describes it as a technique in which water is poured on a detainee's towelled face to induce the misperception of suffocation. Either way, it would amount to torture. Yet Porter Goss told the Senate Armed Services Committee that the technique fell under "an area of what I will call professional interrogation techniques".[494] The General Counsel of the Department of Defense had earlier indicated that this technique was "legally available", even if a blanket approval was not warranted for use by the military at Guantánamo Bay.[495]

A US military medical report released in April 2005 under the ACLU's freedom of information act lawsuit reveals the following allegations given to a doctor at the US facility, Camp Bucca, in Iraq in June 2004. The detainee said that he was held in Abu Ghraib in May 2004, during which time he alleged, according to the doctor:

> "*He was beaten for 5 days. States he recalls the names [redacted]. Interpreter from Egypt. Two black soldiers. An Iraqi. Started beating him with sticks on the back. Placed in a small room underground. Placed in handcuffs – very tight – injuries to both wrists. Had his head kept under water – did it several times to point of passing out. Then he was placed in water and wires placed on him as if to shock him – said he was shocked 3 times.*"

On the second question, the administration still does not consider itself legally bound by the absolute international prohibition on cruel, inhuman or degrading treatment. Alberto Gonzales said in his written responses to the Senate that the US Justice Department "has concluded that under Article 16 [of the Convention against Torture (CAT)] there is no legal prohibition under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas". Linked to this is the third question – namely what legal guidance the Justice Department has offered to the CIA. Previously secret documents appear to point to an attempt within the executive to immunize the CIA from prosecution for torture and war crimes. In one memorandum, written in response to a CIA request for legal protections, the Justice Department argued that the President can override national and international prohibitions on torture, offered legal defences for anyone accused of torture, narrowed to almost vanishing point the definition of torture, and suggested that there was a "significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment fail to rise to the level of torture" and could therefore not lead to prosecutions under the Anti-Torture Act.[496] This represented the administration's position for some two years until the memorandum emerged into the public domain following the Abu Ghraib scandal. The December 2004 memorandum, rather than explicitly rejecting this position and stating, in

[494] *Questions are left by CIA chief on the use of torture*. New York Times, 18 March 2005.
[495] Action memo. For Secretary of Defense, from William J. Haynes, General Counsel. *Counter-Resistance Techniques*, 27 November 2002. Approved 2 December 2002. http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf.
[496] Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A., Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002. http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

accordance with international law, that no one has the authority to order torture, chose to evade the issue, and to this day the US administration's position remains unclear.

In another memorandum, the White House Counsel advised the President that not applying the Geneva Conventions to detainees captured in the Afghanistan conflict would make future prosecutions of US agents under the War Crimes Act less likely. Another leaked memorandum on legal discussions in the government in early 2002 stated that administration lawyers agreed that "the CIA enjoys the same high level of protection from liability under the War Crimes Act as the US military. It added that to the extent that Geneva Convention protections were not applied as a matter of law but were applied as a matter of policy, "it is desirable to circumscribe that policy so as to limit its application to the CIA".[497] No-one in the CIA has yet been prosecuted.[498]

There is reported to be concern within the CIA that withdrawal of the August 2002 memorandum has withdrawn the legal protections that it purportedly provided to the agency's interrogators, opening them up to prosecution.[499] Under international law, however, there can be no impunity for torture or other cruel, inhuman or degrading treatment. Those who commit such violations and those who authorize such conduct must be brought to account, and may not invoke any justification (such as "necessity", "self-defence" or "superior orders" in their defence.

Dan Coleman, a former FBI agent believes that torture "has become bureaucratized" under the Bush administration. He considers that since 11 September 2001, the CIA has operated under the presumption that "it has extralegal abilities outside the US...Whatever they do is all right. It all takes place overseas".[500] The CIA may be operating under more than a presumption. It may be acting under presidential authorization. If reports to this effect are accurate, ultimate responsibility for any resulting "disappearances", torture or other cruel, inhuman or degrading treatment would lie squarely at the President's door. To this day, the White House is reported to be maintaining extraordinary levels of secrecy about the CIA's detentions, placing unprecedented restrictions on congressional oversight of this issue.[501]

Michael Scheuer, a former CIA officer in the agency for 22 years, said recently in an interview about the CIA's alleged involvement in secret transfers and torture of detainees:

> "*The thing you have to remember, especially about the US clandestine service, is that it is peculiarly the tool of the executive branch and of the President. There is no operation in which the CIA has been involved, for example, against either al Qa'ida or other Sunni terrorists that has not been approved by the legal authorities... Human rights is a very flexible concept. It kind of depends on how hypocritical you want to be on a particular day*".[502]

Hypocrisy remains a part of the USA's "war on terror". The US government recently wrote the following: "[I]n recent years, government officials have inflicted severe prisoner abuse and torture in a series of 'unofficial' secret prisons and detention centers outside the

[497] Status of legal discussions re application of Geneva Conventions to Taliban and al Qaeda.
[498] One civilian contractor working with the CIA is being prosecuted for assault in the case of an Afghan detainee who died in custody in 2003.
[499] *CIA is seen as seeking new role on detainees*. New York Times, 16 February 2005. *Within CIA, worry of prosecution for conduct*. New York Times, 27 February 2005.
[500] *Outsourcing torture*. By Jane Mayer. The New Yorker, 14 February 2005.
[501] *White House has tightly restricted oversight of CIA detentions*. New York Times, 6 April 2005.
[502] Michael Scheuer, interviewed for "Rendition" – File on 4, BBC Radio 4, 8 February 2005.

national prison system". It was writing about Iran.[503] If the US government were to be honest, could it say the same thing about itself?

The government is resisting answering this question. Maher Arar, who was secretly transferred in October 2002 from the USA via Jordan to alleged torture in Syria, is suing the USA and US officials, including former Attorney General John Ashcroft, in the US courts. A legal brief filed on his behalf in opposition to those officials' motion to dismiss the lawsuit, states that "the fundamental question underlying this case" is:

> "*Why would United States officials intercept a Canadian citizen on his way home to Canada, detain him a JFK [airport], international obstruct his access to a lawyer, order him removed, and then place him not on a connecting flight to his home in Canada, but on a federally chartered jet to Syria where he would be detained without charges, interrogated and tortured for nearly one year?*"

The government responded that this "fundamental question" cannot be litigated because doing so would jeopardize national security interests.[504]

15. Transfers from Guantánamo and a return from Saudi Arabia

Security forces continued to abuse detainees and prisoners, arbitrarily arrest, and hold persons in incommunicado detention.
US State Department, on human rights in Saudi Arabia, 2004[505]

On 18 September 2004, the Pentagon announced the transfer of 29 Pakistan nationals from Guantánamo to the "control of Pakistan for continued detention".[506] More than six months later they were indeed still detained in Pakistan without charge or trial, their years of being in a legal vacuum in US custody now stretching into an indefinite future at the hands of their own government. In March 2005, the men staged a peaceful protest at Adiala jail near Islamabad, seeking an end to their legal limbo.[507]

While the US administration continues to resist efforts to have the Guantánamo detentions subjected to full judicial review, it seems that in the wake of the *Rasul* ruling, the subsequent decisions by Judges Robertson and Green, and the prospect of further losses in the courts, the Pentagon may be intending to transfer scores of detainees out of Guantánamo. Some of them may be transferred to detention in other countries, including Afghanistan, Saudi Arabia and Yemen.[508] Lawyers who have been filing *habeas corpus* petitions for the detainees have responded by seeking temporary restraining orders and injunctions in the US courts preventing the transfers of detainees where there is concern that they may face torture or other ill-treatment. Incommunicado or secret detention can *per se* amount to such ill-treatment.

On 29 March 2005, Judge Henry H. Kennedy on the DC District Court granted such a request and ordered the government to provide the lawyers for 13 Yemeni detainees and the court "with 30 days' notice prior to transporting or removing" any of them from Guantánamo

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[503] "Iran" in Country Reports on Human Rights Practices - 2004. US State Department. Released by the Bureau of Democracy, Human Rights, and Labor, 28 February 2005. http://www.state.gov/g/drl/rls/hrrpt/2004/41721.htm.

[504] *Arar v. Ashcroft*, et al. In the United States District Court for the Eastern District of New York. Declaration of James B. Comey, Deputy Attorney General, US Department of Justice.

[505] "Saudi Arabia" in Country Reports on Human Rights Practices - 2004. US Department of State. 28 February 2005, http://www.state.gov/g/drl/rls/hrrpt/2004/41731.htm.

[506] *Transfer of detainees completed.* Department of Defense news release. 18 September 2004.

[507] *Gitmo-freed Pakistanis jailed at home.* Associated Press, 29 March 2005.

[508] *Pentagon seeks to transfer more detainees from base in Cuba.* New York Times, 11 March 2005. See also Amnesty International Urgent Action

Bay."[509] The government had asserted that the claims of detainees facing transfer that they may be subjected to torture or ill-treatment or indefinite detention without due process in other countries were based upon "hollow speculation" and "largely anonymous sources and innuendo". However, Judge Kennedy, appointed to the Court in 1997, ruled that the government's "declarations concerning general policy and practice do not entirely refute Petitioners' claims or render them frivolous". He noted the numerous reports from multiple sources which suggested that such transfers had indeed taken place. In any event, Judge Kennedy agreed that even if they were not facing torture, transfer out of Guantánamo would extinguish the detainees' *habeas corpus* claims by executive fiat, an irreparable harm. The government had also argued that granting an injunction against the government would "illegitimately encroach upon the foreign relations and national security prerogatives of the Executive Branch" and harm the executive in a "myriad" of ways. Judge Kennedy rejected such "vague premonitions", noting that there was no indication that notifying the detainees' lawyers 30 days ahead of any planned transfer would "intrude upon executive authority".[510] Amnesty International welcomes Judge Kennedy's assertion of judicial oversight, which was followed by other similar orders. However, the organization is concerned by rulings from two other judges on the same court on 14 and 21 April 2005.

US District Judge Reggie B. Walton, appointed to the Court by President George W. Bush in 2001, was faced with a similar petition filed on behalf of six Bahraini detainees seeking that they would not be transferred without 30 days notice being given to the court and to the lawyers, including notice of the intended transfer destination. Again the government opposed the detainees' motion on the grounds that the detainees' fears that they would be transferred to situations where they risked torture, death or continued detention without trial were "based on rumors, myths, and hype". Judge Walton took a position that was in marked contrast to that of Judge Kennedy two weeks earlier:

> "*It is clear that the underlying basis for the claims advanced by the petitioners is their basic distrust of the Executive Branch. And, the predicate for their distrust is based on nothing more than speculation, innuendo and second hand media reports. This is not the stuff that should cause the court to disregard declarations of senior Executive Branch officials...In the context of the situation now before the Court, requiring the respondents to provide notice as requested prior to carrying out the transfer of the detainees from Guantánamo Bay on the record before it, would be tantamount to an unconstitutional encroachment on the authority of the Executive Branch to determine when it should continue to detain an individual it has no further interest in detaining. This Court simply does not have authority to require the Executive Branch to provide thirty day notices prior to effecting the transfer of the petitioners.... [I]t is a fundamental principle under our Constitution that deference to the Executive Branch must be afforded in matters concerning the military and national security matters*".[511]

The administration had argued to the court that granting such an injunction would "undermine the United States' ability to reduce the number of individuals under [its] control and [its] effectiveness in eliciting the cooperation of other governments in the war on terrorism". Ignoring this suggestion that the US administration views the fundamental human rights of detainees as negotiable in the context of building alliances in the "war on terror", Judge Walton ruled that these were "weighty and sensitive governmental interests that surely

[509] *Abdah et al. v. Bush et al. Order*. US District Court for the District of Columbia, 29 March 2005.
[510] *Abdah el al. v. Bush et al.* Memorandum Opinion. US District Court for the District of Columbia, 29 March 2005.
[511] *Almurbati et al. v. Bush et al.* Memorandum Opinion, US District Court for the District of Columbia, 14 April 2005.

trump the petitioners' interests concerning why they should not be transferred without advanced notice". He issued an order that the government inform the court, after the event, that any transfer was not made as a means to outsource detention or to extinguish the jurisdiction of the District Court over the detainees.

A week after Judge Walton's ruling, a similar one was handed down by Judge John Bates, also appointed to the Court in 2001 by President Bush. It concerned another six detainees in Guantánamo, including one individual who was a minor at the time he was taken to the base. Judge Bates noted in his decision of 21 April 2005, that, apart from Judge Walton, "generally, other judges have ordered some form of the requested 30-days' notice".[512] Indeed, by 4 May 2005, 14 rulings had been in favour of notice being given on transfers and only two decisions, those of Judge Bates and Judge Walton, against, with 11 more decisions pending. Judge Bates echoed Judge Walton when he said that the petitioners' pursuit of such notice was "founded on fear and mistrust". He added that "it may be understandable for petitioners and their counsel to mistrust the Executive, but this Court cannot rule based on petitioners's speculation, innuendo, and mistrust". Judge Bates ruled that "there is a strong public interest against the judiciary needlessly intruding upon the foreign policy and war powers of the Executive" on such a basis.[513]

Amnesty International, too, understands such mistrust, but unlike Judge Bates believes that it is based on more than mere speculation. There is now compelling evidence that the US administration has said one thing in the "war on terror" – that it is committed to the rule of law and human dignity – and done another.

At the same time as the issue of possible large numbers of transfers of detainees from Guantánamo has come to the fore, it has been reported that the CIA may be seeking to reduce its role in "war on terror" detentions. Following the administration's replacement of the August 2002 memorandum which had reportedly been produced following a request from the CIA for legal protections for its interrogators, there is said to be growing concern within the agency about the prospect of prosecutions for human rights violations. At the same time, long-term secret detentions consume agency resources for ever-diminishing "intelligence" returns. If no other US agency were to step in to assume some of this interrogation and detention role, it is possible that the CIA could decide to turn over some detainees in its custody to other countries.[514]

Amnesty International will continue to press the US authorities to charge or release all the detainees in its custody and to ensure that none will be sent to a country or situation where he or she would face human rights violations, including torture or ill-treatment, arbitrary detention, "disappearance", unfair trial or execution. The USA should not practice torture, ill-treatment or indefinite, incommunicado or secret detention, conduct unfair trial or resort to the death penalty, but neither may it "outsource" such practices to other states.

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[512] "either by granting the motion for preliminary injunction, see *Abdah v. Bush,* No. 04-CV-1254 (HHK) (March 29, 2005 Order); *Al-Joudi v. Bush*, No. 05-CV-0301 (GK) (April 4, 2005 Order), by including the 30-days' notice as a condition of granting respondents' motion to stay the case, see *Abdullah v. Bush,* No. 05-CV-0023 (RWR) (March 16, 2005 Order), or by requiring the 30-days' notice pursuant to the All Writs Act, see *Ameziane v. Bush,* No. 05-CV-0392 (ESH) (April 12, 2005 Order)."

[513] *Al-Anazi et al. v. Bush et al.* Memorandum Opinion. Civil Action No. 05-0345. US District Court for the District of Columbia. 21 April 2005. http://www.dcd.uscourts.gov/opinions/2005/Bates/2005-CV-345-~6:58:55~4-22-2005-a.pdf.

[514] *CIA is seen as seeking new role on detainees.* New York Times, 16 February 2005. *Within CIA, worry of prosecution for conduct.* New York Times, 27 February 2005.

A case that comes to mind in this regard is that of Ahmed Omar Abu Ali, a dual US/Jordanian national who was held for nearly two years in incommunicado detention in Saudi Arabia, allegedly at the behest of the US government.

Ahmed Abu Ali, born in Texas to Jordanian immigrants, was arrested by Saudi police on 11 June 2003 as he was taking his final exams in the Islamic University of Medina, Saudi Arabia. Three other US nationals were arrested in Saudi Arabia around the same time, extradited to the USA, and charged along with eight other men from Virginia with conspiracy to commit terrorism. Ahmed Abu Ali was not extradited. Instead, he was detained in Saudi Arabia without charge or access to legal counsel for the next 20 months.[515]

According to Ahmed Abu Ali's parents, he was detained incommunicado for at least the first month, while their requests for assistance from the US State Department were unsuccessful. The parents said that the State Department later claimed that the Saudi authorities would not allow them access in the first month. However, on 15 June 2003, four days after Ahmed Abu Ali's arrest, FBI agents had visited the prison in Riyadh where he was detained and watched as he was interrogated by Saudi officials.[516] In July 2003, a Saudi government spokesman was reported as saying that the FBI had had "full and complete and direct access" to Ahmed Abu Ali since his arrest.

Over a period of four days in mid-September 2003, Ahmed Abu Ali was interrogated by two FBI agents. He asked for a lawyer, but was told by the FBI that "because he was in Saudi custody, he was not entitled to an attorney because they [the Saudi authorities] would not allow it". The FBI interrogations went ahead nevertheless. According to one of the interrogators in 2005, the interrogations lasted up to eight hours and "would start late at night and go into the early hours" over each of the four consecutive days. The first night, this FBI interrogator said, Saudi security officials were present at the interrogation at which Ahmed Abu Ali said that "he didn't want to talk". According to this agent, on the second day, "to get him to talk… after he had indicated that he didn't want to talk to us and he wanted an attorney", he told Ahmed Abu Ali that he faced three possibilities: designation as an "enemy combatant" and transfer to US military custody; prosecution and imprisonment in Saudi Arabia; or prosecution and imprisonment in Saudi Arabia followed by prosecution in the USA.[517]

After each FBI interrogation session, the Saudi authorities then "took custody of him again". The above FBI agent claimed in March 2005 that he and the other US interrogator had "no knowledge" of what, if any, "encouragement" the Saudi authorities gave Ahmed Abu Ali to talk to the US interrogators the following day. He also responded that he had "no knowledge" of the allegation that Ahmd Abu Ali was "handcuffed to something overhead" during the time between interrogation sessions. The FBI agent claimed to "have no specific knowledge" of the use of torture and beatings in Saudi prisons, although upon further questioning admitted to having "heard that prisoners are mistreated in Saudi jails", and that he was "aware of a newspaper article whereby a Saudi official was quoted as saying [Ahmed Abu Ali] was mistreated".[518]

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[515] The details of the case are taken from the Memorandum Opinion issued by the US District Court for the District of Columbia on 16 December 2004, *Omar Abu Ali, et al. , v. John Ashcroft el al.*, unless otherwise stated.

[516] *USA v Abu Ali*, Cr. No. 05-53. Transcript of detention hearing before Liam O'Grady, Magistrate Judge, US District Court, Eastern District of Virginia, Alexandria Division, 1 March 2005. Testimony of FBI Special Agent Barry Cole.

[517] *Ibid.*

[518] *Ibid.*

As Ahmed Abu Ali's family continued to seek his release, they claimed that the Saudi authorities had described the arrest and detention as an "American case" over which the US, not the Saudi, authorities had ultimate control. His parents filed a petition for a writ of *habeas corpus* in the US District Court for the District of Columbia, arguing that Ahmed Abu Ali was being held in Saudi Arabia at the behest of the USA, and that the administration wanted to keep him there in order that he could be detained and interrogated free from constitutional constraints. Judge John Bates, who noted that there was "at least some circumstantial evidence that Abu Ali has been tortured during interrogations with the knowledge of the United States", issued his ruling on 16 December 2004. His analysis of the case began with the following:

> *"There is no principle more sacred to the jurisprudence of our country or more essential to the liberty of its citizens that the right to be free from arbitrary and indefinite detention at the whim of the executive... This right draws its force from – and would be meaningless without – the ability of the citizen to challenge his detention through a petition for a writ of habeas corpus... Consistent with its high purpose, courts have given the writ an exceptionally broad reach... [H]owever, the United States argues that the habeas petition for Abu Ali should be dismissed as a matter of law, no matter how extensive a role the United States might have played and continues to play in his detention, for the sole reason that he is presently in a foreign prison...*
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> *"This position is as striking as it is sweeping. The full contours of this position would permit the United States, at its discretion and without judicial review, to arrest a citizen of the United States and transfer her to the custody of allies overseas in order to avoid constitutional scrutiny; to arrest a citizen of the United States through the intermediary of a foreign ally and ask the ally to hold the citizen at a foreign location indefinitely at the direction of the United States; or even to deliver American citizens to foreign governments to obtain information through the use of torture. In short, the United States is in effect arguing for nothing less than the unreviewable power to separate an American citizen from the most fundamental of his constitutional rights merely by choosing where he will be detained or who will detain him.*
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> *"This Court simply cannot agree that under our constitutional system of government the executive retains such power free from judicial scrutiny when the fundamental rights of citizens have allegedly been violated".*[519]

The US executive cited not the President's war powers as its authority for what it argued should be a judicially unreviewable detention, but its broad authority to conduct foreign affairs free from judicial scrutiny. Judge Bates, who said that "a citizen cannot be so easily separated from his constitutional rights", rejected the government's motion to dismiss the case. He said that he would tread cautiously given the sensitivity of the foreign relations questions involved. He refused to accept or reject that the court had jurisdiction over the case, instead ordering further "jurisdictional discovery". In other words, the government would have to present evidence to confirm or refute the allegations made by the petitioners, which he described as "considerable" and almost entirely unrebutted by the government. Judge Bates ordered that the two parties submit a proposal of how they would go forward by 10 January 2005.

The case moved swiftly following Judge Bates' order. Rather than respond to the discovery order, after more than a year-and-a-half of detention without charge or trial, the

[519] *Abu Ali et al. v. Ashcroft et al.*, Civil Action No. 04-1258 (JDB), Memorandum Opinion, 16 December 2004, US District Court for the District of Columbia, http://www.dcd/uscourts.gov/04-1258.pdf.

authorities transferred 23-year-old Ahmed Abu Ali back to the USA. He arrived back in the United States on 21 February 2005 to face charges of providing material support for *al-Qa'ida* in a plot to establish an *al-Qa'ida* cell in the USA and to assassinate President Bush.[520] Perhaps he would still be in detention without charge or trial in Saudi Arabia if it had not been for the *habeas corpus* petition brought by his parents.

At a bail hearing on 1 March 2005, it became clear that the charges against Ahmed Abu Ali were based extensively on "admissions" he and alleged co-conspirators gave in detention in Saudi Arabia (one of the alleged co-conspirators has since been killed in a shoot-out with Saudi police in September 2003). Since his return, Ahmed Abu Ali has alleged that he was subjected to torture and ill-treatment in Saudi custody. The US administration has denied the allegation, insisting that "he has simply tried to divert the focus from his own criminal conduct by claiming that he was mistreated while he was in Saudi custody".[521]

The US authorities' conduct has, at best, been highly questionable throughout this case. At the bail hearing, the FBI agent above stated that when he and the other US interrogator had "interviewed" Ahmed Abu Ali over the four days in September 2003, they were only doing so for intelligence-gathering purposes and not for criminal prosecution purposes and had proceeded with this questioning despite the fact that Abu Ali had asked for an attorney because "we felt that the information was so vital to national security, we needed the information." This, of course, conflicts with the FBI agents own admission that he had told Abu Ali on the second day of interrogation that he faced possible prosecution in the USA and/or Saudi Arabia.[522] This has now come to pass with the charges based largely on "admissions" made by the defendant or his alleged co-conspirators when interrogated without access to legal counsel in incommunicado detention in Saudi Arabia.

Ahmed Abu Ali has pleaded not guilty to the charges, which carry a possible 80-year prison sentence.[523] It is notable that the Justice Department chose not to bring these charges until February 2005, despite having the evidence on which they are based by September 2003. For example, during the period between his arrest and late July 2003, Ahmed Abu Ali allegedly gave a written "confession" that he had joined an *al-Qa'ida* cell in Saudi Arabia. During this time, he was also videotaped reading out a "confession".[524] Yet, until Judge Bates ordered jurisdictional discovery in late 2004, the administration had resisted all attempts to have Ahmed Abu Ali brought back to the USA and before a court. Only when that order was issued was he returned and charged. It certainly appears that the USA had control over his fate as Ahmed Abu Ali has alleged the Saudi authorities repeatedly told him.[525]

On 12 May 2004, the Assistant Director of the Washington DC Field Office of the FBI had written in an e-mail that "this office has no further interest in Mr Ali's detention." At the bail hearing on 1 March 2005, Magistrate Judge Liam O'Grady described this e-mail evidence as "disturbing" and questioned the Justice Department official about it, given that

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[520] Department of Justice news release, 22 February 2005.

[521] *USA v Abu Ali*, Cr. No. 05-53. Transcript of detention hearing before Liam O'Grady, Magistrate Judge, US District Court, Eastern District of Virginia, Alexandria Division, 1 March 2005.

[522] *Ibid.*

[523] At the time of writing, the trial was scheduled to begin on 22 August 2005.

[524] *USA v Abu Ali*, Cr. No. 05-53. Transcript of detention hearing before Liam O'Grady, Magistrate Judge, US District Court, Eastern District of Virginia, Alexandria Division, 1 March 2005.

[525] *Ibid.* At the bail hearing, Ahmed Abu Ali's lawyer said: "The government's evidence is that my client is interrogated and admits in Saudi Arabia to being a member of Al Qaeda. And I think the Court can take judicial notice that Saudi Arabia is not on good terms with Al Qaeda at the current time. Yet they have never charged him with any offense. And they have consistently told him at all times that as soon as our [US] government either said, let him go or send him to us, he was going to either be freed or turned over to the United States".

the government was now contesting bail on the grounds that "this defendant presents an extraordinarily grave danger to this community and to this nation". The Justice Department responded to Judge O'Grady's concern with an attempt to distance the government from the e-mail: "we cannot account for every statement made by individuals who are US Government employees".[526] Judge O'Grady denied bail although he repeated that he was "very disturbed by the information" in the e-mail and said that he might reconsider denial of bail if further evidence emerges to undermine the strength of the government's case.

16. Unchecked power at home – "enemy combatants" in the USA

You have to recognize that in situations where there is a war – where the Government is on a war footing, that you have to trust the executive...
US Deputy Solicitor General, to US Supreme Court, 28 April 2004 [527]

While the US administration has not (yet) labelled Ahmed Abu Ali as an "enemy combatant" – two other US citizens, Yaser Esam Hamdi and José Padilla, have been so classified by executive order during the "war on terror". A third person in the USA, Qatari national Ali Saleh Kahlah al-Marri, has also been so designated and held in untried military custody.

Yaser Esam Hamdi was detained in the context of the international armed conflict in Afghanistan in late 2001. He was flown to Guantánamo in January 2002 before the discovery of his US citizenship three months later caused the authorities to transfer him to military custody in Virginia. In July 2003, he was transferred to a naval brig in South Carolina.

Legal efforts challenging his detention eventually reached the US Supreme Court, which on 28 June 2004, ruled that Yaser Hamdi was entitled to a "meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker".[528] The case was remanded back to the lower courts for further proceedings. On 27 August 2004, a federal judge ordered the government to explain why Yaser Hamdi was being held in indefinite solitary confinement, as he had been held for more than two years. The judge ruled that such treatment "without question", raised issues under the US constitutional ban on "cruel and unusual punishment". In a further order of 5 October 2004, the same judge noted that three months since the Supreme Court's *Hamdi* ruling, the detainee had not been provided "with a hearing of any kind by this Court, the military, or any other tribunal." It further noted that no charges had been levelled against Yaser Hamdi, and that he remained in solitary confinement. With Yaser Hamdi so held, an agreement for his release was reached between his lawyers and the government. He was released from US custody later in October 2004 and transferred to Saudi Arabia. The conditions attached to his release included renouncing his US citizenship and undertaking not to leave Saudi Arabia for five years and never to travel to Afghanistan, Iraq, Israel, Pakistan or Syria.

The USA had continued to hold Yaser Hamdi for almost two years after the UN Working Group on Arbitrary Detention had found that his detention was "arbitrary" in violation of the International Covenant on Civil and Political Rights. It levelled the same criticism about the detention of José Padilla.[529] He remains in military detention without charge or trial almost three years after his arrest.

José Padilla was arrested at Chicago Airport in May 2002 on the suspicion of plotting to detonate a radioactive "dirty" bomb against a US target. On the basis of an executive order

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[526] *Ibid.*
[527] *Rumsfeld v. Padilla*, 03-1027, oral argument in the US Supreme Court, 28 April 2004.
[528] *Hamdi v. Rumsfeld*, 03-6696, decided 28 June 2004.
[529] Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2003.8, 16 December 2002, para. 64. The two are referred to as "Mr X and Mr Y".

signed by President Bush on 9 June 2002, he was transferred from civilian to military custody two days before there was to be a court hearing on his case and without his lawyer being informed. From then he was held without charge or trial in a military brig in South Carolina.

In late 2003, the US Court of Appeals for the Second Circuit in New York ruled that the Padilla's detention was unlawful. "The President's inherent constitutional powers", the court ruled, "do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat". It noted: "As this Court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the President and law enforcement officials bear for protecting the nation. But presidential authority does not exist in a vacuum... Under any scenario, Padilla will be entitled to the constitutional protections extended to other citizens."[530] The Court ruled that the government should release José Padilla from military custody within 30 days, and if it wished, transfer him to Justice Department custody which could bring charges against him. The government was willing to do no such thing, however, and appealed to the US Supreme Court.

The Supreme Court did not address the question of whether the President had the authority to detain Padilla in military custody as an "enemy combatant". Instead, on 28 June 2004, the same day as the *Rasul* and *Hamdi* decisions, it ruled the case should not have been filed in federal court in New York, but in South Carolina. Four of the nine Justices dissented, saying not only that it had been filed in the appropriate jurisdiction, but making their opinion clear about unfettered executive power:

> "*At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.*[531] *Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.*
>
> *Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.*"[532]

The Padilla Case was re-filed in the US District Court for the District of South Carolina as the Supreme Court majority had ordered. The government persisted in its contention that the President has the constitutional authority to detain José Padilla without charge or trial as an "enemy combatant", and that the place of his arrest was of no consequence. However, District Judge Henry Floyd found that President Bush's decision to remove Padilla from the ordinary criminal justice system and place him in military custody

[530] *Padilla v. Rumsfeld*, US Court of Appeals for the Second Circuit, 18 December 2003.
[531] The Star Chamber was an English court created in 1487 by King Henry VII. The Star Chamber, comprising 20-30 judges, became notorious under Charles I's reign for handing down judgments favourable to the king and to Archbishop William Laud, who supported the persecution of the Puritans. It was abolished in 1641.
[532] *Rumsfeld v. Padilla*, 03-1027, decided 28 June 2004 (Justice Stevens, dissenting).

was "neither necessary nor appropriate". Judge Floyd described the administration's view of the extent of the President's Commander-in-Chief powers in this case was "deeply troubling" and must be rejected. He continued that:

> "*To do otherwise would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties… [T]he Court finds that the President has no power, neither express nor implied, neither constitutional nor statutory, to hold Petitioner as an enemy combatant*".[533]

Judge Floyd ordered that José Padilla be released within 45 days. However, the Justice Department immediately decided to appeal the ruling to the US Court of Appeals for the Fourth Circuit, thus ensuring that the detainee is kept in indefinite military custody. On 7 April 2005, lawyers for Padilla petitioned the US Supreme Court to take the case prior to the appeal to the Fourth Circuit:

> "*As things stand – and as they will continue to stand for some time in the absence [of US Supreme Court intervention] no one knows the extent of the President's military power over American citizens at home during the 'War on Terror'. The continuing uncertainty about an issue of such imperative public importance does not serve the American people or its government…Neither security nor freedom is served by the continuing shroud of uncertainty that hands over the question whether the President may seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge*".[534]

The appeal brief added that the uncertainty was having a corrosive effect on wider criminal justice: "Since Padilla's military seizure from the civilian prison in which he was held, federal terrorism prosecutions have occurred under explicit or implicit Executive threats to declare criminal suspects enemy combatants and detain them in military prisons without criminal trial… The threat of an enemy combatant designation has loomed over many domestic terrorism cases".[535] At the time of writing, the US Supreme Court had not announced whether it would intervene in the case at this stage.

On 23 June 2003, less than a month before Qatar national Ali Saleh Kahlah al-Marri was due to go to trial in the USA on charges of credit card fraud and making false statements to the FBI, President Bush designated him as an "enemy combatant" by executive order. Al-Marri was transferred from the control of the Department of Justice to incommunicado solitary confinement in the Naval Consolidated Brig in Charleston, South Carolina. Almost two years later, he remains in untried military custody in South Carolina.

Ali al-Marri was held incommunicado from June 2003 to August 2004. In August 2004, he had a visit from the ICRC. It is not known how many other times he has been visited by the ICRC. He was allowed visits from his lawyer in October 2004 and January 2005. Otherwise he has been held incommunicado. He receives limited recreation time, which is considered by the authorities to be a "privilege" not a right. To date, Ali al-Marri has been detained for almost three and a half years, all in solitary confinement. There are concerns for his psychological state based on correspondence to his lawyers.

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[533] *Padilla v. Hanft*, Civil Action No. 2:04-2221-26AJ, memorandum opinion and order, District Court for the District of South Carolina, Charleston Division, 28 February 2005.
[534] *Padilla v. Hanft*, Brief of petitioner for writ of certiorari before judgment. In the Supreme Court of the United States, 7 April 2005.
[535] *Ibid.*

The question of whether President Bush has the authority to detain Ali al-Marri as an "enemy combatant" without charge or due process was pending before Judge Floyd in the US District Court in South Carolina at the time of writing. It is likely that whatever his decision it would be appealed.

17. Guantánamo and beyond: The lawlessness must end

I regret the perception – however wrong it may be – that this Administration may not be committed to the rule of law and to basic fundamental American values....Given the novelty and complex nature of the issues that the Administration has faced since the attacks of September 11, 2001, however, I can certainly understand how well-intentioned individuals could disagree with some of the decisions that we have made.

US Attorney General Alberto Gonzales, January 2005[536]

The Guantánamo Bay detention camp has become a symbol of the US administration's refusal to put human rights and the rule of law at the heart of its response to the atrocities of 11 September 2001. It has become synonymous with the US executive's pursuit of unfettered power, and has become firmly associated with the systematic denial of human dignity and resort to cruel, inhuman or degrading treatment that has marked the USA's detentions and interrogations in the "war on terror".

Guantánamo was specifically selected as a location to hold "war on terror" detainees based on legal advice from the Justice Department that the US federal courts did not have jurisdiction to consider appeals from "enemy aliens" captured abroad and detained there. The *Rasul* ruling by the US Supreme Court in June 2004 showed that this advice was wrong. However, while the administration has withdrawn the 1 August 2002 Justice Department memorandum on torture in the face of widespread outrage (although the withdrawal, as shown, has only been partial), it has not repudiated the Guantánamo advice. Instead, it is seeking to drain the *Rasul* ruling of any meaning and to have the executive entirely control the detainees' fate.

A number of judicial decisions have given some hope of a reassertion of judicial power, but the administration continues to fight such decisions as hard as it can. It is not forced to appeal in this regressive manner. It could, and should, of its own accord, bring its conduct fully into line with international law and standards for the treatment of detainees.

It has been more than three years since detention operations began at Guantánamo. Any doubt that the detention regime at Guantánamo has been an exercise in testing the limits of executive power rather than one in which security concerns have been addressed while respecting the USA's international human rights and humanitarian law obligations, has surely long since dissipated. The administration's disdain for international humanitarian and human rights law has been clear. It has ignored calls from the UN, Amnesty International and others to replace the legal vacuum it has sought to create in Guantánamo with full judicial review, full and fair trials for anyone suspected of internationally recognizable criminal offences, and the repatriation and release, with full human rights protections, for those against whom there is no evidence of wrongdoing.

Guantánamo is just the tip of an iceberg, however. Around the world, there are believed to be thousands of detainees held in secret, incommunicado or indefinite detention without trial in the "war on terror". Many of these detainees are in direct US custody – in Iraq, Afghanistan and in secret locations. In Iraq alone, for example, in early May 2005 there were more than 11,350 detainees held in US custody in Abu Ghraib, Camp Bucca, Camp Cropper

[536] Responses of Alberto R. Gonzales, nominee to be Attorney General, to the written questions of Senator Herb Kohl.

and in holding centres elsewhere.[537] They are held in incommunicado or virtual incommunicado detention. At least 500 detainees are believed to be held in the US air bases in Bagram and Kandahar in Afghanistan.[538] An unknown number are held in other US holding facilities elsewhere in the country. Several dozen "high-value" detainees are believed to be held in secret CIA facilities in these countries or elsewhere. In addition, there are hundreds if not thousands of "war on terror" detainees held by other countries, allegedly at the behest of the USA, or with its knowledge and access for its agents. In Yemen, for example, there are believed to be some 200 detainees so held, in Pakistan some 400, and hundreds in Saudi Arabia.

As the most visible part of this iceberg (although still operated behind a veil of secrecy), Guantánamo is also serving as a diversion. Its continued existence is distracting public attention and diverting legal resources from the greater mass of detentions elsewhere. Perhaps this fits the US administration's ends for those other detentions, which it wishes also to keep unscrutinized. Indeed, just as the courts are beginning to reassert a degree of scrutiny over the Guantánamo detainees, the executive may be looking to transfer large numbers of detainees to other locations for continued detention there. The US government must not be allowed to outsource its unlawful detention practices to other governments or to other agencies in order to bypass judicial scrutiny in its own courts. The rule of law must be reestablished.

All secret and incommunicado US detentions must end. Access to lawyers, relatives, the ICRC and national and international human rights monitors should be granted and maintained. All detainees must be treated humanely in the real sense of the term, namely in full accordance with international law and standards. All past violations must be fully and independently investigated and revealed, and those responsible for them held accountable. Anyone in US custody suspected of a criminal offence should be charged and brought to trial in full accordance with international standards of fairness. Anyone else should be released. No one should be returned from US custody to a country or situation where he or she would face execution or torture or other cruel, inhuman or degrading treatment or punishment, or to unfair trial, or indefinite incommunicado or secret detention without charge or trial.

The USA and other countries face serious security threats, including those posed by groups determined to pursue their fight by abusing fundamental human rights without restraint. Governments have a duty to protect people's rights from such threats. In so doing, however, governments must not lose sight of other human rights and of their obligation to respect them. As the US administration itself purports to recognize, respect for human rights is the route to security not an obstacle to it. Confronting crime, including "terrorism", with unlawful means undermines the very principles which States claim to be seeking to protect.

Amnesty International has made more than 60 recommendations to the US government structured around the organization's 12 Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State (see Appendix 4). It continues to appeal for implementation of these recommendations, central to which is Amnesty International's call for the establishment of a full independent

[537] There were reported to be 6,370 detainees in Camp Bucca; 3,538 in Abu Ghraib; 114 in Camp Cropper; and 1,331 in other US facilities. *US to expand prison facilities in Iraq*. Washington Post, 9 May 2005. In its Second Periodic Report to the Committee against Torture on 6 May 2005, the USA acknowledged that was detaining "approximately 10,000 persons in Iraq". *Supra*, note 16, Annex 1.
[538] According to the ICRC, as of October 2004, there were around 300 detainees being held at Bagram, and it was visiting on a regular basis to around 250 detainees in Kandahar. *US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC*. ICRC operational update, 29 March 2005. In its Second Periodic Report to the Committee against Torture on 6 May 2005, the USA acknowledged that it had "slightly more than 500 detainees in Afghanistan". *Supra*, note 16, Annex 1.

commission of inquiry into all aspects of the USA's detention and interrogation policies and practices in the "war on terror".[539] In addition to this, Amnesty International is calling for the appointment of a Special Counsel to conduct a criminal investigation into any members of the US administration against whom there is evidence of involvement in crimes in the "war on terror", with the proviso that the Special Counsel take full account of international law and standards. Amnesty International will also continue to call for the facilitation of investigations by UN mechanisms such as the Special Rapporteur on Torture, and human rights organizations.

Amnesty International urges the US government to make a fundamental change in direction, and to embrace the rules and principles of international human rights and humanitarian law, many of which were historically laid down with the USA's active participation and support. The USA must bring the Guantánamo Bay detention camp and any other facilities it is operating outside the USA into full compliance with international law and standards. The only alternative is to close them down.

[539] Pages 192-200, *USA: Human dignity denied*, supra, note 17.

Appendix 1: Some deaths in US custody in Afghanistan and Iraq

Detainee	Date of death	Location	Notes[540]
Mohammad Sayari	28 August 2002	Near Lwara, Afghanistan	The detainee was shot repeatedly by soldiers when, they alleged, he lunged towards a weapon. However, army investigators found that there was probable cause to believe that five soldiers had been involved in a murder, and recommended their prosecution for conspiracy, murder, dereliction of duty and obstruction of justice. Commanders decided to take no action, however, on the grounds of insufficient evidence. A soldier received a letter of reprimand.
Name unknown	November 2002	Kabul, Afghanistan	An unidentified Afghan detainee died, reportedly of hypothermia, in a secret CIA facility, after being stripped, assaulted and left in cell overnight without blankets. The case is reported to be under investigation by CIA Inspector General. No charges yet filed.
Mullah Habibullah	4 December 2002	Bagram, Afghanistan	The autopsy revealed that the detainee had suffered blunt force trauma. Army investigators closed the investigation into the death in October 2004, recommending prosecution of 11 military police (MP) officers and four military intelligence (MI) officers for assault (see also case of Dilawar, below).
Dilawar	10 December 2002	Bagram, Afghanistan	The autopsy revealed that the detainee had suffered blunt force trauma. Army investigators closed the investigation into the death in October 2004, recommending prosecution of 20 MPs and seven MI officers, including on charges of assault, cruelty and maltreatment. In this and the above case, the Church review noted that medical personnel may have attempted to cover-up the abuse. By the end of March 2005, in this and the above case, charges had been laid against two military personnel.
Name unknown	January 2003	Wazi village, Afghanistan	During military operations in Wazi village, three detained Afghans were being questioned, when one of them attempted to stand up, reportedly because he did not understand the questions, and a US soldier shot him. Army investigators recommended prosecution of the soldier for murder and another for dereliction of duty for not reporting the incident. Case under review at the time of writing.
Jamal Naseer	March 2003	Gardez, Afghanistan	Arrested along with seven other Afghan detainees, and during 17 days of detention allegedly subjected to abuse, including electric shocks, beatings, and immersion in water. No autopsy. Army investigation, not initiated until late 2004, ongoing.

[540] This list is illustrative only. Sources: USA's Second Periodic Report to the Committee against Torture, submitted 6 May 2005, *supra*, note 16. *Marine involved in Mosque shooting will not face court martial*. US Marine Corps press release, 4 May 2005. *Prosecution hits snags at hearing on Iraqi killings*. New York Times, 28 April 2005. *Interrogator says US approved handling of detainee who died*. Washington Post, 13 April 2005. *Iraqi general beaten 2 days before death*. The Denver Post, 5 April 2005. *Army Criminal Investigators outline 27 confirmed or suspected detainee homicides for Operation Iraqi Freedom, Operation Enduring Freedom*. United States Army Criminal Investigation Command. 25 March 2005. Unclassified executive summary of review of Department of Defense interrogation operations, conducted by the Naval Inspector General, Vice Admiral Albert T. Church, III, 10 March 2005. *Prisoner deaths in custody*, Associated Press, 16 March 2005. *CIA avoids scrutiny of detainee treatment*, Washington Post, 3 March 2005. Various autopsy reports. Amnesty International, *USA: Human dignity denied*, *supra*, note 17, Pages 146-152.

Nagem Sadun Hatab	6 June 2003	Nasiriya, Iraq	This 52-year-old died on 6 June 2003, three days after his arrest, as a result of "asphyxia due to strangulation". Additional findings at the autopsy included "blunt force injuries, predominantly recent contusions (bruises), on the torso and lower extremeties". It also found that he had suffered six fractured ribs and a broken hyoid bone. Army investigators found that he had been hit and kicked in the chest by soldiers on 4 June. On 5 June, he was reported to be lethargic, not eating and drinking very little, and possibly having difficulty breathing. He had diarrhoea and was covered in faeces. The jail commander ordered that he be stripped and taken outside the cellblock. According to the military investigation, he was left "naked outside in the sun and heat for the rest of the day and into the night." In September 2004, a Marine reservist was convicted of assault and dereliction of duty and sentenced to 60 days' hard labour and was reduced in rank. The camp commander was sentenced to be dismissed from the army, after being convicted of dereliction of duty and maltreatment. Charges against six other marines and the commander of the detention facility were dismissed by their commanding authorities.
Dilar Dababa	13 June 2003	Baghdad, Iraq	Detainee died of head injuries in a US interrogation facility. He died of "closed head injury with a cortical brain contusion and subdural hematoma." While in custody he "was subjected to both physical and psychological stress". He was handcuffed to a chair and the chair secured to a pipe in the room because he was allegedly combative and an escape risk.
Abdul Wali	21 June 2003	Asadabad, Afghanistan	Abdul Wali died in US military custody in Asadabad Fire Base. In June 2004, Justice Department charged a civilian contractor working with the CIA with assault, rather than murder. The indictment stated that the contractor beat Abdul Wali, "using his hands and feet, and a large flashlight". In court proceedings in 2005, the defendant claimed that the interrogation methods had been indirectly authorized by the US administration via its deliberations over torture and ill-treatment as subsequently revealed in various administration memorandums.
Obeed Hethere Radad	11 September 2003	Nasiriya, Iraq	Detainee died in the Forward Operating Base Packho facility. Soldier shot detainee who was standing close to the perimeter wire. He was charged with murder. However, the commander determined that the soldier had been ill-informed about rules of engagement when a detainee approached the perimeter wire, the charge was dropped and the soldier administratively discharged.
Manadel al-Jamadi	4 November 2003	Abu Ghraib, Iraq	Manadel al-Jamadi died in Abu Ghraib prison. The autopsy report concluded that his "external injuries are consistent with injuries sustained during apprehension. Ligature injuries are present on the wrists and ankles. Fractures of the ribs and a contusion of the left lung imply significant blunt force injuries of the thorax and likely resulted in impaired respiration. According to investigative agents, interviews taken from individuals present at the prison during the interrogation indicate that a hood made of synthetic material was placed over the head and neck of the detainee. This likely resulted in further compromise of effective respiration.... The cause of death is blunt force injuries of the torso complicated by compromised respiration. The manner of death is homicide." He was a "ghost detainee" brought into the prison by the CIA and left unregistered and untreated for injuries sustained on arrest. Seven Navy Seals confessed to assaulting the detainee. The army investigation was closed and referred to the Naval Criminal Investigation Service. Several Navy personnel have been charged.

Abdul Wahid	6 November 2003	Gereshk, Afghanistan	Died from "multiple blunt force injuries" in a cell in US Forward Operating Base, Gereshk, 48 hours after being handed over to US by Afghan militia. Army investigation concluded that no US personnel were implicated in his death, and that it had been caused by injuries sustained in Afghan militia custody.
'Abd Hamad Mawhoush	26 November 2003	Al Qaim, Baghdad, Iraq	56-year-old Major General 'Abd Hamad Mawhoush died in US custody, after two soldiers slid a sleeping bag over his body, except for his feet, and began questioning him as they rolled him repeatedly from his back to his stomach. Then one of the soldiers, an interrogator, sat on Mawhoush's chest and placed his hands over the prisoner's mouth. It was during this interrogation that the prisoner "became non-responsive". Four soldiers were charged with the death in October 2004. At a preliminary military hearing for three of them in December 2004, evidence emerged that the detainee had been beaten two days earlier by CIA and special forces soldiers, none of whom had been charged at the time of writing. The detainee was allegedly slapped, punched and beaten with a hose. He had several broken ribs and severe bruising. The decision as to whether to try the four charged soldiers by court-martial had not been taken at the time of writing.
Abu Malik Kenami	9 December 2003	Mosul, Iraq	Abdul Kareem Abdul Rutha, also known as Abu Malik Kenami was detained on 5 December 2003 and brought to the US detention facility at "AO [area of opeation] Glory" in Mosul. He was interrogated for the first and last time on that day. However, for the next four days, he was kept hooded with a plastic sandbag and his hands were handcuffed in front of him with plastic zip ties. The rule in the facility at that time was that the detainee must not attempt to lift the hood or talk. As punishment for disobeying these rules, Abu Malik Kenami was repeatedly subjected to "ups and downs", whereby the detainee is forced to stand up and sit down rapidly, in constant motion for up to 20 minutes at a time. On some occasions, he would have his hands handcuffed behind his back while forced to do this. On the morning of 9 December, he was found dead. His body was put in a refrigerated van for the next six days. No autopsy was conducted. An army investigator assigned to the case said that in the absence of an autopsy, "the cause of Abu Malik Kenami's death will never be known", and that he could only "speculate" on the cause of death. He concluded that the detainee had died of a heart attack, including because "he was performing ups and downs for ten to twenty minutes several times over a two to three hour period".
Zaidoun Hassoun	3 January 2004	Samarra, Iraq	19-year-old detainee drowned after US soldiers allegedly forced him off a bridge in Samarra. Army investigation recommended prosecution of four soldiers for manslaughter. In the event, one soldier was sentenced to 45 days' confinement for assault, obstruction of justice and dereliction of duty, and one to six months' confinement for assault and obstruction of justice. Two other soldiers received non-judicial punishments.
Abdul Jaleel	9 January 2004	Al Asad, Iraq	47-year-old detainee died at Forward Operating Base Rifles. Autopsy concluded that the cause of death was multiple blunt force injuries and asphyxia. It found "deep contusions of the chest wall, numerous displaced rib fractures, lung contusions" and internal bleeding. He also had "fractures of the thyroid cartilage and hyoid bone". In the initial part of his detention he had been put in isolation and shackled to a pipe that ran along the ceiling. During questioning he was allegedly beaten and kicked in the stomach and ribs. Later, because he was allegedly uncooperative and disruptive, his hands were shackled to the top of his cell door,

			and he was gagged. He died in this position. The autopsy concluded that "the severe blunt force injuries, the hanging position, and the obstruction of the oral cavity with a gag contributed to this individual's death. The manner of death is homicide". Army investigations recommended prosecution of two soldiers for negligent homicide and nine others for various offences including assault. However, the commanding officers determined that no charges would be referred, concluding that the detainee died as a result of a series of lawful applications of force in response to aggression and misconduct by the detainee.
Naser Ismail	January 2004	Balad, Iraq	A preliminary military hearing was held in January 2005 into the case of a Staff Sergeant with the 4th Infantry Division charged with murder and obstruction of justice in the case of an Iraqi detainee killed in an incident in January 2004. The hearing was to determine if there was enough evidence to take the case to court-martial. The result was not known at the time of writing.
Mohammed Munim al-Izmerly	31 January 2004	Baghdad, Iraq	On 25 April 2003, this prominent Iraqi scientist was taken, handcuffed and hooded, to an unknown location. He was held for the next nine months, possibly at the "high value detainees" section at Baghdad International Airport. On 17 February 2004, the family received the news from the ICRC that 65-year-old Mohammed al-Izmerly was dead. He had died over two weeks earlier on 31 January 2004. The family commissioned their own autopsy which concluded that he had died from blunt force injury to the back of the head.
Muhamad Husain Kadir	28 February 2004	Near Taal Al Jal, Iraq	Iraqi detainee shot by a soldier near Taal Al Jal, Kirkuk, when he allegedly lunged towards the arresting officer. This was found to be a lie. At a court-martial in August 2004, the soldier was found not guilty of murder but guilty of voluntary manslaughter. Sentenced to three years' confinement and given a dishonourable discharge.
Name unknown	April 2004	Mosul, Iraq	Autopsy indicated blunt force trauma and positional asphyxia. Cause of death undetermined. The army investigation has been closed, and the case referred to Navy whose personnel are implicated.
Hamaady Kareem and Tahah Ahmead Hanjil	15 April 2004	Mahmudiyah, Iraq	The two Iraqi men were allegedly shot in the back after being detained. It was alleged that a soldier shot them in anger after learning that military intelligence officers had decided not to detain them. A Second Lieutenant in the US Marines faced a preliminary military hearing in late April 2005 to determine whether he would face court-martial for the killings, which he maintained were committed in self-defence.
Karim Hassan Abed Ali al-Haleji	21 May 2004	An-Najaf, Iraq	Two wounded Iraqis were captured in An-Najaf. One, Karim Hassan, was shot and killed by a US army captain who was charged with assault with intent to commit murder. He claimed it was a "mercy killing". In March 2005, he was convicted by court-martial of assault with intent to commit voluntary manslaughter, which carried a possible 10-year prison sentence. On 1 April 2005, he was sentenced to dismissal from the army, but received no prison sentence.
Qasim Hassan	18 August 2004	Sadr City, Iraq	16-year-old killed in a purported "mercy killing". In December 2004, one soldier sentenced to three years' imprisonment, and another to one year.
Name	18 August	Abu Ghraib	US guards used lethal force to subdue an "unruly group of

unknown	2004	prison, Iraq	prisoners", according to the autopsy. The detainee was shot in the head.
Thaher Khaleefa Ahmed	25 October 2004	Balad, Iraq	During a house search, a man was shot by a US soldier. Army investigators established that the soldier lied, that the man was handcuffed when he allegedly lunged towards the soldier. The soldier has been charged with premeditated murder, maltreatment and assault. Trial by court-martial due in May 2005.
Name unknown	11 November 2004	Mosul, Iraq	A wounded Iraqi was captured. When the US soldiers came under attack, they decided to withdraw and leave the detainee behind. As the US unit was withdrawing, a sergeant allegedly shot the detainee twice. The sergeant was charged with attempted murder.
Name unknown	13 November 2004	Fallujah, Iraq	A Marine corporal was videotaped shooting an apparently injured and unarmed Iraqi man in a mosque in Fallujah. He subsequently admitted that he had shot three alleged members of the "Anti-Iraqi Forces" in the mosque, and ballistics evidence confirmed this. According to the military investigation, all three died of multiple gunshot wounds. The commanding officer decided that the corporal should not face a court-martial, finding that the killings were "consistent with the established rules of engagement, the law of armed conflict and the Marine's inherent right of self-defense".

Appendix 2: Some additional extracts of CSRT testimony

Detainee	Selected extracts of detainee testimony at Combatant Status Review Tribunals, as per records filed in US District Court
Mohammed Necle Algerian national Detained in Bosnia and Herzegovina On 19 October 2004, CSRT confirmed him as an "enemy combatant"	We were surprised that we were handed over to the American forces that are present in Bosnia. We were bound by our hands and our feet, and we were treated the worst treatment. For 36 hours without food, sleep, water or anything and we were treated the worst treatment. We came to this place so they could interrogate us. Now I have been here for three years... I thought the case was about an [alleged plan to bomb the] American embassy and until now no one has directed one question to me regarding this case. Believe me, I came to this place as a mistake and I think that I was wronged. It was unfair to me... I have a clear conscience that I am not part of these terrorist organizations. I am not afraid of anything because I am not a terrorist. If you interrogated me for 20 years you would find that I am Mohammed Nechle. I used to think that America had respect for human rights when it came to prison. In the beginning [in Guantánamo] they didn't [medically] treat me. I asked them to treat me and they left me for a long time without treatment. I had a haemorrhage, that's what I had and talked to them about that. I used to tell them there was blood; I was bleeding. I used to tell them about it time after time and [they] just left it. In the end the way that this happened, the way I was brought here and the accusations that brought against me, I feel that my future has been destroyed. A person does not even know what to say to their kids now. That's a really big thing.
Omar Rajab Amin Kuwaiti national Detained on Pakistan/Afghanistan border On 1 November 2004, CSRT confirmed him as an "enemy combatant"	I hope this Tribunal is a fair one. I've already been classified as an enemy combatant but from what I know of the American justice system is that a person is innocent until they are proven guilty. Right now, I'm guilty trying to prove my innocence. This is something I haven't heard of in a justice system. The fact that the Americans would not apply the Geneva Conventions to us; that they would capture us and bring us here, never did I expect this to happen.
Bisher al-Rawi Iraqi national, UK resident Detained in Gambia, transferred to Guantánamo via Afghanistan On 25 September 2004, confirmed as "enemy combatant" by CSRT	The way things happened in Gambia was similar to the way a criminal gang would operate (from what I have seen on television)... In Gambia, the Americans were running the show. As I have stated before, the US was there [Gambia] and in charge from day one. They were not very respectful to the Gambians... [Bisher al-Rawi's hearing in front of the CSRT took place over two separate sessions]. After my last Tribunal, I was taken to Camp Echo. In Camp Echo, I was isolated from all detainees. I am participating in this Tribunal in an effort to clear my name. My interrogations will reveal that my story hasn't changed. If I were lying, I wouldn't remember what I told you and my story would change. As you know, we were taken from Gambia to Kabul and then to Bagram Airbase. In Bagram, I provided information only after I was subjected to sleep deprivation, and various threats were made against me... I don't understand why I am shackled in here.

Yasin Qasem Muhammad Ismail Yemeni national On 28 September 2004, CSRT confirmed him as an "enemy combatant"	From there they [the Afghans] sold me to the Americans. I was afraid in the beginning, because whenever we spoke to the interrogators we were punished. We were hit and tortured. Not only did I get hit and punched, they broke my nose. The Americans did this to me. When I arrived in Cuba, I got hit in the place where we eat. I got hit on the shoulder and it was very painful, it was dislocated or something. They threatened to break it monthly, even when I got to Cuba they told me I would be here for a long time... Q. When you got here in Cuba from Afghanistan, you stated you were tortured here? A. Yes, I still use the medication for my shoulder. Q. You were hit on the shoulder one time? A. More than that. When they brought me here they tied my foot to my back and they threw me on my face. I feel there is something torn in my shoulder from the way I was lying on the floor. Q Did you receive medical treatment here? A. I got treatment for the first two weeks I was here. Q. But since that incident there has been no other torture? A. I haven't, but I have seen other people in the camp mistreated and tortured and that affects me psychologically. I was afraid for my life. When the interrogators asked me if I was al-Qa'ida, I would say yes to avoid torture... I have nothing [more] to say. I have no witnesses and this Tribunal is not a legal proceeding, it is a military proceeding. It doesn't matter what I say, it's military and there are no judges.
Jamal Mar'i Yemeni national On 30 September 2004, CSRT confirmed him as an "enemy combatant"	[T]hey apprehended me on September 23rd 2001. They didn't capture me, but some people simply kidnapped me while I was asleep. I was captured with a Pakistani cook. There was nobody else with us. An American interrogator interrogated me, then we were given to Pakistan… They did not release me. They turned me over to the United States. They took me from Pakistan to Jordan… The United States is the one who took me to Jordan… I am not an enemy combatant, I am a sleeping combatant because I was sleeping in my home…How can you call a person an enemy combatant when you're sleeping in your own home and somebody comes to your home and takes you somewhere and you don't know where that is?
Fahmi Abdullah Ahmed Yemeni national On 1 October 2004, CSRT confirmed him as an "enemy combatant"	When the Pakistani authorities captured us, there were two civilian Americans with them…When the Pakistani authorities captured us, they delivered us to Lahore [Pakistan]. In Lahore, some civilian Americans interrogated us. I had only one interrogation with them and it was the same with the other detainees. After that we were delivered to Islamabad… We stayed there for two months… After the two months, we were delivered to the Islamabad airport. The airplane took us to Bagram. The American government received us from the Islamabad airport. It was an American military airplane and the soldiers were Americans. We arrived at the military base in Bagram and stayed there for two or three months. I was interrogated about four or six times. Then they took us to Kandahar and it was the same thing; American airplanes with American soldiers. Again, we were received by Americans. We stayed in a small camp with wires, at the Kandahar airport. After two or three weeks, we walked from the camp to a plane and they took us to Cuba. Just know that I have been here for three years and have [not] been in touch with my family. I don't think this is just and it's not right for the American legal system to not allow people to talk to their families. It is a very small right that is allowed to all detainees around the world. I have a mother, brothers and sisters and I am the man of the house because my father is now out of our house.

Jamil El Banna Jordanian national, long-term UK resident On 9 October 2004, CSRT confirmed him as an "enemy combatant"	Q. You said you were kidnapped in Gambia. Who kidnapped you? A. The Americans. Q. Were they American soldiers or American civilians? A. Civilians from the embassy. That is what I was told… When they came and arrested and handcuffed me, they were wearing all black. They even covered their heads black… They took me, covered me, put me in a vehicle and sent me somewhere. I don't know where. It was at night. Then from there to the airport right away… We were in a room like this with about eight men. All with covered up faces… They cut off my clothes. They were pulling on my hands and my legs…They put me in an airplane and they made me wear the handcuffs that go around your body so I would not do anything on the airplane… This is all kidnapping. Yes. They took me underground in the dark. I did not see light for two weeks… Bagram, Afghanistan. Right there in the dark. They put me in the dark. I was surprised. I did not know what I did wrong or what I did. They starved me; they handcuffed me, there was no food… I was under their control. They are the ones who took me and put me there. They know what they have done. I was surprised that the Americans would do such a thing. It shocked me.
Abd Al Aziz Sayer Uwain Al Shammeri Kuwaiti national On 29 September 2004, CSRT confirmed him as an "enemy combatant"	Also, if I had wanted to fight against the Americans, the matter did not require me travelling to Afghanistan. The Americans are present in Kuwait. So, if I wanted to fight with them, I would have fought them in Kuwait. You saw how people are bombing Americans in Saudi Arabia. If I had any hatred on my part, I would have done that to the Americans in Kuwait. There was no need for me to travel. If you're saying that the American is my enemy, these Americans are there in front of me. The mind does not say to leave my enemy when he is in front of me and go to another country to fight him. When that did not happen, it is proof that there is no hatred on my part towards the Americans… I hope that you really are fair in this Tribunal and that you do not punish me for things that other people have done. If I made a mistake, and you want to punish me for that, I don't have a problem with that because it was something that I did. Don't place other people's mistakes on me.
Abd al Malik Abd Al Wahab Yemeni national On 6 October 2004, CSRT confirmed him as an "enemy combatant"	We were tortured in Kandahar by beatings. Since we arrived in Cuba we have been mentally persuaded. We have been here for three years. We have nothing here, no rights, no trials, nothing. I have never taken part in any act of hostility against America. I am not an enemy combatant, are you trying to force me to be an enemy combatant? That's all I can say and I swear it is the truth. I just hope this hearing is useful. It is a step forward to solve the situation on this island. If you have any evidence against me that shows I am an enemy of the United States or that I fought against the United States, I am willing to face that trial.
Mohammed Mohammed Hassen Yemeni national On 12 October 2004, CSRT confirmed him as an "enemy combatant"	Q. Have you ever been to Afghanistan? A. I had never gone there until I was taken to the prison by the Americans… Q. Were you ever a member of Al Qaida? A. No. Never. I only heard of Al Qaida here in Guantanamo.
Boudella Al Haji Algerian national Seized in Bosnia and Herzegovina	I've never heard of [al-Qa'ida] until the 9/11 incident. I heard about it through the media. How can you associate me with an organization I've never heard of? As I said before, I'm against terrorist attacks… I'm asking you. You are just people, if I did a crime in the United States, would you take me to the courts in the United States? Of course. You are not going to deliver me to another country. If you find me innocent you'd let me go free, if not, you'd take me to jail. If I was innocent, it is impossible that you would give me to

On 18 October 2004, CSRT confirmed him as an "enemy combatant"	another nation. Even though we were innocent, we were delivered to another nation and we don't even know why… The only thing I know is we were taken by the Bosnians, delivered to the Americans and the next thing we knew, we were here. We spent four days with our eyes closed, with bandages on our eyes, tape on our mouths, with shackled hands and feet. Tuesday through Sunday…
Mustafa Ait Idir Algerian national Seized in Bosnia and Herzegovina On 20 October 2004, CSRT confirmed him as an "enemy combatant"	Now I would like to talk about the three days when we were being moved. During those three days we were being transferred here, animals would never have been treated the way we were. In Bosnia, the temperature was -20 degrees and there was ice and snow. It was very cold. They took off all my clothes and they gave me very thin clothes - like that tablecloth [detainee points to the white sheet covering the Tribunal table]. They placed me in a room that was very cold. As they moved me from country to country, my ears, mouth and eyes were covered. I could not even talk or breath. A mask with a metal piece was place over my mouth and nose. Why am I saying this? …I was given a letter from the American Ambassador in Bosnia that lied and said I was moved in a humane manner, when I got to Cuba, the first four or five months I could not feel my left leg. From my thigh to my back, I could not feel anything at all… Regarding my treatment here in prison, I am a person that lived very good life. I never had any problems with people whatsoever. Within my family itself, I had no problems. I never had any problems with my neighbours. The team I trained with consisted of Muslims, Catholics and Orthodox; many different people. My neighbours, were the same way. I made very good wages from my jobs. I never had any problems with money, people, anything. My life has changed completely. It has turned 360 degrees to this, where I am now. There are times when a soldier, who maybe never even went to school and barely knew how to hold a weapon, comes to you and swears at you; he says things to you that you have never ever heard of in your life. As an example, a soldier broke my finger. Can you see? I cannot bring this finger close to my other fingers. I cannot close this gap. On the middle finger, my knuckle has been broken. You probably cannot see that. But my finger, you can see that clearly. Q: Let me ask you a question? Are you saying a soldier in Guantanamo Bay, Cuba, broke your fingers? A: Yes. Soldiers took me and placed me on the ground in the rocks outside. My hands and my feet were bound. The soldiers put my face on the ground. You can see maybe my eye - a small little hole near my eyes. One soldier put my head on the ground, and then another soldier came and put his knee on my face. The soldier hit me on the other side of my face that was not touching the ground. If my head was turned a little bit more, the rocks would have gone into my eye. Next to my eye there is a little hole. There are a lot of things regarding the soldiers, but I won't talk about all of them. I just want to say a small thing. I hope that this is real. I am not berating you with these words, but this is something I don't want to keep inside. I hope this Tribunal is really real. I hope that a person who has made a mistake would admit to making a mistake. No matter who this person is. Even if he is the closest person to you. What I mean by this is, if America made a mistake by bringing me here to Cuba, not just because it is hard for them to admit a mistake was made, but to prevent me from leaving here, then bring all these accusations against me. I will tell you something else, if you have evidence, big or small, that I have any relationship with terrorism or if I helped any terrorists, I am prepared for any kind of punishment in any country. I am saying this to you now, and if you wish for me to, I will sign a piece of paper saying these same words.
Saifullah Paracha Pakistan national seized in Thailand	Tribunal President: Let me clarify that; you do understand this is an administration hearing, and this is not a legal proceeding. I do know you had some questions about the legality of your detention. That would be referred to other organizations of the government, but you will be receiving more specific instructions shortly of how to bring your question to US courts.

On 8 December 2004, CSRT confirmed him as an "enemy combatant"	Detainee: Your honor, I have been here over 17 months; would that be before I expire? Tribunal President: I would certainly hope so.... [T]his is a US government executive decision in regards to the detention of enemy combatants... Detainee: Your honor, my question is that is your Executive Order applicable around the earth? Tribunal President: It is a global war on terrorism. Detainee: I know sir, but you are not the master of the earth, sir.
Saber Lahmar Algerian national Seized in Bosnia and Herzegovina On 8 October 2004, CSRT confirmed him as an "enemy combatant"	I hope this hearing looks at the truth and represents true justice. This country has been a symbol of justice for more than two hundred years. I hope these hearings are not just one movie from many movies that have passed by us. I also hope I will be judged by the law and not by politics... I would like to point out something important. My detention from Sarajevo to Cuba was not legal. There is no current law in the world that allows for my detention from my country to another country. If I am accused of something in a country I was in, I should have been detained in that country. That country is recognized worldwide and therefore it has laws and courts. The court from the country should have tried me. Let's assume I was guilty of something and received punishment for it. The punishment should have been in that country. I have nothing to do with Cuba. The intimidation from the Americans is what caused my illegal detention from one country to another country. The Combatant Status Review Tribunal states I am an enemy combatant. Those words in my view are ridiculous and have no meaning. A sane person or a small child would never say anything like. The words 'enemy combatant' means a prisoner that has been arrested on the frontlines of the battlefield holding a weapon. In my case, I was kidnapped from my home by Americans. Therefore, the words enemy combatant doesn't apply to me.
Adil Kamil Abdullah Al Wadi Bahraini national On 26 September 2004, CSRT confirmed him as an "enemy combatant"	Q: Adil, do you have any other evidence to present to this Tribunal? A: I don't have any other proof or evidence. All what I have is my biography. Everybody knows me in Bahrain. I am a very correct person. I have never had any problems with the government or anything. Q: Anything else? A: I have no proof. I have been here for two years. I don't have anything.
Fouzi Khalid Abdullah Al Awda Kuwaiti national On 11 September 2004, CSRT confirmed him as an "enemy combatant"	I do not know what is the nature of the classified evidence [against me]... After a Government is liberated by another Government – my country was liberated by the United States, so it is impossible after that happening, and after my being surrounded by and living with Americans in my country, and visiting the United States, after all that, it is impossible for me to be an enemy combatant against the United States. In my whole life, I have never been an enemy against anyone. I wish for that to be taken into consideration. Maybe the United States Government knows my father's military history during the time of the occupation of Kuwait. My father was in the military and helped the United States during that time of the occupation. That is all I have.

Appendix 3: Alleged detention and interrogation practices

The following are some of the detention or interrogation practices that are alleged to have been authorized or used by the USA during the "war on terror". Some appear to have been tailored to specific cultural or religious sensitivities of the detainees, thereby introducing a discriminatory element to the abuse. Techniques are often used in combination. Neither gender nor age has offered protection. Children, the elderly, women and men are reported to have been among the subjects of torture or ill-treatment. This list does not claim to be exhaustive.

- Abduction
- Barbed wire, forced to walk barefoot on
- Blindfolding
- "Burking" – hand over detainee's mouth/nose to prevent breathing
- Cell extraction, brutal/punitive use of
- Chemical/pepper spray, misuse of
- Cigarette burns
- Claustrophia-inducing techniques, e.g. tied headfirst in sleeping bag, shut in lockers
- Death threats
- Dietary manipulation
- Dogs used to threaten and intimidate
- Dousing in cold water
- Electric shocks, threats of electric shocks
- Exposure to weather and temperature extremes, especially via air-conditioning
- Flags, wrapped in Israeli or US flags during or prior to interrogation
- Food and water deprivation
- Forced shaving, ie of head, body or facial hair
- Forcible injections, including with unidentified substances
- Ground, forced to lie on bare ground while agents stand on back or back of legs
- Hooding
- Hostage-taking, i.e. individuals detained to force surrender of relatives
- Humiliation, eg forced crawling, forced to make animal noises, being urinated upon.
- Immersion in water to induce perception of drowning
- Incommunicado detention
- Induced perception of suffocation or asyphxiation
- Light deprivation
- Loud music, noise, yelling

- Mock execution
- Photography and videoing as humiliation
- Physical assault, eg punching, kicking, beatings with hands, hose, batons, guns, etc
- Physical exercise to the point of exhaustion, e.g. "ups and downs", carrying rocks
- Piling, i.e. detainee is sat on or jumped on by one or more people ("dog/pig pile")
- Prolonged interrogations, eg 20 hours
- Racial and religious taunts, humiliation
- Relatives, denial of access to, excessive censorship of communications with
- Religious intolerance, eg disrespect for Koran, religious rituals
- Secret detention
- Secret transfer
- Sensory deprivation
- Sexual humiliation
- Sexual assault
- Shackles and handcuffs, excessive and cruel use of. Includes "short shackling"
- Sleep adjustment
- Sleep deprivation
- Solitary confinement for prolonged periods, eg months or more than a year
- Stress positions, eg prolonged forced kneeling and standing
- Stripping, nudity, excessive or humiliating use of
- Strip searches, excessive or humiliating use of
- Strobe lighting
- Suspension, with use of handcuffs/shackles
- Threat of rape
- Threats of reprisals against relatives
- Threat of transfer to third country to inspire fear of torture or death
- Threat of transfer to Guantánamo
- Threats of torture or ill-treatment
- Twenty-four hour bright lighting
- Withdrawal of "comfort items", including religious items
- Withholding of information, e.g. not telling detainee where he is
- Withholding of medication
- Withholding of toilet facilities, leading to defecation and urination in clothing

Appendix 4: Recommendations: Preventing torture & ill-treatment

Amnesty International's recommendations to the US authorities based on the organization's 12-Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State

1. Condemn torture and other ill-treatment

The highest authorities of every country should demonstrate their total opposition to torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment). They should condemn these practices unreservedly whenever it occurs. They should make clear to all members of the police, military and other security forces that torture and other ill-treatment will never be tolerated.

The US authorities should:

- Provide a genuine, unequivocal and continuing public commitment to oppose torture *and* other cruel, inhuman or degrading treatment under any circumstances, regardless of where it takes place, and take every possible measure to ensure that all agencies of government and US allies fully comply with this prohibition;
- Review all government policies and procedures relating to detention and interrogation to ensure that they adhere strictly to international human rights and humanitarian law and standards, and publicly disown those which do not;
- Make clear to all members of the military and all other government agencies, as well as US allies, that torture or other ill-treatment will not be tolerated under any circumstances;
- Commit to a program of public education on the international prohibition of torture and ill-treatment, including challenging any public discourse that seeks to promote tolerance of torture or cruel, inhuman or degrading treatment.

2. Ensure access to prisoners

Torture and other ill-treatment often take place while prisoners are held incommunicado — unable to contact people outside who could help them or find out what is happening to them. The practice of incommunicado detention should be ended. Governments should ensure that all prisoners are brought before an independent judicial authority without delay after being taken into custody. Prisoners should have access to relatives, lawyers and doctors without delay and regularly thereafter.

The US authorities should:

- End the practice of incommunicado detention;
- Grant the International Committee of the Red Cross full access to all detainees according to the organization's mandate;
- Grant all detainees access to legal counsel, relatives, independent doctors, and to consular representatives, without delay and regularly thereafter;
- In battlefield situations, ensure where possible that interrogations are observed by at least one military lawyer with full knowledge of international law and standards as they pertain to the treatment of detainees;
- Grant all detainees access to the courts to be able to challenge the lawfulness of their detention. Presume detainees captured on the battlefield during international conflicts to be prisoners of war unless and until a competent tribunal determines otherwise;

- Reject any measures that narrow or curtail the effect or scope of the *Rasul v. Bush* ruling on the right to judicial review of detainees held in Guantánamo or elsewhere, and facilitate detainees' access to legal counsel for the purpose of judicial review.

3. No secret detention

In some countries torture and other ill-treatment take place in secret locations, often after the victims are made to "disappear". Governments should ensure that prisoners are held only in officially recognized places of detention and that accurate information about their arrest and whereabouts is made available immediately to relatives, lawyers the courts, and others with a legitimate interest, such as the International Committee of the Red Cross (ICRC). Effective judicial remedies should be available at all times to enable relatives and lawyers to find out immediately where a prisoner is held and under what authority and to ensure the prisoner's safety.

The US authorities should:

- Clarify the fate and whereabouts of those detainees reported to be or to have been in US custody or under US interrogation in the custody of other countries, to whom no outside body including the International Committee of the Red Cross are known to have access, and provide assurances of their well-being. These detainees include but are not limited to those named in the 9/11 Commission Report and in this Amnesty International report as having been in custody at some time in undisclosed locations;
- End immediately the practice of secret detention wherever it is occurring, and under whichever agency. Hold detainees only in officially recognized places of detention;
- Not collude with other governments in the practice of "disappearances" or secret detentions, and expose such abuses where the USA becomes aware of them;
- Maintain an accurate and detailed register of all detainees at every detention facility operated by the US, in accordance with international law and standards. This register should be updated on a daily basis, and made available for inspection by, at a minimum, the ICRC, and the detainees' relatives and lawyers or other persons of confidence;
- Make public and regularly update the precise numbers of detainees in US custody specifying the agency under which each person is held, their identity, their nationality and arrest date, and place of detention;
- Either charge and bring to trial, in full accordance with international law and standards and without recourse to the death penalty, all detainees held in US custody in undisclosed locations, or else release them;
- Comply without delay with Freedom of Information Act requests, and related court orders, aimed at clarifying the fate and whereabouts of such detainees;
- Make public and revoke any measures or directives that have been authorized by the President or any other official that could be interpreted as authorizing "disappearances", torture or cruel, inhuman or degrading treatment, or extrajudicial executions.

4. Provide safeguards during detention and interrogation

All prisoners should be immediately informed of their rights. These include the right to lodge complaints about their treatment and to have a judge rule without delay on the lawfulness of their detention. Judges should investigate any evidence of torture and other ill-treatment and order release if the detention is unlawful. A lawyer should be present during interrogations.

Governments should ensure that conditions of detention conform to international standards for the treatment of prisoners and take into account the needs of members of particularly vulnerable groups. The authorities responsible for detention should be separate from those in charge of interrogation. There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention.

The US authorities should:

- Immediately inform anyone taken into US custody of his or her rights, including the right not to be subjected to any form of torture or other ill-treatmentt; their right to challenge the lawfulness of their detention in a court of law; their right to access to relatives and legal counsel, and their consular rights if a foreign national;
- Ensure at all times a clear delineation between powers of detention and interrogation;
- Keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of anyone in US custody, with a view to preventing any cases of torture or other ill-treatment;
- Ensure that conditions of detention strictly comply with international law and standards;
- Prohibit the use of isolation, hooding, stripping, dogs, stress positions, sensory deprivation, feigned suffocation, death threats, use of cold water or weather, sleep deprivation and any other forms of torture or ill-treatment as interrogation techniques;
- Bring to trial in accordance with international fair trial standards all detainees held in Guantánamo, or release them;
- Ensure compliance with all aspects of international law and standards relating to child detainees;
- Ensure compliance with all international law and standards relating to women detainees;
- Invite all relevant human rights monitoring mechanisms, especially the UN Special Rapporteur on Torture, the Working Group on Enforced or Involuntary Disappearances (1980) and the Working Group on Arbitrary detention to visit all places of detention, and grant them unlimited access to these places and to detainees;
- Grant access to national and international human rights organizations, including Amnesty International, to all places of detention and all detainees, regardless of where they are held.

5. Prohibit torture and other ill-treatment in law

Governments should adopt laws for the prohibition and prevention of torture and other ill-treatment incorporating the main elements of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and other relevant international standards. All judicial and administrative corporal punishments should be abolished. The prohibition of torture and other ill-treatment and the essential safeguards for its prevention must not be suspended under any circumstances, including states of war or other public emergency.

The US authorities should:

- Enact a federal crime of torture, as called for by the Committee against Torture, that also defines the infliction of cruel, inhuman or degrading treatment as a crime, wherever it occurs;

- Amend the Uniform Code of Military Justice to criminalize expressly the crime of torture, as well as a crime of infliction of cruel, inhuman or degrading treatment or punishment, wherever it occurs, in line with the Convention against Torture and other international standards;
- Ensure that all legislation criminalizing torture defines torture at least as broadly as the UN Convention against Torture;
- Ensure that legislation criminalizing torture and the infliction of cruel, inhuman or degrading treatment covers all persons, regardless of official status or nationality, wherever this conduct occurred, and that it does not allow any exceptional circumstances whatsoever to be invoked as justification for such conduct, or allow the authorization of torture or ill-treatment by any superior officer or public official, including the President.

6. Investigate

All complaints and reports of torture or other ill-treatment should be promptly, impartially and effectively investigated by a body independent of the alleged perpetrators. The methods and findings of such investigations should be made public. Officials suspected of committing torture or other ill-treatment should be suspended from active duty during the investigation. Complainants, witnesses and others at risk should be protected from intimidation and reprisals.

US Congress should:

- Establish an independent, impartial and non-partisan commission of inquiry into all aspects of the USA's "war on terror" detention and interrogation policies and practices. Such a commission should consist of credible independent experts, have international expert input, and have subpoena powers and access to all levels of government, all agencies, and all documents whether classified or unclassified.

The US Attorney General should:

- Appoint an independent Special Counsel to carry out a criminal investigation into the conduct of any administration officials against whom there is evidence of involvement in crimes in the "war on terror".

The US authorities should:

- Ensure that all allegations of torture and other ill-treatment involving US personnel, whether members of the armed forces, other government agencies, medical personnel, private contractors or interpreters, are subject to prompt, thorough, independent and impartial civilian investigation in strict conformity with international law and standards concerning investigations of human rights violations;
- Ensure that such investigations include cases in which the USA previously had custody of the detainee, but transferred him or her to the custody of another country, or to other forces within the same country, subsequent to which allegations of torture or ill-treatment were made;
- Ensure that the investigative approach at a minimum complies with the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Ensure that the investigation of deaths in custody at a minimum comply with the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, including the provision for adequate autopsies in all such cases;

- In view of evidence that certain persons held in US custody have been subjected to "disappearance", the US authorities should initiate prompt, thorough and impartial investigations into the allegations by a competent and independent state authority, as provided under Article 13 of the UN Declaration on the Protection of All Persons from Enforced Disappearance.

7. Prosecute

Those responsible for torture or other ill-treatment must be brought to justice. This principle should apply wherever alleged torturers happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. Governments should exercise universal jurisdiction over those suspected of these crimes, extradite them, or surrender them to an international criminal court, and cooperate in such criminal proceedings. Trials should be fair. An order from a superior officer should never be accepted as a justification for torture or ill-treatment.

The US authorities should:

- Publicly reject all arguments, including those contained in classified or unclassified government documents, promoting impunity for anyone suspected of torture and cruel, inhuman or degrading treatment, including the ordering of such acts;
- Bring to trial all individuals – whether they be members of the administration, the armed forces, intelligence services and other government agencies, medical personnel, private contractors or interpreters – against whom there is evidence of having authorized, condoned or committed torture or other ill-treatment;
- Any person alleged to have perpetrated an act of "disappearance" should, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities for prosecution and trial, in accordance with Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance;
- Ensure that all trials for alleged perpetrators comply with international fair trial standards, and do not result in imposition of the death penalty.

8. No use of statements extracted under torture or other ill-treatment

Governments should ensure that statements and other evidence obtained through torture or other ill-treatment may not be invoked in any proceedings, except against a person accused of torture or other ill-treatment.

The US authorities should:

- Ensure that no statement coerced as a result of torture or other ill-treatment, including long-term indefinite detention without charge or trial, or any other information or evidence obtained directly or indirectly as the result of torture or ill-treatment, regardless of who was responsible for such acts, is admitted as evidence against any defendant, except the perpetrator of the human rights violation in question;
- Revoke the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, and abandon trials by military commission;
- Expose and reject any use of coerced evidence obtained by other governments from people held in their own or US custody;
- Refrain from transferring any coerced evidence for the use of other governments.

9. Provide effective training

It should be made clear during the training of all officials involved in the custody, interrogation or medical care of prisoners that torture and other ill-treatment are criminal acts. Officials should be instructed that they have the right and duty to refuse to obey any order to torture or to carry out other ill-treatment.

The US authorities should:

- Ensure that all personnel involved in detention and interrogation, including all members of the armed forces or other government agencies, private contractors, medical personnel and interpreters, receive full training, with input from international experts, on the international prohibition of torture and other ill-treatment, and their obligation to expose it;
- Ensure that all members of the armed forces and members of other government agencies, including the CIA, private contractors, medical personnel and interpreters, receive full training in the scope and meaning of the Geneva Conventions and their Additional Protocols, as well as international human rights law and standards, with input from international experts;
- Ensure that full training be similarly provided on international human rights law and standards regarding the treatment of persons deprived of their liberty, including the prohibition on "disappearances", with input from international experts;
- Ensure that all military and other agency personnel, as well as medical personnel and private contractors, receive cultural awareness training appropriate to whatever theatre of operation they may be deployed into.

10. Provide reparation

Victims of torture or other ill-treatment and their dependants should be entitled to obtain prompt reparation from the state including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation.

The US authorities should:

- Ensure that anyone who has suffered torture or ill-treatment while in US custody has access to, and the means to obtain, full reparation including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, wherever they may reside;
- Ensure that all those who have been subject to unlawful arrest by the USA receive full compensation.

11. Ratify international treaties

All governments should ratify without reservations international treaties containing safeguards against torture and other ill-treatment, including the International Covenant on Civil and Political Rights and its first Optional Protocol; and the UN Convention against Torture, with declarations providing for individual and inter-state complaints. Governments should comply with the recommendations of international bodies and experts on the prevention of torture and other ill-treatment.

The US authorities should:

- Make a public commitment to fully adhere to international human rights and humanitarian law and standards – treaties, other instruments, and customary law – and respect the decisions and recommendations of international and regional human rights bodies;

- Make a public commitment to fully adhere to the Geneva Conventions, and to respecting the advice and recommendations of the International Committee of the Red Cross;
- Ratify Additional Protocols I and II to the Geneva Conventions;
- Withdraw all conditions attached to the USA's ratification of the UN Convention against Torture;
- Withdraw all limiting conditions attached to the USA's ratification of the International Covenant on Civil and Political Rights;
- Provide the USA's overdue reports to the Human Rights Committee;[541]
- Ratify the Optional Protocol to the UN Convention against Torture;
- Ratify the UN Convention on the Rights of the Child;
- Ratify the American Convention on Human Rights;
- Ratify the Inter-American Convention on Forced Disappearance of Persons without any reservations and implement it by making enforced disappearances a crime under US law over which US courts have jurisdiction wherever committed by anyone.
- Ratify the Rome Statute of the International Criminal Court.

12. Exercise international responsibility

Governments should use all available channels to intercede with the governments of countries where torture or other ill-treatment are reported. They should ensure that transfers of training and equipment for military, security or police use do not facilitate torture or other ill-treatment. Governments must not forcibly return a person to a country where he or she would be at risk of torture or other ill-treatment.

The US authorities should:

- Withdraw the USA's understanding to Article 3 of the UN Convention against Torture, and publicly state the USA's commitment to the principle of *non-refoulement,* and ensure that no legislation undermines this protection in any way;
- Cease the practice of "renditions" that bypass human rights protections; ensure that all transfers of detainees between the USA and other countries fully comply with international human rights law;
- Not rely on diplomatic assurances as evidence that no risk of torture or ill-treatment exists in the receiving state.

[541] The Human Rights Committee has requested a special report from the US government on its detention practices. The Committee expectd to have the report ahead of its July 2005 session. *Press Briefing by Human Rights Committee Chair*, 1 April 2005.

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INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

ARTICLE, JAMES STURCKE, "GENERAL APPROVED EXTREME INTERROGATION METHODS," GUARDIAN, MARCH 30, 2005

12.30pm

General approved extreme interrogation methods

James Sturcke
Wednesday March 30, 2005

Guardian Unlimited

The highest-ranking US general in Iraq authorised the use of interrogation techniques that included sleep manipulation, stress positions and the use of dogs to "exploit Arab fears" of them, it emerged today.

A memo signed by Lieutenant General Ricardo Sanchez authorised 29 interrogation techniques, including 12 that exceeded limits in the army's own field manual and four that it admitted risked falling foul of international law, the Geneva conventions or accepted standards on the humane treatment of prisoners.

The memo, dated September 14 2003, also stated that the Iraq interrogation policy was modelled on the one used at Guantánamo Bay "but modified for applicability to a theater [sic] of war in which the Geneva conventions apply".

On Friday, a US court ordered the papers' release under the American Freedom of Information Act, following a request by the American Civil Liberties Union.

"The memo clearly establishes that Gen Sanchez authorised unlawful interrogation techniques for use in Iraq, and, in particular, these techniques violate the Geneva conventions and the army's own field manual governing interrogations," ACLU lawyer Amrit Singh said in a statement. "He and other high-ranking officials who bear responsibility for the widespread abuse of detainees must be held accountable."

The memo also authorised techniques to alter the environment of prisoners, such as adjusting temperatures or introducing unpleasant smells, in the full knowledge that "some nations may view application of this technique in certain circumstances to be inhumane". Another technique, called "fear-up harsh", aimed at "significantly increasing the fear level of a detainee", was also given the green light. Yelling, loud music and light control were also cleared "to create fear, disorientate [the] detainee and prolong capture shock".

The existence of the memo had been widely rumoured in the wake of the Abu Ghraib prison scandal over the abuse of detainees by US guards. The US administration has maintained any abuse was the result of improper individual action and was not sanctioned by leaders.

The memo also laid out guidance for when the controversial interrogation techniques could be used. It stated there should be "a reasonable basis to believe that the detainee possesses critical intelligence". Dogs should be muzzled and under the control of a military dog handler "to prevent contact with [the] detainee".

Gen Sanchez ordered that his personal approval should be gained before the most controversial techniques were used. He has denied that he gave that permission. The ACLU has a lawsuit pending against Gen Sanchez alleging direct responsibility for the torture and abuse of detainees in US military custody.

The Abu Ghraib scandal, in which US forces physically abused and sexually humiliated Iraqi prisoners at a jail on the outskirts of Baghdad, occurred on during Gen Sanchez's command. Gen George Casey replaced him as top commander in Iraq nine months ago.

The ACLU said the Pentagon initially refused to release the memo on national security grounds.

Click here to read the memo.

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ARTICLE, BOB HERBERT, "AMERICA A SYMBOL OF . . . ," NEW YORK TIMES, MAY 30, 2005, AVAILABLE ON WESTLAW AT 2005 WLNR 8545594

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May 30, 2005

Section: A

America, A Symbol Of...

Bob Herbert

This Memorial Day is not a good one for the country that was once the world's most brilliant beacon of freedom and justice.

State Department officials know better than anyone that the image of the United States has deteriorated around the world. The U.S. is now widely viewed as a brutal, bullying nation that countenances torture and operates hideous prison camps at Guantanamo Bay, Cuba, and in other parts of the world -- camps where inmates have been horribly abused, gruesomely humiliated and even killed.

The huge and bitter protests of Muslims against the United States last week were touched off by reports that the Koran had been handled disrespectfully by interrogators at Guantanamo. But the anger and rage among Muslims and others had been building for a long time, fueled by indisputable evidence of the atrocious treatment of detainees, terror suspects, wounded prisoners and completely innocent civilians in America's so-called war against terror.

Amnesty International noted last week in its annual report on human rights around the world that more than 500 detainees continue to be held "without charge or trial" at Guantanamo. Locking people up without explaining why, and without giving them a chance to prove their innocence, seems a peculiar way to advance the cause of freedom in the world.

It's now known that many of the individuals swept up and confined at Guantanamo and elsewhere were innocent. The administration says it has evidence it could use to prove the guilt of detainees currently at Guantanamo, but much of the evidence is secret and therefore cannot be revealed.

This is where the war on terror meets Never-Never Land.

President Bush's close confidante, Karen Hughes, has been chosen to lead a high-profile State Department effort to repair America's image. The Bush crowd apparently thinks this is a perception problem, as opposed to a potentially catastrophic crisis that will not be eased without substantive policy changes.

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This is much more than an image problem. The very idea of what it means to be American is at stake. The United States is a country that as a matter of policy (and in the name of freedom) "renders" people to regimes that specialize in the art of torture.

"How," asked Senator Patrick Leahy of Vermont, "can our State Department denounce countries for engaging in torture while the C.I.A. secretly transfers detainees to the very same countries for interrogation?"

Ms. Hughes said in March that she would do her best "to stand for what President Bush called the nonnegotiable demands of human dignity." Someone should tell her that there's not a lot of human dignity in the venues where torture is inflicted.

The U.S. would regain some of its own lost dignity if a truly independent commission were established to thoroughly investigate the interrogation and detention operations associated with the war on terror and the war in Iraq. A real investigation would be traumatic because it would expose behavior most Americans would never want associated with their country. But in the long run it would be extremely beneficial.

William Schulz, executive director of Amnesty International USA, said in an interview last week that it's important to keep in mind how policies formulated at the highest levels of government led inexorably to the abusive treatment of prisoners.

"The critical point is the deliberateness of this policy," he said. "The president gave the green light. The secretary of defense issued the rules. The Justice Department provided the rationale. And the C.I.A. tried to cover it up."

In the immediate aftermath of the Sept. 11 attacks, most of the world was ready to stand with the U.S. in a legitimate fight against terrorists. But the Bush administration, in its lust for war with Iraq and its willingness to jettison every semblance of due process while employing scandalously inhumane practices against detainees, blew that opportunity.

In much of the world, the image of the U.S. under Mr. Bush has morphed from an idealized champion of liberty to a heavily armed thug in camouflage fatigues. America is increasingly being seen as a dangerously arrogant military power that is due for a comeuppance. It will take a lot more than Karen Hughes to turn that around.

---- INDEX REFERENCES ----

REGION: (Cuba (1CU43); Middle East (1MI23); USA (1US73); Americas (1AM92); North America (1NO39); Iraq (1IR87); Arab States (1AR46); Caribbean (1CA06); Latin America (1LA15))

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ARTICLE, NEIL A. LEWIS & CHRISTOPHER MARQUIS, "A NATION CHALLENGED: IMMIGRATION, LONGER VISA WAITS FOR ARABS," NEW YORK TIMES, NOVEMBER 10, 2001, AVAILABLE ON WESTLAW AT 2001 WLNR 3372678

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November 10, 2001

Section: A

A NATION CHALLENGED: IMMIGRATION; Longer Visa Waits for Arabs; Stir Over U.S. Eavesdropping

NEIL A. LEWIS and CHRISTOPHER MARQUIS

State Department says it will slow process for granting visas to young men from Arab and Muslim nations in bid to prevent terrorist attacks; officials cite changes and controversial new Justice Department plan to allow authorities to monitor all communications between some people in federal custody and their lawyers as part of basic shift in antiterror policy to stress prevention; government weighs further preventive moves; legal profession representatives, civil liberties groups and Sen Patrick J Leahy score eavesdropping plan; chronology of moves over centuries curbing civil liberties; photos (M)

WASHINGTON, Nov. 9 The State Department said today that it would slow the process for granting visas to young men from Arab and Muslim nations in an effort to prevent terrorist attacks.

The move came as the Bush administration was engulfed in complaints about a separate new antiterror policy by the Justice Department to allow the authorities to monitor all communications between some people in federal custody and their lawyers. That move provoked an outcry from the legal profession, civil liberties groups and Senator Patrick J. Leahy, the Vermont Democrat who heads the Judiciary Committee.

The changes in visa procedures and the new authorized eavesdropping represented what government officials said was a fundamental shift in antiterror policy to emphasizing prevention.

The government is considering more changes and is enacting others, some of which stem from new antiterrorism legislation. These measures include the following:

*The use of wiretaps secretly authorized by a special federal court to prosecute people suspected of involvement in terrorism on charges unrelated to terrorism. The wiretaps are supposed to be primarily for intelligence gathering and are more easily obtainable than wiretaps sought for criminal investigations.

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*The revision of guidelines prosecutors use to determine when to oppose bail for people charged with relatively minor crimes. Federal prosecutors have in many cases urged judges not to release people suspected of involvement in terrorist activities even if they are charged with minor and unrelated crimes.

*The holding in New York of at least 10 people as material witnesses with their arrest records sealed by court order.

The new State and Justice policies on visas and the monitoring of communications between suspected terrorists and their lawyers highlighted the problem of trying to reconcile growing national security concerns with traditional civil liberties issues.

State Department officials said that starting next week, visa applications from 26 nations from any men 16 to 45 years old would be checked against databases maintained by the F.B.I.

The security procedure will take up to 20 days, officials said. The applicants will also be required to complete a detailed questionnaire on their backgrounds, including questions about any military service or weapons training, previous travel, and whether they had ever lost a passport.

Secretary of State Colin L. Powell today portrayed the new rules as temporary.

"Those who come to the United States, we're going to check on to make sure that we are safe," Mr. Powell said. "We want people to come to our shores but at the same time, we have to protect ourselves. This will be a temporary measure for a number of countries."

Mr. Powell acknowledged that the change could antagonize some Muslim nations whose support the United States seeks in its war against the Taliban and Al Qaeda, Osama bin Laden's organization in Afghanistan.

"We are sensitive to how it will affect our friends," Mr. Powell told Fox News.

Countries affected by the new visa restriction are Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates and Yemen.

The move on visas drew immediate criticism in the United States, where pro-immigration groups and organizations representing American Muslims said the new requirements amounted to profiling by religion or nationality, a shift to methods they called antithetical to American values.

"This policy to me is very gray," said Angela M. Kelley, the deputy director of the National Immigration Forum, a pro-immigrant policy group. "It will catch up in its net people who mean us no harm. It sends the wrong message for a nation of immigrants."

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In defending the regulations about eavesdropping on people in federal custody, which were instituted on Oct. 30 with little public notice, senior government officials said the action would help impede terrorist activities.

The regulation covers not only people in federal prison but also those in the custody of federal marshals and the immigration service.

By monitoring all conversations between lawyers and a small group of people in federal custody, officials said, they would be able to prevent terrorist acts even if the information could not be used to prosecute anyone.

That is a departure from the traditional approach of officials trying to compile evidence to be used in a courtroom.

"The priority now is stopping terrorist activity, saving American lives and not on getting evidence that's admissible in court," a senior government official said.

Under the regulation, the lawyers and their clients would be informed in advance that their personal telephone conversations and mail would be monitored.

Mindy Tucker, the Justice Department spokeswoman, said the new regulation would affect only a small group of people, those who had been designated as requiring special treatment.

Ms. Tucker said that, so far, only 13 people in federal custody had been affected; none of them, she said, had been arrested since Sept. 11.

In an interview tonight with Larry King on CNN, Attorney General John Ashcroft said the new guidelines had been misinterpreted by critics.

"Just imagine this," Mr. Ashcroft said. "You have a terrorist who has -- as a matter of fact, of the 13, some are terrorists -- that has an incompleted task and is waiting to signal those colleagues of his on the outside of a time to complete the task, to finish what the terrorists endeavor.

"We think we ought to be able to try and detect that and prevent that ongoing terrorism."

Mr. Ashcroft said the regulation stipulated that the officials listening in on communications would not be able to pass any information to prosecutors and that none of the information could be used in court without a judge's permission.

Government officials said that among those whose lawyer-client communications had been monitored was Omar Abdul Rahman, the blind sheik convicted in the 1993 bombing of the World Trade Center.

Senator Leahy said he was "deeply troubled by what appears to be an executive effort to exercise new powers without judicial scrutiny or statutory authorization."

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"These are difficult times," Mr. Leahy added. "Trial by fire can refine us but it can also coarsen us."

The administration should devise ways to counter terrorists, he said, without losing "the freedoms that we are fighting to protect."

Robert E. Hirshon, the president of the American Bar Association, said that the new eavesdropping regulation clearly violated the Constitution's guarantees of the right to counsel and to be free of unreasonable searches.

The attorney-client privilege dates to the reign of Elizabeth I in England and, Mr. Hirshon said, "No privilege is more indelibly ensconced in the American legal system than this privilege."

Traditionally, prosecutors may ask judges to wiretap lawyer-client conversations if they can demonstrate probable cause that the lawyer is being used to carry out a criminal enterprise.

The rule about attorney-client conversations was published Oct. 31 in the Federal Register, a day after it went into effect. It states that the monitoring can take place when the attorney general concludes there is "reasonable suspicion" that the communications are intended to further terrorist acts.

Concerning the State Department's new visa policy, even advocates of tighter controls on immigration expressed discomfort with the approach.

Steven Camarota, the research director of the Center for Immigration Reform in Washington, said the United States should scrutinize all visa applicants equally and not just focus on Muslim men. Technological advances should allow for all visa applicants to be finger-printed and checked by the F.B.I., Mr. Camarota said.

"There should be a consensus in the United States that we don't want an ethnic- or religious-based immigration system," he said.

Photos: Secretary of State Colin L. Powell said new visa processing rules would only be temporary. (Agence France-Presse); (Mathew Brady); (Associated Press); (Reuters)(pg. B6)

Chart: "CLOSEUP: Civil Liberties vs. Threats to Society Through U.S. History"
Here are some of the most significant actions by Congress or the president that have restricted civil liberties or have led to disputes about those rights. Most of the actions have come in times of war, anticipated conflict or threats of terrorism.

JULY 6, 1798 -- The Alien Enemy Act, one of the Alien and Sedition Acts passed in anticipation of war with France, authorizes the deportation of "alien enemy males of 14 years and upwards."

APRIL 27, 1861 -- President Abraham Lincoln suspends the writ of habeas corpus in

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Pennsylvania, Delaware, Maryland and the District of Columbia. The suspension is extended to all other states in March 1863.

MAY 22, 1918 -- The Entry and Departure Controls Act allows the president to "control the departure and entry in times of war or national emergency" of any noncitizen "whose presence was deemed contrary to public safety." The act is extended on June 21, 1941.

JUNE 28, 1940 -- The Alien Registration Act requires the registration of all noncitizens and the fingerprinting those over 14 years of age.

FEB. 19, 1942 -- President Franklin D. Roosevelt signs Executive Order 9066, banning from "military areas" all persons "deemed necessary or desirable" to exclude from those areas. The decision forces the relocation of more than 100,000 Japanese-Americans to camps in the nation's interior.

SEPT. 22, 1950 -- The Internal Security Act makes it unlawful for a member of a "Communist-action" organization to "hold any nonelective office or employment under the United States," or to "engage in any employment in any defense facility," or to "apply for or use a passport." The act also establishes a Subversive Activities Control Board with the power to determine whether an organization is a "Communist front." A provision of the act requiring Communist Party members to register with the government was declared unconstitutional by the Supreme Court in 1965, rendering the entire act unenforceable.

OCT. 4, 1973 -- The American Civil Liberties Union calls for impeaching President Richard M. Nixon, for violating the right of political dissent; "establishment of a personal secret police which committed crimes;" interference in the trial of Daniel Ellsberg; and "usurpation of Congressional war-making powers."

OCT. 25, 1978 -- The Foreign Intelligence Surveillance Act, passed in response to increased terrorist activity around the world, authorizes electronic eavesdropping and wiretapping in the collection of "foreign intelligence" information. The act creates a special court composed of seven federal judges, meeting in secret, that considers applications from the Department of Justice and intelligence agencies. In 1994 the act was expanded to permit covert physical searches. Electronic surveillance and physical searches are permissible in some circumstances even without a court order.

APRIL 24, 1996 -- The Antiterrorism and Effective Death Penalty Act, passed in part by the bombing of the World Trade Center in 1993, establishes membership in a terrorist organization as a ground for denying a noncitizen entry into the United States, and returns "to the border" an immigrant who has entered the country unlawfully, "regardless of the duration of his or her presence in the United States." The act also enables federal officials to use court-ordered wiretapping to investigate various immigration offenses, including fraud relating to driver's licenses, passports and other forms of identification. (pg. B6)

---- INDEX REFERENCES ----

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NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); International Terrorism (1IN37))

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Section: A

Stories From The Inside

Bob Herbert

Bob Herbert Op-Ed column says horror stories from scandalous interrogation camp that United States operates at Guantanamo Bay are coming to light in spite of government's 'obsessively reinforced barriers of secrecy'; cites case of Shafiq Rasul, British citizen seized in Afghanistan in aftermath of 9/11 and subjected to two years of physical abuse and isolation before British intelligence officials proved he and two others had been in England during time they were accused of being in Al Qaeda training camp; says Bush administration has turned Guantanamo into place devoid of due process and rule of law; holds that Congress and courts should uproot this evil practice (M)

"During the whole time we were at Guantanamo," said Shafiq Rasul, "we were at a high level of fear. When we first got there the level was sky-high. At the beginning we were terrified that we might be killed at any minute. The guards would say to us, 'We could kill you at any time.' They would say, 'The world doesn't know you're here. Nobody knows you're here. All they know is that you're missing, and we could kill you and no one would know.'"

The horror stories from the scandalous interrogation camp that the United States is operating at Guantanamo Bay, Cuba, are coming to light with increased frequency. At some point the whole shameful tale of this exercise in extreme human degradation will be told. For the time being we have to piece together what we can from a variety of accounts that have escaped the government's obsessively reinforced barriers of secrecy.

We know that people were kept in cells that in some cases were the equivalent of animal cages, and that some detainees, disoriented and despairing, have been shackled like slaves and left to soil themselves with their own urine and feces. Detainees are frequently kicked, punched, beaten and sexually humiliated. Extremely long periods of psychologically damaging isolation are routine.

This is all being done in the name of fighting terror. But the best evidence seems to show that many of the people rounded up and dumped without formal charges into Guantanamo had nothing to do with terror. They just happened to be unfortunate enough to get caught in

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one of Uncle Sam's depressingly indiscriminate sweeps. Which is what happened to Shafiq Rasul, who was released from Guantanamo about a year ago. His story is instructive, and has not been told widely enough.

Mr. Rasul was one of three young men, all friends, from the British town of Tipton who were among thousands of people seized in Afghanistan in the aftermath of Sept. 11, 2001. They had been there, he said, to distribute food and medical supplies to impoverished Afghans.

The three were interviewed soon after their release by Michael Ratner, president of the Center for Constitutional Rights, which has been in the forefront of efforts to secure legal representation for Guantanamo detainees.

Under extreme duress at Guantanamo, including hundreds of hours of interrogation and long periods of isolation, the three men confessed to having been in a terrorist training camp in Afghanistan. They also said they were among a number of men who could be seen in a videotape of Osama bin Laden. The tape had been made in August 2000.

For the better part of two years, Mr. Rasul and his friends, Asif Iqbal and Rhuhel Ahmed, had denied involvement in any terror activity whatsoever. But Mr. Rasul said they eventually succumbed to long months of physical and psychological abuse. Mr. Rasul had been held in isolation for several weeks (his second sustained period of isolation) when an interrogator showed him the video of bin Laden. He said she told him: "I've put detainees here in isolation for 12 months and eventually they've broken. You might as well admit it now."

"I could not bear another day of isolation, let alone the prospect of another year," said Mr. Rasul. He confessed.

The three men, all British citizens, were saved by British intelligence officials, who proved that they had been in England when the video was shot, and during the time they were supposed to have been in Al Qaeda training camps. All three were returned to England, where they were released from custody.

Mr. Rasul has said many times that he and his friends were freed only because their alibis were corroborated. But they continue to worry about the many other Guantanamo detainees who may be innocent but have no way of proving it.

The Bush administration has turned Guantanamo into a place that is devoid of due process and the rule of law. It's a place where human beings can be imprisoned for life without being charged or tried, without ever seeing a lawyer, and without having their cases reviewed by a court. Congress and the courts should be uprooting this evil practice, but freedom and justice in the United States are on a post-9/11 downhill slide.

So we are stuck for the time being with the disgrace of Guantanamo, which will forever be a stain on the history of the United States, like the internment of the Japanese in World

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War II.

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Section: 1

TOUGH JUSTICE -- First of two articles: New Code, New Power
THREATS AND RESPONSES: TOUGH JUSTICE; After Terror, a Secret Rewriting of Military Law

TIM GOLDEN; Jack Begg contributed research for this article.

First of two articles in series, Tough Justice, describes how White House, acting in great secrecy in aftermath of 9/11 terror attacks, gave military authority to detain foreign suspects indefinitely and prosecute them in tribunals not used since World War II; says officials bypassed federal courts and constitutional guarantees, determined to deal aggressively with terrorists they expected to capture; says legal strategy took shape as ambition of small core of conservative administration officials whose political influence and bureaucratic skill gave them remarkable power in aftermath of 9/11; says driving force behind new policy was Vice Pres Dick Cheney; notes that final details were hidden even from national security adviser Condoleezza Rice and Secretary of State Colin L Powell; says strategy has been source of sharp conflict within administration, eventually pitting Rice and Defense Sec Donald H Rumsfeld against one another over issues of due process, intelligence-gathering and international law; notes that some of most forceful critics of Pentagon's system have been uniformed lawyers assigned to defend Guantanano Bay detainees; notes that three years later, not single terrorist has been prosecuted, and only 4 detainees held at US naval base at Guantanamo Bay have been formally charged; detailed description of process by which military law was quickly and secretly rewritten; photos (L)

WASHINGTON In early November 2001, with Americans still staggered by the Sept. 11 attacks, a small group of White House officials worked in great secrecy to devise a new system of justice for the new war they had declared on terrorism.

Determined to deal aggressively with the terrorists they expected to capture, the officials bypassed the federal courts and their constitutional guarantees, giving the military the authority to detain foreign suspects indefinitely and prosecute them in tribunals not used since World War II.

The plan was considered so sensitive that senior White House officials kept its final details hidden from the president's national security adviser, Condoleezza Rice, and the secretary of state, Colin L. Powell, officials said. It was so urgent, some of those

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involved said, that they hardly thought of consulting Congress.

White House officials said their use of extraordinary powers would allow the Pentagon to collect crucial intelligence and mete out swift, unmerciful justice. "We think it guarantees that we'll have the kind of treatment of these individuals that we believe they deserve," said Vice President Dick Cheney, who was a driving force behind the policy.

But three years later, not a single terrorist has been prosecuted. Of the roughly 560 men being held at the United States naval base at Guantanamo Bay, Cuba, only 4 have been formally charged. Preliminary hearings for those suspects brought such a barrage of procedural challenges and public criticism that verdicts could still be months away. And since a Supreme Court decision in June that gave the detainees the right to challenge their imprisonment in federal court, the Pentagon has stepped up efforts to send home hundreds of men whom it once branded as dangerous terrorists.

"We've cleared whole forests of paper developing procedures for these tribunals, and no one has been tried yet," said Richard L. Shiffrin, who worked on the issue as the Pentagon's deputy general counsel for intelligence matters. "They just ended up in this Kafkaesque sort of purgatory."

The story of how Guantanamo and the new military justice system became an intractable legacy of Sept. 11 has been largely hidden from public view.

But extensive interviews with current and former officials and a review of confidential documents reveal that the legal strategy took shape as the ambition of a small core of conservative administration officials whose political influence and bureaucratic skill gave them remarkable power in the aftermath of the attacks.

The strategy became a source of sharp conflict within the Bush administration, eventually pitting the highest-profile cabinet secretaries -- including Ms. Rice and Defense Secretary Donald H. Rumsfeld -- against one another over issues of due process, intelligence-gathering and international law.

In fact, many officials contend, some of the most serious problems with the military justice system are rooted in the secretive and contentious process from which it emerged.

Military lawyers were largely excluded from that process in the days after Sept. 11. They have since waged a long struggle to ensure that terrorist prosecutions meet what they say are basic standards of fairness. Uniformed lawyers now assigned to defend Guantanamo detainees have become among the most forceful critics of the Pentagon's own system.

Foreign policy officials voiced concerns about the legal and diplomatic ramifications, but had little influence. Increasingly, the administration's plan has come under criticism even from close allies, complicating efforts to transfer scores of Guantanamo prisoners back to their home governments.

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To the policy's architects, the attacks on the World Trade Center and the Pentagon represented a stinging challenge to American power and an imperative to consider measures that might have been unimaginable in less threatening times. Yet some officials said the strategy was also shaped by longstanding political agendas that had relatively little to do with fighting terrorism.

The administration's claim of authority to set up military commissions, as the tribunals are formally known, was guided by a desire to strengthen executive power, officials said. Its legal approach, including the decision not to apply the Geneva Conventions, reflected the determination of some influential officials to halt what they viewed as the United States' reflexive submission to international law.

In devising the new system, many officials said they had Osama bin Laden and other leaders of Al Qaeda in mind. But in picking through the hundreds of detainees at Guantanamo Bay, military investigators have struggled to find more than a dozen they can tie directly to significant terrorist acts, officials said. While important Qaeda figures have been captured and held by the C.I.A., administration officials said they were reluctant to bring those prisoners before tribunals they still consider unreliable.

Some administration officials involved in the policy declined to be interviewed, or would do so only on the condition they not be identified. Others defended it strongly, saying the administration had a responsibility to consider extraordinary measures to protect the country from a terrifying enemy.

"Everybody who was involved in this process had, in my mind, a white hat on," Timothy E. Flanigan, the former deputy White House counsel, said in an interview. "They were not out to be cowboys or create a radical new legal regime. What they wanted to do was to use existing legal models to assist in the process of saving lives, to get information. And the war on terror is all about information."

As the policy has faltered, other current and former officials have criticized it on pragmatic grounds, arguing that many of the problems could have been avoided. But some of the criticism also has a moral tone.

"What several of us were concerned about was due process," said John A. Gordon, a retired Air Force general and former deputy C.I.A. director who served as both the senior counterterrorism official and homeland security adviser on President Bush's National Security Council staff. "There was great concern that we were setting up a process that was contrary to our own ideals."

An Aggressive Approach

The administration's legal approach to terrorism began to emerge in the first turbulent days after Sept. 11, as the officials in charge of key agencies exhorted their aides to confront Al Qaeda's threat with bold imagination.

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"Legally, the watchword became 'forward-leaning,'" said a former associate White House counsel, Bradford Berenson, "by which everybody meant: 'We want to be aggressive. We want to take risks.'"

That challenge resounded among young lawyers who were settling into important posts at the White House, the Justice Department and other agencies. Many of them were members of the Federalist Society, a conservative legal fraternity. Some had clerked for Supreme Court justices, Clarence Thomas and Antonin Scalia in particular. A striking number had clerked for a prominent Reagan appointee, Lawrence H. Silberman of the United States Court of Appeals for the District of Columbia Circuit.

One young lawyer recalled looking around the room during a meeting with Attorney General John Ashcroft. "Of 10 people, 7 of us were former Silberman clerks," he said.

Mr. Berenson, then 36, had been consumed with the nomination of federal judges until he was suddenly reassigned to terrorism issues and thrown into intense, 15-hour workdays, filled with competing urgencies and intermittent new alerts.

"All of a sudden, the curtain was lifted on this incredibly frightening world," he said. "You were spending every day looking at the dossiers of the world's leading terrorists. There was a palpable sense of threat."

As generals prepared for war in Afghanistan, lawyers scrambled to understand how the new campaign against terrorism could be waged within the confines of old laws.

Mr. Flanigan was at the center of the administration's legal counteroffensive. A personable, soft-spoken father of 14 children, his easy manner sometimes belied the force of his beliefs. He had arrived at the White House after distinguishing himself as an agile legal thinker and a Republican stalwart: During the Clinton scandals, he defended the independent counsel, Kenneth W. Starr, saying he had conducted his investigation "in a moderate and appropriate fashion." In 2000, he played an important role on the Bush campaign's legal team in the Florida recount.

In the days after the Sept. 11 attacks, Mr. Flanigan sought advice from the Justice Department's Office of Legal Counsel on "the legality of the use of military force to prevent or deter terrorist activity inside the United States," according to a previously undisclosed department memorandum that was reviewed by The New York Times.

The 20-page response came from John C. Yoo, a 34-year-old Bush appointee with a glittering resume and a reputation as perhaps the most intellectually aggressive among a small group of legal scholars who had challenged what they saw as the United States' excessive deference to international law. On Sept. 21, 2001, Mr. Yoo wrote that the question was how the Constitution's Fourth Amendment rights against unreasonable search and seizure might apply if the military used "deadly force in a manner that endangered the lives of United States citizens."

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Mr. Yoo listed an inventory of possible operations: shooting down a civilian airliner hijacked by terrorists; setting up military checkpoints inside an American city; employing surveillance methods more sophisticated than those available to law enforcement; or using military forces "to raid or attack dwellings where terrorists were thought to be, despite risks that third parties could be killed or injured by exchanges of fire."

Mr. Yoo noted that those actions could raise constitutional issues, but said that in the face of devastating terrorist attacks, "the government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties." If the president decided the threat justified deploying the military inside the country, he wrote, then "we think that the Fourth Amendment should be no more relevant than it would be in cases of invasion or insurrection."

The prospect of such military action at home was mostly hypothetical at that point, but with the government taking the fight against terrorism to Afghanistan and elsewhere around the world, lawyers in the administration took the same "forward-leaning" approach to making plans for the terrorists they thought would be captured.

The idea of using military commissions to try suspected terrorists first came to Mr. Flanigan, he said, in a phone call a couple of days after the attacks from William P. Barr, the former attorney general under whom Mr. Flanigan had served as head of the Justice Department's Office of Legal Counsel during the first Bush administration.

Mr. Barr had first suggested the use of military tribunals a decade before, to try suspects in the bombing of Pan Am Flight 103 over Lockerbie, Scotland. Although the idea made little headway at the time, Mr. Barr said he reminded Mr. Flanigan that the Legal Counsel's Office had done considerable research on the question. Mr. Flanigan had an aide call for the files.

"I thought it was a great idea," he recalled.

Military commissions, he thought, would give the government wide latitude to hold, interrogate and prosecute the sort of suspects who might be silenced by lawyers in criminal courts. They would also put the control over prosecutions squarely in the hands of the president.

The same ideas were taking hold in the office of Vice President Cheney, championed by his 44-year-old counsel, David S. Addington. At the time, Mr. Addington, a longtime Cheney aide with an indistinct portfolio and no real staff, was not well-known even in the government. But he would become legendary as a voraciously hard-working official with strongly conservative views, an unusually sharp pen and wide influence over military, intelligence and other matters. In a matter of months, he would make a mark as one of the most important architects of the administration's legal strategy against foreign terrorism.

Beyond the prosecutorial benefits of military commissions, the two lawyers saw a less

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tangible, but perhaps equally important advantage. "From a political standpoint," Mr. Flanigan said, "it communicated the message that we were at war, that this was not going to be business as usual."

Changing the Rules

In fact, very little about how the tribunal policy came about resembled business as usual. For half a century, since the end of World War II, most major national-security initiatives had been forged through interagency debate. But some senior Bush administration officials felt that process placed undue power in the hands of cautious, slow-moving foreign policy bureaucrats. The sense of urgency after Sept. 11 brought that attitude to the surface.

Little more than a week after the attacks, officials said, the White House counsel, Alberto F. Gonzales, set up an interagency group to draw up options for prosecuting terrorists. They came together with high expectations.

"We were going to go after the people responsible for the attacks, and the operating assumption was that we would capture a significant number of Al Qaeda operatives," said Pierre-Richard Prosper, the State Department official assigned to lead the group. "We were thinking hundreds."

Mr. Prosper, then 37, had just been sworn in as the department's ambassador-at-large for war crimes issues. As a prosecutor, he had taken on street gangs and drug Mafias and had won the first genocide conviction before the International Criminal Tribunal for Rwanda. Even so, some administration lawyers eyed him suspiciously -- as more diplomat than crime-fighter.

Mr. Gonzales had made it clear that he wanted Mr. Prosper's group to put forward military commissions as a viable option, officials said. The group laid out three others -- criminal trials, military courts-martial and tribunals with both civilian and military members, like those used for Nazi war criminals at Nuremberg.

Representatives of the Justice Department's criminal division, which had prosecuted a string of Qaeda defendants in federal district court over the previous decade, argued that the federal courts could do the job again. The option of toughening criminal laws or adapting the courts, as several European countries had done, was discussed, but only briefly, two officials said.

"The towers were still smoking, literally," Mr. Prosper said. "I remember asking: Can the federal courts in New York handle this? It wasn't a legal question so much as it was logistical. You had 300 Al Qaeda members, potentially. And did we want to put the judges and juries in harm's way?"

Lawyers at the White House saw criminal courts as a minefield, several officials said.

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Much of the evidence against terror suspects would be classified intelligence that would be difficult to air in court or too sketchy to meet federal standards, the lawyers warned. Another issue was security: Was it safe to try Osama bin Laden in Manhattan, where he was facing federal charges for the 1998 bombings of American Embassies in East Africa?

Then there was a tactical question. To act pre-emptively against Al Qaeda, the authorities would need information that defense lawyers and due-process rules might discourage suspects from giving up.

Mr. Flanigan framed the choice starkly: "Are we going to go with a system that is really guaranteed to prevent us from getting information in every case or are we going to go another route?"

Military commissions had no statutory rules of their own. In past American wars, when such tribunals had been used to carry out battlefield justice against spies, saboteurs and others accused of violating the laws of war, they had generally hewed to prevailing standards of military justice. But the advocates for commissions in the Bush administration saw no reason they could not adapt the rules, officials said. Standards of proof could be lowered. Secrecy provisions could be expanded. The death penalty could be more liberally applied.

But some members of the interagency group saw it as more complicated. Terrorism had not been clearly established as a war crime under international law. Writing new law for a military tribunal might end up being more difficult than prosecuting terrorism cases in existing courts.

By late October 2001, the White House lawyers had grown impatient with what they saw as the dithering of Mr. Prosper's group and what one former official called the "cold feet" of some of its members. Mr. Flanigan said he thought the government needed to move urgently in case a major terrorist linked to the attacks was apprehended.

He gathered up the research that the Prosper group had completed on military commissions and took charge of the matter himself. Suddenly, the other options were off the table and the Prosper group was out of business.

"Prosper is a thoughtful, gentle, process-oriented guy," the former official said. "At that time, gentle was not an adjective that anybody wanted."

A Secretive Circle

With the White House in charge, officials said, the planning for tribunals moved forward more quickly, and more secretly. Whole agencies were left out of the discussion. So were most of the government's experts in military and international law.

The legal basis for the administration's approach was laid out on Nov. 6 in a confidential 35-page memorandum sent to Mr. Gonzales from Patrick F. Philbin, a deputy in the Legal

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Counsel's office. (Attorney General Ashcroft has refused recent Congressional requests for the document, but a copy was reviewed by The Times.)

The memorandum's plain legalese belied its bold assertions.

It said that the president, as commander in chief, has "inherent authority" to establish military commissions without Congressional authorization. It concluded that the Sept. 11 attacks were "plainly sufficient" to warrant applying the laws of war.

Opening a debate that would later divide the administration, the memorandum also suggested that the White House could apply international law selectively. It stated specifically that trying terrorists under the laws of war "does not mean that terrorists will receive the protections of the Geneva Conventions or the rights that laws of war accord to lawful combatants."

The central legal precedent cited in the memorandum was a 1942 case in which the Supreme Court upheld President Franklin D. Roosevelt's use of a military commission to try eight Nazi saboteurs who had sneaked into the United States aboard submarines. Since that ruling, revolutions had taken place in both international and military law, with the adoption of the Geneva Conventions in 1949 and the Uniform Code of Military Justice in 1951. Even so, the Justice memorandum said the 1942 ruling had "set a clear constitutional analysis" under which due process rights do not apply to military commissions.

Roosevelt, too, created his military commission without new and explicit Congressional approval, and authorized the military to fashion its own procedural rules. He also established himself, rather than a military judge, as the "final reviewing authority" for the case.

Mr. Addington seized on the Roosevelt precedent as a model, two people involved in the process said, despite vast differences. Roosevelt acted against enemy agents in a traditional war among nations. Mr. Bush would be asserting the same power to take on a shadowy network of adversaries with no geographic boundaries, in a conflict with no foreseeable end.

Mr. Addington, who drafted the order with Mr. Flanigan, was particularly influential, several officials said, because he represented Mr. Cheney and brought formidable experience in national-security law to a small circle of senior officials. Mr. Addington turned down several requests for interviews and a spokesman for the vice president's office declined to comment.

"He was probably the only one there who would know what an order would look like, what it would say," a former Justice Department official said, noting Mr. Addington's work at the Defense Department, the C.I.A., and Congressional intelligence committees. "He didn't have authority over anyone. But he's a persuasive guy."

To many officials outside the circle, the secrecy was remarkable.

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While Mr. Ashcroft and his deputy, Larry D. Thompson, were closely consulted, the head of the Justice Department's criminal division, Michael Chertoff, who had argued for trying terror suspects in federal court, saw the military order only when it was published, officials said. Mr. Rumsfeld was kept informed of the plan mainly through his general counsel, William J. Haynes II, several Pentagon officials said.

Many of the Pentagon's experts on military justice, uniformed lawyers who had spent their careers working on such issues, were mostly kept in the dark. "I can't tell you how compartmented things were," said retired Rear Adm. Donald J. Guter, who was then the Navy's senior military lawyer, or judge advocate general. "This was a closed administration."

A group of experienced Army lawyers had been meeting with Mr. Haynes repeatedly on the process, but began to suspect that what they said did not resonate outside the Pentagon, several of them said.

On Friday, Nov. 9, Defense Department officials said, Mr. Haynes called the head of the team, Col. Lawrence J. Morris, into his office to review a draft of the presidential order. He was given 30 minutes to study it but was not allowed to keep a copy or even take notes.

The following day, the Army's judge advocate general, Maj. Gen. Thomas J. Romig, hurriedly convened a meeting of senior military lawyers to discuss a response. The group worked through the Veterans Day weekend to prepare suggestions that would have moved the tribunals closer to existing military justice. But when the final document was issued that Tuesday, it reflected none of the officers' ideas, several military officials said. "They hadn't changed a thing," one official said.

In fact, while the military lawyers were pulling together their response, they were unaware that senior administration officials were already at the White House putting finishing touches on the plan. At a meeting that Saturday in the Roosevelt Room, Mr. Cheney led a discussion among Attorney General Ashcroft, Mr. Haynes of the Defense Department, the White House lawyers and a few other aides.

Senior officials of the State Department and the National Security Council staff were excluded from final discussions of the policy, even at a time when they were meeting daily about Afghanistan with the officials who were drafting the order. According to two people involved in the process, Mr. Cheney advocated withholding the draft from Ms. Rice and Secretary Powell.

When the two cabinet members found out about the military order -- upon its public release -- Ms. Rice was particularly angry, several senior officials said. Spokesmen for both officials declined to comment.

Mr. Bush played only a modest role in the debate, senior administration officials said. In an initial discussion, he agreed that military commissions should be an option, the

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officials said. Later, Mr. Cheney discussed a draft of the order with Mr. Bush over lunch, one former official said. The president signed the three-page order on Nov. 13.

No ceremony accompanied the signing, and the order was released to the public that day without so much as a press briefing. But its historic significance was unmistakable.

The military could detain and prosecute any foreigner whom the president or his representative determined to have "engaged in, aided or abetted, or conspired to commit" terrorism. Echoing the Roosevelt order, the Bush document promised "free and fair" tribunals but offered few guarantees: There was no promise of public trials, no right to remain silent, no presumption of innocence. As in 1942, guilt did not necessarily have to be proven beyond a reasonable doubt and a death sentence could be imposed even with a divided verdict.

Despite those similarities, some military and international lawyers were struck by the differences.

"The Roosevelt order referred specifically to eight people, the eight Nazi saboteurs," said Mr. Shiffrin, who was then the Defense Department's deputy general counsel for intelligence matters and had studied the Nazi saboteurs' case. "Here we were putting in place a parallel system of justice for a universe of people who we had no idea about -- who they would be, how many of them there would be. It was a very dramatic measure."

Mounting Criticism

The White House did its best to play down the drama, but criticism of the order was immediate and widespread.

Civil libertarians and some Congressional leaders saw an attempt to supplant the criminal justice system. Critics also worried about the concentration of power: The president or his proxies would define the crimes (often after an act had been committed); set the rules for trial; and choose the judges, juries and appellate panels.

Senator Patrick J. Leahy, the Vermont Democrat who was then chairman of the Senate Judiciary Committee, was among a handful of legislators who argued that the administration's plan required explicit Congressional authorization. The Congress had just passed the Patriot Act by a huge margin, and Mr. Leahy proposed authorizing military commissions, but with some important changes, including a presumption of innocence for defendants and appellate review by the Supreme Court.

Critics seized on complaints from abroad, including an announcement from the Spanish authorities that they would not extradite some terrorist suspects to the United States if they would face the tribunals. "We are the most powerful nation on earth," Mr. Leahy said. "But in the struggle against terrorism, we don't have the option of going it alone. Would these military tribunals be worth jeopardizing the cooperation we expect and need from our allies?"

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Senators called for Mr. Rumsfeld and Mr. Ashcroft to testify about the tribunals plan. Instead, the administration sent Mr. Prosper from the State Department and Mr. Chertoff of the Justice Department -- both of whom had questioned the use of commissions and were later excluded from the administration's final deliberations.

But the Congressional opposition melted in the face of opinion polls showing strong support for the president's measures against terrorism.

There was another reason fears were allayed. With the order signed, the Pentagon was writing rules for exactly how the commissions would be conducted, and an early draft that was leaked to the news media suggested defendants' rights would be expanded. Mr. Rumsfeld, who assembled a group of outside legal experts -- including some who had worked on World War II-era tribunals -- to consult on the rules, said critics' concerns would be taken into account.

But all of the critics were not outside the administration.

Many of the Pentagon's uniformed lawyers were angered by the implication that the military would be used to deliver "rough justice" for the terrorists. The Uniform Code of Military Justice had moved steadily into line with the due-process standards of the federal courts, and senior military lawyers were proud and protective of their system. They generally supported using commissions for terrorists, but argued that the system would not be fair without greater rights for defendants.

"The military lawyers would from time to time remind the civilians that there was a Constitution that we had to pay attention to," said Admiral Guter, who, after retiring as the Navy judge advocate general, signed a "friend of the court" brief on behalf of plaintiffs in the Guantanamo Supreme Court case.

Even as uniformed lawyers were given a greater role in writing rules for the commissions, they still felt out of the loop.

In early 2002, Admiral Guter said, during a weekly lunch with Mr. Haynes and the top lawyers for the military branches, he raised the issue with Mr. Haynes directly: "We need more information."

Mr. Haynes looked at him coldly. "No, you don't," he quoted Mr. Haynes as saying.

Mr. Haynes declined to comment on the exchange.

Lt. Col. William K. Lietzau, a Yale-trained Marine lawyer on Mr. Haynes's staff, often found himself in the middle. "I could see how the JAGs were frustrated that the task of setting up the commissions hadn't been delegated to them," he said, referring to the senior military lawyers. "On the other hand, I could see how some of their recommendations frustrated the leadership because they didn't always appear to embrace the paradigm shift needed to deal with terrorism."

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Some Justice Department officials also urged changes in the commission rules, current and former officials said. While Attorney General Ashcroft staunchly defended the policy in public, in a private meeting with Pentagon officials, he said some of the proposed commission rules would be seen as "draconian," two officials said.

On nearly every issue, interviews and documents show, the harder line was staked out by White House lawyers: Mr. Addington, Mr. Gonzales and Mr. Flanigan. They opposed allowing civilian lawyers to assist the tribunal defendants, as military courts-martial permit, or allowing civilians to serve on the appellate panel that would oversee the commissions. They also opposed granting defendants a presumption of innocence.

In the end, Mr. Rumsfeld compromised. He granted defendants a presumption of innocence and set "beyond a reasonable doubt" as a standard for proving guilt. He also allowed the defendants to hire civilian lawyers, but restricted the lawyers' access to case information. And he gave the presiding officer at a tribunal license to admit any evidence he thought might be convincing to a "reasonable person."

One right the administration sought to deny the prisoners was the ability to appeal the legality of their detentions in federal court. The administration had done its best to decide the question when searching for a place to detain hundreds of prisoners captured in Afghanistan. Every location it seriously considered -- including an American military base in Germany and islands in the South Pacific -- was outside the United States and, the administration believed, beyond the reach of the federal judiciary.

On Dec. 28, 2001, after officials settled on Guantanamo Bay, Mr. Philbin and Mr. Yoo told the Pentagon in a memorandum that it could make a "very strong" claim that prisoners there would be outside the purview of American courts. But the memorandum cautioned that a reasonable argument could also be made that Guantanamo "while not part of the sovereign territory of the United States, is within the territorial jurisdiction of a federal court." That warning would come back to haunt the administration.

A Shift in Power

Some of the officials who helped design the new system of justice would later explain the influence they exercised in the chaotic days after Sept. 11 as a response to a crisis. But a more enduring shift of power within the administration was taking place -- one that became apparent in a decision that would have significant consequences for how terror suspects were interrogated and detained.

At issue was whether the administration would apply the Geneva Conventions to the conflicts with Al Qaeda and the Taliban and whether those enemies would be treated as prisoners of war.

Based on the advice of White House and Justice Department lawyers, Mr. Bush initially decided on Jan. 18, 2002, that the conventions would not apply to either conflict. But at a meeting of senior national security officials several days later, Secretary of State

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Powell asked him to reconsider.

Mr. Powell agreed that the conventions did not apply to the global fight against Al Qaeda. But he said troops could be put at risk if the United States disavowed the conventions in dealing with the Taliban -- the de facto government of Afghanistan. Both Mr. Rumsfeld and the chairman of the Joint Chiefs of Staff, Gen. Richard B. Myers, supported his position, Pentagon officials said.In a debate that included the administration's most experienced national-security officials, a voice heard belonged to Mr. Yoo, only a deputy in the Office of Legal Counsel. He cast Afghanistan as a "failed state," and said its fighters should not be considered a real army but a "militant, terrorist-like group." In a Jan. 25 memorandum, the White House counsel, Mr. Gonzales, characterized that opinion as "definitive," although it was not the final basis for the president's decision.

The Gonzales memorandum suggested that the "new kind of war" Mr. Bush wanted to fight could hardly be reconciled with the "quaint" privileges that the Geneva Conventions gave to prisoners of war, or the "strict limitations" they imposed on interrogations.

Military lawyers disputed the idea that applying the conventions would necessarily limit interrogators to the name, rank and serial number of their captives. "There were very good reasons not to designate the detainees as prisoners of war, but the claim that they couldn't be interrogated was not one of them," Colonel Lietzau said. Again, though, such questions were scarcely heard, officials involved in the discussions said.

Mr. Yoo's rise reflected a different approach by the Bush administration to sensitive legal questions concerning foreign affairs, defense and intelligence.

In past administrations, officials said, the Office of Legal Counsel usually weighed in with opinions on questions that had already been deliberated by the legal staffs of the agencies involved. Under Mr. Bush, the office frequently had a first and final say. "O.L.C. was definitely running the show legally, and John Yoo in particular," a former Pentagon lawyer said. "He's kind of fun to be around, and he has an opinion on everything. Even though he was quite young, he exercised disproportionate authority because of his personality and his strong opinions."

Mr. Yoo's influence was amplified by friendships he developed not just with Mr. Addington and Mr. Flanigan, but also Mr. Haynes, with whom he played squash as often as three or four times a week at the Pentagon Officers Athletic Club.

If the Geneva Conventions debate raised Mr. Yoo's stature, it had the opposite effect on lawyers at the State Department, who were later excluded from sensitive discussions on matters like the interrogation of detainees, officials from several agencies said.

"State was cut out of a lot of this activity from February of 2002 on," one senior administration official said. "These were treaties that we were dealing with; they are meant to know about that."

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The State Department legal adviser, William H. Taft IV, was shunned by the lawyers who dominated the detainee policy, officials said. Although Mr. Taft had served as the deputy secretary of defense during the Reagan administration, more conservative colleagues whispered that he lacked the constitution to fight terrorists.

"He was seen as ideologically squishy and suspect," a former White House official said. "People did not take him very seriously."

Through a State Department spokesman, Richard A. Boucher, Mr. Taft declined to comment.

The rivalries could be almost adolescent. When field trips to Guantanamo Bay were arranged for administration lawyers, the invitations were sometimes relayed last to the State Department and National Security Council, officials said, in the hope that lawyers there would not be able to go on short notice.

It was on the first field trip, 10 days after detainees began to arrive there on Jan. 11, 2002, that White House lawyers made clear their intention to move forward quickly with military commissions.

On the flight home, several officials said, Mr. Addington urged Mr. Gonzales to seek a blanket designation of all the detainees being sent to Guantanamo as eligible for trial under the president's order. Mr. Gonzales agreed.

The next day, the Pentagon instructed military intelligence officers at the base to start filling out one-page forms for each detainee, describing their alleged offenses. Weeks later, Mr. Haynes issued an urgent call to the military services, asking them to submit nominations for a chief prosecutor.

The first trials, many military and administration officials believed, were just around the corner.

Next: A Policy Unravels

Photos: Seen through a night vision scope, marines escorted prisoners into a detention center in Kandahar, Afghanistan in late 2001. Many were later sent to Guantanamo Bay. (Photo Pool photo by U.S.M.C. Sgt. Thomas Michael Corcoran)(pg. 12); The courtroom at Guantanamo Bay, where some preliminary hearings have taken place. Of the roughly 560 men being held at the base, only 4 have been formally charged. (Photo by Angel Franco/The New York Times); (Photo by Hannah Fairfield/The New York Times)(pg. 13); A prisoner at the Guantanamo Bay camp in February 2002. (Photo by Lynne Sladky/Associated Press)(pg. 1)

Chart/Photos: "Behind Closed Doors, a New Code Is Written"
A policy for military tribunals emerged from a small group of senior administration officials who exercised unusual power in days after Sept. 11.

Key Players

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OFFICE OF THE VICE PRESIDENT

DICK CHENEY -- Vice president of the United States
Guided pivotal discussions as the presidential order was being written.

DAVID S. ADDINGTON -- Counsel to Vice President Cheney
One of the two main authors.

WHITE HOUSE COUNSEL

ALBERTO F. GONZALES -- White House counsel
Often contributed to discussions.

TIMOTHY E. FLANIGAN -- Deputy White House counsel
One of the two main authors. Has since left the administration.

Other Players
They were closely informed about the plan and contributed to discussions.

JUSTICE DEPARTMENT

JOHN ASHCROFT -- Attorney general

JOHN C. YOO -- Lawyer in Justice Dept.'s Office of Legal Counsel
Has since left the administration.

DEFENSE DEPARTMENT

DONALD H. RUMSFELD -- Secretary of defense

WILLIAM J. HAYNES -- General counsel to Defense Dept.

Outside the Circle
Did not see the presidential order until it was made public.

NATIONAL SECURITY COUNCIL

CONDOLEEZZA RICE -- National security adviser

STATE DEPARTMENT

COLIN L. POWELL -- Secretary of state

(pg. 13)

---- INDEX REFERENCES ----

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); International Terrorism (1IN37); Legislation (1LE97); United Nations (1UN54); Government (1GO80); International Law

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(1IN60); Economics & Trade (1EC26); Sept 11th Aftermath (1SE05))

INDUSTRY: (Aerospace & Defense (1AE96); Defense (1DE43); Ground Forces (1GR94); Defense Intelligence (1DE90); Military Forces (1MI37); Defense Policy (1DE81); Aerospace & Defense Regulatory (1AE25); Defense Spending (1DE35))

REGION: (North America (1NO39); Western Europe (1WE41); Latin America (1LA15); Cuba (1CU43); Germany (1GE16); Europe (1EU83); Central Europe (1CE50); New York (1NE72); Western Asia (1WE54); Afghanistan (1AF45); Americas (1AM92); Asia (1AS61); USA (1US73); Switzerland (1SW77); Caribbean (1CA06))

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March 11, 2005

Section: A

THE REACH OF WAR: GUANTANAMO; PENTAGON SEEKS TO SHIFT INMATES FROM CUBA BASE

DOUGLAS JEHL; Neil A. Lewis and Tim Golden contributed reporting for this article.

Pentagon reportedly seeks help from State Department and other agencies to cut detainee population at Guantanamo prison by more than half, in part by transferring suspected terrorists to prisons in Saudi Arabia, Afghanistan and Yemen; CIA, which has carried out such transfers, and State and Justice Departments have resisted some previous handovers out of concern for US security or potential mistreatment; Sec Donald Rumsfeld seeks support for plan, starting with Afghanistan; some outright releases are also possible to cut detainee population of about 540; Pentagon has also halted flow of new prisoners into Guantanamo; most there no longer have intelligence value and are not interrogated regularly; adverse court rulings and determination to get other countries to share burden also cited; Rumsfeld photo; chart on transfers (M)

WASHINGTON, March 10 The Pentagon is seeking to enlist help from the State Department and other agencies in a plan to cut by more than half the population at its detention facility in Guantanamo Bay, Cuba, in part by transferring hundreds of suspected terrorists to prisons in Saudi Arabia, Afghanistan and Yemen, according to senior administration officials.

The transfers would be similar to the renditions, or transfers of captives to other countries, carried out by the Central Intelligence Agency, but are subject to stricter approval within the government, and face potential opposition from the C.I.A. as well as the State and Justice Departments, the officials said.

Administration officials say those agencies have resisted some previous handovers, out of concern that transferring the prisoners to foreign governments could harm American security or subject the prisoners to mistreatment.

A Feb. 5 memorandum from Defense Secretary Donald H. Rumsfeld calls for broader interagency support for the plan, starting with efforts to work out a significant transfer of prisoners to Afghanistan, the officials said. The proposal is part of a Pentagon effort to cut a Guantanamo population that stands at about 540 detainees by releasing some outright and by transferring others for continued detention elsewhere.

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The proposal comes as the Bush administration reviews the future of the naval base at Guantanamo as a detention center, after court decisions and shifts in public opinion have raised legal and political questions about the use of the facility.

The White House first embraced using Guantanamo as a holding place for terrorism suspects taken in Afghanistan, in part because the base was seen as beyond the jurisdiction of United States law. But recent court rulings have held that prisoners there may challenge their detentions in federal court.

Indeed, the Pentagon has halted, for the last six months, the flow of new terrorism suspects into the prison, Defense Department officials said. In January, a senior American official said in an interview that most prisoners at Guantanamo no longer had any intelligence value and were not being regularly interrogated.

The proposed transfers would represent a major acceleration of Pentagon efforts that have transferred 65 prisoners from Guantanamo to foreign countries. The population at Guantanamo includes more than 100 prisoners each from Afghanistan, Saudi Arabia and Yemen, a senior administration official said, and the United States might need to provide money or other logistical support to make possible a large-scale transfer to any of those nations.

Defense Department officials said that the adverse court rulings had contributed to their determination to reduce the population at Guantanamo, in part by persuading other countries to bear some of the burden of detaining terrorism suspects.

Under the administration's approach, the State Department is responsible for negotiating agreements in which receiving countries agree "to detain, investigate, and/or prosecute" the prisoners and to treat them humanely.

"Our top choice would be to win the war on terrorism and declare an end to it and repatriate everybody," a senior Defense Department official said in an interview. "The next best solution would be to work with the home governments of the detainees in order to get them to take the necessary steps to mitigate the threat these individuals pose."

The official, who spoke on condition of anonymity, said that future transfers into Guantanamo remained a "possibility," but made clear that the court decisions and the burdens of detaining prisoners at the American facility had made it seem less attractive to administration policymakers than before.

"It's fair to say that the calculus now is different than it was before, because the legal landscape has changed and those are factors that might be considered," a senior Defense Department official said.

In addition to working to transfer prisoners to their home countries, either to face charges there or simply to be kept in detention, officials also hope to shed dozens of prisoners whose cases are being studied by special review boards.

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Those three-member military boards began working in earnest in January to determine which prisoners are no longer a threat, have no information of value and may be released outright.

At its peak, the population at Guantanamo exceeded 750 prisoners. But the last time prisoners were transferred there was on Sept. 22, 2004, when a group of 10 was transferred from Afghanistan. The United States has already dispatched 211 Guantanamo prisoners, releasing the majority of them. Sixty-five have been transferred to the custody of other counties, including 29 to Pakistan, 5 to Morocco, 7 to France, 7 to Russia, and 4 to Saudi Arabia.

The administration's policy of detaining suspected terrorists at Guantanamo has relied on declarations that the detainees are unlawful "enemy combatants," based on assertions that they did not serve in a conventional army, and thus did not qualify for the protections listed in the Geneva Conventions.

Administration lawyers argued successfully in lower federal courts that United States laws, including access to the courts, did not apply because Guantanamo is part of Cuba.

But last June, the Supreme Court ruled that United States law applied to Guantanamo and that prisoners there could challenge their detentions in federal courts.

In August, a federal district judge ruled that the Geneva Conventions apply to Guantanamo prisoners and that the special military commissions to try war crimes were unconstitutional. The government's appeal of that ruling is scheduled to be heard next month.

Even as it moves to reduce the population at Guantanamo, the Pentagon has asked Congress for another $41 million in supplemental financing for construction there, including $36 million for a new, more modern prison and $5 million for a new perimeter fence.

The purpose, Defense Department officials said, was to provide a secure, humane detention facility for a remnant of the current population who are expected to remain there for the foreseeable future.

As many as 200 of those now at Guantanamo will most likely remain there indefinitely, the officials said, on grounds that they are too dangerous to be turned over to other nations or would probably face mistreatment if returned to those nations.

Each of the roughly 540 prisoners at Guantanamo have gone before a three-member military board, to have their status as enemy combatants reviewed. A final review has been completed in 487 cases; of those, all but 22 were found to have been properly classified, a status leaving them subject to possible war crimes charges.

Unlike the Pentagon, the C.I.A. was authorized by President Bush after the Sept. 11 attacks to transfer prisoners from one foreign country to another without case-by-case

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approval from other government departments. Former intelligence officials said that the C.I.A. has carried out 100 to 150 such transfers, known as renditions, since Sept. 11.

By contrast, the transfers carried out by the Pentagon are subject to strict rules requiring interagency approval. Officials said that the transfers do not constitute renditions under the Pentagon's definition, because the governments that accept the prisoners are not expected to carry out the will of the United States.

Indeed, officials have been concerned that transfer of some detainees could threaten American security because they might escape from foreign prisons or the foreign governments might free them.

The White House has said its policy prohibits the transfer of prisoners to other nations if it is likely they will be tortured, and administration officials said the interagency review is intended in part to enforce that standard. Transfers have been approved by the State Department to countries including Saudi Arabia and Pakistan, identified in the department's own human rights reports as nations where the use of torture in prisons is common.

Administration officials said that American diplomats in those countries were responsible for monitoring agreements to make sure prisoners were not mistreated. The senior Defense Department official said that the difficulty of "gaining effective and credible assurances" that prisoners would not be mistreated had been "a cause of some delay in releasing or transferring some detainees we have at Guantanamo."

It is possible that Guantanamo inmates could petition a federal court to stop a transfer to a country where they did not want to be sent. But there is little if any precedent to suggest how the courts would rule.

In November, a lawyer for Mamdouh Habib, a prisoner who claimed he had been tortured in Egypt before being transferred to Guantanamo, asked a federal district court to stop the Bush administration from returning him to Egypt. Before the court ruled, he was sent to Australia in January and freed.

Photo: Defense Secretary Donald H. Rumsfeld is said to have sought broader support from other governmental agencies for transfers of detainees. (Photo by Doug Mills/The New York Times)(pg. A10)

Chart: "Transferred From Guantnamo"
While roughly 540 detainees are still being held by the American military at Guantnamo Bay, Cuba, 211 detainees have left. Of those 211, 146 have been released, and 65 have been transferred to other countries for further detention or for prosecution.

Detainees transferred from Guantnamo to other countries

To Pakistan: 29

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Britain: 9
France: 7
Russia: 7
Morocco:5
Saudi Arabia: 4
Australia, Kuwait, Spain and Sweden: 1 each

(Source by Department of Defense)(pg. A10)

March 15, 2005, Tuesday - A front-page article on Friday about the Pentagon's efforts to send prisoners to other countries from Guantanamo Bay, Cuba, referred incompletely to legal proceedings in a recent case involving Mamdouh Habib, who had asked the Federal District Court in Washington to prohibit the government from sending him to Egypt. In November, a judge denied Mr. Habib's request but gave him permission to renew it if the government ordered his transfer there, and required the government to give advance notice of any such transfer. Mr. Habib was later sent instead to Australia, where he was released.

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Section: A

THE BAGRAM FILE: First of two articles.
In U.S. Report, Brutal Details Of 2 Afghan Inmates' Deaths

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First of two articles on Army's criminal investigation into brutal deaths of two detainees at detention center in Bagram, Afghanistan; 2,000-page confidential file depicts young, poorly trained soldiers in repeated incidents of abuse; finds that in some instances, it was directed or carried out by interrogators to extract information, that sometimes it was punishment meted out by military police guards, and that torment sometimes seemed driven by little more than boredom or cruelty, or both; finds one detainee, who had been chained to top of his cell by his wrists for many days, was taken for last abusive interrogation when most of interrogators believed he was innocent; so far, only seven soldiers have been charged; most of those who could still face legal action have denied wrongdoing; story of abuses at Bagram remains incomplete, but documents and interviews reveal striking disparity between findings of Army investigators and what military officials said in aftermath of two deaths; detailed description of treatment of two detainees; photos; excerpts from statements by various officers (L)

Even as the young Afghan man was dying before them, his American jailers continued to torment him.

The prisoner, a slight, 22-year-old taxi driver known only as Dilawar, was hauled from his cell at the detention center in Bagram, Afghanistan, at around 2 a.m. to answer questions about a rocket attack on an American base. When he arrived in the interrogation room, an interpreter who was present said, his legs were bouncing uncontrollably in the plastic chair and his hands were numb. He had been chained by the wrists to the top of his cell for much of the previous four days.

Mr. Dilawar asked for a drink of water, and one of the two interrogators, Specialist Joshua R. Claus, 21, picked up a large plastic bottle. But first he punched a hole in the bottom, the interpreter said, so as the prisoner fumbled weakly with the cap, the water poured out over his orange prison scrubs. The soldier then grabbed the bottle back and began squirting the water forcefully into Mr. Dilawar's face.

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"Come on, drink!" the interpreter said Specialist Claus had shouted, as the prisoner gagged on the spray. "Drink!"

At the interrogators' behest, a guard tried to force the young man to his knees. But his legs, which had been pummeled by guards for several days, could no longer bend. An interrogator told Mr. Dilawar that he could see a doctor after they finished with him. When he was finally sent back to his cell, though, the guards were instructed only to chain the prisoner back to the ceiling.

"Leave him up," one of the guards quoted Specialist Claus as saying.

Several hours passed before an emergency room doctor finally saw Mr. Dilawar. By then he was dead, his body beginning to stiffen. It would be many months before Army investigators learned a final horrific detail: Most of the interrogators had believed Mr. Dilawar was an innocent man who simply drove his taxi past the American base at the wrong time.

The story of Mr. Dilawar's brutal death at the Bagram Collection Point -- and that of another detainee, Habibullah, who died there six days earlier in December 2002 -- emerge from a nearly 2,000-page confidential file of the Army's criminal investigation into the case, a copy of which was obtained by The New York Times.

Like a narrative counterpart to the digital images from Abu Ghraib, the Bagram file depicts young, poorly trained soldiers in repeated incidents of abuse. The harsh treatment, which has resulted in criminal charges against seven soldiers, went well beyond the two deaths.

In some instances, testimony shows, it was directed or carried out by interrogators to extract information. In others, it was punishment meted out by military police guards. Sometimes, the torment seems to have been driven by little more than boredom or cruelty, or both.

In sworn statements to Army investigators, soldiers describe one female interrogator with a taste for humiliation stepping on the neck of one prostrate detainee and kicking another in the genitals. They tell of a shackled prisoner being forced to roll back and forth on the floor of a cell, kissing the boots of his two interrogators as he went. Yet another prisoner is made to pick plastic bottle caps out of a drum mixed with excrement and water as part of a strategy to soften him up for questioning.

The Times obtained a copy of the file from a person involved in the investigation who was critical of the methods used at Bagram and the military's response to the deaths.

Although incidents of prisoner abuse at Bagram in 2002, including some details of the two men's deaths, have been previously reported, American officials have characterized them as isolated problems that were thoroughly investigated. And many of the officers and soldiers interviewed in the Dilawar investigation said the large majority of detainees at Bagram were compliant and reasonably well treated.

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"What we have learned through the course of all these investigations is that there were people who clearly violated anyone's standard for humane treatment," said the Pentagon's chief spokesman, Larry Di Rita. "We're finding some cases that were not close calls."

Yet the Bagram file includes ample testimony that harsh treatment by some interrogators was routine and that guards could strike shackled detainees with virtual impunity. Prisoners considered important or troublesome were also handcuffed and chained to the ceilings and doors of their cells, sometimes for long periods, an action Army prosecutors recently classified as criminal assault.

Some of the mistreatment was quite obvious, the file suggests. Senior officers frequently toured the detention center, and several of them acknowledged seeing prisoners chained up for punishment or to deprive them of sleep. Shortly before the two deaths, observers from the International Committee of the Red Cross specifically complained to the military authorities at Bagram about the shackling of prisoners in "fixed positions," documents show.

Even though military investigators learned soon after Mr. Dilawar's death that he had been abused by at least two interrogators, the Army's criminal inquiry moved slowly. Meanwhile, many of the Bagram interrogators, led by the same operations officer, Capt. Carolyn A. Wood, were redeployed to Iraq and in July 2003 took charge of interrogations at the Abu Ghraib prison. According to a high-level Army inquiry last year, Captain Wood applied techniques there that were "remarkably similar" to those used at Bagram.

Last October, the Army's Criminal Investigation Command concluded that there was probable cause to charge 27 officers and enlisted personnel with criminal offenses in the Dilawar case ranging from dereliction of duty to maiming and involuntary manslaughter. Fifteen of the same soldiers were also cited for probable criminal responsibility in the Habibullah case.

So far, only the seven soldiers have been charged, including four last week. No one has been convicted in either death. Two Army interrogators were also reprimanded, a military spokesman said. Most of those who could still face legal action have denied wrongdoing, either in statements to investigators or in comments to a reporter.

"The whole situation is unfair," Sgt. Selena M. Salcedo, a former Bagram interrogator who was charged with assaulting Mr. Dilawar, dereliction of duty and lying to investigators, said in a telephone interview. "It's all going to come out when everything is said and done."

With most of the legal action pending, the story of abuses at Bagram remains incomplete. But documents and interviews reveal a striking disparity between the findings of Army investigators and what military officials said in the aftermath of the deaths.

Military spokesmen maintained that both men had died of natural causes, even after military coroners had ruled the deaths homicides. Two months after those autopsies, the

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American commander in Afghanistan, then-Lt. Gen. Daniel K. McNeill, said he had no indication that abuse by soldiers had contributed to the two deaths. The methods used at Bagram, he said, were "in accordance with what is generally accepted as interrogation techniques."

The Interrogators

In the summer of 2002, the military detention center at Bagram, about 40 miles north of Kabul, stood as a hulking reminder of the Americans' improvised hold over Afghanistan.

Built by the Soviets as an aircraft machine shop for the operations base they established after their intervention in the country in 1979, the building had survived the ensuing wars as a battered relic -- a long, squat, concrete block with rusted metal sheets where the windows had once been.

Retrofitted with five large wire pens and a half dozen plywood isolation cells, the building became the Bagram Collection Point, a clearinghouse for prisoners captured in Afghanistan and elsewhere. The B.C.P., as soldiers called it, typically held between 40 and 80 detainees while they were interrogated and screened for possible shipment to the Pentagon's longer-term detention center at Guantanamo Bay, Cuba.

The new interrogation unit that arrived in July 2002 had been improvised as well. Captain Wood, then a 32-year-old lieutenant, came with 13 soldiers from the 525th Military Intelligence Brigade at Fort Bragg, N.C.; six Arabic-speaking reservists were added from the Utah National Guard.

Part of the new group, which was consolidated under Company A of the 519th Military Intelligence Battalion, was made up of counterintelligence specialists with no background in interrogation. Only two of the soldiers had ever questioned actual prisoners.

What specialized training the unit received came on the job, in sessions with two interrogators who had worked in the prison for a few months. "There was nothing that prepared us for running an interrogation operation" like the one at Bagram, the noncommissioned officer in charge of the interrogators, Staff Sgt. Steven W. Loring, later told investigators.

Nor were the rules of engagement very clear. The platoon had the standard interrogations guide, Army Field Manual 34-52, and an order from the secretary of defense, Donald H. Rumsfeld, to treat prisoners "humanely," and when possible, in accordance with the Geneva Conventions. But with President Bush's final determination in February 2002 that the Conventions did not apply to the conflict with Al Qaeda and that Taliban fighters would not be accorded the rights of prisoners of war, the interrogators believed they "could deviate slightly from the rules," said one of the Utah reservists, Sgt. James A. Leahy.

"There was the Geneva Conventions for enemy prisoners of war, but nothing for terrorists," Sergeant Leahy told Army investigators. And the detainees, senior intelligence officers

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said, were to be considered terrorists until proved otherwise.

The deviations included the use of "safety positions" or "stress positions" that would make the detainees uncomfortable but not necessarily hurt them -- kneeling on the ground, for instance, or sitting in a "chair" position against the wall. The new platoon was also trained in sleep deprivation, which the previous unit had generally limited to 24 hours or less, insisting that the interrogator remain awake with the prisoner to avoid pushing the limits of humane treatment.

But as the 519th interrogators settled into their jobs, they set their own procedures for sleep deprivation. They decided on 32 to 36 hours as the optimal time to keep prisoners awake and eliminated the practice of staying up themselves, one former interrogator, Eric LaHammer, said in an interview.

The interrogators worked from a menu of basic tactics to gain a prisoner's cooperation, from the "friendly" approach, to good cop-bad cop routines, to the threat of long-term imprisonment. But some less-experienced interrogators came to rely on the method known in the military as "Fear Up Harsh," or what one soldier referred to as "the screaming technique."

Sergeant Loring, then 27, tried with limited success to wean those interrogators off that approach, which typically involved yelling and throwing chairs. Mr. Leahy said the sergeant "put the brakes on when certain approaches got out of hand." But he could also be dismissive of tactics he considered too soft, several soldiers told investigators, and gave some of the most aggressive interrogators wide latitude. (Efforts to locate Mr. Loring, who has left the military, were unsuccessful.)

"We sometimes developed a rapport with detainees, and Sergeant Loring would sit us down and remind us that these were evil people and talk about 9/11 and they weren't our friends and could not be trusted," Mr. Leahy said.

Specialist Damien M. Corsetti, a tall, bearded interrogator sometimes called "Monster" --he had the nickname tattooed in Italian across his stomach, other soldiers said -- was often chosen to intimidate new detainees. Specialist Corsetti, they said, would glower and yell at the arrivals as they stood chained to an overhead pole or lay face down on the floor of a holding room. (A military police K-9 unit often brought growling dogs to walk among the new prisoners for similar effect, documents show.)

"The other interrogators would use his reputation," said one interrogator, Specialist Eric H. Barclais. "They would tell the detainee, 'If you don't cooperate, we'll have to get Monster, and he won't be as nice.'" Another soldier told investigators that Sergeant Loring lightheartedly referred to Specialist Corsetti, then 23, as "the King of Torture."

A Saudi detainee who was interviewed by Army investigators last June at Guantanamo said Specialist Corsetti had pulled out his penis during an interrogation at Bagram, held it against the prisoner's face and threatened to rape him, excerpts from the man's statement

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show.

Last fall, the investigators cited probable cause to charge Specialist Corsetti with assault, maltreatment of a prisoner and indecent acts in the incident; he has not been charged. At Abu Ghraib, he was also one of three members of the 519th who were fined and demoted for forcing an Iraqi woman to strip during questioning, another interrogator said. A spokesman at Fort Bragg said Specialist Corsetti would not comment.

In late August of 2002, the Bagram interrogators were joined by a new military police unit that was assigned to guard the detainees. The soldiers, mostly reservists from the 377th Military Police Company based in Cincinnati and Bloomington, Ind., were similarly unprepared for their mission, members of the unit said.

The company received basic lessons in handling prisoners at Fort Dix, N.J., and some police and corrections officers in its ranks provided further training. That instruction included an overview of "pressure-point control tactics" and notably the "common peroneal strike" -- a potentially disabling blow to the side of the leg, just above the knee.

The M.P.'s said they were never told that peroneal strikes were not part of Army doctrine. Nor did most of them hear one of the former police officers tell a fellow soldier during the training that he would never use such strikes because they would "tear up" a prisoner's legs.

But once in Afghanistan, members of the 377th found that the usual rules did not seem to apply. The peroneal strike quickly became a basic weapon of the M.P. arsenal. "That was kind of like an accepted thing; you could knee somebody in the leg," former Sgt. Thomas V. Curtis told the investigators.

A few weeks into the company's tour, Specialist Jeremy M. Callaway overheard another guard boasting about having beaten a detainee who had spit on him. Specialist Callaway also told investigators that other soldiers had congratulated the guard "for not taking any" from a detainee.

One captain nicknamed members of the Third Platoon "the Testosterone Gang." Several were devout bodybuilders. Upon arriving in Afghanistan, a group of the soldiers decorated their tent with a Confederate flag, one soldier said.

Some of the same M.P.'s took a particular interest in an emotionally disturbed Afghan detainee who was known to eat his feces and mutilate himself with concertina wire. The soldiers kneed the man repeatedly in the legs and, at one point, chained him with his arms straight up in the air, Specialist Callaway told investigators. They also nicknamed him "Timmy," after a disabled child in the animated television series "South Park." One of the guards who beat the prisoner also taught him to screech like the cartoon character, Specialist Callaway said.

Eventually, the man was sent home.

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The Defiant Detainee

The detainee known as Person Under Control No. 412 was a portly, well-groomed Afghan named Habibullah. Some American officials identified him as "Mullah" Habibullah, a brother of a former Taliban commander from the southern Afghan province of Oruzgan.

He stood out from the scraggly guerrillas and villagers whom the Bagram interrogators typically saw. "He had a piercing gaze and was very confident," the provost marshal in charge of the M.P.'s, Maj. Bobby R. Atwell, recalled.

Documents from the investigation suggest that Mr. Habibullah was captured by an Afghan warlord on Nov. 28, 2002, and delivered to Bagram by C.I.A. operatives two days later. His well-being at that point is a matter of dispute. The doctor who examined him on arrival at Bagram reported him in good health. But the intelligence operations chief, Lt. Col. John W. Loffert Jr., later told Army investigators, "He was already in bad condition when he arrived."

What is clear is that Mr. Habibullah was identified at Bagram as an important prisoner and an unusually sharp-tongued and insubordinate one.

One of the 377th's Third Platoon sergeants, Alan J. Driver Jr., told investigators that Mr. Habibullah rose up after a rectal examination and kneed him in the groin. The guard said he grabbed the prisoner by the head and yelled in his face. Mr. Habibullah then "became combative," Sergeant Driver said, and had to be subdued by three guards and led away in an armlock.

He was then confined in one of the 9-foot by 7-foot isolation cells, which the M.P. commander, Capt. Christopher M. Beiring, later described as a standard procedure. "There was a policy that detainees were hooded, shackled and isolated for at least the first 24 hours, sometimes 72 hours of captivity," he told investigators.

While the guards kept some prisoners awake by yelling or poking at them or banging on their cell doors, Mr. Habibullah was shackled by the wrists to the wire ceiling over his cell, soldiers said.

On his second day, Dec. 1, the prisoner was "uncooperative" again, this time with Specialist Willie V. Brand. The guard, who has since been charged with assault and other crimes, told investigators he had delivered three peroneal strikes in response. The next day, Specialist Brand said, he had to knee the prisoner again. Other blows followed.

A lawyer for Specialist Brand, John P. Galligan, said there was no criminal intent by his client to hurt any detainee. "At the time, my client was acting consistently with the standard operating procedure that was in place at the Bagram facility."

The communication between Mr. Habibullah and his jailers appears to have been almost exclusively physical. Despite repeated requests, the M.P.'s were assigned no interpreters

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of their own. Instead, they borrowed from the interrogators when they could and relied on prisoners who spoke even a little English to translate for them.

When the detainees were beaten or kicked for "noncompliance," one of the interpreters, Ali M. Baryalai said, it was often "because they have no idea what the M.P. is saying."

By the morning of Dec. 2, witnesses told the investigators, Mr. Habibullah was coughing and complaining of chest pains. He limped into the interrogation room in shackles, his right leg stiff and his right foot swollen. The lead interrogator, Sergeant Leahy, let him sit on the floor because he could not bend his knees and sit in a chair.

The interpreter who was on hand, Ebrahim Baerde, said the interrogators had kept their distance that day "because he was spitting up a lot of phlegm."

"They were laughing and making fun of him, saying it was 'gross' or 'nasty,'" Mr. Baerde said.

Though battered, Mr. Habibullah was unbowed.

"Once they asked him if he wanted to spend the rest of his life in handcuffs," Mr. Baerde said. "His response was, 'Yes, don't they look good on me?'"

By Dec. 3, Mr. Habibullah's reputation for defiance seemed to make him an open target. One M.P. said he had given him five peroneal strikes for being "noncompliant and combative." Another gave him three or four more for being "combative and noncompliant." Some guards later asserted that he had been hurt trying to escape.

When Sgt. James P. Boland saw Mr. Habibullah on Dec. 3, he was in one of the isolation cells, tethered to the ceiling by two sets of handcuffs and a chain around his waist. His body was slumped forward, held up by the chains.

Sergeant Boland told the investigators he had entered the cell with two other guards, Specialists Anthony M. Morden and Brian E. Cammack. (All three have been charged with assault and other crimes.) One of them pulled off the prisoner's black hood. His head was slumped to one side, his tongue sticking out. Specialist Cammack said he had put some bread on Mr. Habibullah's tongue. Another soldier put an apple in the prisoner's hand; it fell to the floor.

When Specialist Cammack turned back toward the prisoner, he said in one statement, Mr. Habibullah's spit hit his chest. Later, Specialist Cammack acknowledged, "I'm not sure if he spit at me." But at the time, he exploded, yelling, "Don't ever spit on me again!" and kneeing the prisoner sharply in the thigh, "maybe a couple" of times. Mr. Habibullah's limp body swayed back and forth in the chains.

When Sergeant Boland returned to the cell some 20 minutes later, he said, Mr. Habibullah was not moving and had no pulse. Finally, the prisoner was unchained and laid out on the

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floor of his cell.

The guard who Specialist Cammack said had counseled him back in New Jersey about the dangers of peroneal strikes found him in the room where Mr. Habibullah lay, his body already cold.

"Specialist Cammack appeared very distraught," Specialist William Bohl told an investigator. The soldier "was running about the room hysterically."

An M.P. was sent to wake one of the medics.

"What are you getting me for?" the medic, Specialist Robert S. Melone, responded, telling him to call an ambulance instead.

When another medic finally arrived, he found Mr. Habibullah on the floor, his arms outstretched, his eyes and mouth open.

"It looked like he had been dead for a while, and it looked like nobody cared," the medic, Staff Sgt. Rodney D. Glass, recalled.

Not all of the guards were indifferent, their statements show. But if Mr. Habibullah's death shocked some of them, it did not lead to major changes in the detention center's operation.

Military police guards were assigned to be present during interrogations to help prevent mistreatment. The provost marshal, Major Atwell, told investigators he had already instructed the commander of the M.P. company, Captain Beiring, to stop chaining prisoners to the ceiling. Others said they never received such an order.

Senior officers later told investigators that they had been unaware of any serious abuses at the B.C.P. But the first sergeant of the 377th, Betty J. Jones, told investigators that the use of standing restraints, sleep deprivation and peroneal strikes was readily apparent.

"Everyone that is anyone went through the facility at one time or another," she said.

Major Atwell said the death "did not cause an enormous amount of concern 'cause it appeared natural."

In fact, Mr. Habibullah's autopsy, completed on Dec. 8, showed bruises or abrasions on his chest, arms and head. There were deep contusions on his calves, knees and thighs. His left calf was marked by what appeared to have been the sole of a boot.

His death was attributed to a blood clot, probably caused by the severe injuries to his legs, which traveled to his heart and blocked the blood flow to his lungs.

The Shy Detainee

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On Dec. 5, one day after Mr. Habibullah died, Mr. Dilawar arrived at Bagram.

Four days before, on the eve of the Muslim holiday of Id al-Fitr, Mr. Dilawar set out from his tiny village of Yakubi in a prized new possession, a used Toyota sedan that his family bought for him a few weeks earlier to drive as a taxi.

Mr. Dilawar was not an adventurous man. He rarely went far from the stone farmhouse he shared with his wife, young daughter and extended family. He never attended school, relatives said, and had only one friend, Bacha Khel, with whom he would sit in the wheat fields surrounding the village and talk.

"He was a shy man, a very simple man," his eldest brother, Shahpoor, said in an interview.

On the day he disappeared, Mr. Dilawar's mother had asked him to gather his three sisters from their nearby villages and bring them home for the holiday. But he needed gas money and decided instead to drive to the provincial capital, Khost, about 45 minutes away, to look for fares.

At a taxi stand there, he found three men headed back toward Yakubi. On the way, they passed a base used by American troops, Camp Salerno, which had been the target of a rocket attack that morning.

Militiamen loyal to the guerrilla commander guarding the base, Jan Baz Khan, stopped the Toyota at a checkpoint. They confiscated a broken walkie-talkie from one of Mr. Dilawar's passengers. In the trunk, they found an electric stabilizer used to regulate current from a generator. (Mr. Dilawar's family said the stabilizer was not theirs; at the time, they said, they had no electricity at all.)

The four men were detained and turned over to American soldiers at the base as suspects in the attack. Mr. Dilawar and his passengers spent their first night there handcuffed to a fence, so they would be unable to sleep. When a doctor examined them the next morning, he said later, he found Mr. Dilawar tired and suffering from headaches but otherwise fine.

Mr. Dilawar's three passengers were eventually flown to Guantanamo and held for more than a year before being sent home without charge. In interviews after their release, the men described their treatment at Bagram as far worse than at Guantanamo. While all of them said they had been beaten, they complained most bitterly of being stripped naked in front of female soldiers for showers and medical examinations, which they said included the first of several painful and humiliating rectal exams.

"They did lots and lots of bad things to me," said Abdur Rahim, a 26-year-old baker from Khost. "I was shouting and crying, and no one was listening. When I was shouting, the soldiers were slamming my head against the desk."

For Mr. Dilawar, his fellow prisoners said, the most difficult thing seemed to be the black cloth hood that was pulled over his head. "He could not breathe," said a man called

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Parkhudin, who had been one of Mr. Dilawar's passengers.

Mr. Dilawar was a frail man, standing only 5 feet 9 inches and weighing 122 pounds. But at Bagram, he was quickly labeled one of the "noncompliant" ones.

When one of the First Platoon M.P.'s, Specialist Corey E. Jones, was sent to Mr. Dilawar's cell to give him some water, he said the prisoner spit in his face and started kicking him. Specialist Jones responded, he said, with a couple of knee strikes to the leg of the shackled man.

"He screamed out, 'Allah! Allah! Allah!' and my first reaction was that he was crying out to his god," Specialist Jones said to investigators. "Everybody heard him cry out and thought it was funny."

Other Third Platoon M.P.'s later came by the detention center and stopped at the isolation cells to see for themselves, Specialist Jones said.

It became a kind of running joke, and people kept showing up to give this detainee a common peroneal strike just to hear him scream out 'Allah,'" he said. "It went on over a 24-hour period, and I would think that it was over 100 strikes."

In a subsequent statement, Specialist Jones was vague about which M.P.'s had delivered the blows. His estimate was never confirmed, but other guards eventually admitted striking Mr. Dilawar repeatedly.

Many M.P.'s would eventually deny that they had any idea of Mr. Dilawar's injuries, explaining that they never saw his legs beneath his jumpsuit. But Specialist Jones recalled that the drawstring pants of Mr. Dilawar's orange prison suit fell down again and again while he was shackled.

"I saw the bruise because his pants kept falling down while he was in standing restraints," the soldier told investigators. "Over a certain time period, I noticed it was the size of a fist."

As Mr. Dilawar grew desperate, he began crying out more loudly to be released. But even the interpreters had trouble understanding his Pashto dialect; the annoyed guards heard only noise.

"He had constantly been screaming, 'Release me; I don't want to be here,' and things like that," said the one linguist who could decipher his distress, Abdul Ahad Wardak.

The Interrogation

On Dec. 8, Mr. Dilawar was taken for his fourth interrogation. It quickly turned hostile.

The 21-year-old lead interrogator, Specialist Glendale C. Walls II, later contended that Mr. Dilawar was evasive. "Some holes came up, and we wanted him to answer us truthfully,"

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he said. The other interrogator, Sergeant Salcedo, complained that the prisoner was smiling, not answering questions, and refusing to stay kneeling on the ground or sitting against the wall.

The interpreter who was present, Ahmad Ahmadzai, recalled the encounter differently to investigators.

The interrogators, Mr. Ahmadzai said, accused Mr. Dilawar of launching the rockets that had hit the American base. He denied that. While kneeling on the ground, he was unable to hold his cuffed hands above his head as instructed, prompting Sergeant Salcedo to slap them back up whenever they began to drop.

"Selena berated him for being weak and questioned him about being a man, which was very insulting because of his heritage," Mr. Ahmadzai said.

When Mr. Dilawar was unable to sit in the chair position against the wall because of his battered legs, the two interrogators grabbed him by the shirt and repeatedly shoved him back against the wall.

"This went on for 10 or 15 minutes," the interpreter said. "He was so tired he couldn't get up."

"They stood him up, and at one point Selena stepped on his bare foot with her boot and grabbed him by his beard and pulled him towards her," he went on. "Once Selena kicked Dilawar in the groin, private areas, with her right foot. She was standing some distance from him, and she stepped back and kicked him.

"About the first 10 minutes, I think, they were actually questioning him, after that it was pushing, shoving, kicking and shouting at him," Mr. Ahmadzai said. "There was no interrogation going on."

The session ended, he said, with Sergeant Salcedo instructing the M.P.'s to keep Mr. Dilawar chained to the ceiling until the next shift came on.

The next morning, Mr. Dilawar began yelling again. At around noon, the M.P.'s called over another of the interpreters, Mr. Baerde, to try to quiet Mr. Dilawar down.

"I told him, 'Look, please, if you want to be able to sit down and be released from shackles, you just need to be quiet for one more hour."

"He told me that if he was in shackles another hour, he would die," Mr. Baerde said.

Half an hour later, Mr. Baerde returned to the cell. Mr. Dilawar's hands hung limply from the cuffs, and his head, covered by the black hood, slumped forward.

"He wanted me to get a doctor, and said that he needed 'a shot,'" Mr. Baerde recalled. "He said that he didn't feel good. He said that his legs were hurting."

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Mr. Baerde translated Mr. Dilawar's plea to one of the guards. The soldier took the prisoner's hand and pressed down on his fingernails to check his circulation.

"He's O.K.," Mr. Baerde quoted the M.P. as saying. "He's just trying to get out of his restraints."

By the time Mr. Dilawar was brought in for his final interrogation in the first hours of the next day, Dec. 10, he appeared exhausted and was babbling that his wife had died. He also told the interrogators that he had been beaten by the guards.

"But we didn't pursue that," said Mr. Baryalai, the interpreter.

Specialist Walls was again the lead interrogator. But his more aggressive partner, Specialist Claus, quickly took over, Mr. Baryalai said.

"Josh had a rule that the detainee had to look at him, not me," the interpreter told investigators. "He gave him three chances, and then he grabbed him by the shirt and pulled him towards him, across the table, slamming his chest into the table front."

When Mr. Dilawar was unable to kneel, the interpreter said, the interrogators pulled him to his feet and pushed him against the wall. Told to assume a stress position, the prisoner leaned his head against the wall and began to fall asleep.

"It looked to me like Dilawar was trying to cooperate, but he couldn't physically perform the tasks," Mr. Baryalai said.Finally, Specialist Walls grabbed the prisoner and "shook him harshly," the interpreter said, telling him that if he failed to cooperate, he would be shipped to a prison in the United States, where he would be "treated like a woman, by the other men" and face the wrath of criminals who "would be very angry with anyone involved in the 9/11 attacks." (Specialist Walls was charged last week with assault, maltreatment and failure to obey a lawful order; Specialist Claus was charged with assault, maltreatment and lying to investigators. Each man declined to comment.)

A third military intelligence specialist who spoke some Pashto, Staff Sgt. W. Christopher Yonushonis, had questioned Mr. Dilawar earlier and had arranged with Specialist Claus to take over when he was done. Instead, the sergeant arrived at the interrogation room to find a large puddle of water on the floor, a wet spot on Mr. Dilawar's shirt and Specialist Claus standing behind the detainee, twisting up the back of the hood that covered the prisoner's head.

"I had the impression that Josh was actually holding the detainee upright by pulling on the hood," he said. "I was furious at this point because I had seen Josh tighten the hood of another detainee the week before. This behavior seemed completely gratuitous and unrelated to intelligence collection."

"What the hell happened with that water?" Sergeant Yonushonis said he had demanded.

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"We had to make sure he stayed hydrated," he said Specialist Claus had responded.

The next morning, Sergeant Yonushonis went to the noncommissioned officer in charge of the interrogators, Sergeant Loring, to report the incident. Mr. Dilawar, however, was already dead.

The Post-Mortem

The findings of Mr. Dilawar's autopsy were succinct. He had had some coronary artery disease, the medical examiner reported, but what caused his heart to fail was "blunt force injuries to the lower extremities." Similar injuries contributed to Mr. Habibullah's death.

One of the coroners later translated the assessment at a pre-trial hearing for Specialist Brand, saying the tissue in the young man's legs "had basically been pulpified."

"I've seen similar injuries in an individual run over by a bus," added Lt. Col. Elizabeth Rouse, the coroner, and a major at that time.

After the second death, several of the 519th Battalion's interrogators were temporarily removed from their posts. A medic was assigned to the detention center to work night shifts. On orders from the Bagram intelligence chief, interrogators were prohibited from any physical contact with the detainees. Chaining prisoners to any fixed object was also banned, and the use of stress positions was curtailed.

In February, an American military official disclosed that the Afghan guerrilla commander whose men had arrested Mr. Dilawar and his passengers had himself been detained. The commander, Jan Baz Khan, was suspected of attacking Camp Salerno himself and then turning over innocent "suspects" to the Americans in a ploy to win their trust, the military official said.

The three passengers in Mr. Dilawar's taxi were sent home from Guantanamo in March 2004, 15 months after their capture, with letters saying they posed "no threat" to American forces.

They were later visited by Mr. Dilawar's parents, who begged them to explain what had happened to their son. But the men said they could not bring themselves to recount the details.

"I told them he had a bed," said Mr. Parkhudin. "I said the Americans were very nice because he had a heart problem."

In late August of last year, shortly before the Army completed its inquiry into the deaths, Sergeant Yonushonis, who was stationed in Germany, went at his own initiative to see an agent of the Criminal Investigation Command. Until then, he had never been interviewed.

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"I expected to be contacted at some point by investigators in this case," he said. "I was living a few doors down from the interrogation room, and I had been one of the last to see this detainee alive."

Sergeant Yonushonis described what he had witnessed of the detainee's last interrogation. "I remember being so mad that I had trouble speaking," he said.

He also added a detail that had been overlooked in the investigative file. By the time Mr. Dilawar was taken into his final interrogations, he said, "most of us were convinced that the detainee was innocent."

Photos: Dilawar, at left, was an Afghan farmer and taxi driver who died while in custody of American troops. Below, a sketch by Thomas V. Curtis, a former Reserve M.P. sergeant, showing how Dilawar was chained to the ceiling of his cell. (pg. A1); Shahpoor visiting the grave of his brother Dilawar, who died in 2002 after mistreatment by soldiers at the Bagram detention facility. Most of his interrogators were said to believe he was innocent of any insurgent activity. (Photographs by Keith Bedford for The New York Times)(pg. A12); Asaldin holding Bibi Rashida, 3, daughter of his son Dilawar, at home in Yakubi. Army coroners ruled Dilawar's death a homicide.; Troops at the American base in Bagram, which houses a prison for suspected Taliban and Qaeda fighters. Photo directly above shows part of a copy of the death certificate for Dilawar, the 22-year-old farmer and part-time taxi driver who died there. (pg. A13)

Chart: "Along the Chain of Command, Confusion and Contradiction"
Statements below show differing perceptions of permissible conduct toward detainees.

Gen. Daniel K. McNeill
Commander of allied forces in Afghanistan

INTERVIEW WITH THE NEW YORK TIMES, FEB. 7, 2003

"We are not chaining people to the ceilings . . . I will say that our interrogation techniques are adapted, they are in accordance with what is generally accepted as interrogation techniques."

Col. Theodore C. Nicholas II
Director of intelligence for the American task force in Afghanistan

STATEMENT TO ARMY INVESTIGATORS, JUNE 11, 2004

"I did not put pressure on the interrogation cell to violate standards to gain information. I would rather not receive the information than harm an individual to produce it."

Capt. Britton T. Hopper
Company commander 519th Military Intelligence Battalion, Bagram, Aug. 2002-Jan. 2003

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STATEMENT TO ARMY INVESTIGATORS, AUG. 2, 2004

"There was a lot of pressure to get more intelligence . . . coming from top down, and probably the perception, on occasion, was that we weren't being as aggressive as we should have been."

Capt. Carolyn A. Wood
Operations officer in charge of interrogations at Bagram Control Point, July 2002-Jan. 2003

STATEMENT IN COMMANDERS CLASSIFIED INVESTIGATION, JAN. 17, 2004

"Would like to get additional legal guidance. We would like to know what our left and right limits are in respect to stress positions and sleep adjustment, for instance."

Former Sgt. James A. (Alex) Leahy
Interrogation team leader

STATEMENT TO ARMY INVESTIGATORS, JAN. 15, 2004

"Due to the lack of clear policy concerning the legality of safety positions and the sleep adjustment schedules, we did not keep records of it."
(pg. A12)

---- INDEX REFERENCES ----

NEWS SUBJECT: (HR & Labor Management (1HR87); Legal (1LE33); Business Management (1BU42); Strikes & Work Stoppages (1ST12); Judicial (1JU36); Prisons (1PR87))

INDUSTRY: (Commercial Construction (1CO15); Aerospace & Defense (1AE96); Defense (1DE43); Construction (1CO11); Correctional Facilities (1CO72); Ground Forces (1GR94); Military Forces (1MI37))

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Callaway; Cammack; Camp Salerno; Carolyn A. Wood; Christopher M. Beiring; Corey E. Jones; Corsetti; Damien M. Corsetti; Daniel K. McNeill; Dilawar; Donald H. Rumsfeld; Driver; Ebrahim Baerde; Elizabeth Rouse; Eric H. Barclais; Eric LaHammer; Fifteen; Fitr; Habibullah; James A. (Alex; James A. Leahy; James P. Boland; Jan; Jan Baz Khan; Jeremy M. Callaway; John P. Galligan; John W. Loffert Jr.; Jones; Josh; Joshua R. Claus; Keith Bedford; Khan; Larry Di Rita; Leahy; Leahy Interrogation; Leave; Loring; Major Atwell; Militiamen; Parkhudin; Platoon M.P.; Qaeda; Reserve M.P.; Retrofitted; Robert S. Melone; Rodney D. Glass; Salcedo; Selena; Selena M. Salcedo; Shahpoor; Specialist; Specialist Brand; Specialist Callaway; Specialist Cammack; Specialist Claus; Specialist Corsetti; Specialist Glendale; Specialist Jones; Steven W. Loring; Theodore C. Nicholas; Thomas V. Curtis; W. Christopher Yonushonis; Walls; William Bohl; Willie V. Brand; Wood; Yonushonis) (United States International Relations; United States Armament and Defense; Surveys and Series) (Series) (Afghanistan; Bagram (Afghanistan); Afghanistan; Afghanistan)

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May 22, 2005

Section: 1

THE BAGRAM FILE: Second of two articles.
Army Faltered In Investigating Detainee Abuse

TIM GOLDEN

Despite autopsy findings of homicide and statements by soldiers that two prisoners died after being struck by guards at an American military detention center in Bagram, Afghanistan, Army investigators initially recommended closing the case without bringing any criminal charges, documents and interviews show.

Within days after the two deaths in December 2002, military coroners determined that both had been caused by "blunt force trauma" to the legs. Soon after, soldiers and others at Bagram told the investigators that military guards had repeatedly struck both men in the thighs while they were shackled and that one had also been mistreated by military interrogators.

Nonetheless, agents of the Army's Criminal Investigation Command reported to their superiors that they could not clearly determine who was responsible for the detainees' injuries, military officials said. Military lawyers at Bagram took the same position, according to confidential documents from the investigation obtained by The New York Times.

"I could never see any criminal intent on the part of the M.P.'s to cause the detainee to die," one of the lawyers, Maj. Jeff A. Bovarnick, later told investigators, referring to one of the deaths. "We believed the M.P.'s story, that this was the most combative detainee ever."

The investigators' move to close the case was among a series of apparent missteps in an Army inquiry that ultimately took almost two years to complete and has so far resulted in criminal charges against seven soldiers. Early on, the documents show, crucial witnesses were not interviewed, documents disappeared, and at least a few pieces of evidence were mishandled.

While senior military intelligence officers at Bagram quickly heard reports of abuse by several interrogators, documents show they also failed to file reports that are mandatory when any intelligence personnel are suspected of misconduct, including mistreatment of detainees. Those reports would have alerted military intelligence officials in the United

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States to a problem in the unit, military officials said.

Those interrogators and others from Bagram were later sent to Iraq and were assigned to Abu Ghraib prison. A high-level military inquiry last year found that the captain who led interrogation operations at Bagram, Capt. Carolyn A. Wood, applied many of the same harsh methods in Iraq that she had overseen in Afghanistan.

Citing "investigative shortfalls," senior Army investigators took the Bagram inquiry away from agents in Afghanistan in August 2003, assigning it to a task force based at the agency's headquarters in Virginia. In October 2004, the task force found probable cause to charge 27 of the military police guards and military intelligence interrogators with crimes ranging from involuntary manslaughter to lying to investigators. Those 27 included the 7 who have actually been charged.

"I would acknowledge that a lot of these investigations appear to have taken excessively long," the Defense Department's chief spokesman, Larry Di Rita, said in an interview on Friday. "There's no other way to describe an investigation that takes two years. People are being held accountable, but it's taking too long."

Mr. Di Rita said the Pentagon was examining ways to speed up such investigations, "because justice delayed is justice denied."

A spokesman for the Criminal Investigation Command, Christopher Grey, would not discuss details of the case, but played down the significance of the agents' early proposal to close it. He said that the investigation had been guided by a desire for thoroughness rather than speed, and that it eventually included more than 250 interviews around the world.

"Case agents make recommendations all the time," Mr. Grey said. "But the review process looks at investigations constantly and points to other things that need to be completed or other investigative approaches."

While the proposal to close the case was ultimately rejected by senior officials, documents show that the inquiry was at a virtual standstill when an article in The New York Times on March 4, 2003, reported that at least one of the prisoner's deaths had been ruled a homicide, contradicting the military's earlier assertions that both had died of natural causes. Activity in the case quickly resumed.

The details of the investigation emerged from a file of almost 2,000 pages of confidential Army documents about the death on Dec. 10, 2002, of Dilawar, a 22-year-old taxi driver. The file was obtained from a person involved in the inquiry who was critical of the abuses at Bagram and the military's response to the deaths.

The file presents the fates of Mr. Dilawar and another detainee who died six days earlier, Mullah Habibullah, against a backdrop of frequent harsh treatment by guards and interrogators who were in many cases poorly trained, loosely supervised and only vaguely

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aware of or attentive to regulations limiting their use of force against prisoners they considered to be terrorists.

According to interviews with military intelligence officials who served at Bagram, only a small fraction of the detainees there were considered important or suspicious enough to be transferred to the American military prison at Guantanamo Bay, Cuba, for further interrogation. Two intelligence officers estimated that about 85 percent of the prisoners were ultimately released.

Still, most new detainees at Bagram were hooded, shackled and isolated for at least 24 hours and sometimes as long as 72 hours, the commander of the military police guards at Bagram, Capt. Christopher M. Beiring, told investigators. Prisoners caught in infractions like talking to one another were handcuffed to cell doors or ceilings, often for half an hour or an hour, but sometimes for far longer. Interrogators trying to break the detainees' resistance sometimes ordered that they be forced to sweep the same floor space over and over or scrub it with a toothbrush.

The responsibility of senior officers at Bagram for carrying out such methods is not clear in the Army's criminal report.

In several instances, the documents show Captain Wood and her deputy, Staff Sgt. Steven W. Loring, sought clarification about what techniques they could use. "Numerous requests for strict guidance on P.U.C. treatment have been voiced to the Staff Judge Advocate," Sergeant Loring said, referring to the detainees by the initials for Persons Under Control, "but no training has been offered."

Major Bovarnick, the former legal adviser to the detention center, told investigators that the shackling of detainees with their arms overhead was standard operating procedure when he arrived at Bagram in mid-November 2002. On Nov. 26, after complaints from the International Committee of the Red Cross, he convened a group of military and C.I.A. officials at Bagram to discuss methods of interrogation and punishment, including shackling to fixed objects.

"My personal question then was, 'Is it inhumane to handcuff somebody to something?'" he said. Referring to his consultations with the two senior lawyers at Bagram, he added, "It was our opinion that it was not inhumane."

After the deaths, officers who served at Bagram said, there was a similar debate over whether criminal charges were warranted.

Military lawyers noted that the autopsies of the two dead detainees had found severe trauma to both prisoners' legs -- injuries that a coroner later compared to the effect of being run over by a bus. They also acknowledged statements by more than half a dozen guards that they or others had struck the detainees. But the lawyers and other officers did not press for a fuller accounting, two officers said in interviews.

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Instead, statements showed, they pointed to indications that both detainees had some existing medical problems when they arrived at Bagram, and emphasized that it would be difficult to determine the responsibility of individual guards for the injuries they sustained in custody.

"No one blow could be determined to have caused the death," the former senior staff lawyer at Bagram, Col. David L. Hayden, said he had been told by the Army's lead investigator. "It was reasonable to conclude at the time that repetitive administration of legitimate force resulted in all the injuries we saw." Both Major Bovarnick and Colonel Hayden declined requests for comment.

As late as Feb. 7 -- nearly two months after the first autopsy reports had classified both deaths as homicides -- the American commander of coalition forces in Afghanistan, Lt. Gen. Daniel K. McNeill, said in an interview that he had "no indication" that either man had been injured in custody.

General McNeill, who has since been promoted, declined repeated requests to clarify his remarks.

In retrospect, the investigators' initial interviews with guards, interrogators and interpreters at the detention center appear cursory and sometimes contradictory. As transcribed, many of the statements are little more than a page or two long.

Most of the guards who admitted punching the detainees or kneeing them in the thighs said they did so in order to subdue prisoners who were extraordinarily combative. But both detainees were shackled at the hands and feet throughout their time at Bagram. One of them, Mr. Dilawar, weighed only 122 pounds and was described by interpreters as neither violent nor aggressive. Both detainees also complained of being beaten and seemed to have trouble walking, some witnesses said.

The early interviews also included statements by two of the interpreters that they had been so troubled by the abusive behavior of some interrogators that they had gone to the noncommissioned officer in charge of the military intelligence group, Staff Sergeant Loring, to complain. One of the interrogators, Specialist Damien M. Corsetti, refused to speak to the agents at all, and another told of the guards' beating one of the detainees who died.

Even so, investigators failed to interview some crucial witnesses, including the officer in charge of the interrogators, Captain Wood, and the commander of the military police company, Captain Beiring. They also neglected an interrogator who had been present for most of Mr. Dilawar's questioning. When he finally went to investigators at his own initiative, he described one of the worst episodes of abuse.

Many of the guards who later provided important testimony were also initially overlooked. Computer records and written logs that were supposed to record treatment of the detainees were not secured and later disappeared. Blood taken from Mr. Habibullah was stored in a

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butter dish in the agents' office refrigerator, from which it was only recovered -- or "seized" as a report explains it -- when the office was later moved.

The record of the investigation indicated that Army investigators almost entirely stopped interviewing witnesses within three weeks after Mr. Dilawar's death. And although Major Bovarnick, the detention center's legal adviser, said he told Captain Beiring after the first death "that there would be no shackling to the ceiling ever again," the issue was largely ignored in the initial investigation.

While the Army's criminal inquiry continued, General McNeill ordered a senior officer, Col. Joseph G. Nesbitt, to conduct a separate, classified examination of procedures at the detention center. That led to changes including prohibitions against the shackling of prisoners for sleep deprivation and interrogators' making physical contact with detainees.

Documents from the criminal investigation suggested that Colonel Nesbitt was also dismissive of the notion that the two deaths pointed to wider wrongdoing. He concluded that military police guards at the detention center "knew, were following and strictly applying" proper rules on the use of force, documents showed, and he cited a "conflict between obtaining accurate, timely information and treating detainees humanely."

Senior officials at the Criminal Investigation Command's headquarters took a different view. On April 15, 2003, they rejected the field agents' proposal to close the case, sending it back "for numerous investigative, operational, administrative and security classification-related issues, which required additional work, pursuit, clarification or scrutiny." Four months later, the headquarters officials reassigned the case to the task force that eventually implicated the 27 soldiers.

Photos: Two Afghan detainees died from their injuries in December 2002 after being shackled and beaten at the American military base in Bagram, Afghanistan, above. (Photo by Wally Santana/Associated Press)(pg. 18)

Chart/Photos: "Time Lag: Detainee Deaths and Military Investigations"

519TH MILITARY INTELLIGENCE BATTALION

July 2002 -- The 519th M.I. Battalion arrives at the Bagram detention center in Afghanistan.

Jan. 2003 -- Interrogators from the battalion return home to Fort Bragg, N.C. The operations officer, Capt. Carolyn A. Wood (left), is awarded a Bronze Star for meritorious service.

March -- Personnel from the battalion deploy to Iraq.

July -- Personnel from the battalion take over interrogations at Abu Ghraib prison under the direct leadership of Captain Wood.

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DETAINEE DEATHS

Nov. 30- Dec. 4, 2002 -- Mullah Habibullah arrives at the Bagram detention center. He dies after days of beatings by guards.

Dec. 5-10 A second Afghan man, Dilawar (left), is taken into custody. He dies after being shackled to the ceiling of his cell for much of five days.

Dec. 8, 13 -- Initial autopsy reports show both men were victims of homicide.

INVESTIGATIONS

Dec. 2002 -- Military spokesmen at Bagram say the men died from natural causes.

Dec. 12 -- Lt. Gen. Daniel K. McNeill, commander of allied forces in Afghanistan, orders an investigation that finds serious problems at the detention center.

Dec. 31 -- The Army's Criminal Investigation Command conducts the last full interview of their initial inquiry into the deaths of the two men. Weeks later, they recommend that the case be closed without seeking charges against any of the soldiers.

April 15, 2003 -- Bagram report is sent back by Criminal Investigation Command headquarters for many issues that "required additional work, pursuit, clarification or scrutiny."

Aug. 6 -- After "a review of investigative shortfalls" by senior officials at the Criminal Investigation Command, the Bagram inquiry is assigned to the agency's headquarters.

Oct. 8 -- The Army's criminal investigation ends, finding probable cause to charge 27 officers and soldiers with crimes related to the deaths of Mr. Dilawar, and 15 of the personnel were charged in the case of Mr. Habibullah.

Aug. 2004 -- Report into abuses at Abu Ghraib by Lt. Gen. Anthony R. Jones finds that Captain Wood instituted methods at the Iraqi prison that were "remarkably similar" to those she applied at Bagram.

(pg. 18)

---- INDEX REFERENCES ----

NEWS SUBJECT: (Violent Crime (1VI27); Legal (1LE33); Social Issues (1SO05); Judicial (1JU36); Crime (1CR87); Criminal Law (1CR79); Prisons (1PR87))

INDUSTRY: (Commercial Construction (1CO15); Aerospace & Defense (1AE96); Defense (1DE43); Construction (1CO11); Correctional Facilities (1CO72); Ground Forces (1GR94); Defense Intelligence (1DE90); Military Forces (1MI37))

REGION: (North America (1NO39); Latin America (1LA15); Cuba (1CU43); Iraq (1IR87); Arab

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States (1AR46); Western Asia (1WE54); Afghanistan (1AF45); Americas (1AM92); Asia (1AS61); Middle East (1MI23); USA (1US73); Caribbean (1CA06))

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Independence Day 2003

Main Street America Fights the Federal Government's Insatiable Appetite for New Powers in the Post 9/11 Era

A Special Report

by

The American Civil Liberties Union

Thursday, July 3, 2003

www.aclu.org

FOREWORD

In arguably the most important area of government -- the preservation of individual liberty in our democracy -- Main Street America has played, and will always play, the preeminent role in gaining and safeguarding American freedoms. American society has a unique ability to achieve social, economic and political progress through spontaneous grassroots movements that begin in neighborhoods, towns and cities and grow into national movements, which, more often than not, actually produce meaningful change in government.

> "I have come to the conclusion that politics are too serious a matter to be left to the politicians."
> --Charles de Gaulle

Consider movements that brought about the abolition of slavery, voting rights for women, labor rights, and more recently, civil rights for African Americans in the 1950s and 1960s. Indeed, even our birth as a nation began with a whisper of discontent as colonists threw tea into the Boston Harbor as an act of protest, and grew into a thunderous declaration of our fundamental rights and freedoms. The result? The creation of a nation with ideals of freedom, liberty and respect for the individual as the fundamental core of its foundation.

Today, a new chapter in this history of political mobilization is being written. In the latest example of Americans fulfilling their civic entitlements in a free society and of our tradition of rejecting intrusive and offensive government policies, communities are banding together to repudiate congressional and Administration efforts to undermine and in some cases eliminate certain liberties as the price of securing safety after the tragic events of September 11, 2001.

All across the country, Americans are challenging the notion that the very liberties that make our nation unique should be sacrificed for the sake of new measures that are of questionable effectiveness in assuring our safety. These communities are standing up to say that while concerned about safety in these difficult times, they believe strongly that our nation can be both safe *and* free. Their message is one that resonates particularly strongly on Independence Day, a day when the nation pauses to reflect on its founding charter and the men who wrote it more than 200 years ago.

To date, more than 130 American communities – of all shapes, sizes, and ideological persuasions – have adopted pro-civil liberties resolutions and laws rejecting federal policies that threaten our basic constitutional rights. Dozens more are considering such initiatives. By all accounts, this grassroots reaction to excessive government policies is only beginning.

What is invoking the ire of Republicans and Democrats alike in these communities? Overbroad federal policies such as the USA PATRIOT Act, new FBI domestic spying guidelines, misguided anti-immigration laws, indefinite imprisonment of American citizens in a manner that strips them of fundamental due process rights, and the failed Operation TIPS program -- which would have recruited neighbor to spy on neighbor -- are but only a few.

Although the Justice Department is actively seeking to downplay the resolutions by inaccurately characterizing them as the product of "liberal college towns,"[1] these resolution campaigns are cropping up in such places as the Republican-controlled state Legislature of Alaska to the conservative American heartland in places like Oklahoma City to liberal Democratic communities like Santa Cruz, CA and Cambridge, MA.

The Justice Department's summary dismissal of the resolution movement is particularly interesting given how closely it mirrors what federal government officials said about the political movements of the past that challenged their authority. FBI Director J. Edgar Hoover, for example, often characterized the Rev. Dr. Martin Luther King Jr. as a troublemaker and an agitator whose movement, while annoying, did not merit much serious consideration.[2] Yet, when the civil rights movement really started gaining steam, the government sought to discredit, defame and then suppress it.

The Justice Department's attempt to discredit the resolution campaign are in sync with the words of Attorney General Ashcroft, who in the days after the 9/11 attacks, characterized those who speak up to protect their freedoms and criticize government policies as un-American and unpatriotic. Testifying before Congress, Ashcroft said: "Those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists."[3]

A year and a half later, faced with the fact that communities in more than half the states have passed resolutions that directly challenge anti-liberty government policies, the federal government is beginning to turn from ignoring this movement to seeking to discredit and combat it. Indeed, the Justice Department has deployed U.S. Attorneys and FBI agents in various localities to counter the resolution drives. These measures have ranged from trying to mislead the media in Maine to making false statements about the provisions in the PATRIOT Act in a hearing before the Alaska Legislature.

The civil liberties resolutions movement is a vindication of the intense concerns the ACLU raised about the welfare of our freedoms in the post-9/11 era. In the hopes of detailing just how this popular revolt developed and where it stands today, the following special report documents the resolution movement, its growing momentum and the scope of its impact. While the details are new, the story is as old as our nation -- a story of individuals working at the community level to protect civil liberties.

This report is the latest in a series of special reports issued by the ACLU on government actions since 9/11 that threaten our fundamental rights and freedoms without making us safer. These special reports include: *The Dangers of Domestic Spying By Federal Law Enforcement* (January 2002), *Insatiable Appetite* (April 2002), *Civil Liberties After 9/11* (September 2002), *Bigger Monster, Weaker Chains* (January 2003), *Freedom Under Fire: Dissent in Post-9/11 America*

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[1] "Morning Edition." NPR, "Many Americans criticizing USA Patriot Act as Attorney General John Ashcroft asks for expanded powers," 06/09/2003

[2] Mary Zepernick, "About a most dangerous man," *Cape Cod Times*, 01/14/2000, Available at: http://www.peace.ca/dangerousman.htm

[3] Testimony of The Honorable John Ashcroft Attorney General, United States Department of Justice, Before the Senate Judiciary Committee Hearing on "DOJ Oversight: Preserving our Freedoms While Defending Against Terrorism," December 6, 2001. Available at: http://www.senate.gov/~judiciary/testimony.cfm?id=121&wit_id=42

(May 2003). Taken together, all of these reports document policies that underlie this local discontent with the state of liberty today.

I urge members of communities interested in passing their own resolutions to contact the nearest ACLU affiliate, or to visit our Web site (www.aclu.org/resolutions), for sample resolutions and strategies for getting them passed. Every resolution sends a message to the President, Justice Department and Congress that we can be both safe *and* free.

The growing resistance to intrusive government policies is a reminder that Americans remain committed to liberty and democracy. What was true in 1776 remains true today; Americans will not tolerate infringements on our core freedoms.

Laura W. Murphy, Director
ACLU Washington Legislative Office

HOW IT ALL STARTED...

A week after the September 11 terrorist attacks, Attorney General Ashcroft submitted to Congress a package of legislative proposals ostensibly designed to combat terrorism in the United States. Formulated by the Department of Justice in part from proposals previously rejected by Congress, the package came with an ominous warning: pass these quickly because we need these new powers immediately to prevent other attacks.

To win quick passage for the bill, which was to become known as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 or the USA PATRIOT Act -- Attorney General Ashcroft and the Bush Administration told Congress that if it didn't rush the bill through immediately any further loss of life would be on lawmakers' hands. The Attorney General demanded that his bill be passed in less than a week, a speed unheard of in the deliberative world of congressional legislating.[4]

When lawmakers demurred, hoping to draft and pass more reasonable legislation than the wish-list bill the White House was trying to force into law, Ashcroft upped the pressure, using public speeches, phone calls, personal meetings and intensive lobbying on Capitol Hill. According to congressional aides, the Attorney General encouraged an atmosphere of hysteria, insisting that without this bill, new catastrophic attacks were a virtual certainty.[5]

In the end the Administration prevailed, and Congress passed the 342-page bill on October 26, 2001 with little debate and a precious few dissenting votes (66 in the House of Representatives and one in the Senate). Most Members of Congress did not even have a chance to read the bill, the final version of which was only made available to lawmakers in the House mere hours before they had to vote on it.

As it was signed into law by the President, the USA PATRIOT Act includes a hodgepodge of expanded surveillance and law enforcement powers, many of which had actually been collecting dust at the Justice Department after having been rejected previously by Congress because of privacy or civil liberties concerns.

Under the PATRIOT Act, the judiciary's role in serving as a check on certain executive branch powers was minimized, curtailing judicial oversight over wiretapping and other investigative techniques. The PATRIOT Act facilitated government secrecy while dramatically rolling back Americans' privacy rights. The Attorney General was given broad new powers to detain non-citizens and other provisions expanded the definition of "domestic terrorism," so that it could potentially encompass domestic groups such as Greenpeace, Operation Rescue, PETA and World Trade Organization protesters. It imposes severe new criminal penalties for certain types of unlawful protest.

Groups on the political right and left were quick to point out those provisions of the PATRIOT Act violated basic constitutional freedoms of speech, free assembly and due process. Initially, those voices went unheeded. Yet, as national concern over these implications began to grow in intensity, the latest chapter in American political protest began to write itself.

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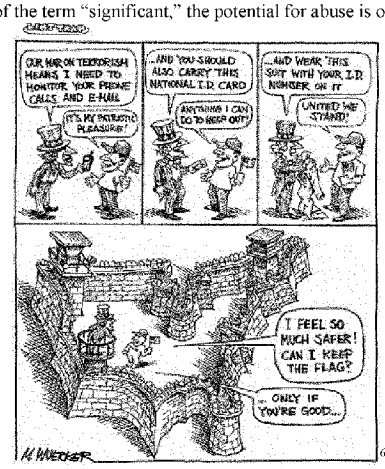
[4] Gail Gibson and Thomas Healy, "Broad anti-terror measures sought," *Baltimore Sun*, 09/18/2001
[5] Robert Dreyfuss, "John Ashcroft's Midnight Raid," *Rolling Stone*, 11/22/2001

"PATRIOT" UNPATRIOTIC?

Controversial provisions in the PATRIOT Act include one that expanded the power of the Foreign Intelligence Surveillance Act (FISA) court, which meets in secret, does not ordinarily publish its decisions and only allows the government to appear before it. With passage of the bill, Congress also granted its approval for "sneak and peek" warrants, which allow federal agents to enter private homes without notifying the owner until much later. Congress also weakened the standards for intelligence wiretaps, permitting them to be used for criminal investigations so long as a "significant purpose" of the surveillance is foreign intelligence. Given the vagueness of the term "significant," the potential for abuse is obvious.



[6]

Under the highly controversial Section 215 of the PATRIOT Act, the FBI was also granted access to highly personal "business records" – including financial, medical, mental health, library and student records -- with no meaningful judicial oversight. In other words, federal officials actually can obtain a court order for records of the books you borrow from libraries or buy from bookstores, without showing probable cause of criminal activity or intent – and the librarian or bookseller cannot even tell you that the government is investigating what you read.

The only standard for obtaining these records is that the FBI must deem them "relevant to an ongoing investigation," after which a judge must issue the court order to seize them. And, under new information sharing provisions, the agency can provide these and other records – without adequate safeguards to prevent their harmful dissemination – to other law enforcement and intelligence agencies, including the State Department and the CIA.

[6] Cartoon by Matt Wuerker. All Rights Reserved.

The White House's disregard for civil liberties continued after Congress passed the PATRIOT Act, as the Administration launched a flurry of executive orders, regulations, policies and new practices that, while of questionable practical use, run counter to basic American freedoms and undermine checks and balances enshrined in the Constitution and the Bill of Rights specifically to protect against potential government abuse.

Under one executive order, the government was permitted to monitor communications between people held in federal prisons—whether they are guilty or innocent—federal detainees and their lawyers, undermining the long-respected privacy of attorney-client privilege and threatening the constitutional right to effective counsel.[7]

Another presidential order paved the way for removing the right to a fair trial for citizens and non-citizens by labeling them "enemy combatants" or having them tried in front of secret military tribunals based solely on secret information and at the behest of the President or Secretary of Defense.[8] Nor do these new tribunals adhere to the principles of justice in the traditional courts, including martial courts to which American soldiers are subject, but instead follow rules that fail to meet even minimal international standards.

Since its passage, average Americans, in communities across the country, are steadily gaining an appreciation for the threats to civil liberties in the USA PATRIOT Act and other new policies approved by Congress and the Administration. And in the grandest of American traditions, they are not standing idly by—they are organizing, speaking up and making their voices heard. Their response and that of their elected representatives and community leaders sends a resounding message to the White House, Department of Justice and Congress that our safety need not come at the expense of the freedoms that make this country great.

The main thrust of this popular backlash is the passage of community resolutions that, taken together, sound a resounding note of protest against the government's seeming inability to prosecute the "war on terrorism" in a way that makes us both safe and free. One after another, these communities – from tiny Crestone, CO (with a population of only 73), to large cities like Seattle and Detroit, to entire states like Alaska, Vermont and Hawaii – are passing ordinances and resolutions expressing their opposition to the PATRIOT Act and their fundamental disagreement with intrusive, post-9/11 federal policies.

A Movement Grows

While communities as diverse as Beaverhead County, MT, Albany, NY and Orange County, NC have called on their federal representatives to repeal sections of the USA PATRIOT Act and related policies of the federal government, many others have also taken matters into their own hands, opposing troubling federal measures and explicitly adopting a different policy with respect to their own communities.

For example, responding to federal dragnets in the aftermath of 9/11 in which hundreds of innocent people were rounded up largely because of their color, religion or national origin,

[7] 66 Fed. Reg. 55062 (October 31, 2001)
[8] 66 Fed. Reg. 57831 (November 16, 2001)

communities like Carrboro, NC, Hartford, CT and Fairfax, CA passed resolutions calling upon their police not to engage in racial profiling.

Other communities, including Rio Arriba County, NM, Detroit, MI and Takoma Park, MD, wanting to ensure that the "war on terrorism" does not become a war on immigrants, instructed local police to "refrain from participating in the enforcement of federal immigration laws."

Reports of FBI spying on religious or political activities without indication of criminal activity has led communities like Baltimore, MD, New Haven, CT and Berkeley, CA to pass resolutions that direct local police not to participate in investigations involving activities protected by the First Amendment.

And across the country -- from Minneapolis, MN to Alachua County, FL -- communities have protested against secret arrests, detentions, wiretaps and document seizures by instructing local officials to demand that federal authorities reveal details of these intrusive actions.

The USA PATRIOT Act *does not* require local law enforcement to follow the federal government's bad example by engaging in abuse. Local municipalities have the legal right not to participate in joint federal, state and local terrorism task forces, not to enforce federal immigration law, which requires detailed legal training before it can be fairly enforced, and not to engage in racial profiling. They also have a right not to participate in any investigation, detention or surveillance unless it is based on *individualized* suspicion of criminal activity.

What we are seeing is a sweeping national movement in which localities are choosing to respect their citizens civil rights even if the federal government will not. Local municipalities are passing these resolutions both to protect the civil liberties of local residents and to pressure federal legislators to roll back intrusive sections of the PATRIOT Act.

ALL ROADS LEAD BACK TO…ANN ARBOR

How did this grassroots movement against federal authority begin? Shortly after 9/11, many people were cautiously supportive of the PATRIOT Act and disinclined to overtly criticize the Bush Administration. But, as time went by, questions started to emerge that perhaps Congress and the White House had taken away too many of our civil liberties in implementing new national security policies.

On January 7, 2002, the city of Ann Arbor, Michigan, became the first city in the country to pass a resolution in direct response to the PATRIOT Act and new federal government policies.[9] The resolution praised the importance of due process, civil liberties and human rights – important concerns given that the nearby Detroit area contains one of the largest concentrations of Middle Easterners, especially Iraqis, in the country.

movement (n.) m^{ōō}v'm^{ə}nt. **a.** A series of actions and events taking place over a period of time and working to foster a principle or policy: *a movement toward world peace.* **b.** An organized effort by supporters of a common goal

[9] Text of Ann Arbor, MI Resolution. http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11286&c=207

"We're very concerned about civil rights and about the potential discrimination," City Councilwoman Heidi Herrell told ABC News. "We spent a lot of time since September 11 making sure that the Muslim members of our community felt safe."[10]

The very next city to pass a resolution was Denver, CO, which, unlike Ann Arbor, is not normally considered a "liberal college town." Its resolution drive came after the ACLU of Colorado discovered that before 9/11, Denver police had collected 3,400 secret files on protestors over a period of several years. Most of the subjects of these secret dossiers were actually peaceful social activists who had never been in trouble with the law. In one case, the Denver police department actually labeled a venerable Quaker organization and a 73-year-old nun "criminal extremists."[11]

Significantly, the resolution states that the Denver police should not gather information on individuals' First Amendment activities unless the information relates to criminal activity and the subject is suspected of criminal activity.[12]

"We were concerned about the abridgement of free speech because of national security concerns," said Councilwoman Kathleen MacKenzie. "As awful as we felt about September 11 and as concerned as we were about national safety, we felt that giving up the right to dissent was too high a price to pay."[13]

The next community to resist the PATRIOT Act and the new Administration policies was Amherst, MA. On April 24, 2002, the town council voted overwhelmingly in favor of a resolution defending civil rights and civil liberties. The preamble to the resolution stated, "The citizens of Amherst are concerned that actions of the Attorney General of the United States and the U.S. Justice Department since the September 11, 2001 attacks pose significant threats to constitutional protections in the name of fighting terrorism. Such undermining of basic civil rights and liberties run the serious risk of destroying freedom in order to save it."[14]

"The Attorney General asserted before the Senate Judiciary Committee that civil libertarians who criticized the Department's policies aid terrorists '...erode our national unity and diminish our resolve.' We disagree," the preamble continued. "We believe that respect for Constitutional rights is essential for the preservation of democratic society."[15]

"...LEERY OF CHANGING THE LYRICS"

Two days later, the nearby town of Leverett, MA, a rural community with a population of 1,663, passed its own resolution. Following the vote, the citizen who submitted the resolution to the town's Select Board said, "It is truly Orwellian double-speak to call such unpatriotic efforts a 'PATRIOT Act.' If the American people do not speak out against such anti-democratic efforts,

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[10] Dean Schabner, "Patriot Revolt?", ABCnews.com, 07/01/2003
[11] Mayor Wellington Webb's Press Statement, 03/13/2002, http://www.aclu-co.org/spyfiles/Documents/webbstatement.htm
[12] http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11482&c=207
[13] Dean Schabner, "Patriot Revolt?", ABCnews.com, 07/01/2003
[14] Civil Rights and Civil Liberties, Amherst Town Meeting Warrant Article, 04/24/2002
[15] ibid.

they will only have themselves to blame when they, their children and grandchildren wake up in a totalitarian police state."[16]

The City Council of the college town of Northampton, MA, unanimously passed a resolution on May 2 calling on local, state and federal officials to monitor any abuses of civil liberties that might result from the USA PATRIOT Act. "This was done in terms of supporting the freedoms that we have and that we cherish," Council President Michael R. Bardsley said at the meeting[17].

Energized by their experience with this effort, several Northampton activists were spurred to set up the Bill of Rights Defense Committee, which, along with the ACLU, has served as a clearinghouse for resolution activities.

By September 2002, only nine communities around the country had passed resolutions opposing the PATRIOT Act. In December, six more communities had passed resolutions, including the cities of Flagstaff, AZ and Detroit, MI. Art Babbott, the Flagstaff City Council member who sponsored the resolution, said, "We've been singing the same song in this country for more than 200 years. It's a very good song, and I want to keep singing it. I'm very leery of changing the lyrics."[18]

> "We've been singing the same song in this country for more than 200 years. It's a very good song, and I want to keep singing it. I'm very leery of changing the lyrics."
> -- Art Babbott, Flagstaff City Council

By February 2003, the national resolution drive was picking up speed. In that month alone, 22 additional communities passed resolutions.[19] As word spread, the number of communities continued to multiply.

To date, more than 130 communities in 26 states have joined the movement, including many large municipalities like Philadelphia, Minneapolis, Oakland and Broward County in Florida, which contains Fort Lauderdale. (See appendix A for a full list of communities).

In a sign of the movement's depth and reach, three state legislatures—Hawaii, Alaska and Vermont—have passed statewide resolutions as well.

LEADING THE LOWER 48...

Hawaii was the first to act, passing a resolution in late April of 2003.[20] The state has a large Japanese-American population and memories of government internments during World War II are still alive for many. State Rep. Roy Takumi introduced the resolution, he said, as a way to open debate. Speaking to the *Washington Post*, he said, "States have every right to consider the concerns of the federal government and voice our opinions. If a number of states pass similar resolutions, then it raises the bar for Congress, making them realize our concerns."[21]

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[16] Bill of Rights Defense Committee press release, "Third Massachusetts town votes to defend Bill of Rights from threats of USA PATRIOT Act", http://www.bordc.org/Northampton_PR.htm, 05/02/02
[17] Thomas Breen, "Council OKs Civil Rights Measure," *Daily Hampshire Gazette*, 05/3/2002
[18] Michael Janovsky, "Cities Urge Restraint in Fight Against Terrorism," *New York Times*, 12/23/2002
[19] http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207
[20] http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12491&c=206
[21] Evelyn Nieves, "Local Officials Rise Up to Defy the Patriot Act, *Washington Post*, 4/21/2003

Hawaii is a majority Democratic state, but concerns about the PATRIOT Act and related government actions span the political spectrum. The next state to pass a resolution was Alaska, which has not sent a Democrat to Congress in almost 25 years. Politically, Alaska is resolutely conservative with a strong independent streak.

In speaking of the resolution he co-sponsored in the Alaska state legislature, Republican Rep. John Coghill said, "We hope that a resolution like this, with the bipartisan support that it has, will urge Congress to re-examine the provisions of the USA PATRIOT Act that challenge the individual freedoms that make this country great." He added, "If we sacrifice our freedom, we let terrorism win."[22]

> "We hope that a resolution like this, with the bipartisan support that it has, will urge Congress to re-examine the provisions of the USA PATRIOT Act that challenge the individual freedoms that make this country great…If we sacrifice our freedom, we let terrorism win."
> --State Rep. John Coghill (R-AK)

Democratic Rep. David Guttenberg, who co-sponsored the resolution, said: "We have a concern that [the Patriot Act] could be abused. The potential for abuse is too great. America is an open state. There's a cost to that. Where are we willing to sacrifice for that? Guys are dying on the battlefield to protect our freedoms. It's up to us to protect those freedoms here at home."[23]

In late May 2003, Vermont joined Alaska and Hawaii with its own resolution, calling on Congress to revise the PATRIOT Act and other new policies to restore civil liberties. The Vermont effort brought together a Republican House of Representatives and a Democratic State Senate. Like the other statewide resolutions, the Vermont resolution called on Congress to fix the USA PATRIOT Act and related new policies to bring them back in line with the Constitution.[24]

THE ATTORNEY GENERAL IS WATCHING

The local resolutions have increasingly drawn the attention of the Justice Department and many in Congress. In fact, in a sign of the government's deepening concern about the resolutions movement, Attorney General Ashcroft acknowledged that fears about the potential for abuse of the PATRIOT Act are becoming widespread in America and called on the media to help the Justice Department explain the Act and quell those fears.

In May 2003 when the City Council of Tucson, AZ was poised to pass a resolution opposing some provisions of the Act, it received a letter from Arizona Senator Jon Kyl (R-AZ) urging it to vote down the resolution. Kyl's letter misrepresented the legislation, implying that all the law really did was give law enforcement the authority to wiretap cellular telephones and e-mail, and

[22] Dean Schabner, "Northern Revolt," ABC News.com, 05/23/2002
[23] ibid.
[24] http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12735&c=206

incorrectly asserting that, prior to the PATRIOT Act, federal officials were hampered by not being able to engage in such surveillance.[25]

In fact, the government has long possessed the power to wiretap land telephone lines, cell phones, and e-mail – after showing probable cause of a crime and obtaining a court order. What the PATRIOT Act really did was reduce oversight of wiretaps and other forms of surveillance by the courts or Congress. Kyl's letter also claimed that only a "miniscule minority" of America's communities had passed such resolutions, while in reality these communities represented millions of Americans. Despite Kyl's letter, the Tucson City Council adopted its resolution.

Also in May of 2003,while the state legislature was considering Alaska's bi-partisan resolution to defend civil liberties, Timothy Burgess, the U.S. Attorney for Alaska, made inaccurate statements about the PATRIOT Act during his testimony before the Senate State Affairs Committee. Calling on state senators to vote against the resolution, Mr. Burgess said, "I think there are a lot of misconceptions being offered about what the PATRIOT Act does or doesn't do, and that's one of the concerns I have. I think, for instance, there is concern that under the PATRIOT Act, federal agents are now able to review library records and books checked out by U.S. citizens. If you read the Act, that's absolutely not true."[26]

In fact, Mr. Burgess' statement is what is simply untrue. According to Section 215 of the USA PATRIOT Act, specific provisions are made for the standards under which records, including library records, of both non-citizens *and* those of U.S. citizens can be seized. The Alaska senators, unimpressed, proceeded to pass the resolution unanimously.[27]

When the Ithaca City Council in New York passed a resolution stating concern "that the USA PATRIOT Act threatens the civil rights and liberties of citizens of the United States and other nations…" and called on federal authorities to provide monthly notification to local authorities of detentions, wiretaps, and surveillance operations undertaken in the city, it received a letter from the FBI office in Albany. The letter contained the odd suggestion that the FBI could not provide the names of those people being secretly detained to local authorities and legal support groups because that would "directly infringe upon the privacy rights" of those being investigated or detained.[28]

What the letter failed to mention was that the Justice Department has refused to provide the names to legal service organizations like the ACLU even when detainees had no objection to having their names released.[29]

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[25] Letter to Mayor and Council Members of the Tucson Mayor and City Council, 05/02/2003, by John Kyl, United States Senator. http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12572&c=207

[26] Alaska Senate State Affairs Committee hearing on CSHJR 22(RLS), 05/13/2003, by Mr. Timothy Burgess, U.S. Attorney for Alaska. http://www.ktoo.com/gavel/audio.cfm?schDay=2003-5-13

[27] http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12707&c=207

[28] Letter to Julie Conley Holcomb, Ithaca City Clerk of the Ithaca City Council, on March 25, 2003, by Keith A. DeVincentis, Special Agent In Charge, Federal Bureau of Investigation, U.S. Department of Justice

[29] *CNSS v. U.S. Dept. Of Justice*, (D.D.C. Aug. 02, 2002) available at http://news.findlaw.com/cnn/docs/terrorism/cnssvdoj080202ord.pdf

LIBRARIANS TELL ASHCROFT TO QUIET DOWN

Cities, towns and states are not the only public institutions rebelling against the PATRIOT Act. Librarians are refusing to cooperate with federal authorities; they are deeply concerned about the provision of the PATRIOT Act affecting the intellectual privacy of their patrons.

Section 215 of the Act allows the FBI to request a court order for any "tangible thing [including books, records, papers, documents and other items] for an investigation to protect against international terrorism or clandestine intelligence activities."

In practice, the FBI can force libraries to reveal what books you are checking out, what chat rooms and websites you are visiting and what e-mails you have sent. Likewise, bookstores can be forced to reveal what books you are buying. Astonishingly, Section 215 even contains a gag order that prevents any librarian or bookseller from telling anyone including you, that the FBI has asked for this information.

Section 215 violates the First, Fourth and Fifth Amendments, and the ACLU is considering a legal challenge seeking to have it declared unconstitutional. In the meantime, however, grassroots resistance to Section 215 has sprouted up around the country in conjunction with the resolutions campaign.

Dozens of state library associations have passed their own anti-PATRIOT Act resolutions and the American Library Association has issued a stern warning in its national resolution stating, "sections of the USA PATRIOT Act are a present danger to the constitutional rights and privacy rights of library users…"[30]

"PLEASE ACT APPROPRIATELY"

Some libraries, including libraries in Killington, VT, and Skokie, IL are posting signs warning patrons that the FBI can now monitor their reading habits and Internet use. "We're sorry," wrote the librarians in Killington. "Due to national security concerns, we are unable to tell you if your Internet surfing habits, passwords and e-mail content are being monitored by federal agents. Please act appropriately."[31]

The public library in Santa Cruz, California, has gone one step further. Every night, the librarian shreds the day's records, handwritten requests for reference books, logs of people who signed up for the library's Internet stations and more.[32]

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[30] "Resolution on the USA Patriot Act and Related Measures That Infringe on the Rights of Library Users", on 01/29/2003, adopted by American Library Association Council. Available at http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/Intellectual_Freedom3/Statements_and_Policies/IF_Resolutions/Resolution_on_the_USA_Patriot_Act_and_Related_Measures_That_Infringe_on_the_Rights_of_Library_Users.htm

[31] Judith Graham, "Libraries protest potential snooping," *Chicago Tribune*, 04/04/2003

[32] Dean E. Murphy, "Librarians Use Shredder to Show Opposition to New F.B.I. Powers," *New York Times*, 04/07/2003

As soon as books are returned at the Santa Cruz, CA and Spokane, WA libraries, the record of who checked them out is purged from library computers. Every night, librarians at the Berkeley, CA library delete all information about the days activities from 50 Internet terminals. Once a month, the names of anyone who took out a particular book are purged.[33] Said one library patron recently: "Yes, I would care if they looked at my records. I came here from Colombia 28 years ago. There they can do anything – stop you when they want, search you when they want. Now, it's getting like that here."[34]

> "Yes, I would care if they looked at my records. I came here from Colombia 28 years ago. There they can do anything -- stop you when they want, search you when they want. Now, it's getting like that here."
>
> --library patron

Because of the secrecy provisions of the law, no one outside the federal government knows how many times Section 215's powers have been invoked or whose book-buying or library habits have been investigated. However, in a news conference, Assistant Attorney General Viet Dinh said the Justice Department had visited libraries about 50 times, but declined to say whether those visits were based on Section 215 authority.[35]

In Congress, Rep. Bernie Sanders (I-VT) has introduced the Freedom to Read Protection Act (H.R. 1157), which would exempt libraries and bookstores from Section 215. As of the date of this report's release, the bill has 122 co-sponsors, including many Republicans. Under the bill, federal agents could still seek bookstore and library records, but only with a criminal subpoena or search warrant based upon probable cause. U.S. Sen. Barbara Boxer (D-CA) has introduced a companion bill in the Senate.

"What freedom is about is having the right to read anything you want and search for any information you want without the government peering over your shoulder," Sanders says. "The PATRIOT Act goes much, much too far in interfering with those rights, which are a cornerstone of our democracy."[36]

Both Barnes & Noble and Borders – the country's two largest booksellers – have backed Sanders' Freedom to Read Protection Act, as has the American Booksellers Foundation for Free Expression. According to the foundation's President, "The book community is united in believing that Section 215 of the PATRIOT Act threatens First Amendment freedom by making people afraid that their purchase and borrowing records may be monitored by the government."[37]

Like community resolutions, the efforts by some libraries to warn patrons have drawn the scrutiny of the federal government. In April 2003, the *Bangor Daily News* of Bangor, ME

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[33] Judith Graham, "Libraries protest potential snooping," *Chicago Tribune*, April 4, 2003
"Libraries keep patrons' habits private," *The Olympian*, April 19, 2003. Available at: http://www.theolympian.com/home/news/20030419/southsound/45821.shtml'
Privacy Statement of Spokane County Library District. Available at: http://www.scld.lib.wa.us/privacy.htm
[34] Al Winslow, "Library Bristles at Patriot Act," *Berkeley Daily Planet*, 04/25/2003
[35] Statement of Barbara Comstock, Director of Public Affairs, United States Department of Justice, "DOJ Testimony Regarding Libraries," 06/02/2003. Available at: http://www.usdoj.gov/opa/pr/2003/June/03_opa_323.htm
[36] Judith Graham, "Libraries protest potential snooping," *Chicago Tribune*, 04/04/2003
[37] David Gorgan, "Book Industry Issues Statement of Strong Support for Sanders' Freedom to Read Bill," *Free Expression*, 05/15/2003. Available at: http://news.bookweb.org/freeexpression/1457.html

reported that the public library in Calais, ME, a small town on the Canadian border, was urging its patrons to support Sanders' bill.

"Public libraries are synonymous with freedom, especially freedom of speech," the town librarian said in a statement. "We do not take this freedom lightly. We are defenders of this right for everyone who enjoys checking out books … I do not think many people realize that their right to check out books without government scrutiny is even an issue. Sadly, it is, however." [38]

The newspaper article prompted a high official at the Justice Department to contact the *Bangor Daily News*, denying it was interested in the reading habits of Americans citizens and asserting that critics of the PATRIOT Act were "completely wrong." The Justice official went so far as to claim that efforts to warn library patrons amounted to a "propaganda campaign."[39]

In fact, the Justice Department again had misrepresented the PATRIOT Act, prompting the *Bangor Daily News* to editorialize that the official's characterization of the Act, "… 'completely' overstates the department's limitations; and 'wrong' is also less than accurate."

The editorial went on to support the Calais librarian: "Supporters of the Sanders legislation and those generally suspicious of anything that interferes with free inquiry are worried that the public will not know about the effects of the Patriot Act until it is too late. They are right to strongly question the potential abuse of the act and right to make their concerns known publicly."[40]

[38] "Following Calais' Lead," *Bangor Daily News*, 04/05/03
[39] Diana Graettinger, "Official counters Patriot Act critics," *Bangor Daily News, 04/04/*2003
[40] Patriotic Reading, Editorial, *Bangor Daily News*, 04/09/2003

CONCLUSION

And so, what began with one town, Ann Arbor, MI, adopting a resolution opposing the USA PATRIOT Act has become a nationwide campaign from the bottom up; encompassing towns, cities, public libraries, counties, states and now Congress. And as word spreads, more communities are joining, and the movement shows no signs of slowing or stopping.

In fact, as with the growth of past grassroots movements in America, the current protest against the Justice Department and the White House will continue to gain strength until the policies that fuel its growth are repealed or modified.

Just as it is possible to remain both safe and free as we meet a new and uncertain era, it is also possible to stand on principle as we take concrete and practical new security measures. For 230 years, our country has faced an array of challenges to our security and we have learned from past mistakes that we must meet these new challenges with fortitude and the willingness to stand on principle, even when it seems expeditious not to do so.

Nothing is more precious in a democracy than freedom of speech and free access to information without government intrusion. The American people seem to understand that, even if Attorney General Ashcroft does not.

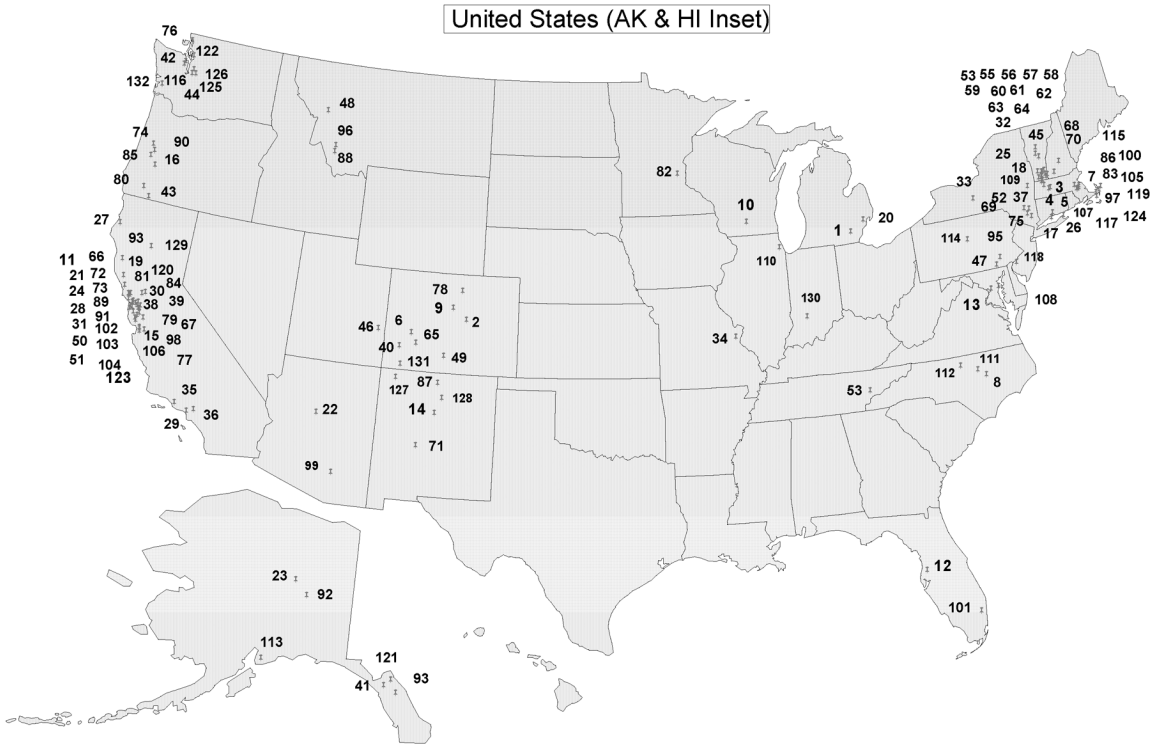
Appendix A: Communities With Resolutions

As of July 2, 2003, resolutions have been passed in 135 communities in 26 states, including three statewide resolutions. These communities represent approximately 16.3 million people who oppose the USA PATRIOT Act.

132. Lane County, OR	July 1, 2003	**State of Hawaii**	**April 25, 2003**
131. Durango, CO	July 1, 2003	93. Mendocino County, CA	April 22, 2003
130. Bloomington, IN	June 26, 2003	92. North Pole, AK	April 21, 2003
129. Tehama County, CA	June 17, 2003	91. Albany, CA	April 21, 2003
128. Taos, NM	June 17, 2003	90. Corvallis, OR	April 21, 2003
127. Aztec, NM	June 17, 2003	89. Dublin, CA	April 16, 2003
126. Port Townsend, WA	June 16, 2003	88. Dillon, MT	April 16, 2003
125. San Juan County, WA	June 11, 2003	87. Rio Arriba County, NM	April 10, 2003
124. Arlington, MA	June 10, 2003	86. Provincetown, MA	April 9, 2003
123. Palo Alto, CA	June 9, 2003	85. Gaston, OR	April 9, 2003
122. Jefferson County, WA	June 9, 2003	84. Mill Valley, CA	April 7, 2003
121. Skagway, AK	June 5, 2003	83. Lincoln, MA	April 5, 2003
120. Contra Costa County, CA	June 3, 2003	82. Minneapolis, MN	April 4, 2003
119. Brookline, MA	May 30, 2003	81. Ukiah, CA	April 2, 2003
118. Philadelphia, PA	May 29, 2003	80. Talent, OR	April 2, 2003
117. Wendell, MA	May 29, 2003	79. Pinole, CA	April 1, 2003
State of Vermont	**May 28, 2003**	78. Fort Collins, CO	March 26, 2003
116. Bainbridge Island, WA	May 28, 2003	77. Watsonville, CA	March 25, 2003
115. Shutesbery, MA	May 27, 2003	76. Bellingham, WA	March 24, 2003
State of Alaska	**May 21, 2003**	75. Woodstock, NY	March 18, 2003
114. Lansdowne, PA	May 21, 2003	74. Benton County, OR	March 18, 2003
113. Kenai, AK	May 20, 2003	73.Los Gatos, CA	March 17, 2003
112. Greensboro, NC	May 20, 2003	72. El Cerrito, CA	March 17, 2003
111. Orange County, NC	May 20, 2003	71. Socorro, NM	March 17, 2003
110. Evanston, IL	May 19, 2003	70. Petersborough, NH	March 15, 2003
109. Albany, NY	May 19, 2003	69. Rosendale, NY	March 12, 2003
108. Baltimore, MD	May 19, 2003	68. Marlborough, NH	March 11, 2003
107. Hartford, CT	May 15, 2003	67. Union City, CA	March 11, 2003
106. Salinas, CA	May 13, 2003	66. Sonoma, CA	March 5, 2003
105. Orleans, MA	May 13, 2003	65. Telluride, CO	March 4, 2003
104. Sausalito, CA	May 6, 2003	64. Waitsfield, VT	March 4, 2003
103. Marin County, CA	May 6, 2003	63. Westminster, VT	March 4, 2003
102. San Mateo County, CA	May 6. 2003	62. Windham, VT	March 4, 2003
101. Broward County, FL	May 6, 2003	61. Putney, VT	March 4, 2003
100. Eastham, MA	May 5, 2003	60. Newfane, VT	March 4, 2003
99. Tucson, AZ	May 5, 2003	59. Marlboro, VT	March 4, 2003
98. Santa Cruz County, CA	April 30, 2003	58. Jamaica, VT	March 4, 2003
97. Wellfleet, MA	April 29, 2003	57. Guilford, VT	March 4, 2003
96. Beaverhead County, MT	April 28, 2003	56. Dummerston, VT	March 4, 2003
95. Reading, PA	April 28, 2003	55. Athens, VT	March 4, 2003
94. Juneau, AK	April 28, 2003	54. Warren, VT	March 4, 2003

53. Blount County, TN February 27, 2003
52. Town of New Paltz, NY February 27, 2003
51. Cotati, CA February 26, 2003
50. Richmond, CA February 25, 2003
49. Crestone, CO February 24, 2003
48. Missoula, MT February 24, 2003
47. York, PA February 19, 2003
46. Castle Valley, UT February 19, 2003
45. Rockingham, VT February 18, 2003
44. Seattle, WA February 18, 2003
43. Ashland, OR February 18, 2003
42 Vashon-Maury Island, WA February 17, 2003
41. Gustavus, AK February 13, 2003
40. Ridgway, CO February 12, 2003
39. Davis, CA February 12, 2003
38. San Anselmo, CA February 12, 2003
37. Village of New Paltz, NY February 12, 2003
36. Claremont, CA February 11, 2003
35. Santa Monica, CA February 11, 2003
34. University City, MO February 10, 2003
33. Ithaca, NY February 5, 2003
32. Brattleboro, VT February 4, 2003
31. Point Arena, CA January 28, 2003
30. Yolo County, CA January 28, 2003
29. West Hollywood, CA January 21, 2003
28. San Francisco, CA January 21, 2003
27. Arcata, CA* January 15, 2003
26. Mansfield, CT January 13, 2003
25. Montpelier, VT January 10, 2003
24. Fairfax, CA January 7, 2003
23.Fairbanks, AK January 6, 2003
22. Flagstaff, AZ December 17, 2002
21. Oakland, CA December 17, 2002
20. Detroit, MI December 6, 2002
19. Sebastapol, CA December 3, 2002
18. Burlington, VT December 2, 2002
17. New Haven, CT December 2, 2002
16. Eugene, OR November 25, 2002
15. Santa Cruz, CA November 12, 2002
14. Santa Fe, NM October 30, 2002
13. Takoma Park, MD October 28, 2002
12. Alachua County, FL October 22, 2002
11. Berkeley, CA October 22, 2002
10.Madison, WI October 15, 2002
9. Boulder, CO July 23, 2002
8. Carrboro, NC June 25, 2002
7. Cambridge, MA June 17, 2002
6. San Miguel County, CO May 20, 2002
5. Northampton, MA May 2, 2002
4. Leverett, MA April 27, 2002
3. Amherst, MA April 24, 2002
2. Denver, CO March 18, 2002
1. Ann Arbor, MI January 7, 2002

* Arcata has also passed an ordinance.


United States (AK & HI Inset)
76 122 42 132 116 126 44 125 48 96 88 74 90 85 16 80 43 27 93 129 11 66 19 21 72 81 120 24 73 30 84 28 89 38 39 31 91 79 67 102 50 103 15 98 106 51 104 77 123 35 36 29 22 99 78 9 2 46 6 65 40 49 131 127 87 128 14 71 82 10 1 20 110 130 34 53 55 56 57 58 59 60 61 62 63 64 32 68 70 115 45 25 86 100 18 109 7 83 105 33 3 52 37 4 5 97 119 69 75 107 124 17 26 117 114 95 47 118 13 108 111 112 8 12 101 23 92 113 121 41 93

Appendix B: MODEL LOCAL RESOLUTION TO PROTECT CIVIL LIBERTIES

WHEREAS the City of _____ is proud of its long and distinguished tradition of protecting the civil rights and liberties of its residents;

WHEREAS the City of _____ has a diverse population, including immigrants and students, whose contributions to the community are vital to its economy, culture and civic character;

WHEREAS the preservation of civil rights and liberties is essential to the well-being of a democratic society;

WHEREAS federal, state and local governments should protect the public from terrorist attacks such as those that occurred on September 11, 2001, but should do so in a rational and deliberative fashion to ensure that any new security measure enhances public safety without impairing constitutional rights or infringing on civil liberties;

WHEREAS government security measures that undermine fundamental rights do damage to the American institutions and values that the residents of the City of _____ hold dear;

WHEREAS the Council of the City of _____ believes that there is no inherent conflict between national security and the preservation of liberty -- Americans can be both safe and free;

WHEREAS federal policies adopted since September 11, 2001, including provisions in the USA PATRIOT Act (Public Law 107-56) and related executive orders, regulations and actions threaten fundamental rights and liberties by:

(a) authorizing the indefinite incarceration of non-citizens based on mere suspicion, and the indefinite incarceration of citizens designated by the President as "enemy combatants" without access to counsel or meaningful recourse to the federal courts;

(b) limiting the traditional authority of federal courts to curb law enforcement abuse of electronic surveillance in anti-terrorism investigations and ordinary criminal investigations;

(c) expanding the authority of federal agents to conduct so-called "sneak and peek" or "black bag" searches, in which the subject of the search warrant is unaware that his property has been searched;

(d) granting law enforcement and intelligence agencies broad access to personal medical, financial, library and education records with little if any judicial oversight;

(e) chilling constitutionally protected speech through overbroad definitions of "terrorism";

(f) driving a wedge between immigrant communities and the police that protect them by encouraging involvement of state and local police in enforcement of federal immigration law;

(g) permitting the FBI to conduct surveillance of religious services, Internet chat rooms, political demonstrations, and other public meetings of any kind without having any evidence that a crime has been or may be committed;

WHEREAS new legislation has been drafted by the Administration entitled the Domestic Security Enhancement Act (DSEA) (also known as PATRIOT II) which contains a multitude of new and sweeping law enforcement and intelligence gathering powers, many of which are not related to terrorism, that would severely dilute, if not undermine, many basic constitutional rights, as well as disturb our unique system of checks and balances by:

(a) diminishing personal privacy by removing important checks on government surveillance authority,

(b) reduce the accountability of government to the public by increasing government secrecy,

(c) expanding the definition of "terrorism" in a manner that threatens the constitutionally protected rights of Americans, and

(d) seriously erode the right of all persons to due process of law

WHEREAS these new powers pose a particular threat to the civil rights and liberties of the residents of our city who are Arab, Muslim or of South Asian descent; and

WHEREAS many other communities throughout the country have enacted resolutions reaffirming support for civil rights and civil liberties in the face of government policies that threaten these values, and demanding accountability from law enforcement agencies regarding their use of these new powers;

THEREFORE BE IT RESOLVED THAT THE COUNCIL OF THE CITY OF _____:

1. AFFIRMS its strong support for fundamental constitutional rights and its opposition to federal measures that infringe on civil liberties.

2. AFFIRMS its strong support for the rights of immigrants and opposes measures that single out individuals for legal scrutiny or enforcement activity based on their country of origin.

3. DIRECTS the Police Department of the City of _____ to:

(a) refrain from participating in the enforcement of federal immigration laws;

(b) seek adequate written assurances from federal authorities that residents of the City of _____ and individuals in the custody of the City of _____ who are placed in federal custody will not be subjected to military detention; secret detention; secret immigration proceedings; or detention without access to counsel, and refrain from assisting federal authorities obtain custody of such individuals absent such assurances;

(c) refrain from engaging in the surveillance of individuals or groups of individuals based on their participation in activities protected by the First Amendment, such as political advocacy or the practice of a religion, without particularized suspicion of criminal activity unrelated to the activity protected by the First Amendment;

(d) refrain from racial profiling. The police department shall not utilize race, religion, ethnicity, or national origin as a factor in selecting which individuals to subject to investigatory activities except when seeking to apprehend a specific suspect whose race, religion, ethnicity or national origin is part of the description of the suspect;

(e) refrain, whether acting alone or with federal or state law enforcement officers, from collecting or maintaining information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct;

(f) refrain from: engaging in video surveillance unless the police have reasonable suspicion that the subjects of the video surveillance have or are about to commit a crime, establishing a general surveillance network of video cameras, deploying facial recognition technology or other unreliable biometric identification technology within the City of _____;

(g) provide advance or simultaneous notice of the execution of a search warrant to any resident of the City of _____ whose property is the subject of such a warrant, and refrain from participating in a joint search with any law enforcement agency absent assurances that such notice will be provided to such individuals during the search;

(h) refrain from undertaking or participating in any initiative, such as the Terrorism Information and Prevention System (TIPS), that encourages members of the general public to spy on their neighbors, colleagues or customers;

(i) refrain from the practice of stopping drivers or pedestrians for the purpose of scrutinizing their identification documents without particularized suspicion of criminal activity;

(j) report to the City Council any request by federal authorities that, if granted, would cause agencies of the City of _____ to exercise powers or cooperate in the exercise of powers in apparent violation of any city ordinance or the laws or Constitution of this State or the United States;

4. DIRECTS public schools and institutions of higher learning within the City of _____ to provide notice to individuals whose education records have been obtained by law enforcement agents pursuant to section 507 of the USA PATRIOT Act;

5. DIRECTS public libraries within the City of _____ to post in a prominent place within the library a notice to library users as follows: "WARNING: Under Section 215 of the federal USA PATRIOT Act (Public Law 107-56), records of the books and other materials you borrow from this library may be obtained by federal agents. That federal law prohibits librarians from informing you if records about you have been obtained by federal agents. Questions about this policy should be directed to: Attorney General John Ashcroft, Department of Justice, Washington, DC 20530 ";

6. Directs the City Council Chief of Staff to:

a. Transmit a copy of this resolution to Senators _____ and _____, and Representatives _____ accompanied by a letter urging them to:

- support Congressional efforts to assess the impacts of the PATRIOT Act
- monitor federal anti-terrorism tactics and work to repeal provisions of the USA PATRIOT ACT and other laws and regulations that infringe on civil rights and liberties
- ensure that provisions of the USA PATRIOT Act "sunset" in accordance with the provisions of the Act.
- take a lead in Congressional action to prohibit passage of the Domestic Security Enhancement Act, known as "Patriot II"

7. DIRECTS the City Manager to seek periodically from federal authorities the following information in a form that facilitates an assessment of the effect of federal anti-terrorism efforts on the residents of the City of _____:

(a) The names of all residents of the City of _____ who have been arrested or otherwise detained by federal authorities as a result of terrorism investigations since September 11, 2001; the location of each detainee; the circumstances that led to each detention; the charges, if any, lodged against each detainee; the name of counsel, if any, representing each detainee;

(b) The number of search warrants that have been executed in the City of _____ without notice to the subject of the warrant pursuant to section 213 of the USA PATRIOT Act;

(c) The extent of electronic surveillance carried out in the City of _____ under powers granted in the USA PATRIOT Act;

(d) The extent to which federal authorities are monitoring political meetings, religious gatherings or other activities protected by the First Amendment within the City of _____;

(e) The number of times education records have been obtained from public schools and institutions of higher learning in the City of _____ under section 507 of the USA PATRIOT Act;

(f) The number of times library records have been obtained from libraries in the City of _____ under section 215 of the USA PATRIOT Act;

(g) The number of times that records of the books purchased by store patrons have been obtained from bookstores in the City of _____ under section 215___ of the USA PATRIOT Act;

8. DIRECTS all public libraries to have a policy that ensures the regular destruction of records that identify the name of the book borrower after the book is returned, or that identify the name of the Internet user after completion of Internet use;

9. ADVISES all persons in local businesses and institutions, and particularly booksellers, to refrain when possible from keeping records which identify the name of the purchaser, and to regularly destroy such records that are maintained, in order to protect intellectual privacy rights; and be it

10. DIRECTS the City Manager to transmit to the City Council no less than once every six months a summary of the information obtained pursuant to the preceding paragraph and, based on such information and any other relevant information, an assessment of the effect of federal anti-terrorism efforts on the residents of the City of _____;

11. DIRECTS the City Manager to transmit a copy of this resolution to Senator _____ , Senator _____ and Congressman _____, accompanied by a letter urging them to monitor federal anti-terrorism tactics and work to repeal provisions of the USA PATRIOT Act and other laws and regulations that infringe on civil rights and liberties;

12. DIRECTS the City Manager to transmit a copy of this resolution to Governor ____, and appropriate members of the State Legislature, accompanied by a letter urging them to ensure that state anti-terrorism laws and policies be implemented in a manner that does not infringe on civil liberties as described in this resolution;

13. DIRECTS the City Manager to transmit a copy of this resolution to President Bush and Attorney General Ashcroft; and be it

14. FURTHER RESOLVED that the provisions of this Resolution shall be severable, and if any phrase, clause, sentence, or provision of this Resolution is declared by a court of competent jurisdiction to be contrary to the Constitution of the United States or of the State of _____ or the applicability thereof to any agency, person, or circumstances is held invalid, the validity of the remainder of this Resolution and the applicability thereof to any other agency, person or circumstances shall not be affected thereby

UNITED STATES

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Members of the Arab-American community in Detroit, Michigan participate in a candlelight vigil in remembrance of the September 11 attack victims. September 19, 2001. © 2001 Agence France Presse

Those who feel like they can intimidate our fellow citizens to take out their anger don't represent the best of America, they represent the worst of humankind, and they should be ashamed of that kind of behavior.

-- George W. Bush

I stand for America all the way! I'm an American. Go ahead. Arrest me and let those terrorists run wild!

-- Frank Roque, after being arrested for the murder of Balbir Singh Sodhi

"WE ARE NOT THE ENEMY"
Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11

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UNITED STATES

"WE ARE NOT THE ENEMY"
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APPENDIX 40

I. SUMMARY

In the aftermath of the September 11, 2001 terrorist attacks, Arabs and Muslims in the United States, and those perceived to be Arab or Muslim, such as Sikhs and South Asians, became victims of a severe wave of backlash violence. The hate crimes included murder, beatings, arson, attacks on mosques, shootings, vehicular assaults and verbal threats. This violence was directed at people solely because they shared or were perceived as sharing the national background or religion of the hijackers and al-Qaeda members deemed responsible for attacking the World Trade Center and the Pentagon.

The post-September 11 violence against Arabs and Muslims was not unprecedented. Over the past twenty years backlash hate crimes against Arabs and Muslims in the United States have become predictable, triggered by conflict in the Middle East and acts of terrorism associated with Arabs or Muslims. The hate crimes that followed the September 11 attacks nonetheless were unique in their severity and extent. While comprehensive and reliable national statistics are not available, Arab and Muslim groups report more than two thousand September 11-related backlash incidents. The Federal Bureau of Investigation reported a seventeen-fold increase in anti-Muslim crimes nationwide during 2001. In Los Angeles County and Chicago, officials reported fifteen times the number of anti-Arab and anti-Muslim crimes in 2001 compared to the preceding year.

In many cases, government officials responded quickly and vigorously to the backlash violence. President George W. Bush and numerous state and city officials publicly condemned anti-Arab and anti-Muslim hate crimes. In addition, as this report documents, state and local government across the nation undertook a series of steps seeking to contain acts of violence and bring perpetrators to justice. Nevertheless, aspects of the U.S. government's anti-terrorism campaign—the detention of twelve hundred mostly Middle Eastern and South Asians because of possible links to terrorism, the effort to question over five thousand young Middle Eastern men, and the decision to fingerprint visitors from certain Middle Eastern and Muslim countries—reinforced a public perception that Arab and Muslim communities as a whole were suspect and linked to the "enemy" in the U.S. war against terrorism.

In this report, Human Rights Watch documents the nature of the September 11 backlash violence and the local, state, and federal government responses to it. Drawing on research in six large cities, Human Rights Watch identified public practices used to protect individuals and communities from hate crimes. The report focuses particularly on four areas of response: police deployment, prosecutions, bias crime monitoring, and outreach to affected communities.

Our research demonstrates that action in advance of potential outbreaks of hate crimes can help mitigate the harm to individuals and property from backlash crimes. The success in combating backlash violence in Dearborn, Michigan, for example, where only two violent September 11-related assaults occurred in a city with 30,000 Arab-Americans, reflected steps taken by local and state officials long before September 11. In particular, Dearborn police had already identified high-risk communities and were ready to deploy officers where needed within hours of the attacks on the World Trade Center and Pentagon; pre-existing relationships between community leaders and officials facilitated communications. In cities such as Los Angeles and New York City, where police departments did not have strong pre-existing relationships with Arab and Muslims, police quickly deployed officers in vulnerable areas once backlash incidents began.

Although various systems existed to track bias crimes in the United States, flaws in those systems limited complete and accurate reporting of the nature and extent of September 11 backlash violence. The effective allocation of public resources to prevent and respond to hate crimes requires better, complete, accurate and timely monitoring of such crime.

None of the cities researched developed backlash mitigation plans. Yet recent U.S. history, as described in this report, had clearly shown that backlash violence usually followed acts of terrorism attributed to Arabs or Muslims. Given that future acts of terrorism in the United States or conflict in the Middle East can be expected to generate new outbreaks of violence against members of Arab and Muslim communities, Human Rights Watch believes that federal, state and local government should develop plans to prevent and mitigate backlash violence.

Ultimately, prevention of anti-Arab violence will require an ongoing national commitment to tolerance, respect for multicultural diversity, and recognition that "guilt by association" has no place in the United States. In the meantime, public officials face the challenge—and the responsibility under U.S. and international law—of combating backlash violence undertaken by private individuals.

The September 11 backlash against Arabs and Muslims is part of a larger, long-standing problem of hate crimes in the United States. Over the past ten years, the Rodney King beating, the 1993 Yusef Hawkins racial murder in Bensonhurst, New York, the 1993 shooting spree on the Long Island Railroad, the summer of 1996 African American church burnings, the 1998 murder of James Byrd, and the 1999 murder of Mathew Shepard have strengthened calls in the U.S. for increased attention to violent bigotry and crimes motivated by bias against distinctive communities identified by race, religion, ethnicity, gender or sexual orientation. While the focus of this report is on violence against Arabs and Muslims, the strengths and weaknesses of official responses to the September 11 backlash reflect the strengths and weaknesses of the official response to all hate crimes.

II. RECOMMENDATIONS

Our research confirmed that local, state, and federal governments in the United States are committed to meet their obligation to protect Arab and Muslim communities from backlash violence but vary in the extent to which they have succeeded in doing so. While no government can wholly prevent hate crimes against Arabs and Muslims—or any other vulnerable community—after September 11 public officials took steps to minimize such violence, to ensure its successful investigation and prosecution, and to reassure communities that the government is committed to their protection. We provide recommendations below drawn from our research. Because Human Rights Watch believes that some government entities have developed measures or practices that may serve as useful examples to others we have provided their contact information in the Appendix.

Policing

1. Law enforcement authorities should prepare a "backlash emergency mitigation plan" that may be implemented immediately following any event that might trigger backlash violence.

2. Following any event that might trigger backlash violence, public officials, as well as civic and social leaders, should make unequivocal statements that bias-motivated violence will not be tolerated and that those who engage in it will be prosecuted.

3. When the possibility of backlash crimes arise, police should heighten their presence in vulnerable communities. Police should also insure open channels of communication with affected communities during these periods.

4. Every law enforcement agency should have one or more officers trained to identify and investigate bias-motivated crimes.

5. All police reports which indicate that a responding officer or a victim believes that a crime may be bias-motivated should be given for review and guidance to a law enforcement officer trained to detect and investigate bias-motivated crimes.

6. Law enforcement agencies should ensure that residents in their jurisdictions know where and to whom and how to report hate crimes. Literature summarizing how victims may report bias-motivated crimes should be

produced, translated into foreign languages as necessary, and distributed widely.

Prosecution

1. Every county and city should provide specialized training to least one, if not more, prosecutors in identifying and prosecuting criminal acts that may constitute a bias-motivated crime and should assign all hate crime prosecution to prosecutors who have received such training.

2. State attorney general offices should create hate crime prosecution units that provide assistance to county prosecutors.

3. Prosecutors should prominently publicize prosecution of bias-motivated crimes to the general public and to the targeted community, and should do so regardless of whether a bias-motivated act is prosecuted under hate crimes legislation

Bias Crime Tracking

1. All local, county, state and federal law enforcement agencies should cooperate with the Federal Bureau of Investigation's National Incident-Based Reporting System (NIBRS) program to report all bias-motivated crimes.

2. Law enforcement agencies should regularly publish and make public comprehensive statistics on bias-motivated crimes in their jurisdictions regardless of whether the crimes are prosecuted under special hate crime legislation. Published statistics on bias-motivated crimes should include: the number of hate crimes committed in the jurisdiction for the specified period; whether the crime was based on the victim's race, ethnicity, religion, national origin, gender, disability, or sexual orientation; the victim's race, ethnicity, religion, national origin, gender, disability, or sexual orientation; the type of crime committed; the setting in which the crime was committed; whether the perpetrator was apprehended and how many of the reported bias-motivated crimes are being prosecuted.

Affected Community Outreach

1. Government agencies should ensure that communities affected by backlash violence are aware of the agencies within their jurisdiction that combat bias-motivated violence and know whom to contact within their jurisdiction in case they are a victim of a hate crime.

2. Where significant numbers of members of a community affected by bias-motivated violence live in a particular jurisdiction, government agencies should establish ongoing channels of communication and interaction with community leaders. They should also consider appointing a community liaison or an advisory council to facilitate interaction between government and the community.

III. U.S. LAW AND INTERNATIONAL HUMAN RIGHTS STANDARDS

The violent acts against Arabs and Muslims after September 11 violate U.S. criminal law regardless of their motivation. U.S. officials recognize their responsibility to prevent, investigate, and prosecute crime in general and to ensure that all U.S. residents, without regard to their race, national origin, or religion, are protected. While flaws exist with the U.S. system of law enforcement and criminal justice, no one doubts that all levels of the U.S. government—federal, state, and local—take crime control seriously.

Hate crimes are a uniquely important and socially devastating kind of crime, however, that warrant enhanced public attention and action. What distinguishes a bias or hate crime[1] from others is not the act itself—e.g. murder or assault—but the racial, ethnic, religious, gender, or sexual orientation animus that propels its commission. While typically directed at a particular individual—often randomly chosen—hate crimes are motivated by anger toward an entire community distinguished by specific shared characteristics. While the bias that motivates a hate crime may be unusual in its ferocity, it is rooted in a wider public climate of discrimina-

[1] We use the terms bias-motivated crime and hate crime interchangeably in this report.

tion, fear, and intolerance against targeted communities, which may also be echoed in or enhanced by public policy. U.S. law as well as international human rights law single out hate crimes for particular attention precisely because of their broad social impact and their roots in discrimination and intolerance.

Hate Crimes Legislation

Over the past several decades, the persistent problem of bias-motivated violence in the United States has spurred the enactment of hate crimes legislation. This legislation either enhances the penalties for a crime when it is motivated by bias or make a bias-motivated criminal act a distinct crime in the criminal code.

The first law uniquely criminalizing bias-motivated conduct in the United States was the federal hate crimes statute.[2] Originally created to protect civil rights workers in the 1960s, the law criminalizes bias-motivated conduct where the perpetrator attempts to stop the victim from engaging in one of six designated activities: (1) enrolling in or attending a public school; (2) participating in a service or facility provided by a state; (3) engaging in employment by any private or state employer; (4) serving as a juror; (5) traveling in or using a facility of interstate commerce; and (6) enjoying the services of certain public establishments. The federal hate crimes law only addresses racial, ethnic, national origin, or religious bias and does not protect persons who are attacked because of their gender or sexual orientation.

The limited scope of the federal hate crimes law and the continuing problem of bias-motivated crime led to the creation of broader state hate crime laws during the 1980s and 1990s. All but five of the fifty U.S. states now have hate crimes legislation.[3] Supporters of hate crimes legislation marshaled a number of arguments to support such laws, including: (1) Because hate crimes cause additional harms over and above the injury caused by crimes not motivated by hate, their unique nature should be recognized in the criminal law and receive greater punishment. For example, a swastika scrawled on a synagogue offends the entire Jewish community, not just the congregants of the affected temple; (2) Legislative recognition of bias-motivated crime encourages increased efforts by public officials to prevent, investigate, and prosecute such crimes; and (3) Hate crimes legislation is an important public affirmation of societal values against bias as well as bias-motivated violence, reinforcing society's commitment to equality among residents.

State hate crime laws typically either make a bias-motivated criminal act a distinct crime or enhance the punishment during sentencing for a crime shown to be motivated by bias.[4] At present, all state hate crime laws include crimes motivated by racial, religious, or ethnic animus. Twenty-six states include crimes motivated by animus against sexual orientation in their hate crime laws,[5] and twenty-four states include crimes motivated by gender animus.[6]

In addition to the federal hate crimes law, the U.S. Congress passed the Hate Crimes Sta-

[2] 18 U.S.C. § 245 (1994).

[3] The states that do not have a law uniquely punishing bias motivated crimes or enhancing punishment for bias-motivated crimes are: South Carolina, Indiana, Arkansas, New Mexico, and Wyoming. *See*, Anti-Defamation League, "State Hate Crime Statutory Provisions," retrieved on September 10, 2002, from http://www.adl.org/99hatecrime/intro.html.

[4] For example, Washington State makes bias motivated crime a distinct crime called "malicious harassment." *See*, § 9A.36.080, Revised Code of Washington (2001). Arizona state law, on the other hand, calls for an enhanced penalty during sentencing where the prosecutor can demonstrate that a criminal act was motivated by bias. *See* § 13-702, Arizona Revised Statutes (2001). The model for most state legislation enhancing penalties was developed in 1981 by the Anti-Defamation League (ADL), a Jewish civil rights organization. The ADL's model hate crimes legislation, however, also required hate crime data collection and police hate crimes investigatory training, features which are not typically included in state hate crime laws. Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U.L. Rev. 1399, 1411 (December 2000).

[5] See Human Rights Campaign, "Does Your State's Hate Crimes Law Include Sexual Orientation and Gender Identity?" retrieved on September 19, 2002, from http://www.hrc.org/issues/hate_crimes/background/statelaws.asp.

[6] See Anti-Defamation League, "State Hate Crime Statutory Provisions," retrieved on September 10, 2002, from http://www.adl.org/99hatecrime/intro.html.

tistics Act (HCSA) in 1990.[7] HCSA requires the U.S. Department of Justice to acquire data from law enforcement agencies across the country on crimes that "manifest prejudice based on race, religion, sexual orientation, or ethnicity" and to publish an annual summary of the findings. In 1996, Congress enacted the Church Arson Prevention Act of 1996.[8] The act criminalizes any intentional destruction, defacement or damage to religious property "because of the religious character" of the property.[9] The Act also criminalizes acts that interfere "with the enjoyment" of a person's "free exercise of religious beliefs."[10]

State and Local Agencies Responsible for Addressing Hate Crimes

In the United States, the prevention, investigation, and prosecution of crimes against persons or property—whether or not bias-motivated—is primarily the responsibility of local authorities. The federal role is limited but nonetheless crucial, with federal authorities serving most often as a backstop when local efforts to address bias crimes issues fail.[11]

Local police are the front line in preventing and investigating hate crimes. The mandate of most police forces is similar to that contained in the New York City Charter: "the police department and force shall have the power and it shall be their duty to preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections… protect the rights of persons and property… and for these purposes to arrest all person guilty of violating any law or ordinance…."[12] Police departments are also another source of statistics on hate crimes.

County prosecutors are primarily responsible for prosecuting crimes covered by state legislation, including hate crimes. In some counties, county officials have created specialized hate crime prosecution units staffed by prosecutors who receive specialized hate crime prosecution training.

Hate crimes also often fall within the mandate of local and state civil rights agencies. In recent years, some cities and states have created agencies that specifically address bias-motivated crime. For example, the California Civil Rights Commission on Hate Crimes, created in 1998, advises California's attorney general on methods to improve hate crime prevention, tolerance and appreciation for diversity, law enforcement training, and the monitoring and suppression of organized, extremist groups. Similarly, the Michigan Alliance Against Hate Crimes is a statewide coalition of federal, state, and local law enforcement agencies, civil rights organizations, and community-based groups who meet periodically to exchange ideas on ensuring that responses to hate crimes are complete and effective. In addition, a few entities have been created with a specific focus on issues affecting the Arab and Muslim communities. For example, the Chicago mayor's office has an Advisory Council on Arab Affairs which provides guidance and direction on issues affecting the Arab community in Chicago, including hate crimes.

Federal Agencies Responsible for Addressing Hate Crimes

Federal officials complement and supplement the efforts of state and local agencies to prevent, investigate, monitor, and prosecute hate crimes.

The Civil Rights Division of the U.S. Department of Justice is charged with enforcing and prosecuting federal hate crimes laws. Federal hate crimes prosecutions under 18 U.S. Code Section 245, the federal hate crimes statute are relatively few in number however, both because of the narrow scope of the federal hate crimes law and because of federal reluctance to preempt or disrupt local prosecutions.The Department of Justice does, however, define certain prosecutions that use statutes other than Section 245, such as assault, to prosecute hate crimes. According to the Department of Justice, from

[7] 28 U.S.C. § 534.
[8] 18 U.S.C. § 247.
[9] Ibid.
[10] Ibid.
[11] Human Rights Watch telephone interview with Ralph Boyd, assistant attorney general for civil rights, United States Department of Justice, August 25, 2002.
[12] New York City Charter § 435 (2001).

Fiscal Years 1998 to 2001, the average number of prosecutions was 28.[13]

Numerous federal agencies assist in addressing bias-motivated violence. Established by the 1964 Civil Rights Act, the Community Relations Service (CRS), an agency within the U.S. Department of Justice, assists communities in addressing inter-group disputes. CRS mediators, working with police officials and civil rights organizations, have often acted to defuse community tensions that might otherwise escalate into racial or ethnic violence. CRS also has played a leading role in the implementation of the HCSA, organizing HCSA training sessions for law enforcement officials from dozens of police agencies across the country.

Also established by the 1964 Civil Rights Act, the U.S. Commission on Civil Rights (UCCR) holds hearings and briefings on race relations and hate violence. It presents its findings on civil rights issues, such as hate violence, in reports submitted to the U.S. Congress and relevant federal agencies. UCCR has branch offices in each of the fifty states in the United States.

The Federal Bureau of Investigation (FBI) is the primary domestic law enforcement agency of the federal government. It conducts investigations into crimes covered by federal hate crimes legislation and can assist local police with hate crime investigations. The results of its investigations are used by the Civil Rights Division and the United States attorneys to initiate federal hate crime prosecution. In conjunction with CRS, the FBI also trains local law enforcement agencies in federal standards of data collection contained in the HCSA and publishes hate crime data collection guidelines for local police agencies.

The Bureau of Justice Statistics (BJS), an office within the U.S. Department of Justice, collects, analyzes, publishes, and disseminates information on crime, including hate crimes, criminal offenders, victims of crime, and the operation of justice systems at all levels of government. BJS is responsible for publishing an annual nationwide hate crimes report that provides the most comprehensive national statistical overview of hate crimes.

The Bureau of Justice Assistance (BJA), another arm of the Justice Department, provides grants to support local police and government agency efforts to build safe communities. BJA has funded numerous local initiatives to prevent and address hate crimes.

International Law

The condemnation and prohibition of racial or ethnic discrimination plays a pivotal role in international human right law. Both the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), enjoin state parties from race discrimination (including discrimination based on ethnicity or national origin) and require them to provide their residents with equal protection of all laws.[14] The United States is a party to both treaties. In addition, article four of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief requires states to "prevent and eliminate discrimination on the grounds of religions" and to "take all appropriate measures to combat intolerance on the grounds of religion…."[15]

[13] Fiscal Years run from October 1 to September 30. Fiscal Year 2001 prosecutions related to 9-11 backlash consider only the first few weeks following the attacks. According to an interview on July 23, 2003 with a staff member of the Criminal Section of the Civil Rights Division, only one September 11-related hate crime prosecution is included in the FY2001 data. U.S. Department of Justice, "Fiscal Year 2000 Performance Report and Fiscal Year 2002 Performance Plan: Appendix A," April 1, 2001 [online] http://www.usdoj.gov:80/ag/annualreports/pr2000/AppAFY2000disc.htm (retrieved July 22, 2003)and Human Rights Watch telephone interview with a staff member of the Criminal Section of the Civil Rights Division, Washington DC, July 23, 2003.

[14] International Covenant on Civil and Political Rights (ICCPR), article 26; International Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 2(1).

[15] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, article 4, General Assembly resolution 36/55, November 25, 1981.

CERD requires governments to punish by law all acts of violence motivated by racial, ethnic, or national origin animus. Specifically, CERD article 4(a) obliges governments to declare "all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin" as offenses punishable by law.[16] Nevertheless, a question remains under international law of whether bias-motivated violence must be penalized by special legislation or whether it can simply be punished through ordinary criminal laws. Some countries have adopted the position that bias-motivated violence must be uniquely criminalized through the creation of hate crimes legislation.[17] The plain text of CERD, however, is silent on this question. It simply calls for bias-motivated violence to be punished without prescribing a means for doing so.[18]

The *Programme of Action of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, published on January 25, 2002, did not call on governments to pass specific hate crime laws. Instead, it recommended that bias motivation be considered by judges during sentencing as an aggravating factor. In particular, the report urged governments to: "take measures so that such motivations are considered an aggravating factor for the purposes of sentencing, to prevent these crimes from going unpunished and to ensure the rule of law."[19]

The program of action also enumerates a range of other measures that governments should take to address and remedy bias-motivated violence. Taken together, these measures provide a useful list of actions that states parties to CERD, including the United States, may employ to combat bias-motivated violence. The measures include:

- establishing working groups of community leaders and national and local law enforcement officials to coordinate efforts to address bias motivated violence;[20]
- enhancing data collection on bias-motivated violence;[21]
- ensuring that civil rights laws prohibiting bias-motivated violence are rigorously enforced;[22]
- training law enforcement on how to investigate bias motivated crimes;[23]
- developing educational materials to teach young persons the importance of tolerance and respect;[24] and
- recognizing the need of all states parties to CERD to counter the present rise of "anti-Arabism and Islamophobia world-wide."[25]

[16] The Committee on the Elimination of Racial Discrimination, a treaty monitoring committee created pursuant to CERD, similarly calls on states parties to penalize "acts of violence against any race or group of persons of another colour or ethnic origin. Committee on the Elimination of Racial Discrimination, "General Recommendation XV," paras. 3 and 4, retrieved on September 19, 2002, from http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768?Opendocument.

[17] The Canadian Department of Justice (CDOC) concluded that "the creation of special criminal legislation to combat hate-motivated violence more forthrightly satisfies Canada's obligations under international law." Glenn A. Gilmour, Hate-Motivated Violence, Canadian Department of Justice, WD1994-6e (1994), retrieved on September 19, 2002, from http://canada.justice.gc.ca/en/dept/pub/hmv/hate 42.html. The Law Reform Commission of Australia, citing Article 4(a) also concluded CERD requires the creation of specific hate crimes legislation, The Law Reform Commission of Australia, Multiculturalism and the Law, p. 153, 155, Report 57 (1992) retrieved on September 19, 2002, from http://www.austlii.edu.au/au/other/alrc/publications/reports/57.

[18] CERD, article 4(a).

[19] Report of the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Programme of Action (WCAR Report), para. 84, retrieved on September 19, 2002, from http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.Conf.189.12.En?Opendocument.

[20] WCAR Report, *Programme of Action*, para. 74(b).

[21] Ibid.

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Ibid., para. 150.

Many of these measures are discussed below in our assessment of the government response to September 11-related hate crimes in the United States.

IV. A HISTORY OF BACKLASH ATTACKS AGAINST ARABS AND MUSLIMS IN AMERICA

Long before September 11, the stereotype of the Arab or Muslim as a "terrorist" had taken hold in the American imagination and fueled anti-Arab and anti-Muslim prejudice. That prejudice sometimes led to hate crimes, particularly after acts of violence ascribed rightly or wrongly to Arab or Muslim terrorists. In light of the history of backlash violence against Arabs and Muslims in the United States before September 11 2001, the hate crimes that followed September 11 were all too predictable. Government officials should be aware that there is a danger of an anti-Arab or anti-Muslim backlash anytime terrorism is linked to these communities.

The victims of this violence have not been limited to one nationality or religion. Those who have been attacked include persons who only appear—at least to some Americans—to be Middle Eastern, Arab, or Muslim. South Asians, for example, have regularly been attacked. So have people who "appear" Muslim—even though Muslims are found among all races, ethnic groups, and nationalities. In the context of U.S. hate-violence, however, "Muslim" has been equated with Middle Eastern or Arab. Sikh men who wear turbans have also been lumped with "Arab" terrorists and victimized. In short, a confluence of events in U.S. history has led to the construction of a new racial stereotype and target for bias, fear, and hate crimes: persons who are or appear to be "Middle Eastern, Arab or Muslim." For brevity's sake, in this report we refer to this violence as anti-Arab and anti-Muslim, while fully cognizant of the heterogeneous composition of the victims.[26]

Middle East Tensions in the 1970s and 1980s

Though neither government agencies nor Arab or Muslim nongovernmental organizations tracked incidents of bias-motivated crime in the 1970s,[27] Arab and Muslim activists point to the 1973 Arab-Israeli war and oil embargo as a starting point for increased prejudice and hostility against their communities in the United States.[28] An Arab-American from Dearborn, Michigan described the change in public attitudes towards Arab-Americans after 1973 in the following way: "suddenly we were being held responsible for things we had nothing to do with and no control over and maybe didn't even support in the first place."[29] Activists contend that hostility increased during the Iran hostage crisis in 1979. According to Albert Mokhiber, former President of the American Arab Anti-Discrimination Committee (ADC), the oldest Arab-American civil rights organization, "Iranians were being targeted for hate crimes at that point… so were Arab-Americans, and Arabs and Iranians aren't the same…."[30]

Arab-American activists also believe the ABSCAM scandal of 1980 heightened negative stereotypes of Arabs.[31] ABSCAM, short for "Arab Scam," was a federal political corruption sting operation in which federal agents posed as wealthy sheiks and offered bribes to politicians. As one Arab-American noted, after ABSCAM: "[A]ll Arabs were bad. Everybody was lumped together. You became that horrible, hook-nosed, terrorizing murderer. You were not to be trusted."[32] The founders of the ADC credit the

[26] See Leti Volpp, "The Citizen and the Terrorist," 49 UCLA Law Review 1575 (2002).

[27] The federal government began tracking hate crimes data with the passage of the Hate Crime Statistics Act in 1990.

[28] David Lamb, "Loyalty Questioned; U.S. Arabs Close Ranks Over Bias," *Los Angeles Times*, March 13, 1987.

[29] David Lamb, "Loyalty Questioned; U.S. Arabs Close Ranks Over Bias," *Los Angeles Times*, March 13, 1987.

[30] Albert Mokhiber, "American Arab Anti-Discrimination Committee News Conference," National Press Club, Washington, D.C., Federal News Service, February 20, 1992.

[31] Patrick Cooper, "Daschle's Proud Mentor Looks Back," *Roll Call*, July 19, 2001; "Human Rights: American-Arab Committee Fights Discrimination," Inter Press Service, August 20, 1985; Alan Achkar and Michele Fuetsch, "Taking Pride In Their Heritage; Arab-Americans Battle The Sting Of Stereotypes As They Work To Open Others' Eyes To Reality Of Their Culture," *Plain Dealer*, November 26, 1995.

[32] Alan Achkar and Michele Fuetsch, "Taking Pride In Their Heritage; Arab-Americans Battle The Sting Of Stereotypes As They Work To Open Others' Eyes To Reality Of Their Culture," *Plain Dealer*, November 26, 1995.

negative publicity surrounding the ABSCAM scandal as the impetus for the group's creation.[33]

The hijacking of TWA Flight 847 by Shiite militants on June 14, 1985 and the hijacking of the Italian cruise liner the Achille Lauro on October 7, 1985 by the Palestinian Liberation Organization were followed by a spate of violent crimes against Arab and Muslims in the United States. On October 11, 1985, the regional director of the ADC Southern California office, Alex Odeh, was killed when a bomb exploded outside the front door of his office.[34] The day before, Odeh had been on local television denying PLO involvement in the hijacking.[35] The ADC office in Washington, D.C., was firebombed two months after Odeh's death.[36] Two months before Odeh's murder, a bomb outside the ADC's Boston office injured a policeman when it detonated while the officer was trying to defuse it.[37] In the same time period, a Houston mosque was pipe-bombed (causing $50,000 in damage),[38] the windows of the Islamic Institute in Dearborn, Michigan were broken,[39] and a mosque in Potomac, Maryland was vandalized.[40] In 1986, the day the United States attacked Libya, five Arab students at Syracuse University were beaten while their attackers yelled anti-Arab epithets.[41] Arab-American businesses in Dearborn, Michigan were also vandalized soon after the attack on Libya.[42]

[33] Chris Tricarico and Marison Mull, "The Arab: No More Mister Bad Guy?" *Los Angeles Times*, September 14, 1986.
[34] Steve Lerner, "Terror Against Arabs in America: No More Looking the Other Way," *New Republic*, July 28, 1986.
[35] Steve Lerner, "Terror Against Arabs in America: No More Looking the Other Way," *New Republic*, July 28, 1986.
[36] Thomas Lerner, "Cover Story Language, incidents increasingly [sic]," *United Press International*, December 15, 1985.
[37] Thomas Lerner, "Cover Story Language, incidents increasingly [sic]," *United Press International*, December 15, 1985.
[38] "Terror Against Arabs in America: No More Looking the Other Way," *New Republic*, July 28, 1986.
[39] "Human Rights: American-Arab Committee Fights Discrimination," *Inter Press Service*, August 20, 1985.
[40] Ibid.
[41] "Arab-Americans Are Targets Of Terrorism In U.S.," *Seattle Times*, September 7, 1986.
[42] Murray Dubin, "'Hate acts' against minorities are on the rise, experts say," *Houston Chronicle*, December 7, 1986.

Persian Gulf War

The beginning of the Persian Gulf crisis in August 1990 led to a major wave of hate crimes nationwide against Arabs and Muslims in the United States. The ADC recorded four anti-Arab hate crimes, from January to August 1990, before the crisis began[43]; between August and the start of the war on January 16, 1991 it recorded forty hate crimes. During the first week of the war, it recorded another forty-four.[44]

In Los Angeles, fires destroyed the businesses of a Lebanese-American and an Iranian Jew.[45] In Cincinnati, a store owned by an Arab-American was firebombed.[46] In New York, ten men with a bottle beat a man who looked Arab on the subway.[47] In Baltimore, four or five men yelling "filthy Arab" attacked and broke the car window of a Polynesian Jew.[48] In San Francisco, vandals smashed the windows of four Arab-American businesses.[49] In Tulsa, Oklahoma, the house of an Iraqi native was burned down.[50] Threats against Arab and Muslim Americans were so numerous in Detroit that

[43] "American Arab Anti-Discrimination Committee News Conference," Federal News Service, February 20, 1992. The ADC data is based on reports of hate crimes filed by victims with its national office. Unlike a law enforcement agency, the ADC does not conduct an investigation to confirm whether a report of a bias incident is true. In classifying a criminal act and as a hate crime, the ADC used the federal definition of a hate crime.
[44] Albert Mokhiber, "American Arab Anti-Discrimination Committee News Conference," National Press Club, Washington, D.C., Federal News Service, February 20, 1992.
[45] Kenneth Reich and Richard A. Serrano, "Suspicious Fires Probed for Ties to Gulf Tension Crime: An Arson Unit studies a West Los Angeles Market Blaze and Police Label the Torching of a Sherman Oaks Store a Likely Hate Crime. Owners of Both Businesses are of Mideast Descent," *Los Angeles Times*, January 24, 1991.
[46] Adam Gelb, "War's Backlash: Two Communities Torn by Conflict; Arabs Emerge as New Target of Prejudice," *Atlanta Journal and Constitution*, January 19, 1991.
[47] Cynthia Ducanin, "Crisis in the Middle East: American Sentiment: Threats Against Arab-Americans Rise, Hotline Set up for Victims; Savannah Station Stirs Outcry," *Atlanta Journal and Constitution*, September 1, 1990.
[48] Adam Gelb, "War's Backlash: Two Communities Torn by Conflict. Arabs Emerge as New Target of Prejudice," *Atlanta Journal and Constitution*, January 19, 1991.
[49] "Vandals Strike at Arabs in The City," *San Francisco Examiner*, January 25, 1991.
[50] Ted Bridis, "Suspected 'Hate Crime' Yields to Flood of Support," Associated Press, February 23, 1991.

Mayor Coleman Young asked Michigan's Governor to assign National Guard troops to protect the city's Arab and Muslim population.[51]

The severe nature and extent of the crimes prompted the first efforts by public officials to address violence against Arab and Muslim Americans. President George H.W. Bush strongly called for an end to hate attacks against Arab-Americans, insisting on September 24, 1990 that "death threats, physical attacks, vandalism, religious violence and discrimination against Arab-Americans must end." [52] In California, noting that the current "wave of hate crimes is greater than we have seen since the brutal heyday of the Klu Klux Klan," Lieutenant Governor Leo McCarthy introduced hate crimes legislation that proposed to increase civil and criminal penalties for those who commit bias-motivated crime.[53] In Los Angeles, the district attorney's office released a public service announcement asking viewers to call the Los Angeles County district attorney's office if they had any knowledge of crimes against Arabs, Muslims or Jews.[54] In Chicago, the Human Relations Commission helped Arab and Muslim shopkeepers post signs warning against committing hate crimes.[55]

Oklahoma City Bombing and TWA Flight 800

On April 19, 1985, a bomb destroyed the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, killing 168 people. In the two days before federal authorities stated that foreign terrorists were not responsible, many Americans assumed Arab terrorists were behind the attack.[56] The Council on Islamic Relations (CAIR), a Muslim civil rights organization, recorded over two hundred incidents of anti-Muslim harassment, assault, or property damage in the days immediately following the bombing.[57]

In Oklahoma City, a Muslim woman who was seven months pregnant suffered a miscarriage after a brick thrown through her window traumatized her the morning after the bombing.[58] At a Muslim day care center in Texas, a teacher and sixty young students were frightened when a passing driver shouted to the teacher, "Here's a bomb for you lady," and then threw a bag of soda cans at her.[59] In New York City, callers threatened to bomb Arab-owned business and attack the families of the owners.[60] In Richardson, Texas, a mosque received ten threatening phone calls.[61] Just one day after the bombing, as reports of backlash attacks began to surface, President Bill Clinton called on Americans not to rush to any judgments or blame any religion for the attack.[62]

On July 17, 1996, TWA Flight 800 exploded soon after leaving New York, killing all its passengers. As with the Oklahoma City bombing, there was public speculation in the media that Muslim or Arab terrorists were responsible for the explosion.[63] Ultimately, the downing of TWA Flight 800 was blamed on a

[51] Rick Hampson, "Arab-Americans: Dual Loyalties and Nagging Worries," Associated Press, January 20, 1991.
[52] "Home-Grown Hatemongers," *New York Times*, February 27, 1991.
[53] "McCarthy, Lockyer Announce Legislation to Battle Hate Crimes," *Business Wire*, February 6, 1991. The California State Legislature enacted the legislation that year.
[54] "Southland: Briefly TV Ads to Fight Hate Crimes," *Los Angeles Daily News*, February 1991.
[55] Frank Burgos and Zay N. Smith, "Shops Asked to Help Fight Hate Crimes," *Chicago Sun-Times*, January 30, 1991.
[56] Bonnie Miller Rubin, "U.S. Muslims Are Looking For Apology," *Chicago Tribune*, April 22, 1995. Timothy McVeigh, a U.S. citizen who was neither Arab or Muslim, was eventually tried and executed for the bombing.
[57] Farhan Haq, "United States: Terrorism Fears Put Muslims on the Alert," *Inter Press Service*, August 17, 1995. CAIR data is based on reports of bias incidents filed by victims with its national office. These incidents include everything from verbal harassment to discrimination to bias-motivated criminal acts. CAIR accepts the facts reported to it as true.
[58] Charles M. Sennott, "After the bombings, America Faces up to Prejudice," *Boston Globe*, June 21, 1995.
[59] Hamzi Moghradi, "A Rush to Judgment – Again," *Plain Dealer*, April 23, 1995.
[60] Laura Outerbridge, "American Muslims Articulate Fear of Backlash," *Washington Times*, April 21, 1995.
[61] Hamzi Moghradi, "A Rush to Judgment Again," *Plain Dealer*, April 23, 1995.
[62] John Nichols, "Bumbling Analysis Of Bombing Promoted Ethnic Stereotypes," *Capital Times*, April 24, 1995.
[63] David Johnston; "Terror In Oklahoma City: The Investigation; At Least 31 Are Dead, Scores Are Missing After Car Bomb Attack In Oklahoma City Wrecks 9-Story Federal Office Building," *New York Times*, April 20, 1995; Stewart M. Powell and Holly Yeager, "FBI Issues Bulletin for 3 Suspects," *Seattle Post-Intelligencer*, April 20, 1995.

mechanical failure.[64] Nevertheless, CAIR received ten reports of anti-Muslim verbal harassment and threats of violence prompted by anger against Muslims after the plane exploded.[65]

September 11: Expectations of Backlash Violence

The past history of backlash violence left many of Arabs, Muslims, and those perceived to be Arab or Muslim, apprehensive that they would be targets of backlash violence whenever a terrorist incident was blamed on Arabs or Muslims. This fear was vividly expressed in messages sent by Muslims, Arabs, and Sikhs to community e-mail groups in the hours immediately after the September 11 attacks. A few of the messages are excerpted below:

- "Both towers of the World Trade Center are burning. In the coming hours (minutes?), the finger pointing will start just as it did after Oklahoma City."[66]
- "I apologize for this haphazard email. I am shocked beyond belief as our great country is going through crisis as none before. At this time we stand with our hands folded in Ardas (Sikh prayer) to all victims of this dastardly attack. However…it is critical that we as Sikh-Americans do not become victims of this terror…What I am saying is very simple, "though we are peace loving people with no connections whatsoever to… (Osama bin Laden etal[sic]), there are individuals which may not see the difference"… Everyone's work or school situation is different but noone [sic] should go under any bullying or even be made uncomfortable by fellow colleagues."[67]
- "I'm sure we've all heard of the tragedy this morning... Needless to say, we all realize that no Muslim in their right mind would condone such an action. I'm only writing to be sure you are all aware of the unavoidable atmosphere that will rise as a result of this attack: we're non-white, we're Arab… we're Muslims… There will be some 'serious' anti-arab, anti-Muslim sentiment running rampant through this country… So be careful, stay with your families, stay off the streets unnecessarily, and watch your fellow sisters and brothers."[68]
- "During this period of time in which events unfold in NY and Washington, we urge Arabs and Muslims to be watchful and proactive in handling what may result in backlash against our communities, property and persons."[69]

V. THE SEPTEMBER 11 BACKLASH

The September 11 hate crime backlash confirmed the fears of Arabs and Muslims in the United States: a major terrorist attack gave rise to a nationwide wave of hate crimes against persons and institutions perceived to be Arab or Muslim. Unlike previous hate crime waves, however, the September 11 backlash distin-

[64] Rick Hampson, "Another Grim Task," *USA Today*, November 1, 1999.
[65] Suzanne Cassidy, "Muslim Report Validates Local, National Aura of Bias: Pervasive Bigotry Alleged to Arise from Unjust, Constant Media Pairing of Islam with Terrorism," The Harrisburg Patriot, August 5, 1997.
[66] Alex Khalil, September 11, 2001, written to Global Network of Arab Activists Yahoogroup at 9:49 a.m.
[67] "Sikh-Americans: we need to be proactive During this Crisis!!!!!!," retrieved on September 11, 2001, from http://groups.yahoo.com/group/sikh-sewa/. Accessed by subscribing to Sikh-Sewa Yahoogroup and viewing archives.
[68] "Bismillah," retrieved on September 11, 2001, from http://groups.yahoo.com/group/ymaonline. Accessed by subscribing to Young Muslim Association Yahoogroup and viewing archives.
[69] "Action Alert: Report Hate Crimes and Contact Media Outlets," from http://groups.yahoo.com/group/adcsf. Accessed by subscribing to American Arab Anti-Discrimination Committee Yahoogroup and viewing archives.

guished itself by its ferocity and extent. The violence included murder, physical assaults, arson, vandalism of places of worship and other property damage, death threats, and public harassment. Most incidents occurred in the first months after September 11, with the violence tapering off by December.

Both official and community-based organization tabulations—derived from self-reported incidents and newspaper accounts—clearly demonstrate the severity of the September 11 backlash. The FBI reported that the number of anti-Muslim hate crimes rose from twenty-eight in 2000 to 481 in 2001, a seventeen-fold increase.[70] The ADC reported over six hundred September 11-related hate crimes committed against Arabs, Muslims, and those perceived to be Arab or Muslim, such as Sikhs and South Asians.[71] Tabulating backlash incidents ranging from verbal taunts to employment discrimination to airport profiling to hate crimes, CAIR reported one thousand seven hundred and seventeen incidents of backlash discrimination against Muslims from September 11 through February 2002.[72]

State and local agency data provide additional perspective on the extent of the violence. In Chicago, the police department reported only four anti-Muslim or anti-Arab hate crimes during the year 2000; in the three months of September through November 2001, the number was fifty-one.[73] In Los Angeles County, California, there were twelve hate crimes against persons of Middle Eastern descent in the year 2000, compared to 188 such hate crimes in 2001.[74] In Florida, the attorney general directly attributed the 24.5 percent increase in the total number of hate crimes registered for the year 2001 to September 11-related bias.[75]

Not surprisingly, the persons most vulnerable to September 11-related hate crimes were those easily identified as Arabs or Muslims, including Muslim women who wear hijabs.[76] Sikhs who wear turbans also appear to have been disproportionately targeted, presumably because of the erroneous assumption by many Americans that men wearing turbans are Arab or Muslim. Similarly, bias-motivated property attacks were often directed at property that could easily be identified with Muslims or Arabs, such as mosques.

Many Arabs and South Asians who have come to the United States seem to have clustered in certain jobs, including driving taxis, or have become small business owners, running gas stations, convenience stores, and motels. This may account for the prevalence of backlash victims among persons with these occupations. Two of the three September 11-related murders for which charges have been brought were of convenience store workers.[77] The other September 11-related murder for which charges have been brought was of a gas station owner.[78] In Tulsa, Oklahoma and Seattle, Washington, taxi dispatch services noted that after September 11 they had received threatening calls saying that their Muslim and Arab taxi workers would be killed.[79]

[70] "Crime in the United States 2001," Federal Bureau of Investigation, retrieved on October 30, 2002, from http://www.fbi.gov/ucr/01cius.htm.

[71] "ADC Fact Sheet: The Condition of Arab Americans Post-September 11," American Arab Anti-Discrimination Committee, retrieved on September 24, 2002, from http://www.adc.org/index.php?lbid.=282&no cache=1&sword list[]=hate&sword list[]=crime.

[72] "Anti-Muslim incidents," retrieved on September 8, 2002, from http://www.cair-net.org.

[73] "Hate Crimes in Chicago: 2001," Chicago Police Department, p. 13, retrieved on September 24, 2002, from http://www.ci.chi.il.us/CommunityPolicing/Statistics/Reports/HateCrimes/HateCrimes01.pdf.

[74] "Compounding Tragedy: The Other Victims of September 11," Los Angeles County Commission on Human Relations, p. 12, 14, retrieved on September 24, 2002, from http://humanrelations.co.la.ca.us/Our_publications/pdf/2001HCR.pdf.

[75] "Hate Crimes in Florida: January 1, 2001-December 31, 2001," Office of Attorney General, p. 6, retrieved on September 24, 2002, from http://legal.firn.edu/justice/01hate.pdf.

[76] Hijab is the practice among Muslim women of covering the head and body.

[77] Vasudev Patel and Waquar Hassan were killed while working in convenience stores.

[78] Balbir Singh Sodhi was killed while working at his gas station.

[79] Curtis Killman, "Tulsa-area Muslims feel fear," *Tulsa World,* September 16, 2001; "Bush Appeals For Calm Amid Incidents Of Hate; Threats And Attacks Have Targeted Mosques, Arab Americans," *Seattle Post-Intelligencer,* September 14, 2001.

In addition to bias-motivated criminal acts, the September 11 attacks spurred complaints of non-criminal acts of discrimination and racial profiling. As of May 2002, the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing federal employment discrimination laws, had received 488 complaints of September 11-related employment discrimination. Of these, 301 involved persons who were fired from their jobs.[80] Similarly, as of June 2002, the U.S. Department of Transporation (DOT) reported that it had investigated 111 September 11-related complaints from airline passengers who claimed that they were singled out at security screenings because of their ethnic or religious appearance.[81] The DOT reported that it was also investigating an additional thirty-one complaints of persons who alleged they were barred altogether from boarding airplanes because of their ethnic or religious appearance.[82] The overwhelming number of September 11-related discrimination complaints compelled the DOT and EEOC to specially track and report the backlash incidents.[83]

Polls conducted by national Arab and Muslim advocacy groups measured the cumulative perceptions created by September 11-related criminal and non-criminal bias incidents in the Arab and Muslim communities. In July 2002, CAIR polled 945 Muslim Americans on how September 11 and its aftermath affected them. The poll found that 48 percent believed their lives had changed for the worse since September 11.[84] While 79 percent said they experienced an act of kindness or support from friends or colleagues of other faiths since September 11, 57 percent experienced an act of bias or discrimination, ranging from a disparaging remark to employment discrimination to a hate crime.[85] A poll of Arab-Americans conducted in May 2002 found that that 20 percent had personally experienced discrimination since September 11.

The full dimensions of the backlash may never be known. As discussed in section V, there are two reasons for what amounts to a systemic gap in public knowledge about the extent of hate crimes in the United States. First, the federal hate crimes reporting system contains significant limitations, including the voluntary nature of the reporting system and the failure of some local law enforcement agencies that ostensibly participate in the federal reporting system to furnish information on hate crimes to federal authorities. These gaps in the federal hate crimes reporting system were detailed in a September 2000 U.S. Department of Justice-funded study, which estimated that almost six thousand law enforcement agencies in the United States likely experience at least one hate crime that goes unreported each year.[86] Second, the racial or ethnic identity of a crime victim without more is an insufficient basis on which to determine whether a crime is hate-related. Absent specific indicia of bias—e.g, statements made by the perpetrator—hate-based crimes may not be recorded as such.

[80] "EEOC Provides Answers About the Workplace Rights of Muslims, Arabs, South Asians and Sikhs," Press Release, Equal Employment Opportunity Commission, May 15, 2002, retrieved on September 23, 2002, from http://www.eeoc.gov/press/5-15-02.html.

[81] William Wan, "Four Airlines Sued For Alleged Post-Sept. 11 Discrimination," Cox News Service, June 4, 2002.

[82] Ibid.

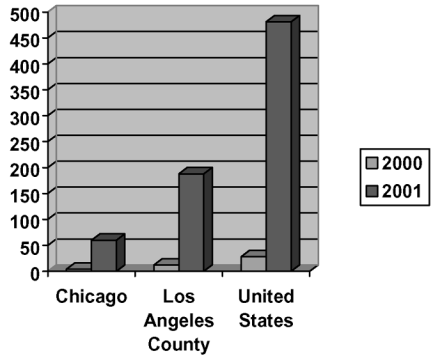
[83] William Wan, "Four Airlines Sued For Alleged Post-Sept. 11 Discrimination," Cox News Service, June 4, 2002; "EEOC Provides Answers About the Workplace Rights of Muslims, Arabs, South Asians and Sikhs," Press Release, Equal Employment Opportunity Commission, May 15, 2002, retrieved on September 23, 2002, from http://www.eeoc.gov/press/5-15-02.html.

[84] "Poll: Majority of U.S. Muslims suffered post September 11 bias," Council on American-Islamic Relation, August 21, 2002, retrieved on August 28, 2002, from http://www.cair-net.org/asp/article.asp?articleid=895&articletype=3.

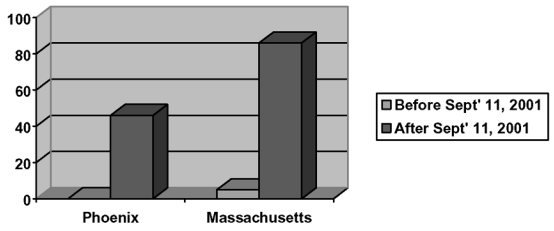
[85] Ibid.

[86] "Improving The Quality And Accuracy Of Bias Crime Statistics Nationally: An Assessment of the First Ten Years of Bias Crime Data Collection," The Center for Criminal Justice Policy Research College of Criminal Justice, p. 61 (2000).

Anti-Arab or Anti-Muslim Hate Crimes During The Years 2000 and 2001[87]



Anti-Arab and Muslim Hate Crimes During 2001 Before and After September 11, 2001[88]



[87] Anti-Muslim hate crimes in the United States increased from twenty-eight during 2000 to 481 during 2001. See "Crime in the United States – 2001," Federal Bureau of Investigation, retrieved on October 30, 2002, from http://www.fbi.gov/ucr/01cius.htm. Anti-Arab and anti-Muslim hate crimes in Los Angeles County increased from twelve during 2000 to 188 during 2001. See "Compounding Tragedy: The Other Victims of September 11," Los Angeles County Commission on Human Relations, p. 12 and 14, retrieved on September 24, 2002, from http://humanrelations.co.la.ca.us/Our_publications/pdf/2001HCR.pdf. Anti-Arab and anti-Muslim hate crimes in Chicago increased from four during 2000 to sixty during 2001. See "Hate Crimes in Chicago: 2001," Chicago Police Department, p. 13, retrieved on September 24, 2002, from http://www.ci.chi.il.us/CommunityPolicing/Statistics/Reports/HateCrimes/HateCrimes01.pdf.

[88] During 2001, Massachusetts had five anti-Arab or anti-Muslim hate crimes before September 11 and eighty-six after. See Marie Szaniszlo, "Study: 9/11 fuels anti-Arab crime," *Boston Herald,* September 25, 2002. During 2001, Phoenix had no anti-Arab or anti-Muslim hate crimes before September 11 and forty-six after. See "Bias Incident Statistics," Phoenix Police Department, retrieved on October 29, 2002, from http://www.ci.phoenix.az.us/POLICE/hatecr2.html.

Murder

> *I stand for America all the way! I'm an American. Go ahead. Arrest me and let those terrorists run wild!*[89]
>
> —Frank Roque, after being arrested for the murder of Balbir Singh Sodhi

At least three people were murdered as a result of the September 11 backlash. There is reason to suspect four other people may also have been murdered because of anti-Arab and anti-Muslim hatred.

Balbir Singh Sodhi

Balbir Singh Sodhi, a forty-nine-year-old turbaned Sikh and father of three, was shot and killed while planting flowers at his gas station on September 15, 2002. Police officials told Human Rights Watch that hours before the crime, Sodhi's alleged killer, Frank Roque, had bragged at a local bar of his intention to "kill the ragheads responsible for September 11."[90] In addition to shooting Sodhi three times before driving away, Roque also allegedly shot into the home of an Afghani American and at two Lebanese gas station clerks.[91] The Maricopa County prosecutor's office was due to try Roque for Sodhi's murder on November 12, 2002.

Vasudev Patel

On October 4, 2001, Mark Stroman shot and killed Vasudev Patel, a forty-nine-year old Indian and father of two, while Patel was working at his convenience store in Mesquite, Texas.[92] A store video camera recorded the murder, allowing law enforcement detectives to identify Stroman as the killer. Stroman said during a television interview that anger over the September 11 attacks caused him to attack any store owner who appeared to be Muslim. He further stated during the interview: "We're at war. I did what I had to do. I did it to retaliate against those who retaliated against us."[93] In addition to killing Patel, Stroman also shot and killed Waquar Hassan on September 15, 2001 (see below), and also shot Rais Uddin, a gas station attendant, blinding him.[94] Stroman was tried and convicted of capital murder for killing Patel and sentenced to death on April 3, 2002.[95]

Waquar Hassan

Waquar Hassan, a forty-six-year-old Pakistani and father of four, was killed while cooking hamburgers at his grocery store near Dallas, Texas on September 15, 2001. Although no money was taken from Hassan's store, police in Dallas initially believed that he was killed during a robbery because he had been robbed twice that year.[96] Hassan's family, however, believed his murder was a hate crime because nothing was stolen by the assailant and the murder had occurred so soon after September 11.[97] His family also pointed out that customers visiting Hassan's store after September 11 subjected him to ethnic and religious slurs.[98] The case remained unsolved until Mark Stroman admitted to killing Hassan to a fellow prison inmate in January 2002.[99] Murder charges against Stroman were dropped once he was convicted and sentenced to death for Vasudev Patel's murder.[100]

Ali Almansoop

On September 17, 2001, Ali Almansoop, a forty-four year old Yemini Arab, was shot and killed in his home in Lincoln Park, Michigan after being awoken from his sleep by Brent David Seever. At the time of his murder, Al-

[89] Human Rights Watch interview with Sergeant Mike Goulet of the Mesa, Arizona police department, August 6, 2002.
[90] Ibid.
[91] Ibid.
[92] Michael Tate, "Mesquite seeks clues in killing of gas-store owner," Dallas Morning News, October 5, 2001.
[93] "News Roundup," *San Antonio Express-News*, February 14, 2002.
[94] Ibid.
[95] "Death Sentence for Revenge Killing," United Press International, April 4, 2002. While Human Rights Watch believes all bias-motivated crimes should be prosecuted, it does not condone the death sentence in this or any other criminal matter.
[96] Alan Cooperman, "Sept.11 Backlash Murders and the State of 'Hate'; Between Families and Police, a Gulf on Victim Count," *Washington Post*, January 20, 2002.
[97] Human Rights Watch telephone interview with Zahid Ghani, brother-in-law of Waquar Hassan, August 25, 2002.
[98] Ibid.
[99] Ibid.
[100] The prosecution used Stroman's confession that he killed Hussain during sentencing portion of his trial for the murder of Vasudev Patel.

mansoop was in bed with Seever's ex-girlfriend.[101] Immediately before killing Almansoop, Seever said that he was angry about the September 11 terrorist attacks. Almansoop pleaded that he did not have anything to do with the attacks.[102] Seever shot Almansoop anyway. Seever acknowledged to police investigators that he killed Almansoop in part because of anger related to September 11. Prosecutors chose to prosecute the matter as a murder, rather than a bias-motivated murder, because they believe Mr. Seever's motivation for murdering Almansoop was motivated in part by jealousy over Almansoop's relationship with is ex-girlfriend. Mr. Seever had been stalking his ex-girlfriend before the murder.[103]

Abdo Ali Ahmed

On September 29, 2001, Abdo Ali Ahmed, a fifty-one-year-old Yemini Arab and Muslim, and father of eight, was shot and killed while working at his convenience store in Reedley, California.[104] Cash in two registers and rolled coins inside an open safe were left untouched. In addition, Ahmed's gun, which he kept for protection, reportedly remained in its usual spot, indicating that he may not have felt in mortal danger.[105] Two days before his murder, Ahmed had found a note on his car windshield which stated, "We're going to kill all of you [expletive] Arabs."[106] Instead of contacting the police, Ahmed threw the note away.[107]

Ahmed's family and local Muslim leaders have told the local press that they believe his killing was a hate crime.[108] However, largely because no perpetrator or perpetrators have been found for whom a motive can be established, police have not classified the murder as a hate crime. California Governor Gray Davis offered a $50,000 reward for information leading to the conviction of Ahmed's killers.[109] At the time of this writing, the investigation into Ahmed's murder was stalled because police had run out of leads.[110]

Adel Karas

On September 15, 2001, Adel Karas, a forty-eight-year-old Arab and Coptic Christian, and father of three, was shot and killed at his convenience store in San Gabriel, California. According to press reports, his wife, Randa Karas, believes he was murdered because he was mistaken for a Muslim. She points out that no money was taken from the cash register and that her husband had a thick wad of bills in his pocket. Local police told Human Rights Watch that they do not believe his murder was bias-motivated because there is no evidence to indicate anti-Arab or anti-Muslim bias. The murder remained unsolved at the time of this writing.[111]

Ali W. Ali

Ali W. Ali, a sixty-six-year-old Somali Muslim, died nine days after being punched in the head while standing at a bus stop in Minneapolis, Minnesota on October 15, 2002.[112] According to press reports, the only known witness to the attack saw the assailant walk up to Ali, punch him, stand over him, and then walk away.[113] His son and Somali community members attributed the attack against Ali to anger created against Somalis by a front page local newspaper article that appeared two days before

[101] Alan Cooperman, "Sept. 11 Backlash Murders and the State of 'Hate'; Between Families And Police, a Gulf On Victim Count," *Washington Post*, January 20, 2002.
[102] Ibid.
[103] Ibid.
[104] Evelyn Nieves, "Slain Arab-American May Have Been Hate-Crime Victim," *New York Times*, October 6, 2001
[105] Karen de Sa"Local Muslims Convinced Central Calif. Killing was hate crime," *San Jose Mercury News*, December 6, 2001.
[106] Karen Breslav, "Hate Crime," *Newsweek*, October 15, 2001.
[107] Ibid.
[108] Jennifer Fitzenberger, "Family sees hate crime in Reedley homicide Relatives say victim was shot because he was Muslim; officials draw no conclusions," *Fresno Bee*, October 1, 2001.
[109] "Police," *Fresno Bee*, November 29, 2001.
[110] Human Rights Watch telephone interview, Sergeant Tony Reign, Fresno Police Department, California, September 16, 2002.
[111] Human Rights Watch telephone interview, Lieutenant Joe Hartshorne, Los Angeles County Sheriff's Department, September 16, 2002.
[112] "Somalis discuss freedom and fear; U.S. flags, worries of backlash abound as community meets," *Star Tribune* (Minneapolis, MN), October 25, 2001.
[113] David Chanen, "FBI questions witness in alleged hate assault," *Star Tribune* (Minneapolis, MN), November 16, 2001.

the attack.[114] The article said that Somalis in Minneapolis had given money to a Somali terrorist group with links to Osama Bin Laden.[115] After originally finding that Ali had died of natural causes, the Hennepin County medical examiner's office on January 8, 2002 ruled Ali's death a homicide.[116] Ali's family regards his murder as a hate crime. Both local police and the FBI have been unable to find Ali's assailant.[117]

Assaults

Violent assaults related to September 11 were numerous and widespread. A review by the South Asian American Leaders of Tomorrow (SAALT) of news articles published during the week following September 11 found reports of forty-nine September 11-related assaults.[118] CAIR received 289 reports from Muslims of assaults and property damage incidents across the United States from September 11 until the second week of February.[119]

Issa Qandeel

On the morning of September 13, 2001, Issa Qandeel, a Palestinian Muslim and an Arab, was leaving the Idriss Mosque in Seattle, Washington when he smelled gas near his jeep and saw a man, subsequently identified as Patrick Cunningham, come out from behind his jeep. Cunningham was carrying a can of gasoline and a gun. When Qandeel asked Cunningham what he was doing behind the jeep, Cunningham walked away.

When Qandeel tried to stop him, Cunningham shot at Qandeel three times, although his gun did not discharge any bullets. Cunningham then started running away and Qandeel chased him. Cunningham shot at Qandeel again and this time a bullet did discharge, although it missed Qandeel. Cunningham was apprehended when he crashed his car trying to get away. Police later discovered that Cunningham planned to burn cars in the mosque driveway because of anger at the September 11 attacks. Federal authorities prosecuted Cunningham for attacking Qandeel and attempting to deface a house of worship. He pled guilty on May 9, 2002 and was scheduled to be sentenced on October 18, 2002. He faces a minimum of five years of incarceration.[120]

Kulwinder Singh

On September 13, 2001, Raymond Isais Jr. allegedly assaulted Kulwinder Singh, a turbaned Sikh taxi worker, in SeaTac, Washington. After getting into the back seat of Singh's taxi, Isais told Singh, "You have no right to attack our country!" He then started choking Singh. After both men then got out of the taxi, Isais started punching Singh, pulled out tufts of his beard and knocked off his turban. Isais called Singh a terrorist during the assault. Local police were able to apprehend Isais Jr. the same day using a description provided by Singh. He was charged with a hate crime by local country prosecutors.[121]

Swaran Kaur Bhullar

On September 30, 2001, Swaran Kaur Bhullar, a Sikh woman, was attacked by two men who stabbed her in the head twice as her car was idling at a red light in San Diego. The men shouted at her, "This is what you get for what you've done to us!" and "I'm going to slash your throat," before attacking her. As another car approached the traffic light, the men sped off. Bhullar felt that she would have been killed by the men if the other car had not appeared. She was treated at a local hospital for

[114] Lou Gelfand, "Readers say Sunday article spurred unfair attacks on local Somalis," *Star Tribune* (Minneapolis, MN), October 21, 2002.
[115] "Somalis, Muslims denounce paper's story," *Star Tribune* (Minneapolis, MN), October 16, 2001.
[116] David Chanen, "Bus stop assault is ruled homicide; Somali victim's family maintains it was hate crime," *Star Tribune* (Minneapolis, MN), January 9, 2002
[117] "FBI questions witness in alleged hate assault," *Star Tribune* (Minneapolis, MN), November 16, 2001.
[118] "American Backlash: Terrorists Bring War Home in More Ways Than One," South Asian American Leaders of Tomorrow, p. 7, retrieved on August 28, 2002, from http://www.saalt.org/biasreport.pdf. SAALT is a national South Asian advocacy organization
[119] "Number of Reported Incidents by Category," Council on American-Islamic Relations, retrieved on August 30, 200, from http://www.cair-net.org/html/bycategory.htm.
[120] Human Rights Watch interview with Issa Qandeel, July 31, 2002.
[121] Human Rights Watch telephone interview with Kulwinder Singh, August 3, 2002.

two cuts in her scalp and released later that same day. Local police and federal law enforcement officials have been unable to identify Bhullar's attackers.[122]

Faiza Ejaz

On September 12, 2001, Faiza Ejaz, a Pakistani woman, was standing outside a mall in Huntington, New York waiting for her husband to pick her up from work. According to press reports, Adam Lang, a seventy-six-year-old man sitting in his car outside the mall, allegedly put his car in drive and started driving towards her. Ejaz was able to avoid the car by jumping out of the way and running into the mall. Lang then jumped out of his car and screamed that he was "doing this for my country" and was "going to kill her." Mall security agents seized Lang. Sergeant Robert Reecks, commander of the Suffolk County Bias Crimes Bureau, told reporters: "if she hadn't jumped out of the way, he would have run right over her."[123] Lang was charged with first-degree reckless endangerment, which requires an enhanced penalty if the crime is bias-motivated.

Crystal Ali-Khan

On June 18, 2002, Crystal Ali Khan, a American Muslim woman who wears a hijab, was allegedly assaulted by a woman in a drug store near Houston, Texas. Before assaulting Khan, the woman told her that she had learned about "you people" over the last ten months and doesn't trust "a single damn one of you." Before Khan could get away from the woman, she slammed Khan to the floor and began pulling at her headscarf, which had the effect of choking her. Though Khan told the woman she could not breathe, she kept pulling at the headscarf. Khan then pulled off her headscarf, in violation of her religious obligations in a desperate effort to alleviate the choking. The woman then dragged Khan by her hair to the front of the store. When police arrived, the woman was holding Khan by her ponytail on the front sidewalk of the store. She told police that she was making a citizen's arrest. The police told her to let Khan go, at which point Khan was able to put her headscarf back on.[124]

Karnail Singh

Karnail Singh is a Sikh man who owns a motel in SeaTac, Washington. In mid-October, 2001, John Bethel, a local vagrant who sometimes came into Singh's motel for coffee and food, told Singh, "You better go back to your country. We're coming to kick your ass." A few days later, on October 19, Bethel entered Singh's motel and shouted, "You still here? Go back to Allah!" before hitting Singh with a metal cane while he stood behind the counter in the motel lobby. Singh, who bled profusely from the blow, spent half a day in the hospital and required ten stitches on his head. Bethel was sentenced to nearly two years in prison for assault with a deadly weapon.[125]

Satpreet Singh

On September 19, 2001, Satpreet Singh, a turbaned Sikh, was driving in the middle lane of a two lane highway in Frederick County, Maryland. A pickup truck pulled up close behind Singh and the driver started making profane gestures towards him. The pickup truck then moved alongside Singh's car on his left and the driver took out a rifle. Singh increased his speed to get away from the pickup truck. Seconds later he heard rifle shots. No bullets hit Singh or his car. The pickup truck then turned around and started traveling in the opposite direction. Singh filed a criminal complaint with the local police. At the time of this writing, local authorities have not been able to ascertain the identity of the person who shot at Singh.[126]

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[122] Human Rights Watch telephone interview with Swaran Kaur Bhullar, June 27, 2002.

[123] Pat Burson, "Terrorist Attacks; Driver Arrested in Hate Crime at Mall," *Newsday*, September 13, 2001.

[124] Human Rights Watch telephone interview with Crystal Khan, August 21, 2002.

[125] Human Rights Watch interview with Karnail Singh, August 2, 2002.

[126] Human Rights Watch telephone Interview with Satpreet Singh, August 19, 2002. The Sikh Coalition, a Sikh civil rights organization formed in the wake of the September 11 backlash, received nineteen reports of turbaned Sikhs being harassed by other motorists while driving since September 11. Human Rights Watch telephone interview with Prabhjot Singh, director, Sikh Coalition, August 16, 2002.

Place of Worship Attacks

Mosques and places of worship perceived to be mosques appeared to be among the most likely places of September 11-related backlash violence. SAALT's survey of bias incidents reported in major news media found 104 bias incidents against places of worship reported during the first week after September 11.[127] Of these 104 bias incidents, fifty-five were telephone threats, twenty-four involved harassment of mosque worshippers outside mosques, twenty-two involved property damage from vandalism, arson, or gun shots, and three were assaults on mosque worshipers.[128] Arab churches, Sikh *gurdwaras* (houses of worship), and Hindu temples were also objects of backlash violence. The number of worshippers at the attacked mosques decreased for weeks following the attacks, apparently because of fear of additional violence.[129]

Although September 11 backlash violence against individual Arabs and Muslims decreased markedly by November 2001, attacks continued against mosques or houses of worship perceived to be Arab or Muslim. On November 19, 2001, four teenagers burned down the Gobind Sadan, a multi-faith worship center Oswego, New York, because they believed the worshippers were supporters of Osama Bin Laden.[130] On March 25, 2002, a man who stated to police that he hated Muslims crashed his pickup truck into a mosque in Tallahassee, Florida thirty minutes after evening prayers.[131] On June 11, 2002, in Milipitas, California, vandals broke into a mosque under construction, scrawled derogatory remarks such as, "F— Arabs" and damaged the interior of a construction trailer near the mosque.[132] On August 24, 2002, federal authorities announced they had discovered a plan by a doctor in Tampa Bay to bomb and destroy approximately 50 mosques and Islamic cultural centers in south Florida.[133] The doctor's home contained rocket launchers, sniper rifles and twenty live bombs.[134]

Guru Gobind Singh Sikh Gurdwara

On the night of September 11, 2001, somebody threw three Molotov cocktails into the Guru Gobind Singh Sikh Gurdwara, a Sikh house of worship in Bedford, Ohio. The Molotov cocktails started a small fire that was quickly extinguished by the gurdwara's caretakers. Two windows were also broken. A report was filed with local police. No one has been apprehended for the crime.[135]

Mosque Foundation of Bridgeview

On September 12, 2001, over one hundred police officers were deployed to stop approximately three hundred protestors from marching on the mosque in Bridgeview, Illinois. The mosque is located in a neighborhood of mostly Arab and Muslim American families. Stopped two blocks from the mosque, the protestors then demonstrated for approximately three hours shouting anti-Arab and anti-Muslim insults such as "Arabs go home" and harassing passersby who looked Muslim or Arab. Similar protests, though smaller in size, were held over the next two days. Police from various jurisdictions cordoned off the area around the mosque, only allowing persons into the neighborhood who could prove they lived there. Many of the Muslim and

[127] South Asian American Leaders of Tomorrow, "American Backlash: Terrorists Bring War Home in More Ways Than One," retrieved on August 26, 2002, from http://www.saalt.org/biasreport.pdf.

[128] Ibid. These statistics were compiled after analyzing reports listed in the "American Backlash" report.

[129] Human Rights Watch telephone interview with Imam Ayaaz, Iman of Islamic Foundation of Irving, July 17, 2002; Human Rights Watch telephone interview with Dr. Magdy Adbelhady, member of United Muslim Masjid, July 18, 2002.

[130] Catie O'Toole, "2 in Temple Case Denied Shock Camp; Joshua Centrone, William Reeves Can't Get Out Early After Admitting Hate Crime," *Post-Standard Syracuse*, June 23, 2002.

[131] "Florida Mosque Attack Result of Anti-Muslim Rhetoric, Says CAIR," *U.S. Newswire*, March 26, 2002. Charles D. Franklin was indicted in federal court on April 17, 2002 for the alleged crime.

[132] "Vandals Attack California Mosque Under Construction; Derogatory Remarks Written Inside Mosque, Police Suspect Hate Crime," *U.S. Newswire*, June 13, 2002.

[133] Stephen Thompson, Paula Christian and Natashia Gregoire, "Agents Say Mosques Target Of Arsenal," *Tampa Tribune*, August 24, 2002.

[134] Stephen Thompson, Paula Christian and Natashia Gregoire, "Agents Say Mosques Target Of Arsenal," *Tampa Tribune*, August 24, 2002.

[135] Human Rights Watch telephone interview with Dr. Tara Singh Mangat, President, Guru Gobind Singh Sikh Gurdwara, August 16, 2002.

Arab families remained in their homes for the next few days because they feared hostility once outside the police cordon. Scores of police protected the mosque during Friday prayers on September 14, 2001.[136]

Islamic Center of Irving, Texas

On the night of September 12, 2001, someone fired at the Islamic Center of Irving, leaving thirteen to fourteen bullet holes in the building. The shots were fired after the evening prayer had ended and the building was empty. For the first two or three days after the attack, local police provided security for the mosque. Immediately after the attack, the imam reported a noticeable decline in prayer attendance. He estimated that daily prayer attendance dropped from 150 to thirty or forty persons. Friday prayers dropped from one thousand to five hundred persons. Mosque attendance normalized after a few weeks.[137]

St. John's Assyrian American Church

On September 23, 2001, the St. John's Assyrian American Church was set on fire in Chicago, Illinois in the early morning, causing approximately $150,000 worth of damage. The fire was caused by someone who put a piece of paper through the church mail slot and then dropped a lit match onto it. Water from fire department fire extinguishers ruined holy pictures, carpeting, and floor tiles. According to the church's pastor, Reverend Charles Klutz, the person whom he believed set the fire had asked a local resident whether the church was a mosque. Reverend Klutz also stated that local police initially asked whether the church was a mosque when they first arrived at the church even though many crosses were located prominently on the church premises. Local police and federal authorities were investigating the cause of the fire at the time of this writing.[138]

Islamic Foundation of Central Ohio

Sometime during the evening of December 29, 2001, vandals broke into the Islamic Foundation of Central Ohio in Columbus, Ohio. The vandals broke a bathroom pipe and clogged the sink, forcing it to overflow for hours; tore frames encasing religious verses off a wall; destroyed a chandelier in the main prayer hall; flipped over the pulpit; cut the wires of high-mounted speakers and amplifiers and threw them to the ground; tore posters off a mosque classroom wall; pulled down curtains and drapes; and tipped over bookcases and file cabinets in a classroom and threw approximately one hundred copies of the Quran onto the floor.[139] Water from the stopped-up third-floor sink seeped into the second floor main prayer hall, causing plaster pieces from the main prayer hall ceiling to fall. A torn Quran and a smashed clock from the mosque were found in the mosque parking lot.

The damage to the mosque was estimated at $379,000. The mosque was closed after the incident but planned to reopen in October 2002. Both local police and the FBI are conducting investigations.[140]

United Muslim Masjid

On November 16, 2001, during an evening Ramadan prayer service, rocks were thrown through two windows of the United Muslim Masjid in Waterbury, Connecticut. Approximately thirty-five to forty people were in the mosque at the time. Local police are investigating the incident as a possible hate crime. Dr. Magdy Adbelhady, a member of the mosque, said that local police were responsive to mosque member concerns and seemed to be taking the matter seriously. He said that immediately after the attack on the mosque, mosque attendance had dropped but was now back to normal.[141]

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[136] Human Rights Watch interview with Safiiya Shillo, director, Ethnic Affairs, Office of Illinois Lieutenant Governor, June 12, 2002.

[137] Human Rights Watch telephone interview with Imam Ayaaz, Iman of Islamic Foundation of Irving, July 17, 2002.

[138] Human Rights Watch telephone interview with Dr. Magdy Adbelhady, member of United Muslim Masjid, July 18, 2002.

[139] Many Muslims consider it disrespectful to leave the Quran or any book of knowledge on the floor.

[140] Human Rights Watch telephone interview with Siraj Haji, member of the Islamic Foundation of Central Ohio, July 19, 2002.

[141] Human Rights Watch telephone interview with Dr. Magdy Adbelhady, member of United Muslim Masjid, July 18, 2002.

Arson

There have been press reports of more than fifteen arsons and attempted arsons that may be part of the post-September 11 backlash.[142] Local law enforcement agents believe that fires at six houses of worship were September 11-related hate crimes.[143] The other press-documented cases of arson involved places of business owned or operated by Muslims, Arabs, or those perceived to be Muslim or Arab. There have been three convictions and one indictment thus far for September 11-related arsons.[144]

Curry in a Hurry Restaurant

On September 15, 2001, James Herrick set fire to the Curry in a Hurry restaurant in Salt Lake City, Utah, causing minimal damage. Herrick admitted to setting the fire because he was angry over the September 11 attacks and knew the restaurant owners were from Pakistan. A federal district court in Utah sentenced him on January 7, 2001 to fifty-one months in jail.[145]

Prime Tires

On September 16, 2001, someone allegedly set fire to Prime Tires, a Pakistani-owned auto mechanic shop located in an enclave of Pakistani businesses in Houston, Texas. The fire destroyed the store. The store had received threats immediately after September 11. Thus far, police have been unable to ascertain who started the blaze and the motive of the perpetrator.[146]

[142] These reports are from newspaper accounts and Muslim, Arab, Sikh, and South Asian community organization accounts.

[143] In particular, the arsons or attempted arsons against houses of worship generally thought to reflect September 11-related animus were against the Gobind Sadan, a multicultural interfaith center in Oswego, New York; St. John's Assyrian American Church in Chicago, Illinois; Guru Gobind Singh Sikh Gurdwara in Bedford, Ohio; Idriss Mosque in Seattle, Washington; Omar al-Farooq Mosque in Mountlake Terrace, Washington; and a Hindu temple in Matawan, New Jersey.

[144] Convictions were obtained for the arson of the Gobind Sadan in Oswego, New York; Curry in a Hurry restaurant in Salt Lake City, Utah; and the attempted arson of the Idriss Mosque in Seattle, Washington. A charge of arson has been brought for the attempted arson of the Omar al-Farooq mosque in Mountlake Terrace, Washington.

[145] Angie Welling and Anne Jacobs, "Feds hope hate-crime sentence is warning," *Deseret News*, January 8, 2002.

[146] "Fire at Pakistani Shop May Be Hate-Fueled Arson," *Houston Chronicle*, September 19, 2001.

VI. FEDERAL, STATE, AND LOCAL HATE CRIME PREVENTION EFFORTS BEFORE AND AFTER SEPTEMBER 11

Government efforts to protect people from bias-motivated violence varied from state to state and city to city in the United States. Our research found different practices with regard to critical anti-bias crime measures such as hate crime investigation protocols, prosecution, bias crime tracking, and community outreach. The most successful efforts to combat backlash violence—as in Dearborn, Michigan, where only two violent September 11-related assaults occurred in a city with thirty thousand Arab-Americans—correlated with prior recognition that backlash attacks against Arabs, Muslims, Sikhs, and South Asians are a recurring problem; a high degree of affected community access and input into law enforcement planning and decision-making; and combined efforts by local, county, state and federal authorities.

Government officials face a complex challenge in seeking to prevent spontaneous, unorganized bias-motivated acts of violence. The experiences discussed below reveal the importance, first of all, of a serious commitment to act decisively before, during, and after outbreaks of such violence. They also reveal the efficacy of specific steps taken in some jurisdictions that may serve as a model for others.

Public Condemnation

Hate crimes are symbolic acts conveying the message that the victim's religious, ethnic, or racial community is unwelcome.[147] Animosity against Arabs, Muslims, and those perceived to be Arab or Muslim, reflects a belief that persons from these communities are "foreigners" who are not "loyal" Americans and who are intrinsically linked to an Arab and Muslim terrorist enemy. The man who killed Balbir Singh Sodhi

[147] Human Rights Watch telephone interview with Jack Levin, Professor, Northeastern University, August 18, 2002.

yelled, "I'm an American."[148] The person who attempted to run over Faiza Ejaz screamed he was "doing this for my country."[149] The protestors at the Bridgeview mosque chanted, "USA!"[150] Professor Leti Volpp describes the phenomena in this way:

> Many of those racially profiled in the sense of being the targets of hate violence or being thrown off airplanes are formally citizens of the United States, through birth or naturalization. But they are not considered citizens as a matter of identity....[151]

Public statements embracing the millions of law-abiding Arabs and Muslims as part of American society and communicating that hate crimes would not be tolerated were among the most effective measures that countered and contained September 11-related violence.[152] Arab and Muslim activists believe that anti-backlash "messages" by prominent political and civil society leaders helped stem the number of backlash attacks.

The most notable public figure decrying September 11-related hate crimes was U.S. President George W. Bush. On September 12, 2001, in published remarks to New York Mayor Rudolph Giuliani, President Bush stated: "Our nation should be mindful that there are thousands of Arab-Americans who live in New York City, who love their flag just as much as [we] do, and...that as we seek to win the war, that we treat Arab-Americans and Muslims with the respect they deserve."[153] Less than a week after the September 11 attacks, President Bush made a highly visible visit to the Islamic Cultural Center in Washington, D.C., and in a speech there stated:

> I've been told that some fear to leave; some don't want to go shopping for their families; some don't want to go about their ordinary daily routines because, by wearing cover, they're afraid they'll be intimidated. That should not and that will not stand in America.
>
> Those who feel like they can intimidate our fellow citizens to take out their anger don't represent the best of America, they represent the worst of humankind, and they should be ashamed of that kind of behavior.[154]

Similar statements were made by U.S. Attorney General John Ashcroft and Assistant Attorney General for Civil Rights Ralph Boyd, and released to the press in public meetings with Arab, Muslim, Sikh, and South Asian community groups.[155] Around the country, and in every city researched for this report, governors and mayors appeared publicly with victim communities to condemn backlash hate crimes and went on record as saying that perpetrators would be prosecuted.[156] Leaders of affected community groups said the willingness of public officials to directly condemn hate crimes made those communities feel more secure during a time of significant fear and imparted an impor-

[148] Human Rights Watch interview with Sergeant Mike Goulet of the Mesa, Arizona police department, August 6, 2002.

[149] Owen Moritz, "Local Victims Of Backlash Deny Accusations," *Daily News* (New York), September 14, 2001.

[150] Human Rights Watch interview with Saffiya Shillo, director, Ethnic Affairs, Office of Illinois Lieutenant Governor, June 12, 2002.

[151] Leti Volpp, Critical Race Studies: The Citizen and the Terrorist, 49 UCLA L. Rev. 1575, 1592 (2002).

[152] Human Rights Watch interview with Raed Tayeh, director, American Muslims for Global Peace and Justice, February 21, 2002; Human Rights Watch telephone interview, Deepa Iyer, South Asian American Leaders of Tomorrow, February 26, 2002.

[153] President George W. Bush, in a telephone conversation with New York Mayor Rudy Giuliani, September 12, 2001, retrieved on September 9, 2002, from http://www.aaiusa.org/PDF/healing_the_nation.pdf.

[154] Remarks of President George W. Bush at the Islamic Center, September 17, 2001, retrieved on September 9, 2002, from http://www.usdoj.gov/crt/legalinfo/bushremarks.html.

[155] Excerpts of remarks by Attorney General John Ashcroft and Assistant Attorney General for Civil Rights Ralph Boyd, retrieved on September 1, 2002, from http://www.usdoj.gov/crt/legalinfo/dojstatements.html.

[156] Remarks of Washington Governor Gary Locke, September 14, 2001, retrieved on September 1, 2002, from http://www.governor.wa.gov/press/press-view.asp?pressRelease=977&newsType=1.

tant message to the public that backlash hate crimes were unacceptable and misguided.[157]

In addition to public statements from individual government officials, legislative bodies also condemned backlash crimes. The United States House of Representatives passed a resolution on September 15, 2001 condemning hate crimes against Arabs, Muslims, and South Asians.[158] Similarly, the United States Senate, recognizing the disproportionate number of attacks against turbaned Sikhs, passed a resolution introduced by Senator Richard Durbin condemning hate crimes against Sikhs in the United States and calling for their prevention and prosecution.[159] City entities acted as well. For example, the city of Seattle passed a resolution decrying hate crimes in Seattle. The resolution also called on citizens to report hate crime incidents to government authorities.[160]

Though the overwhelming majority of public figures in the United States condemned acts of bias after September 11, there were a few who expressed contempt for or bias against Arabs and Muslims. Just a week after September 11, a member of Congress, John Cooksey, told a Louisiana radio station, "If I see someone [who] comes in that's got a diaper on his head and a fan belt wrapped around the diaper on his head, that guy needs to be pulled over."[161] Similarly, while speaking to law enforcement officers in Georgia, Representative C. Saxby Chambliss stated: "just turn [the sheriff] loose and have him arrest every Muslim that crosses the state line."[162] Representatives Cooksey and Chambliss both eventually apologized for their remarks.[163]

In addition, a few significant religious commentators publicly expressed distrust or anger against Muslims. Franklin Graham, son of the well-known Reverend Billy Graham, called Islam: "wicked, violent and not of the same God."[164] Televangelist Pat Robertson, also speaking about Islam, said: "I have taken issue with our esteemed President in regard to his stand in saying Islam is a peaceful religion.... It's just not."[165] In the same vein, former Southern Baptist President Jerry Vines told conventioneers at the June 2002 annual gathering of the Southern Baptist Convention that the Muslim prophet Muhammad was a "demon-possessed pedophile." Unlike Representatives Cooksey and Chambliss, these religious leaders have stood by their comments.[166]

Public messages were also used proactively as a tool to prevent future hate crimes. Two weeks before the September 11 one-year anniversary, the San Francisco district attorney's office embarked on a campaign promoting tolerance by placing anti-hate posters on city buses and bus stops.[167] The poster includes the faces of four Arab or Muslims persons or persons who may be perceived as Arab or Muslim under the heading, "We Are Not the Enemy."[168] The campaign was prompted by concerns the September 11 anniversary might rekindle backlash animos-

[157] Human Rights Watch telephone interview with Jean Abi Nader, Arab American Institute, February 25, 2002.

[158] House Concurrent Resolution 227, "Denouncing Bigotry Against Arabs, Muslims, South Asians," September 15, 2001, retrieved on September 1, 2002, from http://usinfo.state.gov/usa/race/hate/t091801.htm.

[159] S. Con. Res. 74, "Condemning bigotry and violence against Sikh-Americans in the wake of terrorist attacks in New York City and Washington, D.C. on September 11, 2001," retrieved on September 1, 2002, from http://www.sikhcoalition.org/LegislativeRes1c.asp.

[160] City of Seattle Resolution 30399, retrieved on September 1, 2002, from http://www.cityofseattle.net/civilrights/documents/steinbrueck%20resolution.pdf.

[161] Joan McKinney, "Cooksey: Expect Racial Profiling," *Advocate* (Baton Rouge, LA), September 19, 2001.

[162] "Lawmaker Tries to Explain Remark; Rep. Chambliss, a Senate Hopeful, Commented on Muslims," *Washington Post*, November 21, 2001.

[163] "Hall of Shame," *Washington Post*, November 22, 2002; Eli Sanders, "Understanding Turbans: Don't Link Them to Terrorism," *Seattle Times*, October 9, 2002.

[164] Kevin Eckstrom, "Graham heir keeps stance on Islam talk," *The Times Union* (Albany, NY), November 24, 2001.

[165] "Mr. Robertson's Incitement," *Washington Post*, February 24, 2002.

[166] Kathy Shaidle, "Full Pews and Empty Gestures," *Toronto Star*, December 23, 2001; Richard N. Ostling, "Falwell labels Muhammad 'terrorist' in TV interview," *Chicago Tribune*, October 4, 2002.

[167] "Anti-hate campaign begins in S.F. / Posters urge tolerance as Sept. 11 nears," *San Francisco Chronicle*, August 27, 2002.

[168] The title of this report was taken from the title of this poster.

ity and anti-Arab and anti-Muslim violence. According to San Francisco District Attorney Terence Hallinan, "With war heating up in the Middle East, we're launching a pre-emptive strike against any backlash against Arab-Americans and Muslims."[169] Eight hundred posters were placed on the outside and inside of San Francisco buses. In addition to promoting a message of tolerance, they also encourage citizens to report hate crimes to the San Francisco district attorney's office.

Mixed Messages

While acknowledging the importance of official condemnation of hate crimes and messages supporting tolerance, Arab and Muslim community leaders have expressed concern about federal government "mixed messages."[170] Official statements exhorting the public not to view Muslims or Arabs differently than anyone else were countered by measures taken as part of the anti-terrorist campaign that cast a cloud of suspicion over all Arabs and Muslims in the United States. Those measures have included, for example, the detention of some 1,200 persons of almost exclusively Arab, Muslim, or South Asian heritage because of "possible" links to terrorism;[171] the FBI requests to interview over eight thousand men of Arab or Muslim heritage; and the decision that visitors to the United States from certain Middle Eastern countries would be fingerprinted. Activists believe these actions reinforce an image of Arabs and Muslims as potential terrorists or terrorist sympathizers. Referring to the effect of these policies on the perception of Muslims and Arabs in the general public, Joshua Salaam, of CAIR, said: "Most people are probably asking, 'If government doesn't trust these people, why should I?'"[172]

The recent practice of government officials after the arrest of six Muslim men in suburban Buffalo, New York, points to ways in which the government may reconcile efforts to combat terrorism with its duty to prevent hate crimes.[173] Soon after the arrests of the six men, who were accused of having attended an al-Qaeda-run training camp in Afghanistan, New York Governor George Pataki met with local Muslim leaders and stated during a press conference that the arrests should not be used as an excuse to commit hate crimes.[174] Similarly, Peter Ahearn, special agent in charge of the FBI's Buffalo field office, publicly stated that hate crimes would not be tolerated.[175] The practice in Buffalo, where an announcement of an alleged terrorism investigation breakthrough was coupled with messages decrying bias, proved effective.

Policing

Given the difficulties of preventing spontaneous, individual acts committed independent of any organization, police were often not as successful in their efforts to contain backlash violence as they had hoped. Every city researched by Human Rights Watch experienced record levels of hate violence against Arabs, Muslims and those perceived to be Arab or Muslim following September 11, 2001.

Perhaps the best police successes were in Dearborn, Michigan, a city with thirty thousand Arab-Americans that only experienced two violent September 11-related hate crimes. In Dearborn, unlike many cities, the police had a prior working relationship with the Arab and Muslim community, which enabled them to mobilize quickly following September 11. Thus long before September 11, officials within the Dearborn

[169] Human Rights Watch telephone interview with Terrence Hallinan, San Francisco district attorney, August 28, 2002.

[170] Human Rights Watch interview with Pramila Jaypal, executive director, Hate Free Zone, July 31, 2002; Human Rights Watch interview with Raed Tayeh, director, American Muslims for Global Peace and Justice, February 21, 2002; Human Rights Watch interview with Joshua Salaam, Civil Rights Coordinator, Council on American-Islamic Relations, February 21, 2002.

[171] Human Rights Watch, "Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees," *A Human Rights Watch Report*, vol. 14, no. 4(G), August 2002.

[172] Human Rights Watch interview with Joshua Salaam, Civil Rights Coordinator, Council on American-Islamic Relations, February 21, 2002.

[173] "Pataki Reassures Islamic Community, Announces Terrorist Tip Line," *Buffalo News*, September 17, 2002.

[174] Ibid.

[175] "Arrests Stir Resentment Against Buffalo Suburb's Yemeni-Americans; Neighborhood Had Seen Little Ethnic Tension Before, Residents Say," *St. Louis Post-Dispatch*, September 16, 2002.

police department were familiar with communities and areas vulnerable to backlash violence, conscious of the history of backlash violence and aware of the possibility that it might occur in the future. Police departments in other parts of the United States did not have this level of previous engagement with backlash issues before September 11. Their policing, therefore primarily consisted of responding to backlash crimes after they occurred.

The measures discussed below detail some of the strategies police used to contain and investigate September 11-related backlash violence.

Backlash Planning

Given the relative predictability and severity of anti-Arab and anti-Muslim backlash violence prior to September 11, activists and experts called for law enforcement agencies to create and coordinate "emergency plans" to mitigate any possible future backlash.[176] Nevertheless, none of the law enforcement or officials in the major cities Human Rights Watch visited during the course of research—Seattle, Phoenix, Chicago, New York or Los Angeles—had devised any written emergency plans to prepare for future backlash violence.

In Portland, Maine, by contrast, the Center for the Prevention of Hate Violence is working with city officials to create a "Rapid Response Plan" to mitigate backlash discrimination in case of any future terrorist act blamed on Arabs or Muslims.[177] Stephen Wessler, executive director of the center and author of a report on September 11-related backlash violence against Muslims in Maine stated his fear that "if there is another terrorist attack, we will see a more intensified reaction towards the affected communities…If there is anything government can do to prepare, that will be a big step." Among the measures the center has discussed for possible incorporation into any rapid response plan are: 1) issuance of immediate public statements from government officials condemning discrimination immediately after an event that may trigger a backlash; 2) development of public service announcements urging tolerance before any backlash, which may be broadcast immediately in case of an emergency; 3) gathering intelligence on areas of the city especially vulnerable to backlash violence and creating a plan to rapidly deploy law enforcement officers in those areas in case of an emergency; and 4) creating a "buddy program" which would gather volunteers from non-Muslim communities to travel with Muslims, especially women who wear the hijab, who are afraid to travel alone during a backlash period.[178]

Police Deployment

Among the most helpful measures in preventing anti-Arab and anti-Muslim attacks after September 11 was the immediate deployment of police officers in areas with high concentrations of the vulnerable communities. Cities differed, however, in how quickly police were deployed to patrol vulnerable communities. These differences usually reflected the amount of interaction a police department had with the vulnerable communities prior to September 11.

The Dearborn Police Department was exemplary in its immediate deployment of police officers in sensitive areas of Dearborn immediately after the September 11 terrorist attacks. According to community leaders, police were patrolling Arab neighborhoods and mosques by early afternoon on September 11.[179] Police on foot stood in areas that could have been attacked and police cars patrolled Arab neighborhoods on September 11 and in the days afterwards.[180] The presence of a specially appointed "Arab com-

[176] Human Rights Watch telephone interview with William Haddad, President, Arab American Bar Association, June 17, 2002; Human Rights Watch telephone interview with Stephen Wessler, executive director, Center for the Prevention of Hate Violence, August 27, 2002.

[177] The pursuit for the creation of a "Rapid Response Plan" in Portland, Maine comes from a recommendation contained in a report published by the Center entitled, "After September 11: Under standing the Impact on Muslim Communities in Maine," retrieved on September 24, 2002, from http://www.cphv.usm.maine.edu/report.doc.

[178] Human Rights Watch telephone interview with Stephen Wessler, executive director, Center for the Prevention of Hate Violence, August 27, 2002.

[179] Human Rights Watch interview with Imad Hamad, Midwest regional director, American Arab-Anti-Discrimination Committee, June 5, 2002.

[180] Ibid.

munity police officer" before September 11 also allowed police to gain important intelligence on areas in Dearborn vulnerable to attack.[181] Arab community leaders stated that during the weeks after September 11 most members of the Arab community "felt safer in Dearborn" than outside it because of the increased and visible police presence in their communities.[182]

Although police departments in New York, Phoenix, and Los Angeles did not have strong pre-existing relationships with the Arab and Muslim community, after the September 11 attacks, these departments nonetheless dispatched police officers to protect primarily Muslim or Sikh places of worship and areas with high Arab, Muslim, Sikh, or South Asian concentrations. In Phoenix, the day after September 11, after consulting with concerned members of the Arab and Muslim communities, the police department established twenty-four hour patrols at area mosques.[183] The Phoenix Police Department's bias crime unit credited the department's Muslim community liaison for providing the department with information on the Muslim and Arab community in Phoenix gained through prior interaction with those communities before September 11.[184] In Los Angeles, the Los Angeles County Commission on Human Relations on September 11 notified the police department of vulnerable "hotspots,", such as mosques and Arab-owned convenience stores. As a result, police were dispatched to protect some of these vulnerable areas. In New York City, Sikh community leaders reported that after a gurdwara was vandalized on September 11, police officers patrolled the area around the gurdwara by foot during the next week. New York City police also provided protective escorts for busloads of Sikhs traveling from Queens to Manhattan for a Sikh community vigil on September 15, 2001, in honor of the September 11 terrorist attack victims.[185]

Initial Classification of Crimes

In some instances after September 11, the decisions of police officers not to classify crimes as possible hate crimes meant that no further investigation of possible bias motive was conducted. For example, Kripa Ubadhyay, program coordinator for the Anti-Discrimination and Hate Crimes Program of the South Asian Network (SAN), cited the case of two Bangladeshi Muslims who were held up at gun point while numerous ethnic epithets were yelled at them. For months, there was no investigation of possible bias motivation for the crime because the responding officers chose to classify the matter as a robbery. Only after SAN directly appealed to the Los Angeles County's bias crime investigator was the matter recorded and investigated as a possible hate crime.[186] Police departments in different cities had differing standards on the discretion available to responding police officers to classify a matter as a possible hate crime.

In New York, if a responding police officer believed that a hate crime might have occurred, he or she was to report this to the duty captain in the police precinct. If the duty captain also believed the crime to be bias-motivated, the matter was referred to the police department's Hate Crimes Task Force for investigation as a possible hate crime.[187] Linda Wancel, head of the Civil Rights Bureau within the Brooklyn district attorney's office, stated that whether a matter was investigated by police as a possible hate crime was "contingent on the duty captain calling it a hate crime… We disagree sometimes with the duty captain not classifying cases as a possible a hate crime."[188]

[181] Human Rights Watch interview with Imad Hamad, Midwest regional director, American Arab-Anti-Discrimination Committee, June 5, 2002; Human Rights Watch interview with Hassan Jaber, executive director, ACCESS, June 4, 2002; Human Rights Watch interview with Daniel Saab, Dearborn community police officer, June 1, 2002.
[182] Ibid.
[183] Human Rights Watch interview with Sergeant Jerry Hill, Phoenix Police Department, August 8, 2002.
[184] Ibid.
[185] Human Rights Watch telephone interview with Prabhjot Singh, director, Sikh Coalition, August 16, 2002.
[186] Human Rights Watch telephone interview with Kripa Ubadhay, Anti-Discrimination and Hate Crimes Program Coordinator, South Asian Network, August 21, 2002.
[187] Human Rights Watch telephone interview with Adil Almontaser, American Muslim Law Enforcement Officers Association, August 27, 2002.
[188] Human Rights Watch telephone interview with Linda Wancel, Civil Rights Bureau, Brooklyn district attorney's office, August 26, 2002.

In Seattle, staff at the Office of Civil Rights expressed frustration that complaints they received about bias-motivated criminal acts did not appear in monthly hate crime reports produced by the police department. According to staff, the discretion responding police officers to not classify a crime as a possible hate crime, created the possibility that they would investigate many crimes as possible hate crimes despite evidence that they may have been so motivated.[189]

The Phoenix Police Department, on the other hand, required responding officers to indicate on a police report whether either the victim or the responding officer believed bias motivated the crime. Where any such belief that a bias crime may have occurred existed, no matter how seemingly inconsequential to the responding officer, the responding officer police report was forwarded to the Phoenix Bias Crime Detail, where officers specially trained to investigate hate crimes determined whether there was any bias motivation for the crime.

Hate Crime Units and Institutional Support for Hate Crimes Training

Police departments in all of the cities Human Rights Watch researched stated that they trained their officers on the basic elements of a hate crime. With the exception of Dearborn, Michigan, they also all have at least one officer who investigates bias crimes exclusively. In the Seattle, Phoenix, Chicago and New York police departments, a bias crime unit officer is responsible for investigating any incident where evidence exists that a bias motive was present. The utility of this protocol for investigating bias crimes, according to Sergeant Jerry Hill, head of the Phoenix Police Department's Bias Crime Detail, is that it "ensures someone with expertise on hate crimes is investigating the matter. It takes pressure off the responding officer to make the call on whether this was a hate crime."[190]

Many local police departments, however, did not have the resources or a sufficient bias-crime caseload to justify training all officers on how to investigate bias crimes or to appoint a specialized bias crime investigator. In Maine, the attorney general's office attempted to address this problem by asking each law enforcement agency in Maine to appoint a "civil rights officer" to review all crime reports for bias motivation indicia. Any report that contains indications of bias is forwarded to the attorney general's office for further review and guidance. Thomas Harnett, a prosecutor in the attorney general's office, stated that this system allows the office to assist local law enforcement agencies with bias crime investigations and also provides a layer of review for their work.[191] In the aftermath of September 11, this system was used to refer September 11-related bias incidents to the Maine attorney general's office for review and consultation on further action.[192]

Prosecution

After September 11, 2001, prosecutors across the country acted conscientiously to use their authority to bring hate crime perpetrators to justice. Numerous state attorneys general and county prosecutors issued statements condemning anti-Arab and anti-Muslim hate crimes, visited affected communities, encouraged them to report hate crimes to authorities and vowed to prosecute them vigorously.[193] During our research, Human Rights Watch found that prosecutors were proceeding actively on serious hate crimes that had occurred in their jurisdiction.

The number of September 11-related hate crimes prosecuted was, not surprisingly, smaller

[189] Human Rights Watch interview with Julie Pate, Seattle Office of Civil Rights, July 31, 2002.

[190] Human Rights Watch interview with Sergeant Jerry Hill, Phoenix Police Department, August 8, 2002.

[191] Human Rights Watch e-mail correspondence with Thomas Harnett, prosecutor, Maine attorney general's office, August 26, 2002.

[192] Ibid.

[193] See "Charges Filed in Recent Hate Crimes," Press Release, King County prosecutor's office, September 19, 2001, retrieved on August 30, 2002, from http://www.metroke.gov/proatty/News/Current/Hatecrim.htm; "Attorney General Napolitano, Maricopa County attorney Romley, Others Band Together To Urge Reporting Of Hate Crimes," Press Release, Arizona attorney general, September 20, 2001, retrieved on August 30, 2002, from http://www.attorney general.state.az.us/press releases/sept /092001.html.

than the number of September 11-related hate crimes reported. But the proportion of September 11-related crimes that have been the subject of indictment and trial does not appear to vary significantly from the usual rates of indictment and trial for other types of crime. Many variables influence prosecution rates—including the ability of the police to identify a suspect, the quality of the evidence developed against him or her, the seriousness of the crime, and available prosecutorial resources. While our research did not uncover any instances of prosecutorial reluctance to take hate crimes seriously, some community activists expressed concern to us that prosecutors were placing insufficient priority on hate crime prosecutions.

The Department of Justice prosecuted twelve September 11-related hate crimes and cooperated with local county prosecutors in the prosecution of approximately eighty more.

On the local level, the Cook County state's attorney's office prosecuted six September 11-related hate crimes.[194] The Los Angeles County district attorney's office prosecuted three September 11-related crimes. In Maricopa County, containing Phoenix, there were three September 11-related hate crime prosecutions.[195]

Not all post-September 11 bias crimes were prosecuted as hate crimes under state or federal hate crimes legislation. For example, of the twelve September 11-related crimes prosecuted by the U.S. Justice Department, only half were charged under the federal hate crimes statute. Prosecuting a crime as a hate crime places an additional evidentiary burden on the prosecutor to prove in court not only the regular elements of the crime, but the existence of bias motivation as well.[196] Proof of such bias was difficult to demonstrate unless the defendant confessed his motivation, made statements during the crime demonstrating direct bias, or had otherwise clearly signaled his views. In the absence of strong evidence of bias, prosecutors often preferred to utilize regular criminal statutes to secure a conviction.[197]

Publicizing Prosecutions

September 11-related hate crime prosecutions did not only secure justice for particular victims. They also communicated society's repudiation of the crimes. Prosecution of September 11-related crimes conveyed the message that violent bigotry against Arabs and Muslims was not condoned and that law enforcement took seriously their obligation to protect all members of society and to bring those who committed crimes to justice.

According to Thomas Harnett, a prosecutor in the Maine attorney general's office, hate crime perpetrators "believe that their actions have community support." Publicizing prosecutions communicates the error of this belief to potential hate crime perpetrators as well as to the community at large. Indeed, according to Harnett, "one of the reasons we publicized [September 11-related] cases and successful enforcement actions was to instill in the community the belief that these incidents should be reported and when they are reported, victims are safer not more at risk."[198] Deepa Iyer of the South Asian American Leaders of Tomorrow concurred that publicizing prosecutions lets affected community members know that the government is committed to protecting them and encourages victims to report hate crimes against them.[199]

In Los Angeles and Phoenix, the district attorneys held press conferences and issued press releases announcing prominent September 11-related prosecutions. In Seattle, the Kings County prosecutor's office issued press releases on September 11-related prominent prosecu-

[194] Human Right Watch interview with Neera Walsh, prosecutor, Cook County prosecutor's office Bias Crime Unit, June 18, 2002.
[195] Human Rights Watch interview with Bill Fitzgerald, public relations officer, Maricopa County district attorney office, August 3, 2002.
[196] Human Rights Watch interview with Genna Gent and Daniel Levy, prosecutors, Michigan Attorney General's Hate Crimes Prosecution Team, June 3, 2002.
[197] Ibid.
[198] Human Rights Watch e-mail correspondence with Thomas Harnett, August 26, 2002.
[199] Human Rights Watch telephone interview with Deepa Iyer, February 26, 2002.

tions.[200] At the federal level, the Civil Rights Division of the U.S. Department of Justice issued press releases on most of its twelve September 11-related prosecutions. The Civil Rights Division, however, did not hold any press conferences to publicize its prosecutions, even though some community groups thought press conferences would secure greater coverage.[201] The Civil Rights Division nevertheless spread notice of its prosecutions by directly informing Arab, Muslim, Sikh, and South Asian community leaders and by sending the news to community e-mail lists.[202] Although these communications did not reach the broader American public, they at least informed the affected communities that the federal government was working to punish bias crime perpetrators. The Civil Rights Division also publicized most of the prosecutions on its website, although the website was not always up to date.[203]

Hate Crime Prosecutor Units

In some larger cities, efforts to bring hate crime perpetrators to justice were enhanced by the presence of specially trained hate crime prosecutors. For example, Chicago, Los Angeles, Phoenix, and New York City all have prosecutors who specialize in the prosecution of bias-motivated crimes.

According to Neera Walsh, head of the Cook County prosecutor's office Bias Crime Unit, the existence of a bias crimes prosecution unit permitted the development of specialized expertise to handle the unique challenges posed by hate crimes cases.[204] Since September 11, the Bias Crimes Unit has been responsible for the prosecution of six September 11-related bias crimes. Phoenix police investigators also stated that working with prosecutors who specialize in bias crime prosecution gave them more confidence that the effort they put into investigating bias crimes would be taken seriously and better understood by prosecutors with training on understanding the nature of bias crimes.[205] Community leaders believe specialized units provided them with a central point of contact and thus enabled them to develop a better relationship with country prosecutors.[206]

Many small counties did not have the resources or large enough vulnerable communities to justify the creation of bias crime prosecution units. Recognizing the difficulty that small counties had undertaking the prosecution of September 11-related hate crimes, Michigan's attorney general created in May 2002 a Hate Crimes Prosecution Team to enhance the capacity of local prosecutors in smaller counties.[207] The team trains local prosecutors in the prosecution of hate crimes against Arab-Americans and Muslims as well as members of any other group that may be targets of bias-motivated violence. It also offers to assist with the prosecution of the bias element of a hate crime during trial.[208] The Michigan attorney general's program was unique among the cities and states Human Rights Watch visited because it allowed local prosecutors to have access to expertise in bias crime prosecution without having to develop such expertise within their own agencies.

Crimes with Mixed Motives

Some crimes had multiple motives, including anti-Arab and anti-Muslim bias. For example, the murderer of Ali Almansoop, who found Mr. Almansoop in bed with his ex-girlfriend, appears to have been motivated by both jealousy

[200] "Charges Filed in Recent Hate Crimes," Press Release, King County prosecutor's office, September 19, 2001, retrieved on August 30, 2002, from http://www.metrokc.gov/proatty/News/Current/Hatecrim.htm.

[201] Human Rights Watch telephone interview with Prabhjot Singh, director, Sikh Coalition, August 16, 2002.

[202] Human Rights Watch telephone interview with Joseph Zogby, special assistant for the Civil Rights Division's Backlash Initiative, August 25, 2002.

[203] See www.usdoj.gov/crt, retrieved on September 20, 2002.

[204] Human Right Watch interview with Neera Walsh, prosecutor, Cook County prosecutor's office Bias Crime Unit, June 18, 2002.

[205] Human Rights Watch interview with Sergeant Jerry Hill, August 8, 2002

[206] Human Rights Watch interview with Manjari Chawla, staff attorney, Asian Pacific American Legal Center, June 30, 2002.

[207] Human Rights Watch interview with Genna Gent and Daniel Levy, June 3, 2002.

[208] Ibid. Since its creation, the team has offered its assistance to local prosecutors in two matters, one involving the beating of an African-American and the other involving vandalism to the office of U.S. Congressman.

and post-September 11 bias. In cases that have mixed motives, some departments did not investigate the crime as possibly being bias-motivated. The Seattle police department's bias crime investigator, for example, told Human Rights Watch that the department would not treat violence motivated only in part by anti-Arab or anti-Muslim bias as hate crimes.[209] Prosecutors in such cases, including in the Almansoop case, typically chose to proceed under ordinary criminal law.

Even if state law only permits hate crimes prosecution when bias is the sole motive, it is nonetheless important where crimes have multiple motives that police record such crimes as hate crimes to establish a barometer of a given population's vulnerability.[210] Illinois amended its hate crimes law so that a crime may be prosecuted as a hate crime when it is motivated "in any part" by bias.[211] Though the purpose of the amendment was to facilitate the use of the Illinois hate crime statute in mixed motive cases, one of the benefits of the law is that tracking of mixed motive crimes is no longer precluded. According to Elizabeth Schulman-Moore of the Lawyer's Committee for Civil Rights in Chicago, as a result of this amendment all crimes with a bias motive "no matter how small" are recognized as such by local government officials.[212]

Affected Community Outreach

Prior to the September 11 attacks, many government agencies in the cities researched had scant relationships with Arab and Muslim communities, even in cities with substantial Arab and Muslim populations and despite previous histories of bias-motivated attacks. Nevertheless, outreach efforts after the September 11 backlash were robust. Outreach efforts included meetings at mosques, community forums, printed materials translated into languages spoken in the communities, and the creation of hate crime "hotlines."

Relationship With Affected Communities Before September 11

Nowhere were the benefits of a pre-existing government relationship with potential victim communities more apparent than in Dearborn, Michigan. Community leaders in Dearborn told Human Rights Watch that before September 11 they had regular and consistent meetings with the Dearborn mayor's office, the Dearborn Chief of Police, the Wayne County prosecutor's office, the state attorney general's office and the U.S. attorney for the Eastern District of Michigan on a range of issues affecting Arabs and Muslims in and around Dearborn.[213] According to community leaders, these meetings ensured that government agencies "more or less knew our concerns, regardless of whether we were always in agreement."[214]

The open channels of communication and high level of interaction between Dearborn officials and members of the Dearborn Arab and Muslim communities enabled community leaders to mobilize officials promptly to address a potential backlash after the September 11 attacks.[215] City leaders also had access to information with which to assess the needs of the Arab and Muslim communities following the September 11 attacks. According to Imad Hamad, Midwest Director of the ADC in Dearborn, Michigan:

> We were able to call the mayor's office on the morning of September 11 about our concerns that our community members would be attacked. By 11:30 a.m. we were meeting with the Mayor and Chief of Police about a

[209] Human Rights Watch interview with Detective Christie Lynn-Bonner, Seattle Police Department, August 2, 2002.
[210] Human Rights Watch interview with Elizabeth Schulman-Moore, attorney, Lawyer's Committee for Civil Rights, June 17, 2002.
[211] Daniel C. Vock, "House passes bill expanding hate crimes," *Chicago Daily Law Bulletin*, February 25, 2002.
[212] Human Rights Watch interview with Elizabeth Schulman-Moore, June 17, 2002.
[213] Human Rights Watch interview with Hassan Jaber, executive director, ACCESS, June 4, 2002; Human Rights Watch Interview with Daniel Saab, Dearborn community police officer, June 1, 2002.
[214] Human Rights Watch interview with Imad Hamad, June 5, 2002.
[215] Human Rights Watch interview with Imad Hamad, June 5, 2002; Human Rights Watch interview with Hassan Jaber, executive director, ACCESS, June 4, 2002; Human Rights Watch interview with Nasser Beydoun, American Arab Chamber of Commerce, June 5, 2002.

possible backlash against our community. By 1:00 p.m. the Mayor was on the local cable public access channel warning people against committing hate crimes against Arabs in Dearborn and the police cars were patrolling our shopping areas and neighborhoods.[216]

Outreach after September 11: Barriers to Trust

The general fear of government among Arab and Muslim immigrant communities remained one of the more significant challenges posed in creating working relationships with those communities on hate crime issues after September 11. According to Rita Zawaideh of the Arab America Community Coalition, an umbrella group of Arab organizations in western Washington: "In countries where many Arab immigrants are from, the government and the police are repressive, they are not your friend."[217] This general fear of government was aggravated by the detention and deportation of Muslims and Arabs by the federal government after September 11 and by fears that reporting hate crimes would draw attention to non-citizens who had violated the terms of their visas.[218] Kripa Ubadhyay, hate crimes coordinator for the South Asian Network in Los Angeles related her experience organizing a community forum on September 11-related civil liberties issues: "We invited the FBI and INS. One hundred and fifty people attend a similar past forum, however only sixty attended this one. We later found out from many [who didn't attend] that they were afraid of being detained by the INS."[219] Similarly, Stephen Wessler of the Center on the Prevention of Hate Violence in Portland, Maine, stated: "what struck me most was not a fear of hate crimes [in the Muslim community], it was a fear of the federal government. The fear of detention or deportation continued even when the fear of hate crimes ended."[220]

Cultural Competency

Cultural competency is "a set of behaviors and attitudes integrated into the practices and policies of agencies or professional service providers that enables them to understand and work effectively in cross-cultural situations."[221] Because many of the persons affected by the September 11 backlash are foreign-born, cultural competency training was important for police officers and other government officials who regularly interacted with Muslim, Arabs, Sikhs or South Asians after September 11.[222]

The importance of such training was underscored by Sheila Bell, Communications Director for the Muslim Law Enforcement Officers Association of New York City. As an example, Bell cited the practice in Middle Eastern culture of not looking authority figures in the eye during discussions because doing so is a sign of disrespect. Bell stated that officers in the New York City police department have mistaken this habit as an effort to be deceitful.[223] Similarly, Guru Roop Kaur Khalsa, a gurdwara official in Phoenix, narrated a discussion she had with a police officer who along with other officers were assigned to protect the gurdwara shortly after Balbir Singh Sodhi's murder, discussed in section III above.[224] The police officer reported to Khalsa that the members of the officers' families were "very nervous" about them protecting the gurdwara because they thought Sikhs might be terrorists affiliated with Osama Bin Laden be-

[216] Human Rights Watch interview with Imad Hamad, June 5, 2002.

[217] Human Rights Watch interview with Rita Zawaideh, Spokesperson, Arab American Community Coalition, August 5, 2002.

[218] Human Rights Watch telephone interview with Stephen Wessler, August 27, 2002. *See also*, "Fear Of Detention Haunts South Florida Muslims; Dozens Held By U.S. Agencies In Terror Inquiries," *South Florida Sun-Sentinel*, July 9, 2002.

[219] Human Rights Watch telephone interview with Kripa Ubadhay, Anti-Discrimination and Hate Crimes Program Coordinator, South Asian Network, August 21, 2002.

[220] Human Rights Watch telephone interview with Stephen Wessler, August 27, 2002.

[221] "Cultural Competency," retrieved on September 21, 2002, from http://www.aoa.gov/may2001/factsheets/Cultural-Competency.html.

[222] Human Rights Watch interview, Pramilla Jaypal, executive director with Hate Free Zone of Washington, July 31, 2002.

[223] Human Rights Watch telephone interview with Sheila Bell, communications director, Muslim Law Enforcement Officers Association, August 27, 2002.

[224] Human Rights Watch interview with Guru Roop Kaur Khalsa, Phoenix Gurdwara, August 9, 2002.

cause of their turbans and beards.[225] After gaining exposure to Sikhs while protecting the gurdwara, the officer told Ms. Khalsa that they felt much more comfortable performing their duties to protect them.[226]

On the federal level, the Community Relations Service of the Department of Justice (CRS) organized and sponsored numerous cultural competency training sessions nationwide after September 11 for a wide range of federal employees, including congressional staffers, FBI agents, and federal civil rights officials.[227] These forums usually involved presentations by members of the Muslim and Sikh faiths on aspects of their faiths and cultures that may impact the work of federal officials. The sessions typically ended with a question and answer period. On the local level, cultural competency training often was done "on the fly" with government officials and police officers learning about relevant cultural traits of the various communities as they worked with them after September 11.[228] In Seattle for example, the police force did not have any training on Muslim practices for police officers. Instead, officers who worked with these communities learned about basic Muslim beliefs as they visited city mosques after September 11.[229]

Language Barriers

Because many of the September 11 backlash victims were foreign-born, the inability to speak or comprehend English was a barrier to effective interaction with government officials. Sheila Bell of the Muslim Law Enforcement Officers Association of New York City pointed out that language has also been a barrier to effective communication with the New York City Police Department because crime victims calling the Department in an emergency were sometimes not been able to speak English well enough to be understood completely.[230] Language was also a barrier for community groups organizing outreach events with government agencies. For example, Rita Zawaideh of the Arab America Community Coalition noted that even though police officers in the Seattle Police Department initiated and participated in outreach meetings at every mosque in Seattle after September 11: "They weren't always understood because not everyone speaks English."[231]

In the Dearborn Police Department, language barriers have been overcome by the appointment of an Arab community police officer who speaks Arabic.[232] At the national level, the Civil Rights Division has made a concerted effort to publish brochures explaining civil rights protections in the languages of the backlash-affected communities. The brochures, written in languages such as Arabic, Farsi, and Punjabi, have been distributed in the Arab, Muslim, Sikh, and South Asian communities by mailing them to community organizations and places of worship. The Civil Rights Division states that it has mailed thousands of these brochures to affected community groups since September 11.[233] They are also available on the Civil Rights Division website.

Community Liaisons

The creation of community liaisons, whether they be individuals or committees, was an effective tool utilized by some governments to work with vulnerable groups.

After September 11, the Department of Justice Community Relations Service (CRS) was especially helpful in identifying civil rights leaders and organizations in the Sikh and South

[225] Ibid.
[226] Ibid.
[227] Human Rights Watch interview with Sharee Freeman, executive director, Community Relations Service, Department of Justice, May 5, 2002.
[228] Human Rights Watch interview with Sergeant Jerry Hill, August 8, 2002; Human Rights Watch telephone interview with Robin Toma, executive director, Los Angeles Human Relations Commission, August 27, 2002,
[229] Human Rights Watch interview with Detective Christie Lynn-Bonner, Seattle Police Department, August 2, 2002.
[230] Human Rights Watch telephone interview with Sheila Bell, August 27, 2002.
[231] Human Rights Watch interview with Rita Zawaideh, August 5, 2002.
[232] Human Rights Watch interview with Officer Daniel Saab, Dearborn Police Department, May 31, 2002.
[233] Human Rights Watch interview with Joseph Zogby, special assistant for the Assistant Attorney General's 9/11 Backlash Initiative, U.S. Department of Justice, March 29, 2002. See http://www.usdoj.gov/crt/legalinfo/nordwg brochure.html, retrieved on September 23, 2002.

Asian community with whom the Civil Rights Division could work once it was clear that those communities were vulnerable to backlash violence.[234] In the Sikh and South Asian communities the CRS was in many cases the first federal government agency to ever contact them.[235] The Civil Rights Division appointed specific persons to undertake outreach with each of the affected communities. These persons took calls from community leaders, e-mailed news of progress in backlash-related matters to community e-mail listserves, and spoke at eight community forums organized by the Civil Rights Division nationwide on September 11-related civil rights issues.[236] Leaders of community organizations reported a very high level of satisfaction with their access to liaisons and ability to discuss urgent matters with them.[237] The Civil Rights Division was generally known for having an "open door policy" in which "a meeting with division heads can be arranged anytime there is an issue of pressing concern."[238]

In Seattle, the Mayor created an Arab advisory council after September 11. The Seattle Police Department also made presentations on hate crime issues in each of the eleven mosques in Seattle, providing names and numbers of persons that community members could contact in case they were a victim of a hate crime.[239] In Chicago, the creation eight years ago of an Arab Community Advisory Council in the mayor's office greatly facilitated interaction between the mayor's office, the chief of police, and the Arab community both before and after September 11.

Community organizations in New York, especially in the Muslim, South Asian, and Sikh community expressed frustration in their level of interaction with the New York City Police Department and other city officials who might have been of assistance on hate crime issues. Especially in the Sikh and South Asian communities, civil rights activists stated that there was only one community police officer in the whole police department assigned to interact with members of the huge Sikh and South Asian communities.[240] Furthermore, Sikh and South Asian community leaders stated that in general government agencies had not organized any forums for the community members to educate them on police protections from hate crimes and that community members did not know who to contact if they were a victim of a hate crime.[241]

Creation of Hotlines on Hate Crimes

Some cities and states as well as the federal government created specific hate crime hotlines to give affected community members a point of contact in government when backlash hate crimes occurred. Seattle, Arizona, California, and, at the federal level, the U.S. Commission on Civil Rights, all created and advertised the creation of September 11-related hate crimes hotlines. Community organizations generally reported satisfaction with the hotlines, stating that they were important in letting victim communities know that they could easily contact government.

The creation of a federal September 11 hate crimes hotline encountered serious difficulties. On September 14, 2001, the U.S. Commission on Civil Rights announced the creation of a "National Complaint Line… to solicit and catalogue discrimination complaints from Arab and Muslim Americans."[242] The number was publicized

[234] Human Rights Watch interview with Sharee Freeman, executive director, May 5, 2002.

[235] Human Rights Watch interview with Sharee Freeman, executive director, Community Relations Service, Department of Justice, May 5, 2002.

[236] Human Rights Watch interview with Joseph Zogby, special assistant for the Assistant Attorney General's 9/11 Backlash Initiative, U.S. Department of Justice, March 29, 2002. See, http://www.usdoj.gov/crt/legalinfo/nordwg brochure.html, accessed on September 23, 2002.

[237] Human Rights Watch interview with Nawar Shora, attorney, Arab American Anti-Discrimination Committee, February 28, 2002.

[238] Human Rights Watch telephone interview with Prabhjot Singh, August 16, 2002.

[239] Human Rights Watch interview with Rita Zarweih, August 3, 2002.

[240] Human Rights Watch telephone interview with Sin Yen Ling, attorney, Asian-American Legal Defense Fund, August 26, 2002. Human Rights Watch interview with Pritpal Singh, Sikh Youth of America, August 25, 2002.

[241] Human Rights Watch interview with Pritpal Singh, August 25, 2002.

[242] "U.S. Commission On Civil Rights Announces Complaint Line To Protect Rights Of Arab, Islamic Communities; Urges Tolerance In The Face Of Tragedy," United States Commission on Civil Rights, September 14, 2001.

by numerous Arab, Muslim, and South Asian organizations as a means to complain about hate crimes to the federal government. The number listed on the press release, however, was incorrect, forwarding callers to a dating service.[243] Once the correct number was released by the commission three days later, the commission received approximately 140 calls from September 17 to October 2 that it considered possible hate crimes.[244] Nevertheless, many persons who called the line did not understand that their complaints would not be forwarded to federal law enforcement authorities. The commission, when requested by Civil Rights Division to forward reports of hate crimes to it or the FBI, refused to do so. The commission maintained that it needed to protect the callers' anonymity so that they would not be discouraged from calling the commission. It also insisted it was an information gathering service rather than a complaint referral service.[245]

Bias Crime Tracking

Federal, state, and city governments made varied efforts to track bias crimes after September 11. Many city governments created separate classifications for September 11-related crimes in an effort to track the course of investigations and better inform the public on such efforts. Reliable national statistics on September 11 hate crimes did not exist at the time of this writing, however, because the federal Department of Justice had not yet published its annual hate crimes report for the year 2001.

Federal Hate Crime Statistics

In the United States, the Hate Crime Statistics Act of 1990 requires the Department of Justice to collect statistics on hate crimes using the Uniform Crime Reporting System (UCR).[246] According to Michael Lieberman, a long time activist on hate crime issues for the Anti-Defamation League: "The [federal] hate crime reporting statute is the most important hate crime law. It has pushed law enforcement to train police officers to detect bias-motivations for crimes in communities… It has revolutionized awareness of hate crime issues by creating a measure of accountability in communities."[247] Under UCR, law enforcement authorities around the United States are asked to aggregate the number of hate crime incidents by offense type and the racial, religious, national origin or sexual orientation of the victim every quarter and report these totals to the FBI. These local reports are compiled by the FBI and published yearly by the Bureau of Justice Statistics, in the form of simple data on the number of hate crimes committed each year in a particular jurisdiction and the number of hate crimes committed against a particular victim type in each jurisdiction. The Bureau of Justice Statistics report is the only government-produced national snapshot on hate crimes each year.

Over the past eight years, the FBI has encouraged local jurisdictions to report incidents of crime, including hate crime, using the National Incident Based Reporting System (NIBRS). The NIBRS reporting system provides more than a simple summary count of the number of hate crimes committed in each jurisdiction and the victim type. Under incident-based reporting, local law enforcement agencies provide an individual record for each crime reported to the FBI. Details about each incident include detailed information on the type of offender, victim, offense, weapon used, and location of the offense.

Participation in both the reporting systems is voluntary. Though most police agencies in the United States report hate crimes to the FBI, not all do so. Furthermore, among the agencies that do report hate crimes, many significantly underreport the occurrence of hate crimes in their jurisdiction. A study funded by the Department of Justice found that 83 percent of the law enforcement agencies who participate in either the UCR or the NIBRS report that they

[243] "Rights panel keeps hot line data from Justice; Claims of bias directed at Arabs, Muslims at issue." *Washington Times*, October 13, 2001.
[244] Ibid.
[245] Ibid.
[246] Bureau of Justice Statistics website, http://www.ojp.usdoj.gov/bjs/nibrs.htm, retrieved on September 3, 2002.
[247] Human Rights Watch telephone interview with Michael Lieberman, Washington Counsel, Anti-Defamation League, August 15, 2002.

had no hate crimes each year.[248] Nevertheless, the study found that many of those jurisdictions had hate crimes that were not reported to the FBI.[249] This "false-zero" reporting to the FBI is so severe that the study estimated six thousand hate crimes, almost 75 percent again as much as the total number of hate crimes reported nationwide each year to the FBI, are not included in reports to the FBI.[250] Further complicating matters with regard to tracking anti-Arab violence is that the FBI does not track specific ethnic community hate crimes, instead generically classifying any anti-ethnic violence into a single ethnic crime category.

City and State Hate Crime Tracking

In addition to federal efforts to collect hate crime data, a handful of city and state agencies in the United States also collect and publish their own hate crime statistics. Most notable among these are California, Illinois, Chicago, and Los Angeles County, which all publish detailed statistics each year on hate crimes.

The law enforcement agencies in the cities researched for this report—Dearborn, Chicago, Seattle, Los Angeles, Phoenix, and New York—all participate in the UCR system at the federal level. Some cities and states, like California and Chicago, also have specially tracked and published statistics on September 11-related bias crimes, while others, like Seattle and New York, did not. The Office of the Attorney General for California was the most aggressive in collecting data on September 11-related hate crimes and widely publishing it. The California attorney general's office issued two "Interim Reports" listing the number of September 11-related bias on hate crimes against Arab and Muslims and those perceived to be Arab or Muslim in six large California cities. The attorney general published the data because he believed the information was "central to developing effective measures to combat these despicable acts."[251] The first report was issued on October 11, 2001 once it was clear that a widespread backlash, numbering ten incidents per day, was occurring in California; the second was issued on December 11, 2001, after the backlash had significantly decreased to one incident per day.[252] To our knowledge, the California attorney general's office was the only state or local government agency to publish data on the September 11 backlash while it was occurring.

In addition to making a special effort to track and publish September 11-related crimes, California also publishes a yearly hate crimes report containing detailed statistical data on the type of hate crimes occurring, the victims, the offenders, location of attacks, and prosecution rates. The yearly report for the year 2001 was published on September 18, 2002. The report found that: "the overall number of hate crimes reported last year actually would have decreased five percent from a year earlier if not for the bias-motivated assaults against Californians victimized because they are Muslim or appeared to be of Middle Eastern descent."[253]

The Los Angeles County Commission on Human Relations also publishes a comprehensive annual hate crimes report with detailed statistics on hate crimes in Los Angeles County. According to the commission's executive director, the report is the oldest yearly hate crimes report of any jurisdiction in the United States, having been published since 1980.[254] Like the California attorney general's report, it includes detailed statistical data on hate crimes each year,

[248] "Improving The Quality And Accuracy Of Bias Crime Statistics Nationally: An Assessment Of The First Ten Years Of Bias Crime Data Collection," The Center for Criminal Justice Policy Research College of Criminal Justice Northeastern University and Justice Research and Statistics Association, September 2000.
[249] Ibid.
[250] Ibid.
[251] "Attorney General Releases Interim Report on Anti-Arab Hate Crimes," Office of the Attorney General State of California, October 11, 2001.
[252] "Attorney General Releases Interim Report on Anti-Arab Hate Crimes," Office of the Attorney General State of California, October 11, 2001; "Attorney General Releases Interim Report on Anti-Arab Hate Crimes," Office of the Attorney General State of California, December 11, 2001.
[253] "Attorney General Lockyer Releases Annual Hate Crime Report Showing Spike From Post 9/11 Anti-Arab Attacks," Press Release, Office of the California Attorney General, September 18, 2002, retrieved on September 18, 2002, from http://caag.state.ca.us/newsalerts/2002/02-106.htm.
[254] Human Rights Watch telephone interview with Robin Toma, August 27, 2002.

including information on the type of the victims, the offenders, location of attacks, prosecution rates, and type of hate crimes occurring. On September 9, 2002, the commission published its annual report for the year 2001.[255]

The Chicago Police Department has published a comprehensive annual hate crimes report since 1995. On June 27, 2002, it issued its annual "Hate Crimes in Chicago Report."[256] The report stated that Chicago police separately tracked September 11-related hate crimes and listed the number of September 11-related hate crimes in Chicago. Like the Los Angeles County Commission on Human Relations and the California attorney general's annual hate crime reports, the Chicago Police Department report includes information on the type of victims, the offenders, location of attacks, and types of hate crimes occurring, but it does not contain data on prosecution rates.

The Chicago Police Department's annual report is unique in that it also lists the number of "hate incidents," a category which includes bias-motivated conduct that may fall short of violating criminal laws.[257] The collection of hate incident statistics gives law enforcement officers clues on areas of the city where racial or ethnic tensions exist that could escalate into hate crimes.[258]

The Phoenix Police Department simply published on its website the number of anti-Arab and anti-Muslim hate crimes that occurred in Phoenix for the year 2001, noting with an asterisk that all anti-Arab hate crimes in Phoenix occurred after September 11.[259] The published numbers also made the error of separately listing "anti-Muslim" and "anti-Islamic" hate crimes even though the terms are synonymous.

The Dearborn Police Department separately categorized September 11-related hate crimes and logged them for internal investigatory purposes. The Department, however, has not published hate crimes statistics in the past.[260] Information on hate crimes in Dearborn is published each year as part of the Michigan State Police department's submission of data to the FBI's Uniform Reporting System program.[261]

Neither New York nor Seattle publish yearly data on hate crimes. The Bias Crimes Unit of the New York City Police Department did, however, track the number of September 11-related hate crimes in the three months after September 11 for internal investigatory purposes. Seattle did not track such data, and indeed, unlike any city researched for this report, did not track September 11-related hate crimes at all.[262] The only published data on hate crimes in New York and Seattle is the data published yearly by the FBI in its annual hate crimes report. This data, as described above, is cursory in nature, providing only the number of hate crimes committed each year and the types of victims attacked. Information on hate crime perpetrators, the location of attacks, the type of crimes committed, or prosecution rates is not included in the Uniform Crime Reporting system used by New York City and Seattle.

[255] See http://humanrelations.co.la.ca.us/Our publications/pdf/2001HCR.pdf, retrieved on September 10, 2002.
[256] See http://w4.ci.chi.il.us./caps/Statistics/Reports/HateCrimes/index.html, retrieved on September 10, 2002.
[257] Ibid.
[258] Ibid.
[259] See http://www.ci.phoenix.az.us/POLICE/hatecr2.html, retrieved on September 10, 2002.
[260] Human Rights Watch Interview with Sergeant Timothy Harper, Dearborn Police Department, June 3, 2002.
[261] See http://www.state.mi.us/msp/crd/ucr98/ucr_h07.htm, retrieved on September 10, 2002.
[262] Human Rights Watch interview with Julie Pate, Seattle Office of Civil Rights, July 31, 2002; Human Rights Watch interview with Detective Christie Lynn-Bonner, Seattle Police Department, August 2, 2002.

APPENDIX

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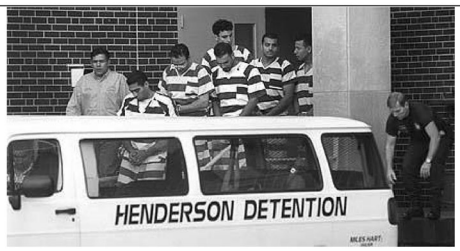

Six of nine Egyptian nationals arrested in Evansville, Indiana on October 11, 2001 in the wake of the September 11 investigation. Eight of the men were held as material witnesses, the other was held on immigration charges. The men alleged that they were interrogated by the FBI before being allowed to make a phone call, after which they could not talk to their attorneys for four days. None were charged in connection with the September 11 attacks.
(c) 2001 Denny Simmons/Evansville Courier and Press

We were treated like criminals. We felt discriminated against and treated different from other detainees. Our requests were ignored; we were held in isolation and had no access to our lawyer for two weeks. Other prisoners did not face these conditions. We felt the treatment was degrading.

Testimony to Human Rights Watch

PRESUMPTION OF GUILT:
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PRESUMPTION OF GUILT:
Human Rights Abuses of Post-September 11 Detainees

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I. SUMMARY AND RECOMMENDATIONS

For me America was the dreamland. I used to think that I was lucky to live in a liberal and democratic country. But the dreamland became hell for me after September 11.

Muffed Khan, a deported Pakistani.[1]

On September 11, 2001, hijackers turned four airplanes into instruments of terror. Their horrific crime left some 3,000 dead, devastated the lives of many thousands more, destroyed the World Trade Center, and created a sense of urgency about protecting the United States from future terrorists attacks. September 11 was not just an assault, however, on lives and buildings. It was also, as United States President George W. Bush pointed out, an attack on the fundamental freedoms on which the U.S. was founded.

Unfortunately, the fight against terrorism launched by the United States after September 11 did not include a vigorous affirmation of those freedoms. Instead, the country has witnessed a persistent, deliberate, and unwarranted erosion of basic rights against abusive governmental power that are guaranteed by the U.S. Constitution and international human rights law. Most of those directly affected have been non-U.S. citizens. Under Attorney General John Ashcroft, the Department of Justice has subjected them to arbitrary detention, violated due process in legal proceedings against them, and run roughshod over the presumption of innocence.

To many Americans, the failure to uphold rights may seem an abstract concern in the face of the very concrete threat posed by terrorist attacks. But the lives of many who came to the United States with high hopes for a better life have been harmed by the practices documented in this report. Their lives were turned upside down when their nationality and religion drew the government's attention although they were never charged with terrorism

Drawing on scores of interviews with current and former detainees and their attorneys, this report provides the most comprehensive analysis to date of the mistreatment of non-citizens swept up in the September 11 investigation. Separate chapters detail the unjustified secrecy of the government's practices, including the secret incarceration of post-September 11 detainees and immigration proceedings closed to the public; custodial interrogations without access to counsel; arbitrarily prolonged confinement, including detention without charge; and the deplorable conditions—including solitary confinement—as well as the physical abuse to which some detainees have been subjected.

Immediately after the September 11 attacks, the Department of Justice—through constituent agencies, the Federal Bureau of Investigation (FBI) and the Immigration and Naturalization Service (INS)—began a process of questioning thousands of people who might have information about or connections to terrorist activity. The decision of whom to question often appeared to be haphazard, at times prompted by law enforcement agents' random encounters with foreign male Muslims or neighbors' suspicions. The questioning led to the arrest and incarceration of as many as 1,200 non-citizens, although the exact number remains uncertain. Of those arrested, 752 were charged with immigration violations.

By February 2002, the Department of Justice acknowledged that most of the persons detained in the course of the September 11 investigation and charged with immigration violations—what it terms "special interest" detainees—were of no interest to its anti-terrorist efforts. As of July 2002, none of the "special interest" detainees had been indicted for terrorist activity; most had been deported for visa violations. Nevertheless, their histories of arrest, interrogation, and detention reflected the department's unwarranted presumption of their guilt.

[1] "Pakistanis Tell of US Prison Horror," *BBC*, June 29, 2002.

Arresting persons of interest to the September 11 investigation on immigration charges, such as overstaying a visa, enabled the Department of Justice to keep them jailed while it continued investigating and interrogating them about possible criminal activities—a form of preventive detention not permissible under U.S. criminal law. Using immigration law violations as a basis for detention permitted the Department of Justice to avoid the greater safeguards in the criminal law—for example, the requirement of probable cause for arrest, the right to be brought before a judge within forty-eight hours of arrest, and the right to court-appointed counsel. While the alleged visa violations provided a lawful basis for seeking to deport these non-citizens, the Justice Department's actions constituted an end run around constitutional and international legal requirements governing criminal investigations.

In addition to using immigration law to circumvent its obligations under the criminal justice system, the Department of Justice has also created new immigration policies and procedures that weaken previously existing safeguards against arbitrary detention by the INS. While an immigration law violation may justify deportation, it does not in itself justify detention after arrest. The INS has the legal authority to keep a non-citizen confined pending conclusion of his or her deportation proceedings only if there is evidence of the individual's dangerousness or risk of flight. Whereas most persons accused of overstaying their visas, working on a tourist visa, or other common immigration law violations are routinely released from jail while their cases proceed, the Department of Justice has sought to keep "special interest" detainees confined in the absence of evidence that they were dangerous or a flight risk. Their release from jail has been contingent on government "clearance," that is a decision that they were not linked to nor had knowledge about terrorist activities. In effect, "special interest" detainees have been presumed guilty until law enforcement agents concluded otherwise.

The "clearance" process was not the only innovation in immigration practice instituted to expand government powers vis-a-vis INS detainees. The Department of Justice promulgated new rules and issued new policies that permit detainees to be held without charge in cases of an undefined "emergency"; that authorize blanket closure of immigration hearings to the public, including detainees' family and friends; and that allow the INS to keep detainees in jail despite immigration judges' orders that they be released on bond. All of these new rules and policies increased the agency's discretionary authority and weakened existing safeguards to protect non-citizens' rights to liberty and due process.

In some cases, the Department of Justice detained people of interest to the September 11 investigation by obtaining arrest warrants for them as material witnesses. The ostensible purpose of such warrants has been to ensure the appearance of witnesses before the grand juries investigating the September 11 attacks. After repeated interrogations—and isolated confinement under extremely restrictive conditions—some of those detained as material witnesses were eventually released, sometimes without ever having been brought before a grand jury, while others were charged with crimes or immigration law violations. The Department of Justice has refused to say how many persons have been arrested as material witnesses or how many remain in custody. Human Rights Watch's research has identified thirty-five individuals who were held as material witnesses.

Most of the "special interest" detainees are Muslim men who are not U.S. citizens. Given that the nineteen alleged hijackers were all men, citizens of Middle Eastern nations, and Muslim, it is not surprising that law enforcement has focused on male Muslim non-citizens from Middle Eastern and contiguous countries. But suspicion that other terrorists in the United States might have a similar profile to the alleged hijackers is no justification for abrogating the rights of the Muslim immigrant community. National origin, religion, and gender do not constitute evidence of unlawful conduct.

In a nation created and continually recreated by immigrants, it is particularly tragic to see the willingness of the U.S. government to sacrifice

the rights of non-citizens and to find the public largely mute in its response. One can only speculate whether the nature of the September 11 investigation would have been different if citizens had been the primary targets. But, as has been pointed out, "[b]ecause non-citizens have no vote, and thus no direct voice in the democratic process, they are a particularly vulnerable minority. And in the heat of the nationalistic and nativist fervor engendered by war, non-citizens' interests are even less likely to weigh in the balance" of freedom versus security.[2]

But it is not only the rights of non-citizens that have been ignored. In refusing to release the names of immigration detainees held in connection with the September 11 investigation and in closing their immigration hearings, the Department of Justice has trampled on basic free speech rights that include the public's right to know "what their government is up to," as the Supreme Court has stated.[3]

The Department of Justice has argued that withholding the names of the detainees from the public and denying the public access to deportation proceedings is essential to protect the national security and September 11 investigation. Its arguments are not persuasive. For example, it has claimed that revealing the names of "special interest" detainees would alert terrorist organizations to who has been detained. Yet it is not plausible that any such organizations would not know already if their members have been arrested, since most of the detainees have been held for long periods of time and they have been free to communicate their detention to whomever they chose. The government also asserts that if detainees' names are disclosed or if deportation hearings are held publicly, terrorists would be able to map the progress of the investigation. While there may be good reason in individual cases to keep the public from all or part of a deportation hearing to prevent the disclosure of sensitive information, the government has closed hundreds of immigration proceedings without making any individualized showing that such closure was necessary. Many of the government's arguments about possible harms that might flow from holding hearings in public and disclosing the identity of "special interest" detainees are predicated on the assumption that the detainees are linked to terrorist activities—yet none of them have been charged with terrorism-related offenses. Unsubstantiated speculations about potential damage to the government's investigation, however, should not be permitted to override the fundamental principle that arrests and hearings affecting a person's liberty should be public to ensure fairness and to prevent the abuse of power.

The veil of secrecy the Department of Justice has wrapped around the post-September 11 detainees reflects a stunning disregard for the democratic principles of public transparency and accountability. The Department of Justice has sought to shield itself from scrutiny by keeping from the public information that is indispensable to determining the extent to which its September 11 investigation has been conducted in accordance with U.S. law and international human rights law. It has also sought to silence criticism of its anti-terrorist efforts, most notably with Attorney General Ashcroft's infamous statement to Congress that those who raise questions about "lost liberty" are aiding the country's enemies.[4]

U.S. history shows how dangerous it is to allow government to claim unchecked power to protect national security. Following World War I during a period of social conflict that included several bombings (including the bombing of the attorney general's home), the government under-

[2] David Cole, "Enemy Aliens," *Stanford Law Review*, vol. 54:950, 2002, p. 955.

[3] *U.S. Department of Justice v. Reporters Committee*, 489 U.S. 749,773 (1989).

[4] Testimony of Attorney General John Ashcroft before a hearing of the Senate Judiciary Committee on "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," December 6, 2001. During that hearing, the attorney general said:

> To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of goodwill to remain silent in the face of evil.

took massive raids and seized thousands of suspected communists and anarchists without any regard for due process. During World War II, more than 110,000 people were detained in internment camps solely because of their Japanese ancestry. During the Cold War, countless persons were victims of the "Red Scare"—losing their jobs, being publicly humiliated, and some even being sent to prison for suspected or real association with the Communist Party. In each case, the government argued necessity. In each case, history vindicates the victims and condemns the government's conduct.

Human Rights Watch recognizes the critical importance of protecting lives from terrorist attacks and of bringing to justice those responsible for them. Law enforcement and information gathering should proceed effectively, intelligently, and efficiently. There is no evidence, however, that prior to September 11 federal agents lacked sufficient means to investigate and prosecute terrorist conspiracies and organizations or that their work was inappropriately hampered by safeguards for individual rights. In our judgment, the abridgment of those safeguards subsequent to September 11 was born not of necessity, but from insufficient recognition of the importance of the rights that are the foundation of American democracy. Indeed, rather than weakening national security, protection of civil liberties is a hallmark of strong, democratic polities. As Supreme Court Justice Louis D. Brandeis wrote in 1927, the framers of the U.S. Constitution knew that "fear breeds repression; that repression breeds hate; [and] that hate menaces stable government."[5]

Nations, like individuals, prove their mettle and the strength of their convictions during crises. Faced with the very real yet immeasurable danger of ongoing terrorist threats and the urgent need to find and hold accountable those responsible for September 11, the U.S. government has failed to hold high the fundamental principles on which the nation is premised—the very values that President Bush declared were under attack from terrorists.

[5] *Whitney v. California*, 247 U.S. 357, 375 (1927) (Justice Brandeis concurring).

We hope this report will encourage U.S. officials, legislators, and the public to insist that U.S. domestic anti-terrorism efforts be conducted with full respect for basic rights. Remedying the rights violations that have accompanied the post-September 11 detentions will require a series of steps, as recommended below. But the overarching goal must be two-fold: 1) bringing transparency and accountability to the government's treatment of detainees by rejecting the pervasive secrecy that has shrouded their detention and legal proceedings; and 2) protecting the integrity of the immigration and criminal justice systems by ending policies and practices that circumvent important rights safeguards.

Recommendations

The recommendations below are intended to address the human rights violations identified in this report. They are directed to the Department of Justice, including the Immigration and Naturalization Service and the Federal Bureau of Investigation, as well as to any new agency that carries out immigration functions. In some cases, acting on the recommendations will entail revision or rescission of administrative regulations or policies. In other cases, the Department of Justice must instruct and oversee its employees to ensure their practices are consistent with human rights requirements. We also urge Congress to exercise its legislative and oversight authority to ensure that the necessary changes in current policies and practices are made. The U.S. government must ensure that the investigation and detention of persons suspected of having links to terrorism are conducted with full regard for the rights of all persons in the United States to be free of discrimination, arbitrary detention, mistreatment in confinement, and violations of due process.

Arrests

1. Federal law enforcement agents should not target persons for investigation or arrest because of their national origin, race, religion, or gender. Either singly or together, these characteristics should not be the basis for suspicion of unlawful conduct.

2. Immigration laws should not be selectively enforced through discriminatory arrests made on

the basis of national origin, race, religion, or gender.

Secrecy

1. The Department of Justice should make promptly available the names of all persons detained on immigration charges, the date of each arrest, place(s) of detention, and name(s) of any attorney(s), to their family members, their counsel, and any other person having a legitimate interest in the information unless a wish to the contrary has been expressed by the persons concerned.

2. The INS should authorize state and local facilities holding INS detainees to make available the information described above.

3. Subject to reasonable security restrictions, the INS should permit independent monitoring groups as well as nongovernmental organizations offering legal, counseling, pastoral, or other services to have access to all facilities in which INS detainees are being held, and permit such groups to speak with detainees.

4. Immigration hearings should be presumptively open. If the government seeks to have an immigration hearing closed, it should present particularized justification that shows the need to conduct all or part of the proceedings in an individual case in secret for reasons of national security or to protect classified information. The final decision to close a hearing should be made by an immigration judge on a case-by-case basis. The INS should not assert detainee's privacy or other individual interests as a basis for closing a hearing to the public unless the detainee has requested the hearings be closed for that reason.

Access to Counsel and Protection of Legal Rights

1. Anyone held in custodial detention, including INS custody, should not be questioned about knowledge of or involvement with criminal activities, including terrorism, without being advised of his or her right to remain silent, to have an attorney present during questioning, and to have one provided through court appointment if he or she cannot afford one, i.e. be given "Miranda" warnings. Where a detainee does not demonstrate a strong command of English, written waiver forms should be in a language the person questioned can read and understand.

2. Anyone who requests to have an attorney present during a custodial interrogation about his or her knowledge of or involvement in criminal activities, including terrorism, should be permitted to secure the assistance of counsel before questioning continues. If a person cannot afford an attorney, one should be appointed. Law enforcement officials should not encourage a person to waive his or her right to counsel.

3. INS officials should inform all detainees, in a language they can understand, of their right to have counsel represent them, and provide them information in a language they can understand regarding how to obtain counsel. INS officials should not encourage detainees to proceed with their immigration cases without counsel.

4. INS detainees—whether in administrative segregation or in the general population—should have generous access to telephones to find attorneys to represent them. Telephone calls for purposes of securing counsel should not be limited to collect calls. Organizations offering free or low-cost legal services should have access to detention facilities to offer their assistance to detainees.

5. INS detainees should not be asked to sign legal documents in English, including descriptions of the rights they are entitled to or waivers of rights, without adequate assurances that they fully understands the content and significance of the document. To the extent possible, documents should be provided in the language of the detainee. In cases where such translation is not possible or where a detainee cannot read, documents must be fully and accurately explained in a language that the detainee can understand.

6. The INS should promptly respond to requests from attorneys and families regarding the location of detainees, including immediately after arrest and after any transfer. The INS should ensure that detainees have adequate phone access to inform their attorneys and family members of their places of detention.

7. In deciding whether to transfer a detainee to a different facility, the INS should take into account the location of a detainee's family, legal counsel, and community ties. Detainees should not be transferred to facilities that impede an existing attorney-client relationship or disrupt family or community ties, absent compelling reasons for the transfer.

Consular Rights

1. The United States should ensure that it meets its obligations under the Vienna Convention on Consular Relations to inform any detainee of his or her right to communicate with a consular officer from his or her country of citizenship or nationality upon his or her detention.

2. The U.S. government should promptly notify the consulate of the detainee's country of citizenship or nationality of his or her detention.

Arbitrary Detention

1. If a person is arrested on the basis of an immigration violation, the INS should only seek the person's continued detention based on individualized evidence of dangerousness or risk of flight.

2. The INS should inform all persons arrested by INS officials of the charges against them within forty-eight hours of arrest or it should release them. The rule promulgated by the INS that permits indefinite delay in charging detainees in "exceptional circumstances" should be rescinded. If the rule is not rescinded, detention without charge for more than forty-eight hours rule should be permitted only in narrowly tailored circumstances. Such exceptions must not allow delays in filing charges beyond seven days, the time limit authorized by Congress in the USA PATRIOT Act for individuals certified as terrorism suspects.

3. If a detainee is held for more than forty-eight hours without charge, the INS should automatically and immediately bring him or her before an immigration or federal court for a determination of the detention's legality.

4. INS detainees should be released on bond pending final adjudication of immigration proceedings unless a judge finds there is evidence of the individual detainee's dangerousness or risk of flight. Absent such evidence, the fact that the detainee was originally identified or questioned in connection with a terrorism investigation should not warrant refusal to authorize release on bond.

5. The INS should initially set or seek judicial bond orders at amounts no higher than that reasonably calculated to ensure detainees will appear for immigration proceedings. High amounts should not be used to force detainees to remain in custody in the absence of particularized evidence of dangerousness or risk of flight.

6. The INS should comply immediately with judicial orders to release detainees on bond. It should rescind its rule preventing release in cases where the INS sets high bond amounts.

7. The INS should comply promptly with orders of removal issued by immigration judges and with grants of voluntary departure, regardless of whether there is an ongoing law enforcement investigation into the detainee's conduct, knowledge, and associations. If Congress wishes to enact legislation authorizing the continued detention of INS detainees pending federal law enforcement "clearance," it should ensure such legislation adequately reflects constitutional due process requirements.

8. Persons ordered deported and held in detention must be removed within ninety days of the issuance of the removal order as required by law.

9. Federal law enforcement agents and prosecutors should not use material witness warrants to circumvent the basic due process requirement that persons may be detained only with probable cause of criminal conduct. In the absence of such probable cause, material witness warrants should not be used to keep possible criminal suspects in detention.

Conditions of Detention

1. INS detainees should not be held in segregated confinement unless there is individualized

reason for believing they are dangerous or poses a security risk. Conditions of segregated confinement should not be unnecessarily restrictive or punitive. Detainees held in segregated confinement for their own protection or other non-disciplinary reasons should be entitled to all the privileges and programs available to general population detainees.

2. The INS should fully implement, monitor, and enforce its own Detention Standards setting forth the basic conditions of detention for INS detainees. It should not place or maintain detainees in facilities that do not meet those standards.

3. INS detainees should not be confined with persons accused or convicted of criminal offenses.

4. The INS should investigate fully all complaints of abuse or mistreatment of detainees. It should remove all detainees from facilities where there are cases of abuse by staff or criminal inmates unless the facility undertakes prompt remedial action, including dismissal of abusive employees.

5. To the maximum extent practicable, jails and detention centers that hold immigration detainees should have staff members who speak the language of the people in custody and can act as translators, particularly in cases where there is a concentration of detainees who speak the same foreign language.

II. ARRESTS

Following the attacks of September 11, the Department of Justice launched an extensive effort aimed at "apprehending those responsible for the September 11 attacks and …detecting, disrupting, and dismantling terrorist organizations."[6] Thousands of Federal Bureau of Investigation (FBI) agents, working with other federal, state and local agencies, have been conducting an unprecedented investigation into terrorist activities in the U.S.

Determined to move swiftly given the urgency of the situation and public pressure to show results, the Department of Justice began a process of questioning thousands of people about whom there were "indications" they might have information about or links to terrorist activity.[7] Our research suggests that the "indications" that triggered questioning in many cases may have been little more than nationality, religion, and gender.[8] As of July 2002, the September 11 investigation had not yielded any criminal indictments for crimes connected to terrorist activity.[9]

Some 1,200 Muslim non-citizens questioned by federal agents in connection with the September 11 investigation were subsequently taken into custody. The vast majority was arrested by the Immigration and Naturalization Service (INS) for immigration law violations, e.g. working on a tourist visa, that had nothing to do with terrorism. Prior to September 11, such violations would not have warranted continued detention; persons arrested would have been quickly released on bail pending final decision on deportation. But immigration violations were the only possible legal basis (other than material witness warrants) for detaining persons identified as of interest to the September 11 investigation while the Department of Justice continued investigating whether they had information about or links to terrorist organizations. The criminal law in the U.S. rightfully does not permit preventive detentions for investigative purposes.[10] The Department of Justice turned to the immigration

[6] Declaration of Dale L. Watson submitted April 9, 2002, in *Detroit Free Press v. John Ashcroft*, 195 F. Supp. 2d 948 (April 3, 2002), p. 2.

[7] Ibid. p. 3.

[8] Human Rights Watch sought meetings with FBI and INS officials to discuss this and other issues raised in this report. The INS denied our request; the FBI never responded.

[9] The only person who has been indicted for crimes related to the September 11 attacks—Zacarias Moussaoui—was already in detention before September 11.

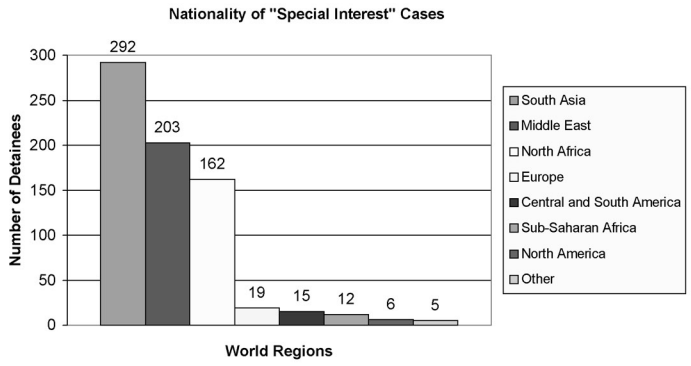
[10] Preventive detention is permissible only in highly limited situations not relevant here, e.g., for certain convicted sex offenders who have served their sentences but are still considered dangerous.

law system to conduct what has been called a "campaign of mass preventive detention."[11] Almost all of the post-September 11 immigration detainees—whom the government has called "special interest" detainees—were ultimately deported or released on bond—sometimes after months of detention—after the Department of Justice concluded they had no connection to terrorist activities or groups.

Who are the Detainees?

Almost all of the "special interest" detainees whose nationalities were revealed by the Department of Justice on January 11, 2002 came from countries in South Asia, the Middle East, and North Africa, as shown on the graph below. The largest group of detainees (248) was from Pakistan, followed by Egypt, 100, and Turkey, fifty-two. Some of the nationals of countries in North America and Europe who were classified as "special interest" cases were naturalized citizens and were in fact also born in South Asia, the Middle East, and North Africa. The Department of Justice has not released the nationalities of post-September 11 detainees charged with federal or state crimes or held on material witness warrants and they are therefore not included in the graph below.

[11] See David Cole, "Enemy Aliens," *Stanford Law Review*, vol. 54:950, 2002, p. 955.



Source: INS detainees defined as "special interest" cases on a list released by the Department of Justice on January 11, 2002.

It is not surprising that the vast majority of those detained in connection with the September 11 investigation are non-citizens from those geographic regions. The nineteen alleged hijackers were all Muslim men from Middle Eastern countries and the U.S. government asserts their attacks were orchestrated by al-Qaeda, a diffuse network of Sunni Islamist militants headed by Osama bin Laden that has heavily (although not exclusively) recruited operatives in or from Middle Eastern and South Asian countries. It would be reasonable for law enforcement agents to assume that other members of al-Qaeda or their allies in the United States might possess similar characteristics. But it is unreasonable to assume that nationality, religion, and gender should suffice to identify suspicious individuals.

The Department of Justice claims that the "special interest" detainees "were originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity.... For example, they may have been questioned because they were identified as having interacted with the hijackers, or were believed to have information relating to other aspects of the investigation.... In the course of questioning them, law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws, and, in some instances, also determined that they had links to other facets of the investigation."[12] Our research, press accounts, and research by other organizations suggests, however, that the "indications" that triggered questioning and subsequent arrest in many cases may have been little more than a form of profiling on the basis of nationality, religion, and gender. Being a male Muslim non-citizen from certain countries became a proxy for suspicious behavior. The cases suggest that where Muslim men from certain countries were involved, law enforcement agents presumed some sort of a connection with or knowledge of terrorism until investigations could subsequently prove otherwise.

Using nationality, religion, and gender as a proxy for suspicion is not only unfair to the millions of law-abiding Muslim immigrants from Middle Eastern and South Asian countries, it may also be an ineffective law enforcement technique. The U.S. government has not charged a single one of the thousand-plus individuals detained after September 11 for crimes related to terrorism. Such targeting has also antagonized the very immigrant and religious communities whose cooperation with law enforcement agencies could produce important leads for the investigation. Additionally, a series of cases in which there is more substantive evidence of links to acts of terror strongly suggests that a national origin terrorist profile is flawed. Zacarias Moussaoui, "the twentieth" hijacker, is a French citizen, Richard Reid, the "shoe bomber," is a British citizen, and José Padilla, aka Abdullah Al Muhajir, "the dirty bomber," is a U.S. citizen of Puerto Rican descent.[13]

Some of the "special interest" cases were originally identified for questioning and detention simply because spouses, neighbors, or members of the public said they were "suspicious" or accused them without any credible basis of being terrorists.

- On November 1, 2001, two FBI agents went to the workplace of a Palestinian civil engineer in New York City. They informed him that they had received an anonymous tip that he had a gun—which was not true. The engineer suspects that a contractor with a grudge against him sent the tip to the FBI. Five days later, INS agents came to his

[12] Declaration of Watson submitted in *Detroit Free Press v. Ashcroft*, p. 3.

[13] Zacarias Moussaoui, a French citizen of Moroccan descent, was arrested at a Minnesota flight school on August 17, 2001. He faces six conspiracy counts alleging that he conspired with Osama bin Laden and al-Qaeda to carry out the September 11 attacks. Richard Reid was arrested on December 22, 2001 after he allegedly tried to detonate a bomb concealed in his shoe aboard a Paris-Miami flight. He has been charged with attempted murder, attempted homicide, and attempted use of a weapon of mass destruction. José Padilla was arrested on May 8, 2002 on suspicions of participating in a plot to explode a bomb laden with radioactive material. He is now being detained without charges as an "enemy combatant."

workplace and arrested him for overstaying his visa. The man's visa had indeed expired but he had applied for an adjustment of status; he was therefore legally in the country. He received a visa extension from the INS office in Vermont while he was detained. He was incarcerated for twenty-two days before being released on bond.[14]

- On November 25, 2001, after a resident of Torrington, Connecticut, told police that he had heard two "Arabs" talking about anthrax, police officers followed two Pakistani men suspected of having had the conversation to a gas station. The officers arrested the two men and also Ayazuddin Sheerazi, an Indian businessman who was minding the station temporarily for his uncle, the owner, and another man from Pakistan who happened to be there at the time. According to Sheerazi's attorney, the police never offered any reason for arresting Sheerazi or suspecting him of wrongdoing. He told Human Rights Watch, "Torrington is a small place, so they arrested the Arabs in the community." Even though Sheerazi was legally in the country the INS kept him eighteen days in detention before he was released on bond. (The caller who made the complaint to the police later failed a voluntary polygraph test).[15]

- Ahmad Abdou El-Khier, an Egyptian national, was picked up on September 13, 2001 after a hotel clerk told police that he appeared "suspicious." El-Khier was initially charged with trespassing in the Maryland hotel where he was staying, then held as a material witness, and finally charged with violating the terms of his visa on a previous visit to the United States. He was deported on November 30, 2001.[16]

- Mohammed Asrar, a Pakistani convenience store owner in Dallas, Texas, was arrested on September 11, 2001, after a neighbor called the police to report that he was an "Arab" who possessed guns and might be a terrorist. Asrar was arrested by the FBI at his convenience store and interrogated without an attorney for hours. He was charged with "possession of ammunition while a prohibited person." The fact that he had overstayed his visa rendered him a person prohibited from possessing ammunition. "[The prosecutors] think he's a terrorist, but when I ask them why, they won't tell me," said his court-appointed attorney. The attorney told Human Rights Watch that he believed innocuous facts, such as that Asrar, who is an avid photographer, took pictures of the Atlanta skyline, were seen with suspicion because Asrar is South Asian. "There is no question in my mind that the prosecution of this case and the treatment of my client are unique because of his ethnicity," he said.[17]

- Two Somali men, Ismael Abdi Hassan and Ahmed Shucib Yusuf, stopped their rental

[14] Human Rights Watch interview with Palestinian civil engineer, Paterson, New Jersey, December 20, 2001. The detainee's name has been withheld upon request.

[15] Sheerazi, whose family owns a carpet plant in Bombay, was in the United States beginning in May 1, 2001 on business. He had entered the country legally and had applied for an extension of his visa before it expired. After his release he returned to India. Human Rights Watch telephone interview with attorney Neil Weinrib, New York, New York, January 28, 2002.

[16] Human Rights Watch telephone interview with Martin Stolar, Ahmed Abdou El-Khier's attorney, New York, New York, March 28, 2002. For newspaper accounts of this case see John Cloud, "Hitting the Wall," *Time Magazine*, November 5, 2001; vol. 158 no. 20. Patrick McDonnell, "Nation's Frantic Dragnet Entangles Many Lives Investigation: Some are jailed on tenuous 'evidence,' their opinion of America soured," *Los Angeles Times*, November 7, 2001; Jodi Wilgoren, "Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, 'Why?,'" *New York Times*, November 25, 2001; and Josh Gerstein, "Cases Closed: In Immigration Cases, Information on Hearings and Court Records Is Restricted," *ABCNews.com*, November 19, 2001.

[17] The attorney said that Asrar has been held in a maximum-security area of jail, and, if convicted, faces three to four years in prison for the charge of illegal possession of ammunition. Human Rights Watch telephone interview with Robert Carlin, Texas, March 15, 2002.

vehicle on November 26, 2001 to kneel in a parking lot and pray in Texas City, Texas. Responding to a call by a "nervous bystander" who reported "suspicious activity," Texas City police approached the men and subsequently arrested them after a search of their car uncovered a knife and a driver's license that appeared to have been altered.[18]

- Forty Mauritanians were arrested in Louisville, Kentucky apparently because someone had told the police that one of them was taking flying lessons, which turned out to be untrue, and another person said that one of the Mauritanians looked like one of the alleged hijackers. Bah Isselou told Human Rights Watch that he and others who were arrested at his home were not told the reason for the arrests or who was arresting them. They were driven to the INS office in Louisville, where they learned they had been arrested by the FBI and the INS. All but four of them were released the next day. On the third or fourth day after their arrest the four still in custody were informed they had been charged with overstaying their visas.[19]

Individuals from Muslim or Middle Eastern countries who encountered law enforcement randomly have been arrested and investigated in connection with the terrorist attacks:

- Upon arriving at the Newark, New Jersey train station, on October 11, 2001, Osama Sewilam asked a policeman for directions to his immigration attorney's office. The policeman asked him where he was from, and he replied, "Egypt." The policeman asked him if he had a visa. He said it had expired and that was why he was going to see his lawyer. The policeman took him to the police station and called the FBI. Sewilam was deported on March 15, 2002.[20]

- On September 21, 2001, Ahmed Alenany, an Egyptian physician, was approached by a police officer after he had stopped by the roadside in New York City to look at a map. According to Alenany, the police officer questioned why he had stopped in a no-parking zone, asked to see his visa, and discovered it had expired. The police officer also noted two pictures of the World Trade Center in Alenany's car. Alenany was subsequently charged with overstaying his visa even though he had filed for an extension before it expired, and thus, he was legally in the country. Without the advice of counsel, Alenany agreed to be deported because the judge suggested that pursuing his case would keep him in jail for many weeks. He was detained for more than five months while waiting to be removed from the country, during which time the government presented no evidence linking him to terrorism. He is now free but still faces possible removal from the country.[21]

[18] When the police searched Hassan and Yusuf's truck they found a knife with a blade measuring a quarter inch more than Texas law allows. Yusuf was charged with possession of an illegal weapon. Reportedly, Hassan gave the police officers a driver's license on which the photograph appeared to have been burned, and where the height and weight listed far exceeded his. Hassan, who later presented a valid Texas identification card, was charged with possessing an altered driver's license. They were reportedly released on bail the next day. Kevin Moran, "Praying Muslims find selves in jail; 2 face charges over license, knife," *Houston Chronicle*, November 29, 2001; and "Two Muslims Arrested for Suspicious Activity," Associated Press, November 29, 2001.

[19] The Mauritanians were detained on September 14, 2001. Isselou and the other three spent more than a month in jail before being released on bond while their deportation proceedings continued. Human Rights Watch telephone interviews with Bah Isselou, Florida, October 6, 2001; and with Dennis Clare, Bah Isselou's attorney, Louisville, Kentucky, October 23 and 31, 2001. For press reports on this case, see "Mauritanian in USA Recounts Arrest, Interrogation Over 11 September Attacks," *BBC*, September 29, 2001; David Firestone, "Federal Arrest Leaves Mauritanian Bitter," *New York Times*, December 9, 2001.

[20] Human Rights Watch interview with Osama Sewilam, Hudson County Correctional Center, Kearny, New Jersey, February 6, 2002; and his attorney Sohail Mohammed, Clifton, New Jersey, November 5 and November 19, 2001.

[21] Human Rights Watch interviews with Mohammed. For a press report of this case see Christopher Drew and Judith Miller, "Though not Linked to Terrorism,

- On October 11, 2001, Habib Soueidan, a Lebanese national, was selling pictures of the World Trade Center and U.S. flags on a New York City sidewalk when he was arrested for not possessing a vendor's license. He said police did not arrest three vendors of Chinese descent who were also there, even though he claimed that they did not have licenses either. Soueidan was charged with overstaying his visa and interrogated about the terrorist attacks.[22]

- Ali Alikhan, a citizen of Iran, was driving back to Colorado from vacation at Yellowstone National Park on September 15, 2001, when he was pulled over by a police officer for speeding. When the officer saw his name on the license, he asked Alikhan for his immigration documentation. The officer called the INS, who told him to arrest Alikhan for overstaying his visa. The officer arrested Alikhan and delivered him to the INS. Alikhan was interrogated several times about the September 11 attacks, always without an attorney. He was held in custody for 120 days, thirty-five of those in isolation, on the charge of overstaying his visa. He has been released on bond.[23]

Some Middle Easterners were arrested simply because they approached sensitive sites:

- Ansar Mahmood, a twenty-four-year-old Pakistani who was a legal permanent resident in the United States, decided to have his picture taken on October 9, 2001 to send to his family, according to a newspaper report. After work, he drove to the highest point in Hudson, New York, a hilltop overlooking the Catskills Mountains, but the view also included the main water treatment plant for the town. Two guards had been posted there that day because of the anthrax scare. While one of the guards took Mahmood's picture, the other called the police. The FBI's investigation of Mahmood uncovered that he had helped an undocumented friend from Pakistan find an apartment and he was charged with harboring an illegal immigrant.[24]

- Tiffanay Hughes, a U.S. citizen, and her husband, Ali Al-Maqtari, a Yemeni citizen, were searched and detained at an army base in Kentucky where she was a recruit on September 15, 2001, for no stated reason. She said that two days earlier, when she went to pick up her orders in Massachusetts, an officer told her repeatedly that she could not wear a *hejab*, a headdress used by many Muslim women. She protested and said it was a religious symbol. She said that the officer replied, "Don't let people know that you're Muslim. It's dangerous."[25] Hughes believed that her identification card photo, in which she was wearing the hejab and which was allegedly posted at the army base guardhouse when she arrived there, and her speaking a foreign language (French) with her husband may have raised suspicions. Hughes was followed by three officers everywhere she went for almost two weeks while at the army base. The army encouraged her to take an honorable discharge, and she did so on September 28. Her husband was detained for fifty-two days, mostly in solitary confinement. He was charged with

Many Detainees Cannot Go Home," *New York Times*, February 18, 2002.

[22] Soueidan said that he had arrived in the United States in 1999 and married an American citizen but never regularized his immigration status. He was ordered deported on October 31 but remained in custody as of February 6, 2002. He had no attorney. Human Rights Watch interview with Habib Soueidan, Passaic County Jail, Paterson, New Jersey, February 6, 2002.

[23] Human Rights Watch telephone interview with Ali Alikhan, Vail, Colorado, March 11, 2002.

[24] Hanna Rosin, "Snapshot of an Immigrant's Dream Fading," *Washington Post*, March 24, 2002.

[25] The U.S. military does not allow personnel to wear religious headdress when on duty and in uniform, as sanctioned by the Supreme Court in *Goldman v. Weinberger* 475 U.S. 503 (1986). Hughes was told she could not wear a hejab when she went to pick up her orders at the army's office in Massachusetts. At that moment she was not on duty; she was in fact not working for the military yet. Her starting day was a few days later, when she arrived at the army base in Kentucky, and on that day she was not wearing the hejab.

an immigration violation for ten days of "unlawful presence" in the United States while he changed from a visitor's visa to a visa sponsored by his wife. He had been released on bond.[26]

Some individuals may have been detained because their names resembled those of the alleged hijackers.[27] "The only thing a lot of these people are guilty of is having the Arabic version of Bob Jones for a name," said Bob Doguim, an FBI spokesman in Houston.[28]

The Department of Justice has detained men from the Middle East on immigration charges after they contacted the agency volunteering information about the alleged hijackers. For example, two days after the attacks, Mustafa Abu Jdai, a Jordanian of Palestinian descent, contacted the FBI and told investigators he had answered an advertisement for a job posted at a Dallas, Texas, mosque and met in the spring of 2001 with several Arabic-speaking men who offered to pay him to take flight lessons in Texas, Florida, or Oklahoma. The FBI showed him photographs and he recognized one of the men as Marwan Al-Shehhi, one of the alleged hijackers. Abu Jdai was subsequently charged with overstaying his visa and remained in detention three months later pending deportation.[29]

III. SECRECY

The requirement that arrest books be open to the public is to prevent any "secret arrests," a concept odious to a democratic society.

Morrow v. District of Columbia.[30]

Secrecy only breeds suspicions.

Detroit Free Press v. Ashcroft.[31]

James Madison, a framer of the U.S. Constitution and the fourth president of the United States, described openness as the bedrock of democracy: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.... A people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[32] The principle of openness became one of the bulwarks of American democracy, offering crucial protections against governmental abuse of power. It is particularly important where the liberty of indi-

[26] Human Rights Watch telephone interviews with Ali Al-Maqtari and Tiffanay Hughes, November 29, 2001, and with attorney Michael Boyle, October 24, 2001.

[27] Men who may have been detained because of their last names include Abdulaziz Alomary, Al-Badr Al-Hazmi, Khalid S.S. Al Draibi, and Saeed Al Kahtani, according to press reports. Some were charged with immigration violations while others were eventually released. See Cloud, "Hitting the Wall"; Scot Paltrow and Laurie P. Cohen, "Government won't disclose reasons for detaining people in terror probe," *Wall Street Journal*, September 27, 2001; Robyn Blumner, "Abusing detention powers," *St. Petersburg Times*, October 15, 2001; Sydney P. Freedberg, "Terror sweep a battle of rights and safety," *St. Petersburg Times*, January 13, 2002; and Pete Yost, "3 Tunisians ordered out of U.S.," Associated Press, November 15, 2001.

[28] McDonnell, "Nation's Frantic Dragnet Entangles Many Lives Investigation...."

[29] Human Rights Watch interview with attorney Karen Pennington, Dallas, Texas, January 15, 2002; and Amy Goldstein et al., "A Deliberate Strategy of Disruption: Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror," *Washington Post*, November 4, 2001, p. A01. Cloud, "Hitting the Wall." See also the case of Eyad Mustafa Alrababah in the section, Misuse of Material Witness Warrants, in this report.
Some attorneys have said that cooperation with the FBI once in custody has not helped their clients. They complain that their clients have been kept in detention even after they were promised to be released if they took and passed polygraph tests, which they did.

[30] *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969).

[31] *Detroit Free Press v. John Ashcroft*, 195 F. Supp. 2d 948 (April 3, 2002), p. 10.

[32] Letter to W. T. Barry, August 4, 1822.

viduals is at stake—in the criminal justice system as well as in immigration proceedings.

U.S. law has long recognized that secrecy is inconsistent with justice and democratic principles of government accountability. The courts have ruled repeatedly that criminal and administrative proceedings should be subject to public scrutiny to protect the defendant's or detainee's right to a fair trial as well as to uphold "the public's right to know what goes on when men's lives and liberty are at stake."[33] Constitutional mandates for public trials are mirrored in international human rights law, which requires "public" hearings when an individual's rights and obligations will be determined by a court or tribunal.[34]

Since September 11, however, the U.S. Department of Justice has chosen to arrest, detain, and adjudicate the fate of over 1,000 people under a veil of secrecy. It has refused to release the names of most persons arrested in connection with its September 11 investigations, although the names of arrestees are traditionally public, and it has shut the public out of immigration proceedings against those individuals, although such proceedings have long been open.[35] Department of Justice officials have insisted such secrecy is vital to their campaign against terrorism, but their arguments for such unprecedented and widespread secrecy are not persuasive, as we discuss below. There may well be compelling reasons in particular cases why the name of an individual detainee or the proceedings against him should be kept closed to the public. But the Department of Justice's unilateral decision to keep the public in the dark about arrests and administrative proceedings against all non-citizens swept up in the September 11 investigation cannot be squared with principles of justice and democratic accountability.

Secrecy comes with a high price. It has bred questions about the legality of the detentions and the fairness of the treatment of non-citizens. By shielding its acts from public scrutiny, the U.S. government has cast a cloud of suspicion over the appropriateness of its actions and has exacerbated fears among the Middle Eastern and South Asian communities in the United States from which most of the post-September 11 detainees have come.[36]

[33] *Pechter v. Lyons* 441 F. Supp. 115 (S.D.N.Y. 1977), p. 118.

[34] International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), entered into force Mar. 23, 1976, article 14(1). Proceedings may be closed to the public and media for all or part of a trial for reasons of "national security" or for other specified reasons. The United States ratified the ICCPR in 1992.

[35] The U.S. government has refused to disclose the names of September 11 detainees charged with immigration violations or held as material witnesses, while the regulations governing the U.S. criminal justice system have forced it to reveal the identities of 108 September 11 detainees charged with federal crimes unrelated to the attacks but arrested in connection with the investigation.
For brevity's sake, throughout this report we will use the term "post-September 11 detainees" to refer to persons arrested and held in detention in connection with the U.S. government's investigation into the September 11 terrorist attacks.

[36] Human Rights Watch tried for more than ten weeks to arrange a meeting with INS officials to discuss allegations of mistreatment and the findings contained in this report. On February 12, 2002, we wrote a letter requesting a meeting with INS Commissioner James Ziglar or his designate, which was followed by numerous phone calls. On April 26, 2002, the INS informed us that the new Executive Assistant Commissioner for Field Operations, Johnny Williams, was too busy to meet with us anytime in the foreseeable future. When Human Rights Watch asked if there would be anyone else with whom we could meet, we were told that Williams would be the only suitable person. We requested and received a letter recounting the INS's formal refusal to meet with us, which read, in part:

> At the present time, neither I nor Anthony Tangeman, the Deputy Executive Associate Commissioner for Detention and Removal Operations, are able to meet with you concerning the matters which you raised in your letter.... We would appreciate receiving copies of your report.

Letter from Executive Associate Commissioner Johnny Williams to Human Rights Watch, April 29, 2002.
On April 29, 2002, Human Rights Watch sent a letter to Dale Watson, executive assistant director for counterterrorism and counterintelligence, Federal Bureau

Refusal to Release Information about Detainees

Secret detentions are antithetical to U.S. tradition and fundamental principles of international human rights.[37] Yet the Department of Justice has refused to provide a complete accounting of the number of those detained during its investigation of the September 11 attacks, their names, and their places of detention.

On November 5, 2001, the Department of Justice of Justice stated that 1,182 individuals had been arrested in connection with the September 11 investigation and that most of them remained in custody at that time.[38] The government has never provided a clear explanation for the disparity between the figures it released in November and June, nor has it indicated the number of arrests since November.[39]

The total number of persons detained in connection with the September 11 investigation may never be known. The withholding of the identities of those charged with immigration violations in the context of the September 11 investigation—called "special interest" cases in government documents—makes it impossible to check the accuracy of the numbers released by the Department of Justice, but there are indications that more people have been arrested than the government has recognized. In addition, the Department of Justice has refused to say how many individuals have been held as material witnesses and has stated that it does not maintain records of those initially detained as part of the September 11 investigation and then held on state or local criminal charges.[40]

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of Investigation, requesting a meeting with him to discuss the findings of this report, but we never received a response.

[37] The Declaration on the Protection of All Persons from Enforced Disappearances, a non-binding resolution adopted by the U.N. General Assembly in 1992, provides that accurate information on the detention of persons and their places of detention, including transfers "shall be made promptly available to their family members, their counsel *or to ony other persons having a legitimate interest in the information* unless a wish to the contrary has been manifested by the persons concerned." [Emphasis added.] G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (December 18, 1992), Art. 10(2). Furthermore, an official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention and steps shall be taken to maintain similar centralized registers, information in which shall be made available to the persons noted above. Ibid., article 10(3).

[38] Dan Eggen and Susan Schmidt, "Count of Released Detainees Is Hard to Pin Down," *Washington Post*, November 6, 2001; "Two Branches at Odds on Detainees' Status," *Philadelphia Inquirer*, November 6, 2001; and Amy Goldstein and Dan Eggen, "U.S. to Stop Issuing Detention Tallies," *Washington Post*, November 9, 2001.

[39] In testimony before the Senate Judiciary Committee, Michael Chertoff, assistant attorney general of the Criminal Division, was asked about the disparity between the Department of Justice's assertion that more than 1,100 people had been detained in the terrorism investigation until the beginning of November and its statement at the end of January that less than 600 had been charged with federal crimes or immigration violations. Chertoff said:

> I can't give you the number relating to material witnesses on grand jury because I am forbidden by law. I don't know the number of people being held in state and local custody because, frankly, we don't track that. And so without those two numbers, I cannot do the mathematics necessary to subtract from the 1,100.

Testimony of Michael Chertoff, assistant attorney general of the Criminal Division, before the Senate Judiciary Committee at its hearing on "DOJ Oversight: Preserving Freedoms While Defending Against Terrorism," November 28, 2001.

Regarding this issue, James Reynolds, chief of the Terrorism and Violent Crime Section in the Criminal Division of the Department of Justice, declared:

> While DOJ attempted at one time to keep and publicly release a count of all persons contacted by law enforcement in connection with the attacks, even if they were just briefly stopped, it became clear that this was impractical. Eventually, DOJ concluded that it was better to focus on the individuals who were formally taken into custody because they were believed to have violated federal criminal law or the immigration laws, or were believed to have information material to grand jury investigations emanating from the events of September 11.

Supplemental Declaration of James S. Reynolds submitted February 5, 2002, in *Center for National Security Studies v. U.S. Department of Justice*, 2002 U.S. District Court, Lexis 14168 (D.D.C. August 2, 2002), p. 1.

[40] Ibid.

Initially, the Department of Justice refused to provide any details regarding the identity of those detained in connection with the September 11 investigation. After considerable public pressure, requests by members of Congress, and a Freedom of Information Act (FOIA) lawsuit filed by twenty-two Arab-American, Muslim, and rights organizations, including Human Rights Watch, on January 11, 2002, the U.S. government released a limited amount of information about the post-September 11 detainees.[41] The Department of Justice released two lists of selected information about 835 individuals detained in connection with the September 11 investigation. The department amended those lists three weeks later but has not publicly released any additional or updated lists since then.

One of the January 11 lists contained the names of individuals who had been charged with federal crimes.[42] Of the 108 people identified as having been criminally indicted, only one—Zacarias Moussaoui—was charged with crimes related to the September 11 attacks. (As of this writing, Moussaoui was being tried in federal district court in Virginia; prosecutors believe he would have been the twentieth hijacker had he not been arrested before the attacks.) Most of the others on the list were charged with relatively minor crimes, such as lying to government investigators, fraudulent acquisition of a driver's license, and theft of a truckload of cereal. In addition, the Department of Justice subsequently said there were nine sealed cases involving people charged with federal crimes, the nature of which it has not revealed.[43]

The list of those charged with crimes may be incomplete. Human Rights Watch has learned of the cases of six individuals who were arrested after September 11, interrogated by the FBI in connection with the terrorist attacks, and later charged with crimes, whose names do not appear on the January 11 list.[44] The Department of

[41] Requests made in an October 31, 2001 letter sent by seven lawmakers, including the chair of the Senate Judiciary Committee, to the Department of Justice seeking information about the detainees were only partially met and left the lawmakers unsatisfied. Senator Russell Feingold, who had initiated the requests, stated, "At a minimum, the department can and should produce a list of who is being held in connection with this investigation and why." Josh Gerstein, "DOJ won't identify Sept. 11 detainees," *ABCNews.com*, November 22, 2001.
The Freedom of Information Act (FOIA), which was passed by Congress in 1966 and amended in 1974, creates procedures whereby any member of the public may obtain certain records of the agencies of the U.S. federal government. The FOIA's primary objective is disclosure. *Department of the Interior v. Klamath Water Users Protective Association,* 532 U.S. 1, 8 (2001).

[42] The list of persons charged with federal crimes released on January 11, 2002 included ninety-two names. On February 5, the Department of Justice amended the list with "the names and other information about sixteen individuals who were inadvertently omitted from the original" list. Robert McCallum, "Defendant's Notice of Filing of Amended and Supplemental Exhibits," submitted February 5, 2002, in *Center for National Security Studies v. U.S. Department of Justice*, p. 1. Sixty-two of the 108 appeared to remain in detention as of January 11, 2002.

[43] Supplemental Declaration of Reynolds submitted in *Center for National Security Studies v. U.S. Department of Justice,* p. 2.

[44] The six cases are below:
Qaiser Rafiq was charged with larceny and repeatedly interrogated about the September 11 attacks. For more details on this case see the section, Abusive Interrogations, in this report. Human Rights Watch telephone interview with Qaiser Rafiq, Corrigan-Radgowski Correctional Center, Uncasville, Connecticut, March 14, 15, and 18, 2002.
Wael Abdel Rahman Kishk was convicted of lying to federal officials about whether he planned to take flying lessons in this country, according to a newspaper article. The report states that for a time officials feared that he might have been part of a second wave of terrorism. William Glaberson, "Judge Rejects Long Prison Term for Arab Caught in Terror Sweep," *New York Times*, February 16, 2002.
Mohammed Asrar was arrested after a neighbor called the police to report he was an "Arab" who possessed guns and might be a terrorist. He was interrogated by the FBI for hours and was eventually charged with possession of ammunition while a "prohibited" person. Asrar was a "prohibited" person because he had overstayed his visa; otherwise, his possession of ammunition would have been legal. Human Rights Watch telephone interview with

Justice stated that the total number of individuals charged with federal criminal violations between September 11, 2001 and June 28, 2002 was 129.[45]

The second Department of Justice list contained limited information about 718 noncitizens arrested in connection with the investigation of the September 11 attacks and charged with immigration violations. The list did not provide their names or the locations of imprisonment, but simply indicated their nationalities, arrest dates, and the nature of the immigration charges, e.g. overstaying their visa. (The first page of the list is attached in Appendix A as a sample.)

The lists left many questions unanswered about the total number of individuals detained as part of the investigation of the September 11 attacks. As noted above, the lists refer to only 835 cases of the 1,182 detainees previously acknowledged by the Department of Justice. The Department of Justice has never clarified whether the 347 detainees not included in the January 11, 2002 lists continued in custody without charges ever being brought against them, were held on material witness warrants, or faced other, undisclosed charges.[46]

There are other problems with the January 11 lists. For example, according to statements by Department of Justice officials to the press, 460 of the 718 INS detainees on the list remained in custody on January 11.[47] Yet, according to press reports, on January 18, there were about 600 "special interest" cases in custody in three facilities alone: 346 individuals were held at the Passaic County Jail in New Jersey, fifty-two were held at the Krome Service Processing Center in Miami, Florida, and about 200 at the Hudson County Correctional Center in New Jersey.[48] Human Rights Watch also talked to "special interest" detainees who were held in facilities in other states at the time. The Department of Justice stated a total of 752 persons had been detained on immigration charges at some point between September 11, 2001 and June 24, 2002.[49]

The release of the January lists was the result of legal actions carried out by rights groups against the Department of Justice. As already indicated, a coalition of nongovernmental groups, including Human Rights Watch, filed a request for the disclosure of basic information about the post-September 11 detainees under

Robert Carlin, Mohammed Asrar's attorney, Dallas, Texas, March 15, 2002.

Javid Naghani was sentenced to two years and nine months in federal prison for interfering with a flight crew. Naghani allegedly threatened to "kill all Americans" after he was caught smoking on a plane, according to press reports. His comments caused the plane to be escorted by military jets back to its departure city. Naghani's attorney said that his client was intoxicated when on board and that the man, who has a thick accent, did not say "kill all Americans" but "Cleaning of America," the company he works for. David Rosenzweig, "Immigrant Gets Prison for Threats on Plane," *Los Angeles Times*, March 19, 2002; "Iranian Gests Prison for Flight Outburst," Copley News Service, March 19, 2002; and "Iranian Man Sentenced to 33 Months in Prison in Air Canada Incident," Associated Press, March 18, 2002.

According to a newspaper report, Viqar Ali and Waqar Ali Khan were indicted for possessing fraudulent passports. They were arrested on September 13 when authorities went to their home as they investigated their roommate, Iftikhar Ahmed, who was charged with fraud. "Roommate of immigration fraud suspect also charged," *newsobserver.com*, February 21, 2002. Ahmed's name is on the government list but Ali and Khan's names are not.

[45] Letter to Senator Carl Levin, chairman of the Senate's Permanent Subcommittee on Investigations, from Daniel J. Bryant, assistant attorney general, July 3, 2002.

[46] Both the 835 and the 1,182 numbers are of people arrested at some point in connection with the September 11 investigation, not of individuals held in custody at the time the Department of Justice released the numbers.

[47] Dan Eggen, "Delays Cited In Charging Detainees," *Washington Post*, January 15, 2002.

[48] See Jim Edwards, "'Special Case' INS Detainees Decline, But Not as Fast as Ashcroft Reckons," *New Jersey Law Journal*, January 18, 2002; Susannah Bryan, "Protesters Seek Muslims' Release, More than 50 Detainees Held at Krome Center," *South Florida Sun-Sentinel*, December 26, 2001; and Brian Donohue, "US Stirs Criticism on Number of Detainees," *Star-Ledger*, December 15, 2001.

[49] Letter to Levin from Bryant.

FOIA on October 29, 2001. After the Department of Justice turned it down,[50] the groups filed a lawsuit on December 5, 2001.

On August 2, 2002, a federal district court ordered the release of the identities of all those detained in connection with the September 11 investigation. The judge called secret arrests "a concept odious to a democratic society ...and profoundly antithetical to the bedrock values that characterize a free and open one such as ours."[51] The court fully acknowledged the importance of protecting the nation's physical security in a time of crisis, but emphasized that "the first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."[52]

The court rejected the government's rationale for keeping the names of the detainees secret. It found that the government failed to prove that disclosure of the names would hinder cooperation by the detainees in the investigation, and that it failed to prove that disclosure would provide a roadmap of the investigation to terrorist groups, or enable them to create false evidence. Indeed, the court noted that none of the INS detainees had been linked to terrorism, and therefore concluded that the government's recitation of harms regarding disclosure was "pure speculation."[53] In ordering the release of the names, the judge concluded: "Unquestionably, the public's interest in learning the identities of those arrested and detained is essential to verifying whether the government is operating within the bounds of the law."[54]

The court ordered the Department of Justice to disclose the names of the detainees, including material witnesses, and their attorneys within fifteen days of the ruling. The judge allowed the withholding of the identities of detainees who requested confidentiality in writing, and asked that the government submit any judicial sealing orders that bar the disclosure of detainees' names in specific cases for *in camera* (in judge's chambers) review or provide an additional affidavit describing the legal basis of any sealing orders. She said that the Department of Justice does not have to disclose the dates and locations of arrest, detention, and release.

In response, the Department of Justice stated that the "ruling impedes one of the most important federal law enforcement investigations in history, harms our efforts to bring to justice those responsible for the heinous attacks of September 11 and increases the risk of future terrorist threats to our nation."[55] The government is expected to appeal the decision and seek a stay of the order of disclosure.

The New Jersey chapter of the American Civil Liberties Union (ACLU) also filed a lawsuit against local authorities on January 22, 2002, seeking information on those held in New Jersey jails on immigration violations.[56] On

[50] The Department of Justice's denial of the FOIA request was hardly surprising. A memo issued on October 12, 2001 by Attorney General Ashcroft was an indication of the administration's drive to restrict access to information. The memo stated:

> Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.... When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions.

John Ashcroft, "Memorandum for Heads of All Federal Departments and Agencies," October 12, 2001.

[51] *Center for National Security Studies v. U.S. Department of Justice*, p. 2.

[52] Ibid, p. 4.

[53] Ibid, p. 19.

[54] Ibid, p. 26.

[55] Statement by Assistant Attorney General Robert McCallum Jr. cited in Steve Fainaru and Dan Eggen, "Judge Rules U.S. Must Release Detainees' Names," *Washington Post*, August 3, 2002; and in Gina Holland, "Officials Oppose Naming Detainees," Associated Press, August 3, 2002.

[56] In 2001, 54 percent of all INS detainees were held in local jails because of inadequate space in federal facilities. INS Detention Standards Presentation to various NGOs by the INS's Detention and Removal Office, June 7, 2001. For information on the repercussions of INS's policy of holding individuals in its

March 26, 2002, a New Jersey Superior Court judge ruled that the government's refusal to release the names and other basic information on immigration detainees violated a state law that requires jail officials to publish a list of all inmates in their facilities and ordered that the names be made public.[57]

In response to the New Jersey decision, and in an effort to override state or local laws requiring the release of information about detainees, the Department of Justice issued a new interim rule that prohibits state and local employees from disclosing names and other information relating to immigration detainees.[58] The preamble to the rule expressly states that its aim is to supersede state or local law regarding the release of such information.[59] A New Jersey appeals court concluded that the rule, as federal law, must prevail over state law and, therefore, it overturned the March 26 order by the New Jersey Superior Court to release the names.[60] The ACLU has appealed this decision.

The new rule will not only frustrate efforts to determine how many post-September 11 detainees there are, and where they are held, but it will adversely affect the situation of all INS detainees, even those who have not been detained in connection with the September 11 investigation. INS detainees often have difficulty getting access to telephones to inform family, friends, and lawyers where they are held; the various INS offices often do not know who is detained where; and detainees are frequently moved without notice by the INS.[61] Contacting detention centers directly is thus often the best way to determine where a person is in fact held. However, the new rule prohibits jail staff from telling relatives, friends, and attorneys whether the detainee they are looking for is incarcerated at their facility. For instance, a lawyer in Florida was denied access to his client pursuant to the new rule. Salman Salman's attorney called the Orange County jail in early July 2002 to find out whether his client, a "special interest" detainee, was being held there. Jail officials reportedly told him that he was not incarcerated at the jail, which was not true.[62] In addition, the new rule may prevent nongovernmental organizations that provide pastoral care, legal advice, visitation, or other services to INS detainees from revealing any information about the detainees with whom they come in contact. This would hinder their ability to denounce human rights abuses, de-

custody in local jails, see Human Rights Watch, "Locked Away: Immigration detainees in jails in the United States," *A Human Rights Watch Report*, vol. 10, no. 1(G), September 1998.

[57] *American Civil Liberties Union v. County of Hudson*, Superior Court of New Jersey, Docket No. A-4100-01T7 (March 26, 2002).

[58] 8 CFR Parts 236 and 241, INS No. 2203-02. The rule states:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee.

8 CFR 236.6.

[59] According to the preamble to the rule, "It would make little sense for the release of potentially sensitive information concerning Service detainees to be subject to the vagaries of the laws of the various States within which those detainees are housed and maintained." "Supplementary Information," 8 CFR Parts 236 and 241, INS No. 2203-02, p. 6.

[60] *American Civil Liberties Union v. County of Hudson*, 2002 New Jersey Superior Court, Lexis 272 (June 12, 2002). In its ruling, the court drew from the federal pre-emption provision contained in article 6 of the U.S. Constitution, which declares that "the laws of the United States ...shall be the supreme law of the land...anything in the constitution or laws of any State to the contrary notwithstanding." The appeals court found that the INS commissioner had the authority to issue the rule, and since the rule is federal law, it should prevail over state law.

[61] See Human Rights Watch, "Locked Away...."

[62] Henry Pierson Curtis, "Jail Cites INS Secrecy Rule in Denying Attorney Access," *Orlando Sentinel*, July 2, 2002. The attorney was able to see his client only a day after his phone call.

mand adequate detention conditions, and advocate on behalf of individual detainees.[63]

Denial of Access to Detention Facilities

Access to detention facilities by independent monitoring groups such as Human Rights Watch helps ensure that detainees are treated in a fair and humane manner. Such scrutiny is particularly important when dealing with foreigners who for reasons of language, lack of political clout, difficulty retaining counsel—immigration detainees do not have the right to free counsel—, and unfamiliarity with the U.S. justice system may be more vulnerable to violations of these rights.

Human Rights Watch and other rights groups have visited facilities holding INS detainees many times prior to September 11.[64] However, officials have denied access to most of the facilities that hold post-September 11 detainees, thus impeding independent monitoring of their treatment. The fact that these detainees were initially arrested on immigration charges in connection with the investigation of the September 11 attacks does not justify shutting the door to outside observers. On the contrary, independent monitoring is paramount because the connection of these particular detainees to the terrorist investigation has put some of them at risk of mistreatment by correctional officers and by other individuals in custody; this is especially true for those who share living quarters with accused or convicted criminals. In addition, the U.S. government has kept some of these detainees under particularly harsh detention conditions, as described in the chapter, Conditions of Detention, below.

Non-citizen detainees held in connection with the September 11 investigation have been held in federal as well as local facilities. Human Rights Watch was denied permission to visit two federal facilities reportedly holding many post-September 11 detainees, the Metropolitan Correctional Center (MCC) in Manhattan and the Metropolitan Detention Center (MDC) in Brooklyn, New York. We were given a limited tour of the Passaic County Jail in Paterson, New Jersey, and a more complete tour of the Hudson County Correctional Center in Kearny, New Jersey. Human Rights Watch's requests to visit the Denton County Jail in Texas, the Middlesex County Jail in New Jersey, and the Krome Service Processing Center in Florida have been pending for months.

The wardens of MCC and MDC rejected Human Rights Watch's requests for access with identical letters dated November 30, and December 5, 2001, respectively. Both letters stated that the events of September 11 required them to minimize "activities not critical to the day-to-day operations of the institution."[65] Two months later, the warden of the MDC denied a second Human Rights Watch request to tour the facility. Human Rights Watch made the second request after receiving allegations of poor conditions and ill-treatment at the facility that were impossible to confirm or deny without access to MDC's premises and its staff.[66] The warden also turned down similar requests by Amnesty

[63] The prohibition on disclosing information about the detainees may apply to these organizations if their relationship to the facility is deemed to be "official or contractual." See language of the rule in note 59 above.

[64] Human Rights Watch has monitored the treatment of INS detainees for almost fifteen years, visiting scores of detention facilities and jails. Some of our investigations into custodial conditions have resulted in publications, such as Human Rights Watch, "Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration and Naturalization Service," *A Human Rights Watch Report*, vol. 10, no. 4(G), December 1998; Human Rights Watch, "Locked Away....."; Human Rights Watch, *Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service* (New York: Human Rights Watch, 1997); and Helsinki Watch, *Detained, Denied, Deported: Asylum Seekers in the United States* (New York: Human Rights Watch, June 1989).

[65] Dennis W. Hasty, warden, Metropolitan Detention Center, letters to Human Rights Watch, December 5, 2001; and Gregory L. Parks, warden, Metropolitan Correctional Center, letter to Human Rights Watch, November 30, 2001.

[66] See, for instance, Chisun Lee, "INS Detainee Hits, US Strikes Back," *Village Voice*, February 5, 2002.

International and by reporters who wanted to visit specific detainees at the facility.

The INS district director in Newark, New Jersey, denied Human Rights Watch access to the Hudson County Correctional Center in Kearny on November 30, 2001 and to the Passaic County Jail in Paterson on December 12, 2001, saying that interviewing detainees would not be feasible given the "extraordinary" circumstances. The INS district director subsequently changed her position and allowed Human Rights Watch and other groups to tour the two facilities on February 6, 2002.

INS and jail officials allowed a complete tour of the Hudson County Correctional Center. The tour of the jail in Passaic County was rushed and incomplete.[67] The INS district director in charge of the visit refused a Human Rights Watch request to view an occupied housing unit, citing privacy and security concerns, although officials had permitted the group to view an occupied housing unit at the Hudson County Correctional Center.[68] Detainees held at the Passaic County Jail at the time told Human Rights Watch that housing cells were cramped and that they were confined with accused or convicted criminals.

Immigration Proceedings Conducted in Secrecy

For almost fifty years INS regulations have mandated that deportation proceedings be presumptively open.[69] Immigration judges, however, can close individual court proceedings if necessary to protect sensitive information or vulnerable individuals, for example, in cases of asylum seekers and battered spouses.[70] The traditionally open nature of deportation proceedings is consistent with U.S. constitutional law. The U.S. Supreme Court has ruled that criminal and quasi-judicial administrative hearings should be open and public if such hearings have traditionally been open to the public and if a public hearing plays a significant role in the judicial process.[71]

The Department of Justice broke with this long-established practice of openness when it closed immigration proceedings for post-September 11 INS detainees. On September 21, 2001, pursuant to direction from the attorney general, Chief Immigration Judge Michael Creppy sent an internal memorandum to all immigration judges and court administrators detailing special, additional security procedures for certain cases.[72] Under these special procedures, immigration judges are required to close hearings to the public, including family, friends, and the media.[73] In addition, Creppy ordered that the special cases are not to be posted on court calendars outside the courtroom and are not to be included in information provided on the immigration courts' telephone information service. Courtroom personnel may not discuss the case with anyone and may not confirm or deny to anyone whether a case is on the docket or scheduled for a hearing.[74] The Creppy memorandum also prohibits the release of the "Record of Proceeding" (the official file containing documents relating to a non-citizen's case) to anyone except for the detainee's attorney "assuming the file does not contain classified information."[75] Neither detainees nor their attorneys, however, were precluded from publicly revealing information about the cases, including any evidence presented by the government during the hearings.

[67] The visiting groups were only allowed to view the processing area, the visiting areas, and an empty housing cell.
[68] Statements by Andrea Quarantillo, Newark district director, INS, to Human Rights Watch staff during a tour of Passaic County Jail, February 6, 2002.
[69] 8 CFR 3.27. See also, *Detroit Free Press v. Ashcroft*, p. 8.
[70] 8 CFR 3.27(b) and (c).
[71] *Globe Newspaper Co. v. Superior Court* (1982).
[72] Michael Creppy, "Cases Requiring Special Procedure," *Internal Memorandum-Executive Office for Immigration Review* (Creppy memorandum), September 21, 2001. Immigration judges are not part of the judicial branch under article 3 of the U.S. Constitution but are employees of the Department of Justice.
[73] Ibid, paras. 10 and 11.
[74] Ibid.
[75] Ibid.

The attorney general made the decision to order the blanket closure of immigration hearings without any public notice or debate. Since the Creppy directive was released, the Department of Justice has not publicly revealed its criteria to determine when a case should be closed, and there is no procedure for the review of the decision to close a hearing. For more than nine months, the Department of Justice refused to say how many cases had been conducted behind closed doors. In July, in response to a Congressional request for information, it stated that as of May 29, 2002, 611 individuals had been subject to secret hearings, and 419 of them had more than one secret hearing.[76] Some detainees have told Human Rights Watch that their hearings were initially closed but were opened later once they received "clearance" from the FBI, i.e. once the FBI determined they had no links to or knowledge of terror groups or the September 11 hijackers.[77]

Closing immigration proceedings implicates two distinct but interconnected constitutionally protected rights: the due process right of detainees to public trials when their liberty interests are being adjudicated, and the First Amendment right of access to quasi-judicial administrative proceedings by the public—including the press.[78] Several lawsuits have been filed challenging the closure of immigration hearings as a violation of those rights. In two cases decided as of this writing, federal district courts ruled the blanket closure of immigration proceedings unconstitutional. International human rights law also provides for open hearings in administrative cases.[79]

Rabih Haddad, a citizen of Lebanon, was arrested on December 14, 2001 and charged with overstaying his visa. His first hearing, on whether he should be released on bond pending final adjudication of the charges against him, was closed to the public pursuant to the Creppy memorandum.[80] Haddad sued the U.S. govern-

[76] Letter to Levin from Bryant.

[77] For instance, a Palestinian civil engineer held in INS custody said that his first hearing, which took place on November 28, was initially closed. The immigration judge asked an FBI agent who was attending the proceeding whether the detainee had received the agency's "clearance." When the agent responded yes, the immigration judge opened the hearing to the public. Human Rights Watch interview with a Palestinian civil engineer, Paterson, New Jersey, December 20, 2001. The detainee's name has been withheld upon request. Similarly, attorney Vicky Dobrin said that the initial immigration proceedings for two of her clients, Elyes Glaissia and his roommate, whose name has not been disclosed, were closed. Subsequent hearings have been held publicly. Human Rights Watch telephone interviews with attorney Vicky Dobrin, Seattle, Washington, November 20, 2001 and January 31, 2002.

[78] The due process clause of the Fifth Amendment to the U.S. Constitution applies to all persons, whether they are U.S. citizens or not. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 121 Ct. 2491 (2001).

[79] Article 14 of the ICCPR states that "[i]n the determination of …his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The Human Rights Committee has broadly interpreted the term "suit at law." See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p. 250. In *Y.L. v. Canada*, the committee stated that: "In the view of the Committee, the concept of a 'suit at law' …is based on the nature of the right in question rather than on the status of one of the parties (governmental; parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon." No. 112/1981. See also, *Casanovas v. France* (441/1990). Matters of rights in public law, such as administrative hearings, will come within article 14 particularly when such rights are subject to judicial review. For instance, in *V.M.R.B. v. Canada* (235/1987), the committee did not exclude the possibility that deportation proceedings may be "suits at law." See S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights* (Oxford: Oxford Univ. Press, 2000), p. 282. The only restrictions would be the narrow ones provided for in the ICCPR, namely that the media and public may be excluded from a hearing for reasons of "morals, public order (*ordre public*) or national security in a democratic society." Article 14.

[80] When a non-citizen is charged with a violation of his visa and proceedings are instituted to determine whether the detainee is to be removed from the U.S., a bond hearing is held to determine whether a de-

ment arguing that holding his deportation proceedings in secret violated his constitutionally protected due process rights. The ACLU, four Michigan newspapers, and U.S. Representative John Conyers, also filed lawsuits, claiming exclusion from Haddad's hearings violated their right of access under the First Amendment to the U.S. Constitution.[81] On April 3, 2002, a federal judge in Michigan concluded the blanket closure of removal hearings in "special interest" cases violated constitutional mandates.[82] The judge quoted from an earlier decision that pointed out:

> [I]n administrative proceedings of a quasi-judicial character the liberty and property of the citizens shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administration regulation and to the maintenance of public confidence in the value and soundness of this important governmental process …when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.[83]

After reviewing the numerous cases affirming the right of access, the judge concluded:

> It is important for the public, particularly individuals who feel that they are being targeted by the Government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals' rights. Openness is necessary for the public to maintain confidence in the value and soundness of the Government's actions, as secrecy only breeds suspicions.[84]

The judge noted that the right of access is not unlimited. But the presumption of openness can only be overcome when closure directly serves a compelling interest and is narrowly tailored to achieve that interest. In light of the government's failure to articulate any specific reasons pertinent to Haddad's case for why his hearings must be closed, the judge ordered Haddad's hearings to be open and records of previous hearings to be released. The government appealed the court's ruling, but an appeals court forced it to release the transcripts and denied it an emergency stay to keep hearings closed pending appeal.[85]

Another federal district court judge in New Jersey ruled against the Department of Justice in a lawsuit challenging the closure of "special interest" case hearings brought by the New Jersey chapter of the ACLU and the New York-based Center for Constitutional Rights on behalf of three New Jersey publications. In declaring the blanket secrecy pursuant to the Creppy memorandum unlawful, the court in *North Jersey Media Group v. Ashcroft* noted the important public interests served by open judicial proceedings:

> Promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices

tainee may be released pending ultimate adjudication of the proceedings.

[81] See Cecil Angel, "Lawsuit by paper asks for access," *Detroit Free Press*, January 29, 2002; "ACLU Files First Post-Sept. 11 Challenge To Closed Immigration Hearings on Behalf of MI Congressman and Journalists," *ACLU Press Release*, January 29, 2002; and "Head of Closed Muslim Charity Files Suit," *Chicago Tribune*, February 15, 2002.

[82] *Detroit Free Press v. Ashcroft*, p. 3.

[83] Ibid, p. 9, quoting from *Fitzgerald v. Hampton*, 467 F. 2d 755 (D.C. Cir., 1972).

[84] Ibid, p. 10.

[85] Steve Fainaru, "Judge Orders Released Of Records of Closed Deportation Hearings," *Washington Post*, April 9, 2002.

> by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.[86]

In addition to noting the history of openness in deportation or removal proceedings, the court also found:

> [T]he ultimate individual stake in [deportation] proceedings is the same as or greater than in criminal or civil actions. Moreover, the proceedings have undeniable similarities to judicial proceedings.... The parallels in both the nature of the right at stake and the character of the proceedings lead to the conclusion that the same functional goals served by openness in the civil and criminal judicial contexts would be equally served in the context of deportation hearings.[87]

As in the Haddad case, the court gave short shrift to the government's position, finding that it had failed to show that the blanket closure policy was narrowly tailored to serve a compelling interest. The court pointed out that the government's asserted interests in preventing disclosure of, e.g. the name of the detainee and the place of his arrest, were vitiated by the fact that nothing prevented the detainee himself from releasing that information publicly. The court also suggested that *in camera* (in a judge's chambers) disclosure of sensitive or classified material in individual cases might serve the government's interests more narrowly than the blanket closure policy of the Creppy memorandum. The judge ordered that deportation proceedings be open to the public, unless the government is able to show a need for a closed hearing on a case-by-case basis. The Department of Justice appealed the decision and the Supreme Court stayed the judge's order pending an appellate ruling.[88]

By depriving immigration judges of the authority to determine the need to close hearings on a case-by-case basis, the Creppy directive circumvents the authority of immigration judges. Not surprisingly, the judges themselves have complained that this policy reinforces "the public perception that due process is not available before Immigration Courts."[89]

On May 28, 2002, perhaps in response to having lost two federal court cases that challenged the blanket secrecy policy, the Department of Justice issued a new interim rule authorizing immigration judges to issue protective orders and seal records relating to law enforcement or national security information in individual cases. The new rule also authorizes judges to issue orders that prohibit detainees or their attorneys from publicly divulging the protected information.[90] The new rule is "designed to work in tandem" with the measures announced in the Creppy directive and "in a limited sense, codify a portion of that authority by limiting what the respondent and his or her representatives may disclose about sensitive law enforcement and national security information outside the context of those hearings."[91]

On its face, granting immigration judges the authority to issue protective orders sealing sensitive information is not problematic; it is a power possessed by federal courts and it enables immi-

[86] *North Jersey Media Group v. Ashcroft*, 205F. Supp 2d 288 (D.N.J. May 28, 2002), quoting from *United States v. Smith*, 787 F2d. 111, 114 (3rd Cir. 1986).
[87] Ibid, p. 129.
[88] The case is now being reviewed by the Court of Appeals of the 3rd Circuit in Philadelphia.

[89] Dana Marks Keener and Denise Noonan Slavin, "An Independent Immigration Court: An Idea Whose Time Has Come," *National Association of Immigration Judges Position Paper*, January 2002. The National Association of Immigration Judges represents the country's 221 immigration judges.
Immigration Courts are an agency within the Department of Justice—called the Executive Office for Immigration Review (EOIR). They are administrative tribunals entrusted with the task of determining whether an individual is in the United States illegally, and if so, whether there is any status or benefit to which he is entitled under immigration laws. Immigration Courts are under the authority of the attorney general.
[90] 8 CFR Part 3, EOIR 133; AG Order No. 2585-2002, published at 67 Fed. Register 36799, May 28, 2002.
[91] Ibid.

gration courts to protect legitimate law enforcement or national security concerns while still protecting the due process interests of immigration detainees. What is troubling, however, is language in the new rule ordering the immigration judges to "give appropriate deference to the expertise of senior officials in law enforcement and national security agencies in any averments in any submitted affidavit in determining whether the disclosure of information will harm the national security or law enforcement interests of the United States."[92] The preamble to the rule points out that "innocuous" information can be sensitive in a broader intelligence context.[93] Given the sweeping, general statements of national security and law enforcement interests made to justify closure of immigration hearings and refusal to release information about "special interest" detainees and the requirement of "deference," it remains to be seen whether immigration judges will require government officials to provide particularized justification for protective orders in individual cases. Vague assertions of connections with or knowledge of terrorist or other criminal activity should not be enough to conduct closed hearings and issue gag orders.

Inadequate Justification for Secrecy

The U.S. government has relied on two arguments to justify keeping from the public the identity of INS detainees and closing the proceedings against them. It has asserted that the disclosure of such information would 1) hinder the September 11 investigation and 2) violate immigration detainees' privacy.

Protection of the Terrorism Investigation

The Department of Justice has argued that disclosing the names and other information about post-September 11 detainees held on immigration charges and opening their immigration hearings to the public could compromise its terrorism-related investigations.

According to the Department of Justice, revealing the names of detainees and the place of their arrest might:

1) Lead to public identification of individuals associated with them, other investigative sources, and potential witnesses, whom terrorist organizations might then intimidate or threaten to discourage them from supplying valuable information.
2) Deter detainees from cooperating with the Department of Justice once they are released;
3) Reveal the direction and progress of the investigations by identifying where the Department of Justice is focusing its efforts.[94]

The Department of Justice has also argued that if the identities of INS detainees are made public,

> … terrorists who learn that their associates or even people who know their associates have been detained [may] alter their plans in a way that presents an even greater threat to the United States. Official verification that a member has been detained and therefore can no longer carry out the plans of his terrorist organization may enable the organization to find a substitute who can achieve its goals more effectively, thereby

[92] Ibid, section 3.46(d).

[93] The rule prescribes sanctions for violations of the protective order. It states that if a detainee or an attorney discloses information from a closed hearing, the lawyer may be barred from appearing in immigration court hearings and the detainee can be denied discretionary relief. According to the language of the rule, a detainee could be punished if the lawyer reveals information without the client's permission and vice versa. In addition, the rule allows only one side—the government—to ask that proceedings be sealed.
Federal authorities first requested that hearings be sealed pursuant to this rule in the case of Zakaria Soubra on June 10, 2002. A Lebanese national held on an immigration violation, Soubra was named in the "Phoenix Memo," which warned before September 11 of the danger that Middle Eastern aviation students could pose to the security of the United States. Dennis Wagner et al. "Feds Invoke Secrecy Rule in INS Case." *Arizona Republic*, June 11, 2002.

[94] Declaration of James S. Reynolds submitted January 11, 2002, in *Center for National Security Studies v. U.S. Department of Justice*, p. 3.

thwarting the government's ability to frustrate ongoing conspiracies.[95]

The Department of Justice has offered similar arguments for closing the immigration hearings of "special interest" detainees. It maintains that public hearings would disclose information from which a terrorist organization could deduce patterns and methods of the investigation and thereby take steps to thwart it. According to Dale Watson, executive assistant director for Counterterrorism and Counterintelligence of the FBI, "[b]its and pieces of information that may appear innocuous in isolation can be fit into a bigger picture by terrorist groups."[96] Watson has speculated about the many ways terrorist organizations could use knowledge revealed in a hearing. For example, "putting entry information into the public realm regarding all 'special interest cases' would allow the terrorist organization to see patterns of entry, what works and what doesn't. It may allow them to have the information they need to alter methods of entry into the United States for terrorist members." He has argued that public hearings involving "evidence about terrorist links (or detainees where we are not even sure yet the extent of any terrorist links) could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence. Even more likely, the terrorist organizations may destroy or conceal evidence, tamper or threaten potential witnesses, or otherwise obstruct the ongoing investigations and pending prosecutions."[97]

The catalogue of adverse possibilities conjured by the government is impressive but unpersuasive. First, there are many cases, such as Haddad's, where the name of the detainee is already public. Moreover, nothing prevents the detainees, their families, or attorneys from revealing their detention—as many have done. As Michael Chertoff, assistant attorney general of the Criminal Division, pointed out in congressional testimony: "Everybody who is in detention ...is absolutely free to publicize their name through their family or through their lawyers. There's nothing that stops them from saying, 'Hey, I'm being held in detention as part of this investigation.'"[98] If releasing the names of detainees could hamper the investigation, as the Department of Justice maintains, "self-identifying" would logically hinder it, as well. Yet any detainee who is in fact a member of a terrorist organization is readily able to alert an associate to his detention.

Second, it is difficult to square the Department of Justice's contention that terrorist organizations are extremely sophisticated and could put together bits and pieces of information from hundreds of hearings around the country, with the argument that official disclosure would alert such organizations to who has been detained. Sophisticated terrorist groups likely already know through their own networks whether any of their members or allies have been arrested.

Third, revealing who has been detained would not reveal who is being watched, who is being wiretapped, or who is a member of a group that has been infiltrated.[99] In other words, releasing the names of detainees would not reveal the full scope or pattern of the FBI's investigations, what the FBI knows or does not know.

Although the Department of Justice has repeatedly asserted that its terrorism investigation might be seriously harmed if the names of "special interest" detainees were publicly revealed, it nonetheless provided those names and place of detention, along with other information, to the embassies of the detainees' countries in fulfillment of its obligations under the Vienna Con-

[95] Ibid, p. 4.
[96] Declaration of Watson submitted in *Detroit Free Press v. Ashcroft*, p. 4.
[97] Ibid, p. 7.

[98] Testimony of Michael Chertoff, assistant attorney general of the Criminal Division, before the Senate Judiciary Committee at its hearing on "DOJ Oversight: Preserving Freedoms While Defending Against Terrorism," November 28, 2001.
[99] FBI Director Robert S. Mueller III has said that a "substantial" number of people suspected of ties to terror are under constant FBI surveillance within the United States. "FBI Chief: 9/11 Surveillance Taxing Bureau," *Washington Post*, June 6, 2002.

vention on Consular Relations.[100] To our knowledge, the U.S. placed no secrecy restrictions on the information it provided the embassies. Indeed, several of those embassies subsequently provided the names, dates of arrest, charges, and places of detention for 130 detainees to the ACLU in response to its request.[101] The embassies presumably have distributed the information to officials in their home countries, including Middle Eastern and South Asian countries, and it may have circulated widely.

The government's allegations of potential harm to the September 11 investigation might have more force if all or most of the INS detainees were involved in some way or had knowledge of terrorist organizations. Yet the Department of Justice has acknowledged that this is not the case. According to Department of Justice officials, the thousand-plus other "special interest" detainees, "were originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States.... In the course of questioning them, law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws and *in some instances*, also determined that they had links to other facets of the investigation." (Emphasis added.)[102] That some detainees might have links to terrorism is scant justification for closing the immigration proceedings of all the "special interest" detainees. Indeed, in February 2002,—two months before the filing of the Watson affidavit, which purported to justify the need for the closed hearings policy—the government declared that about half of the post-September 11 detainees charged with immigration violations were no longer of any interest to the investigation.[103]

The government's justification for blanket secrecy for hundreds of immigration hearings also sweeps too broadly. Its rationale would justify closing trials in any large criminal investigation. The Department of Justice's arguments would, for example, justify closing arrest rosters and trials in organized crime cases where there would be a danger that accomplices and associates might learn details about the progress made by law enforcement, tamper with evidence, and threaten witnesses. The U.S. justice system has mechanisms to ensure reasonable openness while preventing harm to an ongoing investigation, but has never allowed blanket secrecy over hundreds of cases on the mere allegation that criminals might learn something about the investigation if the prosecution were conducted publicly.

Privacy Concerns

The government's second argument—that it does not release the names of INS detainees or conduct their hearings publicly to protect their privacy—also fails to withstand scrutiny. Attorney General Ashcroft originally contended at a hearing before the Senate Judiciary Committee on December 6, 2001, that federal legislation prohibited him from revealing the detainees' names and other information about them. During questioning, however, he was forced to concede that there was no such legislative prohibition.[104] That concession, however, did not result

[100] See discussion of the Vienna Convention in the chapter, Arbitrary Detention, in this report.

[101] Information provided to Human Rights Watch by Anthony Romero, executive director of the ACLU, June 19, 2002.

[102] Declaration of Watson submitted in *Detroit Free Press v. Ashcroft*, p. 3.

[103] The Department of Justice declared: "persons believed not to be of current interest regarding the investigations emanating from the September 11th attacks are placed in an 'inactive' status and may have been released from custody or deported." Supplemental Declaration of Reynolds submitted in *Center for National Security Studies v. U.S. Department of Justice*, p. 1. According to the documents it released on January 11, 2001, the cases of 355 individuals were classified as "inactive," and 363 as "active."

[104] Following is the relevant excerpt of Ashcroft's testimony before the Senate Judiciary Committee:

> Attorney General Ashcroft: I would cite privacy Act 5, U.S. Code 552(a)—that's paren (a), paren (2), as—and the FOIA 5 U.S. Code 552(b)(6), especially as the prohibition regarding naming legal permanent residents.
>
> Senator Feingold: You are citing this as a prohibition on disclosing any of the names of those in detention?
>
> Attorney General Ashcroft: Not any of the names of those in detention. As I indicated earlier,

in the department's release of the detainee information sought by Congress, the media, and rights groups.

> senator, I—there is a varying legal standard, depending on the status of the individual. The prevention is on a narrow group of individuals that are permanent residents. The authority not to disclose relates to those who are not permanent residents, but disclosure of which, in the judgment of law enforcement authorities would be ill advised as it relates to aiding the enemy or interfering with the prosecution.
>
> Senator Feingold: Well, Mr. Chairman, I would simply add that this confirms that there simply is no blanket prohibition in the law of disclosure, and I would just like that on the record.
>
> Attorney General Ashcroft: I—I can agree with the senator, and would stipulate to the fact that there is no blanket prohibition.

Testimony of Attorney General John Ashcroft before a hearing of the Senate Judiciary Committee on "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," December 6, 2001.

The two provisions that the attorney general said prevented him from releasing the identities of persons held in INS custody do not apply to the kinds of information sought regarding the detainees. The first provision states that the government should release final opinions in the adjudication of cases, statements of policy, staff manuals, and records already disclosed unless their release constitutes "a clearly unwarranted invasion of personal privacy" [5 USC Section 552a (2)]. The names of those detained by the INS do not fall in any of these categories. The second provision cited by the attorney general said that the release of information under FOIA requests does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" [5 USC Section 552(b)(6)]. Yet, the detainee information is neither personnel nor medical nor of a similarly private nature. Provision (d) of the same section states, "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress." Therefore, even if the Department of Justice were to argue successfully somehow that the privacy provision prohibited it from releasing information about these detainees to the public, it could not use it to justify its withholding of information from lawmakers. The Department of Justice has still refused to provide basic information to members of Congress. See note 42 above.

While arguing against revealing all the names, the Department of Justice has nonetheless chosen to release the identities of several people whom it said were involved with the terrorist attacks (some of whom were subsequently cleared of any wrongdoing). For example, authorities identified Ayub Ali Khan and Mohammed Jaweed Azmath, who were held on immigration violations, as two key suspects in the investigation.[105] A Chicago FBI agent said Nabil Al-Marabh, another INS detainee, was a terrorism suspect.[106] Law enforcement agents also identified Al-Badr Al-Hazmi, who was held as a material witness.[107]

In response to the Freedom of Information Act lawsuit described above, the Department of Justice has cited a provision contained in the act that exempts the disclosure of documents that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[108] But arrests in the United States as well as immigration charges are traditionally a matter of public record, which precludes a reasonable privacy interest on the part of detainees. In a case brought under the New Jersey Right to Know Act—the state's equivalent of the federal Freedom of Information Act—seeking release of the names of INS detainees held in New Jersey facilities, the judge noted that personal information of those charged with crimes is routinely made public. Rejecting the government's argument that greater protection of privacy was re-

[105] See "Two Amtrak passengers detained in Fort Worth," Associated Press, September 13, 2001; and "Men detained on immigration violations, interviewed by FBI," Associated Press, September 18, 2001.

[106] See Mike Robinson, "Middle Eastern man with name on FBI's list is captured near Chicago," Associated Press, September 20, 2001; and John Carreyrou et al., "Investigators Arrest a Suspect In Chicago," *Wall Street Journal*, September 21, 2001.

[107] See "Saudi Doctor Proclaims Innocence After Release," *Washington Post*, September 26, 2001; and Scot Paltrow and Laurie P. Cohen, "Government won't disclose reasons for detaining people in terror probe" *Wall Street Journal*, September 27, 2001.

[108] 5 USC 552 (b)(7)(C). Declaration of Reynolds submitted in *Center for National Security Studies v. U.S. Department of Justice*, p. 5.

quired for anyone arrested in connection with the September 11 investigation, the court stated that "INS inmates have no more expectation of privacy than do other inmates. The fact of their arrest in connection with September 11 events, however notorious, does not cloak them with privacy rights denied to others arrested for horrific events, including child rape and murder."[109]

While the Department of Justice has argued that keeping the detainees' names and places of detention secret protects them from embarrassment and even retaliation, it has ignored the ways such secrecy harms the detainees. For example, secrecy has made it harder for agencies willing to provide affordable or free legal counsel to locate the detainees and make their services available to them.[110] It has increased the isolation, fear, and helplessness felt by many detainees by making it harder for family and friends to find them—a difficulty compounded in some cases by limited access to telephones and frequent transfers from facility to facility experienced by some detainees.

The Department of Justice has also raised privacy arguments to justify closing to the public immigration hearings of September 11 INS detainees. The government has argued that detainees have a "substantial privacy interest" in keeping hearings closed because opening them "would forever connect [detainees] to the September 11 attacks. Given the nature of these investigations, the mere mention of their names in connection with these investigations could cause the detainees embarrassment and humiliation."[111] This is a curious argument to make to justify excluding family members and friends who are already aware of the detainee's arrest. Even more bizarrely, the government has refused to open hearings even when detainees have requested it.[112]

Without even acknowledging the irony of its position, the Department of Justice forcefully raised the privacy argument in the case of Rabih Haddad, discussed above, even though his arrest and detention had been amply covered in the press and it was Haddad himself who was challenging the closure of his immigration proceedings. None of the dozens of detainees and their lawyers whom Human Rights Watch interviewed indicated they wanted closed hearings; some of the lawyers told us they believed closed hearings were detrimental to their clients' interests. Detainees' lawyers have said that the secrecy surrounding closed hearings raised suspicions that their clients were somehow linked to terrorism, even though during the hearings the INS never produced any evidence of those links, let alone charged them with anything but violating immigration laws and regulations.

The Department of Justice has contended that the release of basic information about the detainees "would not contribute meaningfully to the public's understanding of the inner workings of the government."[113] According to the U.S. Supreme Court, the Freedom of Information Act's "basic policy of full agency disclosure …focuses on the citizens' right to be informed about what their government is up to. Official information that sheds light on an agency's performance of its statutory duties falls squarely

[109] *American Civil Liberties Union v. County of Hudson*, Superior Court of New Jersey, Docket No. A-4100-01T5 (March 26, 2002.)

[110] While immigration detainees have a right to counsel, they do not have a right to free-of-charge, court-appointed counsel if they lack the funds to retain one privately.

[111] Declaration of Watson submitted in *Detroit Free Press v. Ashcroft*, p. 8.

[112] For instance, an attorney for Malick Zeidan, a Syrian man charged with an immigration violation whose case was ordered closed in New Jersey, filed a preliminary injunction to have the proceedings open to the public. He argued that closing a deportation hearing hurt his client's case because it prevented his client's cousin from attending and functioning as a witness and a translator. The attorney maintained that holding proceedings in secret violated his due process rights under the Fifth Amendment. Jim Edwards, "Federal Judge to Review Ban on Open Hearing for Muslim Detainee," *New Jersey Law Journal*, March 5, 2002.

[113] Declaration of Reynolds submitted in *Center for National Security Studies v. U.S. Department of Justice*, p. 5.

within that statutory purpose."[114] Knowledge about government's activities is particularly important when "men's lives and liberty are at stake."[115]

As the district court in *Center for National Securities Studies v. United States* noted, the identity of the detainees is essential to public assessment of the government's conduct of its September 11 investigation.[116] That assessment will include consideration of the effectiveness of the government's efforts as well as the extent to which it is abiding by U.S. and international human rights law. Moreover, as discussed below, the arrest and detention of INS detainees has been accompanied by persistent allegations of violations of detainees' rights—including arbitrary detention, lack of access to attorneys, physical mistreatment, and harsh detention conditions. Without access to the detainees' names and places of detention, the public has a truncated ability to determine how well its government has been upholding basic constitutional and human rights. Human Rights Watch's own efforts to verify the treatment of the detainees was substantially hampered by not having the names and places of detention of the detainees.

IV. DENIAL OF ACCESS TO COUNSEL

The right of any person—citizen or non-citizen—to be represented by legal counsel after being deprived of liberty for alleged criminal or immigration law violations is protected under U.S. as well as international human rights law.[117] U.S. constitutional law also affirms the right to counsel during custodial interrogations on criminal matters.[118] In the criminal context, but

[114] *U.S. Department of Justice v. Reporters Committee*, 489 U.S. 749,773 (1989).

[115] *Pechter v. Lyons* 441 F. Supp. 115 (S.D.N.Y. 1977), p. 118.

[116] *Center for National Security Studies v. U.S. Department of Justice*.

[117] The Sixth Amendment to the U.S. Constitution states: "In all criminal prosecutions, the accused shall enjoy the right …to have the assistance of counsel for his defense." The fifth and fourteenth amendments guarantee due process to any person. Under U.S. law, immigration detainees have the right to be represented by counsel. 8 CFR 240.3. Principle 11 of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: "A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law." Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, Annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988). This principle is derived from article 9 of the ICCPR, which provides that any person deprived of her or his liberty must have an effective opportunity to challenge the lawfulness of their detention before a court. In its general comment no. 8, the U.N. Human Rights Committee interpreted ICCPR article 9 to include "all deprivations of liberty, whether in criminal cases or in other cases such as …immigration control." United Nations Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.4, February 7, 2000, p. 88, para. 1.

[118] In the landmark 1966 case *Miranda v. Arizona*, the Supreme Court ruled that anyone arrested in the course of a criminal investigation shall be afforded certain rights:

> The prosecution may not use statements… stemming from questioning initiated by law enforcement officers after a person has been taken into custody … unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination.
>
> The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he said will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.
>
> Where an interrogation is conducted without the presence of an attorney and a statement is taken, heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel.

Miranda v. Arizona, 384 U.S. 436 (1966).

On February 26, 2000, the U.S. Supreme Court reaffirmed suspects' Miranda rights in two decisions. In *U.S. v. Dickerson*, Chief Justice Rehnquist wrote for the majority that law enforcement officers must warn criminal suspects of their rights, including their right

not in immigration proceedings, the right to counsel includes the right to court-appointed counsel if the detainee cannot afford to hire one.

Legal representation is a crucial safeguard to enable detainees to effectively exercise other rights, including the right against criminal self-incrimination, the right to be charged promptly or released, the right to be brought before a judge to determine the legality of a detention, and the right to not be subjected to torture or other cruel, inhuman, or degrading treatment. Effective access to an attorney is particularly important for immigration detainees who may not know their rights or be familiar with complicated U.S. criminal or immigration law procedures. Unfortunately, many of the post-September 11 detainees were unable to exercise their right to counsel.

Custodial Interrogations without Access to Counsel

"Special interest" detainees were questioned in custody as part of a criminal investigation, even though they were subsequently charged with immigration violations. Our research indicates that many were originally questioned by teams of agents from both the FBI and the INS, or were first questioned by the FBI and then by the INS. The questions typically addressed criminal matters as well as the individual's immigration status.

In practice, the FBI has used administrative proceedings under the immigration law as a proxy to detain and interrogate terrorism suspects without affording them the rights and protections that the U.S. criminal system provides. Among those protections is the right to have an attorney present during custodial interrogations, including free legal counsel if necessary.[119] Even though immigration detainees do not have the right to free counsel in connection with immigration proceedings, they should be granted court-appointed representation when they are interrogated about matters related to a criminal investigation.

An example of the blurring of the distinction between criminal and administrative processes is the case of Ayub Ali Khan. Khan, a citizen of India, was arrested along with Mohammed Jaweed Azmath aboard an Amtrak train near Fort Worth, Texas, on September 12, 2001. Authorities found box cutters, hair dye, and $5,500 in cash in their possession, according to press reports.[120] Law enforcement agents told reporters that they were key suspects in the investigation of the September 11 attacks.[121] Despite apparently being a terrorism suspect, Khan was held in custody solely for overstaying his visa. As an INS detainee, he did not have the right to a court-appointed attorney and he remained unrepresented for fifty-seven days. During this time, he "signed all kinds of papers, and was questioned ad nauseum without an attorney," according to a public defender who was later assigned to him.[122] The lawyer said that his client was brought before an immigration judge only on November 8, 2001, almost two months

to remain silent. In *California Attorneys for Criminal Justice (CACJ) v. Butts*, the Supreme Court upheld a ruling by a federal court in Los Angeles that police interrogation after a suspect has requested an attorney or invoked his or her right to remain silent violates a person's rights under Miranda.

[119] Other differences between administrative and criminal cases are the deadlines for charging and court oversight. Under U.S. law, those detained for crimes have to be charged and brought before a judge within forty-eight hours of arrest. Those detained for immigration violations can be held without charges for an undefined "reasonable period of time" in the event of an "emergency," and may not be brought before an immigration judge for weeks after their arrest, depending on how full the docket in the district is.

[120] See "Two Men with Box Cutters Are Removed From Train In Texas," Associated Press, September 14, 2001; Ross E. Milloy with Michael Moss, "More Suspects Are Detained In Search for Attack Answers," *New York Times*, September 26, 2001; Dan Eggen, "Terrorist Hijacking Probe Slows in U.S.," *Washington Post*, October 19, 2001; and Laurie P. Cohen and Jesse Pesta, "U.S. denies accusations from jailed man that he had no counsel, access to phone," *Wall Street Journal*, November 5, 2001.

[121] Walter Pincus, "Silence of 4 Terror Probe Suspects Poses Dilemma for FBI," *Washington Post*, October 21, 2001.

[122] Human Rights Watch telephone interview with attorney Lawrence Feitell, New York, New York, May 14, 2002.

after his arrest. Khan has been held in restricted confinement at the Special Housing Unit at the Metropolitan Detention Center since September 2001. Both Khan and Azmath were indicted on credit card fraud charges in December 2001.

The constitutional right to counsel exists only during custodial criminal interrogations.[123] A person does not actually have to be held in a police station or arrested for the interrogation to be considered "custodial." U.S. courts have looked to the circumstances of the questioning to determine if a reasonable person would believe he or she had been effectively deprived of his or her freedom in a significant way and could not freely walk away from the law enforcement agents seeking information.[124] Many post-September 11 detainees were originally questioned in their homes or places of work and subsequently taken to FBI or INS offices for further questioning. We have no way of knowing whether many of them believed they had a choice about whether to answer the questions posed to them. We suspect that many did not realize that when the FBI came to their houses, including in the middle of the night, they could refuse to let them in or refuse to answer questions. We also suspect many would have believed they were not free to leave when they were taken to FBI or INS offices.

Our research indicates that the FBI frequently questioned persons in custody without informing them of their "Miranda rights," i.e. their right to remain silent, to have an attorney present during their questioning, and to have an attorney appointed for them if they cannot afford one. Human Rights Watch interviews with INS detainees and their attorneys indicated that in some instances detainees were informed of their right to a lawyer only after the FBI interrogated them. For instance, Bah Isselou and three other Mauritanians arrested in Louisville, Kentucky, were told they had the right to a lawyer and given access to a phone to try to find one four days after their arrest and after FBI questioning about the terrorist attacks. After that single phone call, they were held incommunicado and in isolation for two weeks and denied access to a telephone.[125]

Other times, detainees were given Miranda warnings but when they asked for an attorney, they were reportedly told that they would get one only after the interrogation. Some detainees said that they were pressured to answer "just a few questions" right away and not wait to obtain an attorney. For example, two FBI agents went to the workplace of a Palestinian civil engineer and said they wanted to ask him some questions. He declined to talk to them without a lawyer present. The agents told the man that if he insisted on having a lawyer, they would have to open a "full investigation." He was asked whether he possessed weapons and about the September 11 attacks. The man asked for a lawyer again. He said he was afraid he could be "misquoted" without an attorney present. The agents said, "[t]his is America. This would never happen." A few days later, FBI and INS agents went to the man's workplace again and arrested him for overstaying his visa. Even though the man was legally in the country at the time, he spent twenty-two days in prison.[126] None of the "special interest" detainees interviewed by Human Rights Watch had an attorney present dur-

[123] The Sixth Amendment to the U.S. Constitution says: "In all criminal prosecutions, the accused shall enjoy the right to …have the assistance of counsel." See next note for the Supreme Court's interpretation of this constitutional right.

[124] The Supreme Court has defined custodial interrogation as follows: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona.*

[125] Human Rights Watch telephone interviews with Bah Isselou, Florida, November 6, 2001; and Dennis Clare, his attorney, Louisville, Kentucky, October 23 and 31, 2001. The three other Mauritanians were Sidi Mohammed Ould Bah, Sidi Mohammed Ould Abdou, and Cheikh Melainine Ould Belal. They were all arrested on September 12 and charged with immigration violations. They were released on bond, Isselou on October 10, and the others at the end of October.

[126] Human Rights Watch interview with Palestinian civil engineer, Paterson, New Jersey, December 20, 2001 and email communication with his attorney, Claudia Slovinsky, May 24, 2002. The detainee's name has been withheld upon request.

ing FBI or INS interrogations regarding the terrorist attacks.

A striking case of the FBI's refusal to respect the right to counsel is that of Osama Awadallah, a lawful permanent resident of the United States and a citizen of Jordan. An old phone number of Awadallah's was found in the car abandoned by Nawaf Al-Hazmi, one of the September 11 alleged hijackers, and the FBI subsequently began an investigation of Awadallah.[127] On September 20, 2001, a team of eight FBI agents and local police went to Awadallah's apartment in San Diego. When Awadallah returned home in the early afternoon, the agents told him they wanted to ask him a few questions at the FBI office. Awadallah asked if they could talk to him at his apartment but they insisted that he be interviewed at their offices and told him that they would drive him there. When Awadallah insisted he be allowed to go to his apartment to pray, he was permitted to go to the apartment followed by the agents; he was patted down and the agents made him keep the bathroom door open while he went to urinate and wash before praying. When he was taken to the FBI office around 3:00 p.m., Awadallah repeatedly expressed his concern that he not miss a computer class that began in a few hours. Two agents questioned Awadallah for about six hours and told him they believed he had information regarding the events of September 11. At one point when he asked about getting to his class, the agents told Awadallah that he would "have to stay" with them until the interview was finished. Although these circumstances clearly indicate a custodial interrogation, Awadallah was never advised of his right to an attorney.

When the interview ended at 11:00 that night, Awadallah agreed to take a lie detector test the following morning. The next morning, after he took the test, FBI agents accused him of lying on some of the questions and then told him that he was "one of the terrorists." Awadallah attempted to stand up, but the agents ordered him to "sit down and don't move." He then asked to call his lawyer, but the agents refused his request. They continued to question him, even though Awadallah repeated several times that he had to leave for Friday prayer. The agents told him he was going to miss Friday prayer and that they were going to fly him to New York. Awadallah again demanded to call a lawyer because it was his right, but the agents said, "[h]ere you don't have rights." The FBI subsequently secured a warrant for Awadallah's arrest as a material witness. Later he was charged with perjury for lying to a grand jury. He spent eight-three days in prison before being released on bail.[128]

In a subsequent court case, Awadallah claimed that he had been unlawfully seized by FBI agents. As the court pointed out, "a consensual encounter ripens into a seizure, whether an investigative detention or an arrest, when a reasonable person under all the circumstances would believe he was not free to walk away or otherwise ignore the police's presence."[129] Reviewing the facts, the court concluded Awadallah was "clearly not 'free to ignore' the FBI" and had in fact been "seized"—and, indeed, that the seizure was unlawful because the agents did not have probable cause or even reasonable suspicion to believe that Awadallah had committed a crime. Based on this and other findings of unlawful government conduct, the court dismissed the indictment against him. Although the question of Awadallah's right to an attorney was not raised in the case, the court's finding that he had been "seized" by the FBI when he was questioned indicates that he should have been told his rights and given access to an attorney.

Tiffanay Hughes and Ali Al-Maqtari were arrested on September 15, 2001 when they arrived at the Fort Campbell, Kentucky army base

[127] The phone number was that of a residence where Awadallah had lived briefly two years earlier. The FBI investigations subsequently established that Awadallah had no connections with or knowledge about the September 11 attacks or terrorist activities, but that he had met Al-Hazmi and another alleged hijacker at work and at the local mosque two years earlier when they lived in San Diego, California.

[128] Second Opinion and Order, *United States of America v. Osama Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002).

[129] Ibid., p. 38.

where Hughes was assigned. Without being told why, they were placed in locked, separated rooms at the base, Hughes for five and a half hours, and Al-Maqtari for about nine hours. Then they were interrogated separately for two to three hours without counsel present and without breaks until early in the morning. During their detention they were not given water or food, except for some cookies Al-Maqtari received during his interrogation. At the outset of the questioning, their interrogators—one INS, three FBI, and six or seven army officers—told them that they were not arrested. Al-Maqtari replied, "I wished." He told Human Rights Watch he did not feel free to leave. The interrogators did not inform Al-Maqtari or Hughes of their right to have an attorney present. Al-Maqtari described the interrogation in testimony presented to the Senate Judiciary Committee:

> The investigators said many, many times that our marriage was fake, and that Tiffanay must be married to me because I was abusing her. These accusations were totally false and very painful for me. They also made many negative remarks about Islam, things like Islam being the religion of beating and mistreating women. One acted out a fist hitting his hand, another said my wife had written a letter saying that I beat her, which I knew was false, and another insisted he would beat me all the way to my country because I mistreated my wife.... The interrogators were so angry and wild in their accusations that they made me very frightened for what might happen to me.[130]

Before being released on bond, Al-Maqtari was detained for fifty-two days, mostly in solitary confinement, charged with ten days of "unlawful presence" in the country. The army encouraged Hughes to take an honorable discharge, and she did so on September 28, 2001.[131]

[130] November 29, 2001 hearing before the Senate Judiciary Committee.

[131] Human Rights Watch telephone interviews with Ali Al-Maqtari and Tiffanay Hughes, New Haven, Connecticut, November 29, 2001, and with Michael Boyle, their attorney, New Haven, Connecticut, October 24, 2001.

Abusive Interrogations

One of the purposes of the right to have an attorney present during custodial interrogations is to help prevent coercive interrogations. In the cases described below, detainees were not only denied access to attorneys, but were subjected to abusive treatment in violation of U.S. constitutional[132] and international standards.[133]

[132] The U.S. Supreme Court has repeatedly upheld the rights of individuals not to be subjected to coercive interrogations. In *Haley v. Ohio*, a concurring opinion stated: "An impressive series of cases in this and other courts admonishes of the temptations to abuse of police endeavors to secure confessions from suspects, through protracted questioning, carried on in secrecy, with the inevitable disquietude and fears police interrogations naturally engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry." *Haley v. Ohio*, 332 U.S. 596 (1948). In *Stone v. Powell*, the Supreme Court said: "A confession produced after intimidating or coercive interrogation is inherently dubious. If a suspect's will has been overborne, a cloud hangs over his custodial admissions; the exclusion of such statements is based essentially on their lack of reliability." *Stone v. Powell*.

[133] International standards prohibit law enforcement officials from conducting coercive interrogations. Principle 21 of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: "No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment." Interrogators are banned from using torture to elicit information from people in their custody.

Article 7 of the ICCPR prohibits anyone from being subjected to torture or to cruel, inhuman, or degrading treatment or punishment. In 1994 the United States ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 2 of the convention states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." The definition of torture contained in article 1 of the convention is broader than physical abuse, and includes "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person infor-

- Abdallah Higazy, a thirty-year-old Egyptian graduate student with a valid visa, was detained as a material witness on December 17, 2001. A pilot's radio had allegedly been found in the New York City hotel room where he had stayed on September 11. He was placed in solitary confinement at the Metropolitan Correctional Center in Manhattan.

  Higazy volunteered to take a polygraph test. "I wanted to show I was telling the truth," he told Human Rights Watch. On December 27, he was taken to an office in Manhattan and had a polygraph test administered. He was then questioned more for at total of four to five hours. The detainee stated that he was given no break, drink, or food. His lawyer waited outside and he was not allowed to be present during the questioning.

  Higazy claimed that the interrogating agent threatened him from the beginning: "We will make the Egyptian authorities give your family hell if you don't cooperate," he recalled the agent telling him. During the polygraph test he was asked about the September 11 attacks. The agent repeated, "tell me the truth" after each of his answers and he became increasingly anxious. When the agent described to him about what the radio device allegedly found in his room could do, he said he became nervous and almost fainted. He asked the agent to stop the polygraph test and take the cables off him, and so he did.

  The FBI agent continued the interrogation even though Higazy was not connected to the polygraph machine any more, and without his counsel present. According to Higazy, the following dialogue occurred:

  "The results of the test are inconclusive," the agent said, "but this never happened to anyone who said the truth.... We can show ties between you and September 11. You are smart, you are an engineer, a pilot's radio was found in your room; it doesn't take a genius to figure it out."
  "It's not my device, I don't know who put it there," Higazy replied.
  "You know you have nothing to do with September 11, you were scared of the FBI and denied the radio was yours, but you can tell the truth," the agent persisted.

  Higazy told Human Rights Watch: "I thought I was in trouble, that I had lost the only chance to prove I was innocent." Faced with the FBI's pressure, he ultimately admitted the radio was his. "All I wanted to do is to keep away from September 11 and to keep my family away from them," the detainee told Human Rights Watch. After his admission, he asked for his lawyer. He felt very tired and asked that the rest of the test be postponed.

  Higazy offered to do a polygraph test again but requested that his lawyer be present. According the Higazy, the FBI refused, alleging that the attorney would be a disruption. Higazy refused to do the test again without a lawyer and it was never done. He said the interrogating agent denied in front of his lawyer that he had threatened his family.

  On January 11, 2002, Higazy was charged with lying to the FBI. However, three days later, the owner of the radio, an American pilot, went to the hotel to claim it. Higazy

mation or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Cruel and inhuman treatment includes acts that do not meet the essential elements of torture, such as more limited beating or the deprivation of medical treatment, and harsh conditions of detention. Degrading treatment concerns the humiliation of the victim, regardless of the physical suffering imposed. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, pp. 133-34.

was released in his cotton prison scrubs and given three dollars for subway fare on January 16. The charges against him were dropped.

Higazy told Human Rights Watch: "It was horrible, horrible. I always have the feeling of being accused of something I didn't do. I was crying each and every day five to seven times."

On May 31, 2002, Ronald Ferry, the former hotel security guard who produced the pilot's radio was sentenced to six months of weekends in prison for lying to the FBI. He admitted that he knew that the device was not in a safe belonging to Higazy. Ferry, who is a former police officer, said that he lied during a "time of patriotism, and I'm very, very sorry." The judge said that his conduct was "wrongly motivated by prejudicial stereotypes, misguided patriotism or false heroism."

A judge is considering whether to open an inquiry into the manner in which FBI agents obtained Higazy's confession.[134]

[134] Human Rights Watch telephone interview with Abdallah Higazy, New York, New York, February 1, 2002; and with his attorney, Robert Dunn, New York, New York, July 23, 2002.
For press articles about this case see Jane Fritsch, "Grateful Egyptian is Freed as U.S. Terror Case Fizzles," *New York Times*, January 18, 2002; "Egyptian Student Wants Apology and An Investigation," *Dow Jones International News*, January 21, 2002; Christine Haughney, "A Sept. 11 Casualty: 'Radio Man' Jailed for A Month, Then Freed; Egyptian Student Perplexed by Mistaken Arrest," *Washington Post*, March 11, 2002; Benjamin Weiser, "Worker Is Sentenced for Lie That Jailed Egyptian Student," *New York Times*, May 31, 2002; Mark Hamblett, "Guard Who Lied About Sept. 11 Sentenced," *New York Law Journal*, May 31, 2002; and Benjamin Weiser, "Judge Considers an Inquiry On Radio Case Confession," *New York Times*, June 29, 2002.
According to press reports, Higazy said that he did not hold a grudge against the FBI for pursuing charges against him the day he was released but he later asked for an apology for having been wrongly incarcerated. He is considering whether to file a civil lawsuit.

- On September 14, 2001, the FBI arrested Uzi Bohadana, a twenty-four-year-old Jewish Israeli, in Jackson, Mississippi. The INS charged him with an immigration violation for working while on a tourist visa.

  Bohadana said that on September 16 he was beaten by six accused or convicted criminals who were his cellmates at the Madison County Jail in Canton, Mississippi. He told Human Rights Watch that he was taken to a hospital after the attack, where he received stitches on his eye and lip, but he could not have surgery on his broken jaw because the hospital did not have the capabilities.

  The next day, he was taken to an INS office and interrogated by the FBI and the INS for one and a half hours while injured. Bohadana asserted that at the time of the interrogation he could hardly talk and was dizzy because of the painkillers he had been given. He said that he was informed of his right to contact a lawyer and the consulate of Israel, but he claimed that the agents told him that "if he talked it'd be quicker." He said he was in pain and agreed to talk without a lawyer. He was asked about the jail assault he had suffered and about the September 11 attacks.

  Bohadana was later transferred to Concordia Parish Jail in Ferriday, Louisiana where the FBI interrogated him twice and the INS once. He said that at the first FBI interrogation there he was "overwhelmed with drugs," and could not answer the questions. The agents stopped the interrogation after ten minutes. Bohadana said that the day of his second interrogation jail staff told him that the FBI had ordered that he not be given any medication until after the questioning, so he was in pain all morning. That interrogation lasted for about two hours, during which he was asked about the terrorist attacks. Bohadana said he was not told he had the right to a lawyer during the interrogations at this facility, and he did not ask for one. He told Human Rights Watch that he did not need an attorney because he was innocent and had nothing to hide.

nocent and had nothing to hide. Bohadana was released on bond on October 5, 2001.[135]

- Osama Salem was arrested in mid October 2001, after a former girlfriend of his told the FBI that he was a terrorist and an expert bomb-maker. Eight FBI, INS, and police officers went to his house in Jersey City, New Jersey and arrested him for entering the country with a false passport. Salem said the FBI had no search warrant but searched the house anyway, without asking him for permission.

  Salem said that he was taken to the FBI building in Newark where he was given Miranda warnings but was not told of his right to contact the consulate of Egypt. His request to make a phone call was denied. He asked for an attorney and was told that he would be given a public defender later. He stated that he was then interrogated by five men for seven or eight hours without breaks, not even to go to the bathroom, and he was given water but not food. The agents reportedly warned him, "If you don't answer questions, we'll charge you as a terrorist." He was asked whether he knew Osama bin Laden, if he had collaborated with Mohammed Atta (one of the alleged hijackers), if he went to the mosque, who he knew in the mosque, and if he had a pilot's license. He said that he was called, "Osama bin Laden" during the interrogation.

  He was sent to the INS building in Newark, where he was interrogated again by INS officers for three hours. Salem said he was asked the same questions. He was never assigned a court-appointed lawyer. He was ordered deported on January 18, 2002.[136]

- On his way to New York City, Qaiser Rafiq, a national of Pakistan and a legal permanent resident who has lived thirteen years in the United States, was pulled over by state police and undercover officers in nine vehicles in Colchester, Connecticut, on October 16, 2001. He said he was not given Miranda warnings or told why he was arrested. Rafiq said that while his car was being searched, an agent grabbed him by the hair and banged him on the hood of a car three times while he called him "son of a bitch" and asked him where his "terrorist friends" were. He was taken to his sister's house, six blocks away, which was searched without a warrant, according to Rafiq.

  Rafiq was then taken to a state police station in Hartford, Connecticut, where two FBI agents, "Bob Murphy" and "Frank McCarthy," interrogated him for three and a half hours. Rafiq said he asked for an attorney three or four times during the interrogation but was told by McCarthy, "you guys have no rights here, you better start telling us what we ask you or we'll put you in jail for the rest of your life." Then he was interrogated by six state police officers for about four or five hours. Rafiq said that one of them, "Detective Mellacis," grabbed him by the hair and slapped him repeatedly. During both interrogations, Rafiq was asked about Muslims he knew and about his job.[137]

[135] Human Rights Watch telephone interviews with Uzi Bohadana, Hollywood, Florida, November 13, 2001; and with his attorney, Patricia Ice, Jackson, Mississippi, November 5, 2001.

[136] Human Rights Watch interview with Osama Salem, Hudson County Correctional Center, Kearny, New Jersey, February 6, 2002.

[137] Rafiq was also asked if he recognized any of the alleged hijackers, about the entries in his address book, and why he left his Wall Street job at onenest.com in May 2001. He answered that he was fired after an argument with his boss. He said they told him that he had been seen with three Middle Eastern men in New Jersey on September 8, 2001, but he denied it.
Rafiq was also asked why he had a film permit to shoot on 25th Street in Manhattan starting on September 10. He said he worked part-time for a New York City company called Interactive Media Production Inc. and that they were going to record a television commercial for an insurance company. A March 6, 2002 letter written by Razaq Baloch, producer, Interactive Media Production, Inc., stated: "I would like to clarify that Mr. Rafiq time to time helped us in our television program production and also in covering

> Rafiq said he spent the night in a cell in the basement of the police station. He was not given a blanket despite being very cold. "I was shivering all night." In the morning, he said he was asked whether he wanted to make a statement admitting that he knew Middle Eastern men involved in terrorism. He said he would not sign any such statement and was taken to court, where the prosecutor said that the FBI was interested in questioning him further. The judge set a one million dollar bond. Rafiq would later be charged with larceny. He has been unable to pay the high bond and remains in detention as of this writing.[138]

the news for Pakistan Television.... It is very common in T.V. production that crewmembers keep a copy of the film permit with them for parking and permission purposes." Open Letter by Razaq Baloch, producer, Interactive Media Production, Inc., March 6, 2002.

Prosecutors reportedly asserted that Rafiq had drivers' licenses from multiple jurisdictions with different names, that a note saying "death to the infidels in Afghanistan" was found in his car, and that a car registered to Rafiq was apparently abandoned in Jersey City on September 8, 2002. Rafiq denied holding I.D.'s with different names. He said the note, written in Urdu, was from T.V. interviews and expressed support to the president of Pakistan's alliance with the United States in Afghanistan. He paraphrased the note as saying, "this war is not against Afghanis, this war is only against terrorism, and if there is someone who is going to be hurt it is terrorists." Rafiq said he gave the car found in New Jersey to a friend in 2000 instead of junking it.

In the aftermath of the September 11 attacks, Rafiq allegedly helped organize a couple of rallies condemning terrorism and supporting the decision of Pakistan's president to join the U.S. coalition against terrorism. A letter from the Pakistani embassy reads: "Mr. Rafiq has demonstrated openly his full support for the anti-terrorism efforts of the Pakistani government and has participated in World Trade Center aftermath activities organized by [the] Pakistani-American community." Open letter by Imran Ali, third secretary, Embassy of Pakistan in Washington, DC, February 20, 2002.

[138] Human Rights Watch telephone interviews with Qaiser Rafiq, Corrigan-Radgowski Correctional Center, Uncasville, Connecticut, March 14, 15, and 18, 2002. See also, Dave Altimari, "Enigmatic Suspect Raises Brows: Intriguing Clues Attract Investigators in Terrorism Probe," *Hartford Courant*, January 7, 2002; and Carole Bass, "Bloody Good Reading," *New Haven Advocate*, March 14, 2002.

Access to Counsel for INS Detainees

Although the Department of Justice has not commented on the ability of September 11 investigation suspects to have counsel present during interrogations, it has insisted that their right to counsel for the purposes of immigration proceedings has been respected. In testimony before the Senate on December 7, 2001, Michael Chertoff, assistant attorney general of the Criminal Division, said:

> Every one of [the detainees] has the right to counsel. Every person detained has the right to make phone calls to family and attorneys. Nobody is being held incommunicado.... We don't hold people in secret, you know cut off from lawyers, cut off from the public, cut off from their family and friends. They have the right to communicate with the outside world. We don't stop them from doing that.[139]

Russell Bergeron, a spokesman for the INS, also said: "I've yet to see a specific case involving a specific individual on a specific day, for example, where he was entitled to have access to a phone and call his attorney and was prevented. If such an allegation exists, we would like to hear about it."[140]

Human Rights Watch's research shows, however, that many post-September 11 detainees have not been able to exercise effectively their right to counsel. Detainees have not been informed of their right to counsel or were urged to waive their right; policies and practices of the facilities holding them have impeded their ability to find counsel; and the INS has failed to inform attorneys where their clients are or when

[139] Testimony of Michael Chertoff, assistant attorney general of the Criminal Division, before the Senate Judiciary Committee at its hearing on "DOJ Oversight: Preserving Freedoms While Defending Against Terrorism," November 28, 2001.

[140] Quoted in Jim Edwards, "Attorneys Face Hidden Hurdles in September 11 Detainee Cases," *New Jersey Law Journal*, December 5, 2001.

their hearings are scheduled. Some of the problems of access to counsel by September 11 INS detainees are long-standing and common to all individuals held by the INS, while others are specific to the investigation of the September 11 terrorist attacks.[141]

Immigration detainees do not have the right to a court-appointed attorney under U.S. law, but the INS has the obligation to inform them of their right to be represented by an attorney.[142] Many immigration detainees are unfamiliar with U.S. laws and do not know the rights to which they are entitled. Of twenty-seven "special interest" INS detainees interviewed by Human Rights Watch, only ten said that they were informed of their right to an attorney. Seven detainees said that they were not told of this right, two were informed of their right only after undergoing custodial interrogations, and in eight cases the detainees did not remember or it was not clear.[143]

Some detainees said that they were informed of their right to an attorney but that law enforcement agents discouraged them from exercising that right, telling them that retaining counsel would hurt their cases or would result in lengthier detention. For example, Orin Behr said an agent told him and ten other Israelis arrested with him, "you don't need a lawyer. This is a very simple matter. One day or two and you'll be out."[144] Behr said: "We believed him, so nobody got a lawyer at the beginning." Behr remained four weeks in detention charged with working while on a tourist visa. Ali Saber, a Pakistani citizen, said that upon his arrest, INS agents told him, "If you are going to take a lawyer it is going to be a long process."[145] He had been held for two and a half months when Human Rights Watch interviewed him. He had been charged with overstaying his visa and was unrepresented by counsel.

In some cases, the INS frustrated attorneys' efforts to reach their clients, whether deliberately or because of bureaucratic chaos and confusion. Attorneys have said that it was hard for them to retrieve information about their clients, including the time and date of hearings.[146] For instance, Gerald Goldstein, the attorney for Al-Badr Al-Hazmi, a Saudi national detained in Texas by the INS, testified before the Senate Judiciary Committee that the INS did not let him talk to his client for five days, a period during which Al-Hazmi was interrogated several times.[147] Goldstein also testified about the difficulties in simply finding where his client was held: he talked to three different INS officials, sent four letters to the INS, and placed numerous calls that went unanswered. Five days after Al-Hazmi's arrest, the attorney learned that he had been transferred from Texas to New York.

The attorney of Ahmed Abdou El-Khier, a twenty-eight-year-old Egyptian citizen, told Human Rights Watch that INS officials refused

[141] See Human Rights Watch, "Locked Away: Immigration detainees in jails in the United States," *A Human Rights Watch Report*, vol. 10, no. 1(G), September 1998.

[142] 8 USC 1229(a)(E).

[143] Human Rights Watch also interviewed two detainees initially held as material witnesses and one charged with crimes. One of the material witnesses signed a document informing him of his rights, but he said he could not understand fully what it said; the other material witness said he was informed of his rights. The individual charged with crimes, which are unrelated to terrorism, said that he was not informed of his rights when he was arrested or thereafter.

[144] Human Rights Watch telephone interviews with Orin Behr, Maryland, December 12, 2001; and David Leopold, Orin Behr's attorney, Cleveland, Ohio, December 10, 2001. The eleven Israelis were arrested on the morning of October 31, 2001 by FBI agents and local police in Lima, Ohio.

[145] Human Rights Watch interview with Ali Saber, Passaic County Jail, Paterson, New Jersey, February 6, 2002. Saber was arrested on November 20, 2001, ordered deported on December 14, and was still in detention on February 6, 2002.

[146] Testimony of Michael Boyle, representative of the American Immigration Lawyers Association, before the Senate Judiciary Committee, December 4, 2001.

[147] Testimony of Gerald H. Goldstein, Esq., before the Senate Judiciary Committee, December 4, 2001. Al-Hazmi was arrested in San Antonio, Texas on September 12, 2001 and released on September 24, 2001. Al-Hazmi was held as a material witness for twelve days and was never charged with any crime or violation.

to tell him where his client was detained for two weeks, during which time El-Khier was transferred to several facilities. The attorney said that only after he filed a petition with federal court was he informed that his client was being held at the Passaic County Jail in New Jersey. The INS charged El-Khier with working while on a tourist visa. His attorney said that he called the INS daily for five days to find out when his client's deportation hearing might be held. On the fifth day, an official told him that the hearing had already taken place and that El-Khier had waived the right to an attorney and admitted he had worked for a total of three weeks during two previous trips to the United States. El-Khier was deported on November 30, 2001.[148]

Similarly, the lawyer of Fayez Khidir, a citizen of Sudan charged with overstaying his visa, said that she tried to locate her client for four weeks during which time the INS moved him to three detention centers in the New York/New Jersey area. She eventually threatened to contact the press if the INS did not tell her where Khidir was. An INS officer promised to call her back with the location within three business days, but the promise was not kept. She finally discovered that her client was being held at the Passaic County Jail in Paterson, New Jersey. The same attorney, who represented several other men held in connection with the September 11 investigation besides Khidir, went to a hearing for one client and found that another of her clients, a national of Turkey held for overstaying his visa, was also there for a hearing. She had not been informed of this hearing by the court.[149]

The aftermath of September 11 has exacerbated longstanding difficulties with access to counsel faced by INS detainees.[150] The INS's transfer policy is a common impediment to obtaining and keeping legal representation: the agency moves detainees frequently from one facility to another without regard to where detainees' attorneys are based or where their families live. Furthermore, the INS does not give advance notice to detainees, the detainees' families, or their lawyers of transfers. As a result, attorneys have been unable at times to locate their clients. As a practical matter, attorneys may not be able to continue to represent clients transferred to facilities in other states. A new rule prohibiting facilities from disclosing the identity of immigration detainees they hold will make it even more difficult for lawyers to track down their clients.[151]

Eighty percent of the immigration detainees that appeared before Immigration Courts in 2001 were not represented by counsel, according to data from the Executive Office for Immigration Review.[152] The inability to pay legal fees is perhaps the main obstacle INS detainees face in securing legal counsel as many have scant financial resources. Post-September 11 detainees face even greater legal expenses because their cases involve unique complications, such as being kept in detention pending FBI clearance. "These cases are a headache for a lawyer," said

[148] Human Rights Watch telephone interview with Martin Stolar, Ahmed Adbou El-Khier's attorney, New York, New York, March 28, 2002.

[149] Human Rights Watch telephone interviews with attorney Sandra Nichols, New York, New York, November 27 and December 17, 2001.

[150] See Human Rights Watch, "Locked Away…."

[151] 8 CFR Parts 236 and 241, INS No. 2203-02. See note 58 for a discussion of the rule.

[152] The INS has refused to disclose how many of the thousand-plus "special interest" cases were unrepresented. Forced by a court order, the Department of Justice declared on June 13, 2002, that only eighteen of the seventy-four "special interest" cases in custody at the time did not have counsel (about 25 percent). As the table below shows, the vast majority of noncitizens charged with immigration violations and detained in the United States are not represented by counsel, while most individuals charged with immigration violations but not detained are represented.

Unrepresented non-citizens before immigration judges in 2001		
	Detained	Not Detained
Immigration Courts	(59,734 individuals) 80%	(65,439individuals) 46%
Board of Immigration Appeals	(3,123 individuals) 53%	(6,784 individuals) 32%
Combined	(62,857 individuals) 78%	(72,223 individuals) 44%

Source: Executive Office for Immigration Review

Sohail Mohammed, who represented about a dozen "special interest" detainees. He added that some lawyers were not taking them because they required a lot of work.

The INS is required by law to hand out lists of attorneys and organizations that offer free legal representation to detainees, but in practice these lists may be of little help.[153] For instance, some post-September 11 detainees interviewed by Human Rights Watch at Passaic County and Hudson County jails in New Jersey said they had called all the legal assistance groups on the list provided by the INS, but none of the groups accepted collect calls, the only type of call the detainees were allowed to make. Even though U.S. law requires that this list be updated "not less often than quarterly," the list of pro-bono counsel provided to detainees held at the Metropolitan Detention Center (MDC) in New York was outdated by months.[154] INS facilities are supposed to progressively install phone systems that allow free calls to attorneys on the list handed out to detainees, local courts, and consulates; however, these systems are not operational in most facilities.

The difficulties in finding and in communicating with attorneys were especially severe for the many "special interest" detainees held in administrative segregation. Even though the INS's Detention Standards, which describe the proper treatment to be afforded to immigration detainees, state that individuals kept in segregation "will be permitted telephone access similar to that provided to detainees in the general population," communicating with the outside world was very restricted or outright prohibited for "special interest" detainees in segregation. For instance, attorneys representing detainees held in segregation at MDC said that for months after September 11 their clients could only make one phone call to their attorneys and another to their families per month.[155] "Access to the phone was so restricted that it was almost meaningless," said Brian Lonegan, a Legal Aid Society staff member who arranged legal representation for some detainees. Lonegan said that phone calls to attorneys were at times only allowed after 5:00 p.m. when it was unlikely that detainees would be able to find or reach an attorney.[156]

Difficulty understanding and communicating in English and lack of familiarity with the U.S. legal system are also substantial obstacles for some immigration detainees. Without interpreters or legal counsel, they are left to navigate complicated immigration laws on their own. Some post-September 11 detainees told Human Rights Watch that they signed documents in English given to them by the INS or FBI that they did not understand. By signing them, they unknowingly waived their right to retain counsel, to contact the consulate, or to have a hearing before being deported.[157] In some instances, detainees without representation agreed to be deported during hearings because they were told that they would be sent back to their home countries relatively quickly, while fighting removal would mean that they would remain in jail for many weeks. Nonetheless, in many cases, they were still kept in detention for months pending FBI clearance after agreeing to be deported.

[153] 8 USC 1229(b)(2).

[154] The phone number of one an agency that did accept collect phone calls, the Legal Aid Society, was wrong. A staff member said that the organization had to move because its offices were damaged by the terrorist attacks and it gave the immigration court its new contact information but the MDC did not update the referral list given to detainees. Human Rights Watch telephone interview with Brian Lonegan, Legal Aid Society, New York, New York, April 15, 2002.

[155] Human Rights Watch telephone interview with attorney Bill Goodman, Center for Constitutional Rights, New York, New York, March 25, 2002; and *Ibrahim Tukmen v. John Ashcroft*, "Class Action Complaint and Demand for Jury Trial," April 17, 2002, p. 15.

[156] Human Rights Watch interview with Lonegan.

[157] Imran Ali, an official with the Pakistani embassy in Washington, reportedly said that his embassy raised its concerns with U.S. officials regarding these issues: "We told them many detainees were illiterate and would not know the consequences of signing those documents. We said sometimes people might have been influenced that signing these papers would be in their interest." See Ann Davis, "Why Detainees Signed Waivers Forfeiting Right to Counsel," *Wall Street Journal*, February 8, 2002.

Access to legal documents would help detainees with a fair understanding of English to know their legal options and rights. However, legal libraries are often grossly inadequate for immigration detainees, especially those held in local jails. For instance, even though the Hudson County jail held hundreds of immigration detainees on February 6, 2002, when Human Rights Watch toured it, the immigration "section" in its law library consisted of a stack of about three books held behind a counter.[158] The staff could not produce Title 8 of the United States Code, which contains the U.S. immigration laws, said that they did not have "know-your-rights" materials, and a copy of the INS Detention Standards was stored in a computer that was not operational, according to the INS district director.[159] The INS Detention Standards mandate that all facilities holding INS detainees shall have a law library that contains thirty immigration-related texts, including the above-mentioned Title 8 and "self-help materials." Yet jail officials repeatedly said during our visit that the facility was in full compliance with all the Detention Standards except for one related to telephone access.[160]

V. VIOLATION OF CONSULAR RIGHTS

When the United States ratified the Vienna Convention on Consular Relations in 1969, it bound itself to inform any foreign national detained by U.S. law enforcement, without delay, of his or her right to seek consular assistance. It must also notify the consulate without delay if the detained foreign national so requests. In addition, "consular officers have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation."[161]

The obligation of notification under the Vienna Convention does not hinge on whether a person is held on immigration or criminal charges; it applies to any foreign national of a member party that "is arrested or committed to prison or to custody pending trial or is detained in any other manner."[162] The U.S. obligations under the Vienna Convention are codified in an INS regulation, which states: "Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States."[163] The regulation goes further than the Vienna Convention obligations for nationals of certain countries by requiring "immediate communication with appropriate consular

[158] Library staff said they kept them there instead of on shelves like other legal texts because they only had one copy of each.

[159] Librarians at Hudson County jail did not know what the INS's Detention Standards were when Human Rights Watch asked them. The INS district director said the standards were in a computer recently donated by the INS that was not operational. This information came as a surprise to the librarian, who was unaware that the Detention Standards were available anywhere in the library.

[160] Hudson County jail officials said that the jail had not yet installed the preprogrammed telephone system that allows immigration detainees to call attorneys and agencies on the list of free legal service providers, local courts, and consulates free of charge, as required by the Detention Standards.

[161] Article 36(1)(c) of the Vienna Convention on Consular Relations. U.S. citizens must be granted the same rights when detained in a country that is a member party to the convention, and the United States has demanded strict compliance of other countries. The U.S. government's ability to protect its citizens abroad can be enhanced or diminished by its record of compliance with the Vienna Convention's obligations at home. In a case in which Virginia officials violated a detainee's rights under the Vienna Convention, Judge Buntzer, a judge on the U.S. Court of Appeals for the Fourth Circuit, said:

> United States citizens are scattered around the world—as missionaries, Peace Corps volunteers, doctors, teachers, and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example.

Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998). In spite of the violation, Angel Breard, a Paraguayan national, was executed on April 14, 1998.

[162] Article 36(1)(b) of the Vienna Convention on Consular Relations.

[163] 8 CFR 236.1(c)

or diplomatic officers whenever nationals of the following countries are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf."[164]

The U.S. government has repeatedly stated that it has upheld its obligations under the Vienna Convention. For instance, in a November 16, 2001 letter to Senator Russell Feingold and six other lawmakers, the Department of Justice wrote:

> Every detained alien is also informed that he or she may communicate with consular or diplomatic officers of the country of his or her nationality in the United States. In addition, the INS affirmatively notifies the consulates of countries that are signatories to the Vienna Convention on Consular Notification within 72 hours of the arrest or detention of one of their nationals.[165]

Yet Human Rights Watch's research indicates that the Department of Justice has often failed to abide by its Vienna Convention obligations. Of the thirty detainees or former detainees interviewed by Human Rights Watch, twelve (40 percent) said they were not informed of their right to contact consular officials at the time of arrest or immediately after; six (20 percent) said that they were informed, and the remaining twelve (40 percent) either did not know or did not remember.

At least seven embassies have protested to the State Department about the U.S. government's failure to notify them of the detention of their nationals, according to press reports.[166] In the case of Muhammed Butt, a Pakistani citizen who died in custody thirty-four days after he was arrested by the INS, the consulate stated that it did not know that he was detained until journalists called to inquire about his death.[167] On the other hand, some embassies were notified and given lists of the detainees from their countries and places of detention.[168]

VI. ARBITRARY DETENTION

Physical liberty is a fundamental human right affirmed in international law and in the U.S. Constitution. Arbitrary detention is the antithesis of respect for that right. An individual who is arbitrarily detained is rendered defenseless by the coercive power of the state. While arbitrary detention is a hallmark of repressive regimes, democratic governments are not immune to the temptations of violating the right to liberty.

The right to liberty circumscribes the ability of a government to detain individuals for purposes of law enforcement—including protection of national security. While the right to liberty is not absolute, it is violated when persons are detained unlawfully or when they are "subjected to

[164] Those countries are: Albania, Antigua, Armenia, Azerbaijan, Bahamas, Barbados, Belarus, Belize, Brunei, Bulgaria, China (People's Republic of), Costa Rica, Cyprus, Czech Republic, The Dominican Republic, Fiji, Gambia, Georgia, Ghana, Grenada, Guyana, Hungary, Jamaica, Kazakhstan, Kiribati, Kuwait, Kyrgyzstan, Malaysia, Malta, Mauritius, Moldova, Mongolia, Nigeria, Philippines, Poland, Romania, Russian Federation, St. Kitts/Nevis, St. Lucia, St. Vincent/Grenadines, Seychelles, Sierra Leone, Singapore, Slovak Republic, South Korea, Tajikistan, Tanzania, Tonga, Trinidad/Tobago, Turkmenistan, Tuvalu, Ukraine, United Kingdom, USSR (all USSR successor states are covered by this agreement; they are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan), and Zambia. Ibid.

[165] Daniel J. Bryant, assistant attorney general for the Office of Legislative Affairs, letter to Senator Russell D. Feingold, November 16, 2001.

[166] John Donnelly and Wayne Washington, "Diplomats Fault Lack of U.S. Notice on Many Detainees," *Boston Globe*, November 1, 2001; and David E. Sanger, "President Defends Secret Tribunals in Terrorist Cases," *New York Times*, November 30, 2001.

[167] Somini Sengupta, "Pakistani Man Dies in INS Custody," *New York Times*, October 25, 2001.

[168] In response to a request from the ACLU, embassies from a number of countries provided it with lists of detainees from their countries they had received from the U.S. government. See section, Protection of the Terrorism Investigation, in this report.

arbitrary arrest or detention."[169] A detention is unlawful under international human rights law if it is not conducted "on such grounds and in accordance with such procedure as are established by law."[170] A detention will also be arbitrary—even if conducted according to existing laws—if it is manifestly disproportional, unjust, or unreasonable.[171]

Under the U.S. Constitution, unlawful or arbitrary detentions are considered violations of the right to due process contained in the fifth and fourteenth amendments, which forbid the government from depriving any person of "life, liberty or property without due process of law." As the Supreme Court has stated, "freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."[172] The due process clause applies "to all 'persons' within the United States," including aliens, whether their presence is lawful or not.[173]

As explained below, various safeguards are required by international and U.S. constitutional law to protect individuals from arbitrary detention, including the obligation of authorities to inform a detainee promptly of the charges under which he or she is held; the obligation to permit a detainee to be released on bail absent strong countervailing reasons such as danger to the community or flight risk, pending termination of legal proceedings; and the obligation to provide a detainee with effective access to a court that can review the legality of the detention. In the case of many post-September 11 detainees, these safeguards were ignored and detainees were held arbitrarily for considerable periods of time.

All detention procedures are subject to occasional problems or delays that can lead to accidental violations of detainees' rights, and such problems might be understandably greater in the context of the confusion, urgency, and magnitude of the investigative effort that followed the September 11 attacks. Our research suggests, however, that the numerous violations of detainees' rights were not simply inadvertent. First, the Department of Justice developed new detention rules after September 11 that deliberately truncated protections that previously existed, extending the period during which detainees can be held without charge and permitting the INS to keep in custody detainees who immigration judges had ordered released on bond. Second, the pattern of the government's actions indicates a deliberate effort to use immigration detention as a form of preventive detention for criminal investigation purposes, even though immigration law does not authorize detention for that purpose. The Department of Justice has sought to hold immigration detainees for lengthy periods of time even though it lacked evidence that they were a flight risk or posed a danger to the com-

[169] International Covenant on Civil and Political Rights, Art. 9(1).

[170] Ibid.

[171] The Human Rights Committee, the international body that monitors compliance with the International Covenant on Civil and Political Rights, has determined that arrest and detention are arbitrary if not conducted in accordance with procedures established by law, or if the law itself and its enforcement are arbitrary. Therefore, a detention may be arbitrary even if it is "lawful." In a case involving a Cambodian asylum seeker, the Human Rights Committee noted that "'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice." See *A v. Australia* (Human Rights Committee, No. 560/1993), U.N. Doc. CCPR/C/59/D/560/1993; and *Van Alphen v. Netherlands* (Human Rights Committee, No. 305/1988), U.N. Doc. CCPR/C/39/D/305/1988. Manfred Nowak, a leading commentator on the ICCPR, has stated that the prohibition against arbitrariness should be understood broadly to include deprivations of liberty that are "manifestly unproportional, unjust or unpredictable." Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993.

[172] *Zadvydas v. Davis*, 533 U.S. 678, 121 Ct. 2491 (2001), citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Claims asserting arbitrary detention have also been made on other grounds, such as the right to counsel under the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to …have the assistance of counsel for his defense") and the excessive bail provision of the Eighth Amendment ("Excessive bail shall not be required").

[173] *Zadvydas v. Davis*, citing *Plyler v. Doe*, 457 U.S. 202 (1982); and *Mathews v. Diaz*, 426 U.S. 67 (1976).

munity—the only legitimate bases on which the INS can hold immigration detainees pending the termination of deportation proceedings.

Even after deportation orders were issued, the INS continued to hold some detainees not because it could not remove them from the United States, but because they had not received "clearance" from the FBI. In doing so, the INS overstepped the boundaries of its authority. There are no laws or regulations giving the INS authority to keep detainees in custody for such a reason; indeed, we know of no regulation that establishes such a "clearance" rationale for continued detention. In effect, immigration detainees from Middle Eastern, South Asian, and North African countries, detained for no more than technical visa violations, were presumed guilty of criminal conduct or knowledge thereof until proven innocent.

These policies and practices have significantly eroded non-citizens' legal rights, have seriously undermined judicial oversight over government actions, and, compounded with other due process irregularities such as lack of access to counsel, have resulted in arbitrary detentions under international and U.S. law.

Detaining Non-Citizens without Charge

A fundamental corollary of the right to liberty is the right not to be held without charge. Article 9 of the International Covenant on Civil and Political Rights states, "anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." U.S. constitutional law similarly recognizes that detention without charge violates the right to liberty protected by the due process clause of the fifth and fourteenth amendments. Non-citizens detained for possible immigration law violations have the same right to be "promptly" informed of the charges against them as a citizen held in police custody. If charges are not filed, the detained person is entitled to release.

The right to liberty is also safeguarded by the requirement that detained persons be able to obtain judicial review of their detention, so that a court "may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[174]

In the aftermath of September 11, the Department of Justice sought legislation that would permit it to detain indefinitely, without charge and without judicial review, non-citizens certified by the attorney general as possible terrorists. Congress refused to grant the attorney general such unprecedented powers. In the USA PATRIOT Act, which became law on October 26, 2001, Congress instead granted the Department of Justice the power to keep certified suspected "terrorists" in custody for seven days without charge.[175] At the end of this period, the attorney general must charge the suspect with a crime, initiate immigration procedures for deportation or release him or her.[176] Six months after the USA PATRIOT Act was passed the Department of Justice declared that it had not certified any non-citizen as a terrorism suspect under the act.[177]

Non-citizens are instead being held without charge under the provisions of a new rule which the INS issued quietly and without a public comment period, on September 20, 2001.[178] Prior to the new rule, the INS had to charge a detained non-citizen within twenty-four hours of detention or release him or her; there was no exception for emergency situations.[179] The new rule extended the permissible period of detention without charge to forty-eight hours. A requirement of issuing charges within forty-eight hours is not inherently unreasonable. The Supreme Court has ruled that in criminal cases, the gov-

[174] International Covenant on Civil and Political Rights, Art. 9(4).

[175] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56.

[176] Ibid, sec. 412.

[177] The statement by the Department of Justice was one of the few periodic reports to Congress required by the USA PARTIOT Act. See Tom Brune, "U.S. Evades Curbs in Terror Law," *Newsday.com*, April 26, 2002.

[178] 8 CFR 287, INS No. 2171-01

[179] The original regulation is contained in 8 CFR 287.3(d).

ernment has to bring charges and a judge has to make a determination of probable cause within forty-eight hours of arrest.[180] But the new rule also contained a loophole by which the forty-eight hour limit could be ignored: "[I]n the event of an emergency or other extraordinary circumstance," the agency can hold non-citizens without charge for "an additional reasonable period of time."[181] The rule contains no criteria as to what constitutes an emergency or other extraordinary circumstance, nor does it set any limits on the period of time a non-citizen can be held without charge in such circumstances.

The preamble to the new rule explains that in emergencies the INS may require additional time beyond forty-eight hours before filing charges "to process cases, to arrange for additional personnel or resources, and to coordinate with other law enforcement agencies."[182] The rule does not require that the INS justify the delay in filing charges or even that it serve notice to the individual or to the immigration court of its intent to hold the detainee past forty-eight hours without charge. Immigration detainees who may not even be guilty of violating immigration law are thus subject to being held in jail for an undefined period of time simply because of the INS's inability to process cases promptly and coordinate efficiently with other government agencies. Although the preamble to the rule argues that immediate implementation of the rule without public comment was needed to react to the September 11 attack, the rule has no expiration date, and thus is now a permanent feature of U.S. immigration regulations.

In issuing the new rule, the Department of Justice gave itself extraordinary powers of detention that exceed the limitations subsequently mandated by Congress in the USA PATRIOT Act. Although the "special interest" immigration detainees are held in connection with a criminal investigation, the rule denies them the due process right criminal suspects have to be charged within forty-eight hours. Human Rights Watch believes that the rule permits arbitrary detentions in contravention of international and constitutional law.

Widespread Delays in Filing Charges

Many "special interest" detainees have been held without charge for longer than forty-eight hours. Using the information released by the Department of Justice in January 2002 and updated in February, we have compiled a graph summarizing the length of time 718 "special interest" detainees were held before charges were filed.[183] The Department of Justice has not

[180] In *County of Riverside v. McLaughlin*, the Supreme Court ruled:

> Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment.... We believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.
>
> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate [United States law] if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. *Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.*" (Emphasis added.)

County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

[181] 8 CFR 287, INS No. 2171-01.

[182] "Supplementary Information" to 8 CFR 287, INS No. 2171-01.

[183] The Department of Justice also released a list of those charged with federal crimes. Although this list provided the date of charge it did not include the date of arrest; thus, it is impossible to know how much time elapsed from one to another.

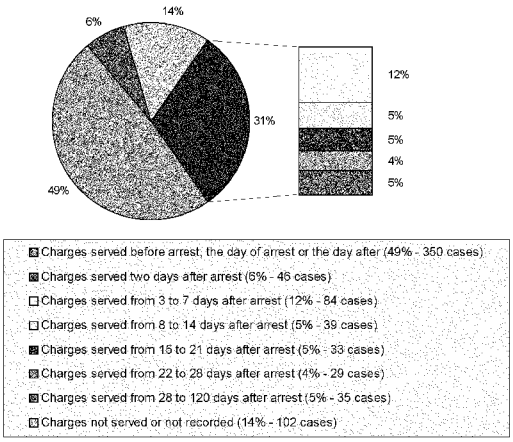
Besides the arrest date and the date when the charging document was served, the list of "special interest" cases included the detainees' nationality, the date when the charging document was filed with the immigration court, and the immigration charge. Other important information such as the detainees' names, arrest location, custody location, and whether they are of interest to the FBI, was redacted. Also redacted were: "JTTF Comments," "Counsel Comments," "DRO Comments," "Bond Info.," "SIOC FBI Interest," and a box under the heading "Legally Suffi-

released any subsequent updates to that information. In 49 percent of the cases, the INS served a charging document to the detainee before the arrest, the day of the arrest, or one day after. In 6 percent of the cases, charges were served two days after the arrest.[184] In 31 percent of the cases, charges were filed three days after the arrest or later. One-hundred and thirty-six noncitizens were held for more than a week without charge, sixty-four of these were charged only three weeks after their arrest or later, and thirty-five detainees were held from one to three months without charge. For instance, a Saudi Arabian was charged with falsely saying that he was a U.S. citizen only 120 days after his arrest and a Jordanian was held for 113 days without charge and finally accused of overstaying his visa.

cient." A press report asserts that JTTF may mean "Joint Terrorism Task Force" and SIOC may mean "Strategic Information and Operations Center" (an intelligence center). Jim Edwards, "Data Show Shoddy Due Process for Post-Sept. 11 Immigration Detainees," *New Jersey Law Journal*, February 6, 2002. See Appendix A for the first page of this list.

[184] Depending on the time of day a person was detained and the charging document served, charging two days after the arrest may or may not be within forty-eight hours of the arrest.

Time Detainees Were Held Before Charged



The list released by the Department of Justice failed to provide the date charges were filed in 14 percent of the cases.[185] It may be that the government simply failed to keep updated information in the cases of 102 individuals detained as of January 2002 in the "largest, most comprehensive criminal investigation in world history," as the attorney general defined it.[186] But the lack of a charging date may also indicate these non-citizens had still not been charged by February 15, 2002, the date when the list was updated. The U.S. government has not provided information on dates of detention or charges for any "special interest" detainees detained after January 2002.

The following are some of the cases of prolonged detention without charge:

- On November 6, 2001, INS and FBI agents arrested a Palestinian civil engineer at his workplace in New York City. He was legally present in the U.S. even though his

[185] The first list released by the Department of Justice on January 4, 2002 lacked this information in more than 16 percent of the cases. The government subsequently disclosed a second list that contained "handwritten corrections to mistakes or omissions that were due to clerical error in the original [document]." "Defendant's Notice of Filing of Amended and Supplemental Exhibits," submitted February 5, 2002, in *Center for National Security Studies v. U.S. Department of Justice*, 2002 U.S. District Court, Lexis 14168 (D.D.C. August 2, 2002). The amended list gave the date the charges were filed for a few but not all cases in which it was missing. The government did not give a reason for its failure to provide such basic information.

[186] Testimony of Attorney General John Ashcroft before a hearing of the Senate Judiciary Committee on "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," December 6, 2001.

visa had expired because he had applied for an extension and was waiting for a response from the U.S. government. The man's attorney filed a motion for a bond hearing and he first appeared before a judge on November 28, twenty-two days after his arrest. At that time, he had still not been charged with any violation.[187] He was released on bond in the minimum amount of $1,500 the next day. The man was informed of the charge against him—overstaying his visa—two weeks after he was released and five weeks after he was arrested.[188]

- Nabil Almarabh, a former Boston cab driver who is a Kuwaiti citizen, was incarcerated in isolation for eight months without charge and without seeing a judge, according to Adem Carroll, a staff member of the Islamic Circle of North America who talked to him on the phone several times and visited him once in detention. Almarabh told Carroll that he was arrested on September 18, 2001, but first stepped into a courtroom only on May 22, 2002, when he was charged with illegal re-entry into the United States, an immigration-related criminal charge for which he was assigned a court-appointed lawyer. Unnamed Department of Justice officials said in a *Washington Post* article that Almarabh had forfeited his right to see an immigration judge because he had violated a previous deportation order by returning to the United States.[189] Paradoxically, they also asserted that he had been brought before a judge at least three times—twice immediately after his arrest and once in May. The article also reported that Almarabh was held as a material witness before May. Material witnesses have the right to court-assigned counsel and Carroll said that Almarabh did not have an attorney before his May proceeding. He also stated that the detainee appeared not to have received any notification of being a material witness. Almarabh has been transferred to the Buffalo Federal Detention Center in Batavia, New York and is being held with the general population.[190]

- Afzal Kham, a forty-eight-year-old man who speaks no English, came to the United States on July 29, 2001 as a stowaway on a ship from Sweden. He said he came to work and send money to his six children in his native Pakistan. He was arrested in the Bronx on September 17, 2001. Four INS and FBI agents arrived at his home at 2:00 a.m. and asked him if he was legally in the country. He said no. The agents detained him and his three roommates. On February 6, 2002, 142 days after his arrest, he told Human Rights Watch that he had not been to court yet and had received no charging document or any other official document from the government.[191]

Delay in Access to Courts

The delay in filing charges also delays detainees' appearance before an immigration judge. Under INS procedures, immigration

[187] A detainee has the right to ask for a bond hearing even if he or she has not received a charging document, 8 CFR 3.14(a).

[188] Human Rights Watch interview with Palestinian civil engineer, Paterson, New Jersey, December 20, 2001; and email communication with his attorney, May 24, 2002. The detainee's name has been withheld upon request. An immigration judge terminated the proceedings against him on February 14, 2002 based on the fact that he was in legal status.

[189] Steve Fainaru, "Suspect held 8 Months Without Seeing Judge," *Washington Post*, June 12, 2002.

[190] Human Rights Watch telephone interview with Adem Carroll, 9/11 relief coordinator for the Islamic Circle of North America, New York, New York, June 13, 2002. Several newspaper reports linked Almarabah to the alleged hijackers and al-Qaeda. See, for instance, Dan Eggen, "Officials Winnow Suspect List: Most in Detention Being Cleared as Sept. 11 Probe Slows," *Washington Post*, December 14, 2001; Amy Goldstein, "A Deliberate Strategy of Disruption: Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror," *Washington Post*, November 4, 2001; and Shelley Murphy, and Stephen Kurkjian, "Lawyers KO Payment for Man in Probe," *Boston Globe*, September 28, 2001.

[191] Human Rights Watch interview with Afzal Kham, Passaic County Jail, Paterson, New Jersey, February 6, 2002. Human Rights Watch interviewed him with the assistance of a fellow detainee who translated for him.

judges do not automatically review whether there is probable cause for a detention. Hearings before immigration judges on the merits of the INS's case against a detainee are not scheduled until after charges have been filed. If a non-citizen is held in custody but not charged, he or she will not be scheduled automatically for a court hearing, regardless of how long he or she has been detained. An immigration detainee held without charges has two recourses to challenge continued detention. The detainee can request a hearing before an immigration judge to consider whether he or she should be released on bond or can file a habeas corpus petition in federal court.[192] Either of these procedures is a formidable obstacle for non-citizens who may not be familiar with the U.S. legal system and who may not have an attorney to counsel and represent them.[193]

Detainees Denied Release on Bond or Held on Extraordinarily High Bond

The right to liberty continues after a person has been accused of violating immigration laws, no less than criminal laws. While an allegation of an immigration violation, if proven, may justify deportation, it does not in itself justify detention. Under U.S. law, immigration detainees should not be kept in custody unless a judge concludes the individual's dangerousness or risk of flight warrant detention until the conclusion of the immigration hearings.[194] As one federal court has noted, "[d]ue process requires an adequate and proportionate justification for detention—a justification that cannot be established without an individualized inquiry into the reasons for detention."[195] Immigration judges should not merely "rubber-stamp" the INS's request that an individual be kept in custody. "The process due even to excludable aliens requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight."[196]

The Department of Justice has sought to circumvent the requirement of an individualized determination of dangerousness or flight risk for "special interest" detainees. Rather than presenting particularized evidence to immigration judges that might justify the need to keep a "special interest" detainee under custody, it has suggested that any post-September 11 detainee of interest to the government's investigation should be kept in custody until it can rule out the detainee's involvement in or even useful knowledge about criminal activity.

The Department of Justice's argument is laid out in an affidavit written by Michael E. Rolince, section chief of the FBI Counterterrorism Division's International Terrorism Operations Section, which the government has filed in an unknown number of bond hearings in "special interest" cases. (The affidavit is attached as Appendix B to this report). The Rolince affidavit consists of a four-page description of the September 11 attacks and the ongoing federal investigation and a two-page section that offers general arguments for the continued detention of non-citizens under FBI scrutiny. It is modified in each case by the addition of a paragraph about the specific detainee in whose case the document is filed. The affidavit states:

> In the context of this terrorism investigation, the FBI identified individuals whose activities warranted further inquiry.... The FBI must consider the possibility that these aliens are somehow linked to, or may possess knowledge useful to the investigation of, the terrorist attacks on the World Trade Center and the Pentagon. The

[192] Regulation 8 CFR 3.14(a) says:

> Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to sec. 3.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings.

[193] The vast majority of INS detainees are unrepresented, as they do not have the right to free-of-charge, court-appointed counsel. See note 152 above.

[194] 8 USC 1231 (a)(6)

[195] *Patel v. Zemski*, 2001 F.3d, No. 01-2398.

[196] *Ngo v. INS*, 192 F.3d 390 (3d. Cir. 1999).

> and the Pentagon. The respondent [name] is one such individual.[197]

Then the paragraph on the individual follows. In the case of Ali Al-Maqtari, the affidavit stated:

> As a result of a search previously described to the court, the FBI continues to download the hard drive of a computer. (The computer was found in a car belonging to Al-Maqtari's wife.) When interviewed by the FBI, Al-Maqtari said he had not used the laptop but purchased it used for $250 from a customer at the convenience store where he works. Al-Maqtari said that the customer obtained the computer form a third party. At present, the download of the hard drive is still running. Once this process is completed, the FBI will need several days to review the information obtained.[198]

No information was provided to suggest why the government believed Al-Maqtari might be linked to the September 11 investigation or what the significance of the laptop might be, nor was any other information offered to the judge during the bond hearing to suggest that Al-Maqtari was dangerous or a flight risk.

In the case of Osama Elfar, the affidavit contended in general terms that the FBI had uncovered information indicating that he might have possible links to terrorist organizations and the 1993 World Trade Center bombing investigation, but it did not provide any facts to support such assertions.[199] According to the detainees and their attorneys, the Rolince affidavit constituted the sole evidence presented by the INS to the immigration judge. No evidence was presented of criminal activity by either detainee, merely FBI conclusory suspicions.[200]

The Rolince affidavit compares counterterrorism intelligence to the construction of a "mosaic," insisting that detainees should remain in custody because although their cases may not look suspicious in isolation, they may form part of a larger picture of terrorist activity when analyzed in a broader context. "What may seem trivial to some may appear of great moment to those within the FBI or the intelligence community," reads the document. The affidavit does not offer evidence of any link between the specific detainee in whose case the document was filed and any crimes or some other reason why he might be a danger to the community or a flight risk if released. It simply contends that the detainee should be kept in custody because "the FBI has been unable to rule out the possibility that respondent is somehow linked to, or possesses knowledge of, the terrorist attacks on the World Trade Center and the Pentagon."[201]

The "mosaic" theory turns the presumption of innocence on its head and eviscerates the right to liberty absent individualized evidence of a person's dangerousness or risk of flight. The Department of Justice is arguing that the U.S. government should be able to detain noncitizens while it investigates them, even if they have not been charged with any crime, simply because it cannot rule out the possibility of criminal conduct. Moreover, it argues that the mere possibility the detainee has "useful information" should warrant his detention. Human

[197] Affidavit by Michael E. Rolince, section chief of the FBI Counterterrorism Division's International Terrorism Operations Section, filed in the cases of Ali Abubakr Ali Al-Maqtari, October 11, 2001, and Osama Mohamed Bassiouny Elfar, October 4, 2001, para. 11.

[198] Affidavit by Rolince filed in the case of Al-Maqtari, para 12.

[199] Affidavit by Rolince filed in the case of Elfar, para. 11. Osama Elfar said that he arrived in the United States three years after the World Trade Center bombing in 1993. Human Rights Watch telephone interview with Osama Elfar, Mississippi County Jail, Missour, November 21, and 26, 2001.

[200] Human Rights Watch telephone interviews with Al-Maqtari and Tiffanay Hughes, New Haven, Connecticut, November 29, 2001; with Michael Boyle, their attorney, New Haven, Connecticut, October 24, 2001; with Elfar; and with his attorneys Dorothy Harper, October 22, and 24, 2001, and Justin Meehan, October 22, 23, and 24, 2001, and February 25, 2002.

[201] Affidavit by Rolince filed in the cases of Al-Maqtari, and Elfar, para. 13.

Rights Watch is aware of no legal basis for detaining non-citizens simply because they may have knowledge related to a crime.

As dubious as the Rolince affidavit's arguments are, they have worked. Prior to September 11, non-citizens accused of technical violations of their visas who did not have a criminal record were routinely released from custody pending deportation proceedings with no bond or a low bond—typically $500. Yet immigration judges have routinely denied bond or set extraordinarily high bonds for non-citizens charged with immigration violations who were arrested in connection with the terrorism investigation. Osama Elfar, for example, who was charged with overstaying his visa, was denied bond and spent eighty-one days in detention, some of them in solitary confinement. When the INS failed to remove him from the country by a deadline set by an immigration judge, his attorney petitioned for a writ of habeas corpus that forced the government to send Elfar back to his native Egypt.[202] The immigration judge initially set a bond of $50,000 in Al-Maqtari's case, but the INS motioned for a stay, so he remained in detention. The immigration judge gave the INS an additional period of time to present more substantial information to support the high bond, but the agency never produced further evidence beyond the Rolince affidavit. After the FBI issued a document stating it had terminated the investigation of Al-Maqtari, he was released on a $10,000 bond, which his attorney still considered very high for Al-Maqtari's alleged violation—ten days of "unlawful presence" in the country while he changed from a tourist to a spouse-sponsored visa.[203] Al-Maqtari spent fifty-two days in detention, mostly in solitary confinement.

Al-Maqtari's extremely high bond is not exceptional. For instance, Sidi Mohammed Ould Bah and Sidi Mohammed Ould Abdou, two Mauritanian men charged with overstaying their visas, were held on $10,000 bonds, which they could not pay. They were released after the immigration judge lowered the bond to $5,000 five weeks after their arrest. "Under normal circumstances my clients would have been released on a low bond from the beginning. They would have not been detained at all," said their attorney.[204] After talking to attorneys representing forty-nine clients, journalist Jim Edwards calculated that New Jersey immigration judges have approved bond amounts five times higher or more than before September 11 for those detained in connection with the terrorist investigation.[205]

Continued Detention Despite Release Order

On October 31, 2001, the INS issued a new "automatic stay" rule that allows it to keep a detainee in custody even after an immigration judge orders him or her released on bond if the initial bond was set at $10,000 or higher.[206] Since the INS determines the initial bond amount, this provision gives the INS the ability to keep a detainee in custody simply by setting the initial bond at $10,000. Detainees can appeal the stay of the judge's release order and their continued detention to the Board of Immigration Appeals (BIA), but even if the BIA upholds the release order, the INS can keep the detainee in custody by taking the case to the attorney general.[207] Hence, the rule gives extraordinary power to the INS to hold people for long periods of time as they try to pursue a complicated and delay-ridden appeal process.

[202] Human Rights Watch telephone interviews with Elfar; with Harper; and with Justin Meehan.

[203] Human Rights Watch telephone interviews with Al-Maqtari and Hughes; and with Boyle.

[204] Human Rights Watch telephone interviews with Dennis Clare, Louisville, Kentucky, October 23 and 31, 2001.

[205] Jim Edwards, "Attorneys Face Hidden Hurdles in September 11 Detainee Cases," *New Jersey Law Journal*, December 5, 2001. See also, Mae Cheng, "Questions Raised About Detainees," *Newsday*, December 17, 2001.

[206] 8 CFR Part 3, INS No. 272-01; and AG Order No. 2528-2001.

[207] The immigration courts are part of the Department of Justice but are independent from the Immigration and Naturalization Service. An attorney general's ruling on an immigration case brought to him can be challenged in federal court.

The automatic stay provision applies to non-citizens held for any kind of immigration offense, no matter how minor. The rule ultimately renders the outcome of bond hearings and immigration judges' review irrelevant. Non-citizens can be detained for months at the discretion of local deportation officers, who set the initial bond, regardless of the immigration judge's impartial assessment of whether the non-citizens present a risk of flight or a danger to the community.

Human Rights Watch does not know how frequently the INS has used the automatic stay provision. The INS does not release such information and, as discussed above, proceedings against "special interest" detainees are shrouded in secrecy. An example of its use, however, is in the case of two Israelis who were charged with working in Ohio while on tourist visas. After the government failed to produce evidence of links to terrorism against them, an immigration judge granted them voluntary departure and ordered each of them released on a $10,000 bond on November 12, 2001.[208] The INS used the automatic stay to keep them in detention. The two remained in jail until November 27, but were never told why. Once released, the INS prevented them from leaving the country by retaining their passports. The two men were finally allowed to leave the United States a month after their release from jail after their attorney filed a petition for a writ of habeas corpus with the federal court.[209] In another case, Atila Kula, a Turkish citizen, was held in a New Jersey jail for more than two weeks after a judge's order that he be released.[210] Kula was legally in the country when he was arrested.

On June 28, 2002, a district judge found continued detention under the automatic stay rule a violation of due process. In *Almonte-Vargas v. Kenneth Elwood*, the judge granted a writ of habeas corpus and ordered released a woman who had been held in detention for more than four months pursuant to the automatic stay rule after an immigration judge ordered her release on bond.[211] In his decision, the federal judge said that due process requires that non-citizens be afforded the opportunity for an individualized hearing addressing the necessity of detention, but "due process is not satisfied where the individualized custody determination afforded to Petitioner was effectively a charade. By pursuing an appeal of the Immigration Judge's bond determination and requesting that

[208] A person who leaves the United States under voluntary departure has a clean record and can apply for a visa in the future, whereas a person removed from the country under a deportation order is barred from re-entering the United States for ten years, unless he or she obtains a special waiver from the U.S. government. Non-citizens who are granted voluntary departure have to pay for their own plane transportation out of the country.

[209] Human Rights Watch telephone interviews with Orin Behr, Maryland, December 12; and David Leopold, Orin Behr's attorney, Cleveland, Ohio, December 10, 2001. For a press report on the case, see Tamara Audi, "Israelis detained, deported during sweep by immigration agency," *Detroit Free Press*, November 15, 2001.

[210] Kula finished classes at Baruch College, New York, on October 17, 2001, but he was legally in the country when he was arrested on November 20 because students are permitted to stay sixty days after classes end. Kula's wedding—which was to have been December 1—would have made him eligible for a work permit. In an interview with reporters, Russ Bergeron, an INS spokesman, said that detainee's rights were not abridged, and noted that Kula could get married in jail. Kula's fiancée asked for just such a ceremony but the local sheriff, who ran the facility where Kula was detained, denied her request. "Muslim behind bars, despite a judge's order," *US-News.com*, November 7, 2001; "No honeymoon," *U.S. News & World Report*, 17 December 2001; and Maki Becker, "Turkish Immigrant Held Despite Judge's Order," *New York Daily News*, December 9, 2001.

[211] *Ursula Altagracia Almonte-Vargas v. Kenneth Elwood*, 2002 U.S. Dist. E.D. Penn. Lexis 12387. The detainee was a woman and a citizen of the Dominican Republic and had not been arrested in connection with the terrorist investigation of the September 11 attacks. Her case is a reminder that the changes to immigration regulations issued by the Department of Justice in the months after September 11 apply to all non-citizens, not only those detained under suspicion of links to or knowledge about terrorism.

no action be taken on the appeal, the INS has nullified that decision."[212]

Immigration judges have also criticized the automatic stay rule. A paper by the National Association of Immigration Judges cites the automatic stay as an example of the immigration courts' "susceptibility to improper interference" by the Department of Justice.[213] The paper advocates the removal of immigration courts from the Department of Justice.

Refusal to Release Detainees for whom Bonds have been Posted

There is no provision of the Immigration and Naturalization Act, nor of regulations issued thereunder, which authorizes continued detention pending authorization from FBI or INS officials after a judge has already ordered release. Nevertheless, in some cases in which an immigration judge has ordered a detainee released on bond, the INS has simply refused to carry out the order until the detainee has received some sort of "clearance" from FBI or INS headquarters. For instance, the family of a man detained in New Jersey tried to pay his bond three times, but a month and a half after the judge ordered him released, he was still in jail, according to his attorney.[214] The INS also repeatedly refused for almost a week to accept the bond payment from the family of two Pakistani men, an uncle and a nephew, also detained in New Jersey.[215] His attorney called the INS and was told that "they needed a response from Washington before releasing him." Human Rights Watch research shows that at least five more detainees who were ordered to be freed on bond by immigration judges were not released by the INS when their families went to pay the bond.[216] In the case of Uzi Bohadana, the INS failed to release him even after his family paid the $2,500 bond that the local INS had set.[217] His attorney said that a local INS officer told her that Bohadana was on "a list" and, therefore, could not be freed. He was finally released three weeks after the bond was paid.

Continued Detention Despite Removal Order

Once an immigration judge has ordered that a non-citizen be removed from the United States, the INS is authorized to keep this individual in custody only as necessary to carry out the removal. The Immigration and Naturalization Act provides that the INS shall remove non-citizens from the United States within ninety days of the issuance of an order of deportation.[218] The act permits the removal period to be extended for an extra ninety days "if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal."[219] Detainees who are granted voluntary departure shall leave the United States within 120 days of the order.[220]

The INS has no authority to keep non-citizens in its custody who have been ordered

[212] Ibid., p. 5.

[213] Dana Marks Keener and Denise Noonan Slavin, "An Independent Immigration Court: An Idea Whose Time Has Come," *National Association of Immigration Judges Position Paper*, January 2002.

[214] Human Rights Watch telephone interview with attorney Regis Fernández, Newark, New Jersey, December 17, 2001.

[215] Human Rights Watch interviews with Sohail Mohammed, Clifton, New Jersey, November 5 and December 19, 2001.

[216] The men are an Egyptian national represented by Rifat Harb of New Jersey, an Egyptian and a Palestinian represented by John Crow of Tucson, Mahmood Abbasi, and Mehmet Aktas. Human Rights Watch telephone interview with attorney Rifat Harb, New York, October 30, 2001; Somini Sengupta and Christopher Drew, "Effort to Discover Terrorists Among Illegal Aliens Makes Glacial Progress, Critics Say," *New York Times*, November 12, 2001; and Brian Donohue, "Foreigners linger in jail despite order to leave," Newhouse News Service, November 16, 2001.

[217] Human Rights Watch telephone interviews with Uzi Bohadana, Hollywood, Florida, November 13, 2001; and with attorney Patricia Ice, Jackson, Mississippi, November 5, 2001.

[218] 241 (a)(1)(A).

[219] 241 (a)(1)(C).

[220] 8 USC 1229(a)(2). See note 208 above for the distinction between deportation and voluntary departure.

deported once it can remove them from the country. Nevertheless, since September 11 the INS has continued to hold individuals ordered deported or granted voluntary departure with safeguards not due to difficulties in arranging for their removal, such as absence of travel documents or lack of a country that would accept them, but because the detainees had not been "cleared" of links to or knowledge of terrorist activities.[221] The process effectively reverses the presumption of innocence: non-citizens detained for immigration law violations are kept jailed until the government concludes they have no links to criminal conduct. This "clearance" process has never been publicly described nor are there any laws or regulations authorizing it. Detainees who were never charged with terrorist offenses are nonetheless held until approval for their release or removal is authorized by several sections of the Department of Justice and the FBI.[222] This "clearance" process is not connected to the immigration charges against the detainee.

The number of non-citizens whose release was delayed pending "clearance" may never be known. According to a press report, eighty-seven detainees with final orders of removal were waiting for clearance as of February 18, 2002.[223] Some detainees who were granted voluntary departure with safeguards by an immigration judge waited in jail, ticket in hand, past the deadline set by the judge for departure until the FBI decided that they were of no use to the terrorism investigation. For instance, on October 15, 2001, an immigration judge granted voluntary departure with safeguards to Mohammed Munir Gondal, who had been charged with working without authorization, and ordered him removed from the country within a month. The deadline passed, however, and the INS did not send Gondal or his counsel notification of any extension of the judge's deadline; it simply refused to allow his departure. Gondal's attorney said that the INS officer in charge of the case told him that they could not let him go because "INS headquarters hasn't authorized it yet." The attorney was also told that the government continued to investigate his client. The government never produced any evidence that linked Gondal to terrorism or to any crime. Gondal was finally allowed to leave the country on February 7, 2002, 115 days after he was granted departure.[224]

Ibrahim Turkmen had a similar experience. A national of Turkey, he was charged with overstaying his visa and granted voluntary departure with safeguards on October 31, 2001. A friend of his bought a plane ticket to Turkey for him two days later and gave it to the INS. In January, an INS agent told Turkmen that he had been "cleared" by the FBI but still needed additional INS "clearance." He was allowed to leave the country four months after the voluntary departure order, on February 25, 2002. During this time he was confined in Passaic County Jail.[225]

Both Mohammed Riaz, a German citizen born in Pakistan, and Habib Soueidan, a Lebanese citizen, were charged with overstaying their visas and ordered deported at the end of October.[226] However, on February 6, 2002, when

[221] Under an order of voluntary departure with safeguards, the non-citizen must be kept in custody until the INS can carry out his or her removal from the country.

[222] Jim Edwards, "Attorneys Face Hidden Hurdles in September 11 Detainee Cases," *New Jersey Law Journal*, December 5, 2001.

[223] Christopher Drew and Judith Miller, "Though Not Linked to Terrorism, Many Detainees Cannot Go Home," *New York Times*, February 18, 2002.

[224] Human Rights Watch interview with Mohammed Munir Gondal, INS's Elizabeth Detention Center, January 27, 2002; and with attorney Michael Levitt, New York, New York, February 28, 2002.

[225] *Ibrahim Tukmen v. John Ashcroft*, "Class Action Complaint and Demand for Jury Trial," April 17, 2002.

[226] Human Rights Watch interviews with Habib Soueidan and Mohammed Riaz, Passaic County Jail, Paterson, New Jersey, February 6, 2002. Mohammed Riaz was detained at his home by INS and FBI agents. He was interrogated twice by the FBI but never told by any law enforcement agent that he had the right to an attorney or to contact the consular office of Germany. He was ordered deported on October 25, 2001. Habib Soueidan, a Lebanese citizen, was arrested on October 11, 2001 by New York City police for selling on the street without a license and handed over to the INS. He was ordered deported on October 31.

Human Rights Watch spoke to them, they were still being held. For Riaz it was 104 days after his final order of deportation, for Soucidan, ninety-eight days. Neither of them had an attorney. Asif-ur-Rehman Saffi, a Pakistan-born French citizen, was charged with working without authorization and ordered deported, but he was removed from the United States only four and a half months after the final order of deportation.[227] In the meantime, Saffi was housed in administrative segregation, where he was allegedly physically and verbally abused by correctional officers. It took the government almost three and a half months to deport Syed Amjad Ali Jaffri, a native of Pakistan, after an immigration judge ordered him removed from the country.[228] He had been charged with working without authorization. Amjad Baig, a Pakistani citizen charged with attempting to use a false passport, remains in custody at the Metropolitan Detention Center in New York as of this writing, even though he was ordered deported on March 18, 2002.[229]

Attorneys have filed petitions in federal courts to pursue redress for the excesses of the INS. For instance, Saffi and Jaffri are plaintiffs in a class action lawsuit brought against the U.S. government on April 17, 2002 that seeks to include all "special interest" detainees who received final orders of removal but were held beyond the period necessary to secure their removal from the United States.[230] The lawsuit seeks the repeal of abusive INS policies and compensatory and punitive damages.

In addition, at least six attorneys representing eight detainees have tried to force the Department of Justice to carry out immigration judges' orders of removal by petitioning for writs of habeas corpus in which they argued that the INS was acting illegally. As a result of the petitions, six detainees have been sent home. The government charged one of the detainees with a crime, illegal re-entry, and kept him in detention after the habeas corpus petition was filed.[231] The other case is still pending.[232]

While petitioning for writs of habeas corpus has provided relief in a number of cases, as a practical matter this approach is not available to every detainee. Lawyers expressed concern that filing a petition with federal court will prompt the government to bring minor immigration-related criminal charges against their clients, such as lying to a law enforcement agent, document fraud, or illegal re-entry, to keep them in detention. Moreover, it is very unlikely that non-citizens who lack counsel and in many cases have limited English language skills, would be able to file such petitions. The INS has refused to reveal how many "special interest" detainees have retained attorneys, but 80 percent of all INS detainees who appeared before immigration courts in 2001 lacked counsel.[233]

[227] *Tukmen v. Ashcroft*. Saffi was arrested on September 30, 2001, ordered deported on October 17, 2001 and removed from the United States on March 5, 2002.

[228] *Tukmen v. Ashcroft*. Jaffri was arrested on September 27, 2001, ordered deported on December 20, 2001, and removed from the country on April 1, 2002.

[229] Request filed before the Inter-American Commission on Human Rights, Organization of American States, by the International Human Rights Law Group, the Center for Constitutional Rights, and the Center for Justice and International Law for Precautionary Measures under article 25 of the commission's regulations, June 20, 2002.

[230] *Tukmen v. Ashcroft*.

[231] The detainee was Shakir Baloch and he was still in detention at this writing. Human Rights Watch interview with attorney Bill Goodman, New York, New York, March 25, 2002.

[232] Human Rights Watch telephone interview with attorney Justin Meehan and the following press reports: "Immigration Detainee Takes Fight for Freedom to Court," Herald News, January 9, 2002; "INS Detainee Hits, US Strikes Back," *Village Voice*, February 5, 2002; and Drew and Miller, "Though Not Linked to Terrorism, Many Detainees Cannot Go Home."

[233] See note 152 above.

Misuse of Material Witness Warrants

To the innocent even a momentary deprivation of liberty is intolerable.... Confinement of the plaintiff [as a material witness] among criminals and forcing him to wear prison garb added the grossest insult to injury.

Quince v. State, Rhode Island Supreme Court, 1962.[234]

Most of the persons placed in federal custody in connection with the government's investigation of the September 11 attacks have been arrested on immigration or federal criminal charges. The U.S. government has also detained a number of people as material witnesses. The Department of Justice has refused to say how many material witnesses have been arrested in connection with the September 11 investigation or to release their names and places of detention.[235] On August 2, a district judge declared: "The Government's treatment of material witness information is deeply troubling.... The public has no idea whether there are 40, 400, or possibly more people in detention on material witness warrants."[236] Human Rights Watch has been able to identify thirty-five individuals, two of them U.S. citizens, who have been held as material witnesses. The judge ordered the Department of Justice to release the identities of all material witnesses, except for those in whose cases a sealing order bars the disclosure. The judge asked the government to submit any such orders for *in camera* (in judge's chambers) review. The Department of Justice is expected to appeal the decision and seek a stay of the order.

Federal law authorizes the courts to issue warrants for the arrest of material witnesses in criminal proceedings in circumstances where securing their testimony might not otherwise be feasible.[237] Rarely used, material witness warrants have a limited but important purpose: to make sure important witnesses render their testimony where there is a real possibility the witnesses may flee to avoid testifying or might be assaulted by persons seeking to silence them, e.g. in mafia trials. The warrants are a singular exception to U.S. law's general prohibition on detaining individuals in the absence of probable cause of criminal conduct.

Our research, including interviews with attorneys and persons who have been held as material witnesses, suggests that the Department of Justice has deliberately used material witness warrants to detain possible criminal suspects who could not otherwise be held in custody on criminal charges and who apparently had not violated immigration laws.[238] Indeed, Department of Justice officials have acknowledged that detentions pursuant to material witness warrants were part of the department's strategy of "inca-

[234] *Quince v. State*, 179 A.2d 485, 487 (1962). The Rhode Island Supreme Court ruled in this case that a material witness had been unlawfully detained.

[235] At least in some, and perhaps all, material witness cases, the Department of Justice has obtained judicial orders sealing the proceedings.

[236] *Center for National Security Studies v. U.S. Department of Justice*, 2002 U.S. District Court, Lexis 14168 (D.D.C. August 2, 2002), p. 28.

[237] 18 U.S.C. § 3144. The federal material witness statute provides:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person.... No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

[238] The government has used material witness warrants in the past to keep suspects in detention for long periods of time. Examples include Wen Ho Lee, a nuclear weapon scientist suspected of but never charged with leaking national security documents; James Nichols, the brother of Terry Nichols who was convicted in connection with the 1995 Oklahoma City bombing; and Abraham Ahmad, a Palestinian American arrested in the aftermath of the Oklahoma City bombing but never charged. Richard Serrano, "After the Attack," *Los Angeles Times*, September 26, 2001.

pacitating" terrorists.[239] For instance, the only person, to our knowledge, who has been charged with a crime connected to the terrorist attacks, Zacarias Moussaoui, the alleged twentieth hijacker, was originally held as a material witness. He was subsequently indicted with six conspiracy counts alleging that he conspired with Osama bin Laden and al-Qaeda to carry out the September 11 attacks. His trial began in July in Virginia. Another man described as a suspect who was initially held as a material witness is José Padilla, who was accused of participating in a plot to explode a radioactive bomb in the United States, but never charged with any crime. He is currently being held as an "enemy combatant" and has been denied access to the courts and an attorney.

The warrants were obtained to secure the presence of the witnesses before the grand juries investigating crimes connected to September 11. All of the material witnesses we interviewed, or whose cases have been described to us by their attorneys, were interrogated extensively about possible criminal conduct or connections to terrorism. A district court declared that at least eight and possible more material witnesses were never brought before a grand jury to testify, although that was the ostensible purpose of the warrants.[240] They were all confined in jail, treated no better than accused or convicted criminals; indeed, some were subjected to punitive conditions, held in solitary confinement, and subjected to security measures typically reserved for dangerous persons. Most were let out of their cells only one hour per day. Although material witnesses have a right to counsel, including court-appointed counsel if necessary, some in fact did not have access to counsel.

Some of the persons held on material witness warrants were ultimately released once the warrants were dismissed while others were charged with federal crimes or immigration violations unearthed during the investigation.

The following cases illustrate the misuse of material witness warrants to keep possible suspects in detention and the mistreatment of the material witnesses while they were confined:

- Jean-Tony Oulai was arrested by eleven FBI, INS, and airport security personnel at a Florida airport on September 14, 2001 after a random search of his luggage turned up a stun gun, flight manuals, and documents with notes in a language that airline workers mistook for Arabic. Oulai, who is a citizen of the Ivory Coast and is black and Roman Catholic, told Human Rights Watch that he was a licensed pilot and that he did not speak Arabic. Stun guns are permitted in checked luggage but have to be reported to the airline. Oulai said that the employee at the airline counter saw the stun gun but did not ask him to fill out any form.

  Oulai was charged with entering the country illegally. Even though he said he entered with a legal student visa, he acknowledged he overstayed his visa and decided to accept deportation instead of spending a long period of time incarcerated while pursuing his case. He was ordered deported on November 15. His embassy allegedly issued him a travel permit and wrote a letter guaranteeing that the Ivorian government would make sure Oulai would cooperate with U.S. law enforcement if his testimony were required in any proceeding in the United States.

  Instead of deporting him, the U.S. government kept him in detention as a material witness for three months. On February 14,

[239] Viet Dinh, assistant attorney general, Office of Legal Counsel, Department of Justice, wrote:

> Each of the detainees has been charged with a violation of either immigration law or criminal law, or is the subject of a material witness warrant issued by a court. The aim of the strategy is to reduce the risk of terrorist attacks on American soil, and the Department's detention policy already may have paid dividends. These detentions may have incapacitated an Al Qaeda sleeper cell that was planning to strike a target in Washington, DC—perhaps the Capitol building—soon after September 11.

Viet Dinh, "Freedom and Security after September 11," 25 *Harvard Journal of Law and Public Policy* 399, Spring 2002.

[240] *Center for National Security Studies v. U.S. Department of Justice*, p. 30.

2002, a judge dismissed the material witness warrant, reportedly after prosecutors admitted that they had no evidence that linked Oulai to terrorism. Still, Oulai was not released. U.S. attorneys in Florida accused him of lying to federal agents about whether he was living legally in the United States the day he was arrested, a crime that is rarely prosecuted. A magistrate set a $100,000 bond on the charge, which was paid by Oulai's brother, who is a physician. Oulai was still not released. The government contended that he was in INS custody because he was waiting to be deported. His attorneys argued that it was illegal for the INS to hold him because the statutory ninety-day deadline for removal after a final order of deportation had passed.

Prosecutors then told the attorneys that Oulai was in the custody of the Marshals Service and was being taken from Virginia to Florida. Reportedly, four federal officials repeatedly contradicted each other over whether the INS or the Marshals Service had custody of Oulai. In the meantime, for seven days neither Oulai's family nor his attorneys could find out where he was held. It turned out that he was being shifted through several states and detention facilities.

As of this writing, Oulai has been in detention for eight months, some of the time in solitary confinement. He alleged he was beaten by law enforcement agents at Baker County Detention Center in Florida.[241] (For more details see the section, Physical and Verbal Abuse, in this report.)

[241] Human Rights Watch interviews with Tony Oulai, Alexandria City Jail, Virginia, February 9, 2002; telephone interviews with his sister Leoncied Ouayouro, Fairfax, Virginia, February 1, 2002, and March 25, 2002; and with his attorney David Sontan, Virginia, February 1, 2002. See also, Amy Goldstein, "'I Want to Go Home': Detainee Tony Oulai Awaits End of 4-Month Legal Limbo," *Washington Post*, January 26, 2002; Amy Goldstein, No Longer Material Witness, West African Still Detained," *Washington Post*, February 15, 2002; and Amy Goldstein, "No Longer a Suspect, But Still a Detainee," *Washington Post*, May 27, 2002.

- When Human Rights Watch interviewed Eyad Mustafa Alrababah, a Palestinian with a Jordanian passport, he had difficulty remembering what had happened to him since his arrest on a material witness warrant, and said he could not see well. He had a bloodshot eye, appeared tired, and said he was depressed, but he had not seen a doctor. He had been held in solitary confinement for more than four months, the first two of them with the lights on twenty-four hours a day, during which time he said he could not sleep.

  On September 29, 2001, Alrababah went to the FBI office in Bridgeport, Connecticut because he had recognized four of the alleged hijackers whose pictures were shown on television. He told Human Rights Watch that he met them at a mosque in March 2001, hosted them at his home, and in June 2001 drove them from Virginia to Connecticut and after that he did not see them again. Alrababah was questioned by two FBI agents and then taken to the Hartford Correctional Center, where he was held for about twenty days. Alrababah was placed in isolation. He was strip and cavity-searched at least once a week. He was not allowed to make any phone calls from the detention center but did telephone his fiancée, a U.S. citizen, a few times from the FBI office where he was taken for interrogations.

  When he asked why he was detained, he was reportedly told, "you're a protected witness," but he said he was not given any document that detailed any charges against him or that stated that he was a material witness.

  In mid-October, six or seven FBI agents interrogated Alrababah for four or five hours. He said he was informed of his right to have an attorney present but he waived his right telling agents, "I'm innocent. I am sure about what I say." Alrababah said one of them, an agent named "Burkowski" threatened him. "He was yelling and screaming. He said 'disgusting Arabs,' and told me 'I'm going to throw you out of the window like

they do in your country.'" Alrababah was interrogated two or three more times, always without an attorney present.

Alrababah was moved to the Metropolitan Correctional Center in Manhattan at the end of October. There he spent about forty-five days in isolation with the lights constantly on. He was reportedly hardly allowed out of the cell. "If you're lucky, you get one hour [of outside time] a week," he told Human Rights Watch. He also said that communication with the outside was "horrible." Alrababah said that he could not call anyone and was only able to tell his fiancée that he was in detention through another detainee. "Nobody knows you are there," he said.

His fiancée confirmed that this detainee called her with Alrababah's message. She had found out from officials where Alrababah was held just a few days before; officials also told her that she could communicate with him only via mail.

From Manhattan, Alrababah was transferred to the Metropolitan Detention Center in Brooklyn in late November. He said that he was assigned an attorney the day he was supposed to appear before a grand jury, but he never testified. Alrababah said that he did not have an attorney during the first two months he was in detention. Despite being a material witness, he said he was not assigned a lawyer and he had tried to hire one but without success due to the difficulties of communicating with the outside from the detention centers.

Alrababah was moved to Alexandria City Jail, Virginia, in early December, where he appeared before a court for the first time since his arrest in September. He was charged with conspiracy and document fraud for signing a form falsely certifying that a New Jersey man was a Virginia resident, which allowed the man to obtain a Virginia driver's license. The man has not been linked to terrorism. Alrababah has not been charged with directly helping any of the alleged hijackers obtain driver's licenses or with knowing their plans.

Alrababah was removed from solitary confinement and placed with the general prison population on February 21, 2002, after spending almost four months isolated in detention. He pleaded guilty to the document fraud charge and was sentenced to time served. He remains in detention pending deportation as of this writing.[242]

- Abdallah Higazy, whose case is described above, was detained as a material witness on December 17, 2001. He was held at the Metropolitan Correctional Center in Manhattan, New York, where he spent thirty days in solitary confinement.

  Higazy said he was only allowed out of the cell three times a week for showers, during which he was handcuffed. He said his cell was ten-by-eleven feet, had a toilet, a bed with a mattress, two sheets, and one blanket. He said the cell was very cold. After two weeks in detention Higazy saw that other detainees had two blankets, and asked for another one. The lights in his cell were kept on twenty-four hours a day. He complained about the lights once orally, but received no response. He said he was never told he could complain in writing.

  When Higazy learned later that he was supposed to be allowed outside time, he requested it seven times, until he was finally permitted to go outside once, the only time during his incarceration. The outside area that he was taken to on that occasion was indoors, though. The detainee said it was a big room (twenty-by-eleven feet) with nothing there (no television or radio). It was "like walking in a bigger cage," he told Human Rights Watch.

[242] Human Rights Watch interview with Eyad Mustafa Alrababah, Alexandria City Jail, Virginia, February 5, 2002; and telephone interview with Ardra Doherty, Eyad Mustafa Alrababah's fiancée, Nutley, New Jersey, January 15, 2002.

Higazy never testified before a grand jury. He was charged with lying to the FBI for denying that a pilot's radio allegedly found in his hotel room belonged to him. As described above, he was released when the owner of the radio, an American pilot, went to the hotel to claim it.[243]

- On October 11, law enforcement officials arrested nine Egyptian, one of whom was a naturalized U.S. citizen, in Evansville, Indiana.[244] Eight of the men were held as material witnesses and the ninth man, Mohammed Youssef, was held on immigration charges. Although the reason for their arrest is unknown, the wife of Fathy Saleh Abdelkhalek, one of the detainees, told a local newspaper that she had triggered the arrest when she called authorities and told them that her husband was suicidal and had threatened to die in a crash.[245] Friends of Abdelkhalek later said that he was not suicidal but that he and his wife had arguments about him sending most of his money home to his children in Egypt.

  The men were allegedly only allowed to make a phone call after they were questioned by the FBI and could not talk to their attorneys for four days after that. They were first held at the Henderson County Detention Center, Kentucky, and later transferred to the Chicago Metropolitan Correction Center. They said they were not allowed to call their families from the Chicago facility.

  Seven of the nine were released on October 18; Abdelkhalek was released on October 26, and Youssef remained in detention and faced deportation proceedings. Abdelkhalek returned to jail a few days later on immigration charges after his wife, who is a U.S. citizen, refused to sign documents that would allow him to stay in the United States.[246]

- Dr. Al-Badr Al-Hazmi, a Saudi national working as a doctor in San Antonio, Texas, was held as a material witness for thirteen days. He was taken first to a local jail, then flown to New York. Authorities allegedly questioned him about a flight he booked and about his credit cards. Al-Hazmi's name is similar to two of the alleged hijackers. He was described in the press by federal government sources as a key suspect who had provided funds for the hijackers. He was denied access to a lawyer for six days, during which he was interrogated repeatedly. He never testified before a grand jury and

[243] Human Rights Watch telephone interview with Abdallah Higazy, New York, New York, February 1, 2002. See also the chapter, Denial of Access to Counsel, in this report.

[244] The men are Fathey Saleh Abdelkhalek, thirty-four; Tarek Abdelhamid Albasti, twenty-nine, a naturalized U.S. citizen; Tarek Eid Omar, twenty-six; Khaled Salah Nasr, twenty-five; Yasser Shahin, twenty-four; Adel Ramadan Khalil, forty-six; Hesham Salem, twenty-eight; Ahmed Attia Hassan, twenty-six; and Mohammed Youssef, age unavailable. The men were former members of the Egyptian national rowing team. The FBI had visited Albasti twice prior to his arrest to inquire about his political beliefs and flying lessons he had taken. Albasti said that the lessons were a gift from his father-in-law, a lawyer and former United States diplomat who is a pilot.

[245] Dave Hosick, "'It Was My Responsibility to Tell,'" *Evansville Courier and Press*, October 22, 2001.

[246] "Federal authorities detain nine people in connection with terrorist activity," Associated Press, October 12, 2001; Terry Horne and Mike Ellis, "Feds detain 8 from Evansville in terror probe: All being held as material witnesses in FBI's investigation after Sept. 11 attacks," *Indianapolis Star*, October 13, 2001; Kimberly Hefling, "Men detained Sept. 11 hope their ordeal is finally over," Associated Press, October 28, 2001; Amy Goldstein et al., "A Deliberate Strategy of Disruption. Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror," *Washington Post*, November 4, 2001, p. A01; Pete Yost, "3 Tunisians ordered out *of U.S.*," Associated Press, November 15, 2001; Don Van Natta, "Arrests have yielded little so far, investigators say," *New York Times*, October 21, 2001; Kim Baker, "Thread of a Threat Led to Wide Dragnet," *Chicago Tribune*, November 5, 2001; and Kimberly Hefling, "2 detainees in terror probe are now facing deportation: The Evansville men remain in jail, waiting for their month-old cases to be resolved," Associated Press, November 16, 2001.

was never charged with any crime or immigration violation.[247]

- Jose Padilla, a U.S. citizen who later used the name of Abdullah Al Mujahir, was arrested on May 8, 2002 on a material witness warrant when he arrived from Pakistan at Chicago's O'Hare International Airport. U.S. officials claimed he had met with al-Qaeda representatives overseas and had plotted to explode a "dirty bomb" on U.S. soil.[248] Padilla was transferred to the Metropolitan Correctional Center in New York, where he was held for a month and where he had access to an attorney.[249] On June 9, U.S. President George W. Bush signed an order designating Padilla as an "enemy combatant" and directing Defense Secretary Donald Rumsfeld to arrest and detain him indefinitely for interrogation. Padilla was transferred to the control of the U.S. military and moved to a Navy brig in South Carolina, where he is being held without charges or access to an attorney.[250]

The Department of Justice's use of material witness warrants to hold individuals in connection with the September 11 investigation has prompted two court decisions reaching opposite results on the lawfulness of such warrants. On April 30, 2002, a federal district judge in New York ruled that the use of material witness warrants to hold persons for future appearances before a grand jury was unlawful.[251] After an analysis of the material witness statute and constitutional considerations, the judge concluded that material witness warrants may only be issued after a criminal case has been filed, and not for a grand jury investigation. She wrote: "If the government has a probable cause to believe a person has committed a crime, it may arrest that person, …but since 1789, no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation."[252]

In July, in another case, a different federal district court judge in New York upheld the use of material witness warrants in the context of

[247] Testimony of Gerald H. Goldstein, Esq., before the Senate Judiciary Committee, December 4, 2001. Al-Hazmi was arrested in San Antonio, Texas on September 12, 2001 and released on September 24, 2001. See also, Scot Paltrow and Laurie P. Cohen, "Government won't disclose reasons for detaining people in terror probe," *Wall Street Journal*, September 27, 2001; Robyn Blumner, "Abusing detention powers," *St. Petersburg Times*, October 15, 2001; and "Saudi Doctor Proclaims Innocence After Release," *Washington Post*, September 26, 2001.

[248] The attorney general said: "In apprehending Al Muhajir as he sought entry into the United States, we have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb.'" A dirty bomb involves exploding a conventional bomb that not only kills victims in the immediate vicinity, but also spreads radioactive material that is highly toxic to humans and can cause mass death and injury. "Transcript of the Attorney General John Ashcroft Regarding the transfer of Abdullah Al Muhajir (Born Jose Padilla) to the Department of Defense as an Enemy Combatant," http://www.justice.gov/ag/speeches/2002/061002agtranscripts.htm, June 10, 2002.

[249] Al Muhajir appeared before a judge on May 15, 2002, who assigned him counsel.

[250] *José Padilla v. George Bush*, "Amended Petition for Writ of Habeas Corpus," United States District County for the Southern District of New York, June 19, 2002. Human Rights Watch questions the government's contention that international humanitarian law—or the laws of war—permits the president to unilaterally designate Padilla an "enemy combatant" who may be held by the military without charge or access to an attorney. International humanitarian law applies to the international armed conflict in Afghanistan, but it does not apply to any and all members of al-Qaeda regardless of their individual involvement with that conflict. If suspects are apprehended outside areas of armed conflict and have no direct connection to the conflict, international humanitarian law is inapplicable. Instead, the protections of international human rights law apply. In the case of a U.S. citizen detained in the United States, the protections of U.S. constitutional law apply as well. These protections include the rights to be formally charged and permitted access to counsel.

[251] *United States of America v. Osama Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. April, 2002).

[252] Ibid, p. 59

grand jury investigations.[253] The judge argued that Congress had intended the material witness statute to apply to grand jury proceedings as well as trials; that detaining witnesses for appearance before a grand jury did not violate the Fourth Amendment, and that courts for decades have routinely applied the statute on the assumption that it could be used to secure the testimony of material witnesses before a grand jury.[254]

The court's opinion in *United States v. Osama Awadallah* offers a detailed picture of how the Department of Justice used a material witness warrant in the case of Osama Awadallah, a lawful permanent resident of the United States and a citizen of Jordan, and how he was treated while detained. Awadallah was first held as a material witness and later charged with perjury for denying to federal investigators that he knew the name of one of the September 11 alleged hijackers, even though he admitted he had met him and another hijacker, whom he identified.[255] The judge ruled his detention illegal and suppressed his testimony not only because of the misuse of the material witness statute in the context of a grand jury investigation but because of an array of other violations committed by the U.S. government. The material witness statute provides that no individual may be detained if his or her testimony can adequately be secured by deposition.[256] In an earlier decision the same judge had concluded that despite being detained for twenty days as a material witness, "there was no indication that the government had attempted to take Awadallah's deposition or offered to explain why it would not have been feasible—even though Awadallah's counsel made the offer to have Awadallah deposed."[257] In addition, the judge determined that the arrest warrant against Awadallah was improperly issued due to "intentional misrepresentations and omissions" contained in the government affidavit, which exaggerated his flight risk and failed to say that he had fully cooperated with law enforcement agents.[258]

The proceedings in Awadallah's case also revealed a grim picture of the treatment that he and other material witnesses received while in custody. As the judge pointed out, Awadallah was held under conditions "more restrictive than that experienced by the general prison population."[259] Whenever he was transported he was placed in a "three-piece suit," consisting of leg shackles, a belly chain, and handcuffs looped through the belly chain so that the hands were restrained at his waist. He was held in solitary confinement, not allowed to have family visits, and unable to make telephone calls for the twenty days he was held as a material witness; his attorney was unable to locate him for four days. Awadallah was also denied showers for many days and strip-searched each time he was taken from and to his cell.

Awadallah and some other material witnesses were held in the maximum-security wing at the Metropolitan Correctional Center (MCC) in New York. Two material witnesses who had been incarcerated there independently told Human Rights Watch that they were held in isolation with the lights on twenty-four hours a day and could not make a single phone call during their stays there (forty-five days for one and thirty days for the other).[260] They also said that they were hardly ever allowed outside of their cells. Human Rights Watch requested but was

[253] *In re the Application of the United States for a Material Witness Warrant*, 2002 U.S. Dist. Lexis 13234 (S.D.N.Y. July 11, 2002).

[254] The Fourth Amendment to the U.S. Constitution states: "The right of people against ...unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause."

[255] Osama Awadallah was a subject of the investigation because agents found a scrap of paper in a car abandoned by the alleged hijackers with the phone number of a residence where he briefly lived two years earlier. He was arrested September 20, 2001 and spent eighty-three days in prison before being released on bail. See discussion of this case in the chapter, Denial of Access to Counsel, in this report.

[256] See statute in note 237 above.

[257] *United States of America v. Awadallah*.

[258] Second Opinion and Order, *United States of America v. Awadallah*.

[259] First Opinion and Order, *United States of America v. Awadallah*.

[260] Human Rights Watch interview with Alrababah; and telephone interview with Higazy.

denied access to the Metropolitan Correctional Center.[261]

Government statements filed in the Awadallah proceedings confirmed a policy at MCC of prohibiting material witnesses from making phone calls.[262] The government acknowledged in an affidavit that "Awadallah and other inmates who were at the New York MCC in connection with the investigation into the September 11 terrorist attack were designated high-security inmates and handled in accordance with the procedures for such inmates."[263] According to another government affidavit: "The warden determined that until [the MCC] had any concrete evidence from the FBI or other folks, that there was not a terrorist association or anything of that nature, [the MCC] would have to keep [the material witnesses] separate" and special precautions would apply.[264] Prison officials recorded their movements with a hand-held camera, a policy that had been previously used with the "African Embassy bombers," the persons charged in the 1998 bombings of the U.S. embassies in Nairobi and Dar es Salaam.[265]

VII. CONDITIONS OF DETENTION

We were treated like criminals. We felt discriminated against and treated different from other detainees. Our requests were ignored; we were held in isolation and had no access to our lawyer for two weeks. Other prisoners did not face these conditions. We felt the treatment was degrading.

Bah Isselou, INS detainee,
October 6, 2001.[266]

Persons detained on immigration charges or on material witness warrants are not accused of criminal conduct, much less convicted of it. Nevertheless, detainees held in connection with the September 11 investigation have been treated as though they were convicted terrorists. They have been forced to spend weeks and even months enduring harsh detention conditions. Some have been held in solitary confinement, allowed out of their cells infrequently, subjected to extraordinary security measures, and often prevented communicating with the outside world, including with family and attorneys. Some have been victims of verbal and physical abuse, denied adequate medical attention, and housed with suspected or convicted criminals. Non-English-speaking detainees have been unable to communicate with officials due to lack of translators and bilingual jail staff. Finally, Muslim and Jewish detainees have had considerable difficulty meeting their religious obligations, including praying practices and special diets.

Such conditions are inconsistent with basic human rights protected by international standards. The International Covenant on Civil and Political Rights (ICCPR) establishes that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[267] The ICCPR also prohibits any "cruel, inhuman or degrading treatment or punishment."[268] The numerous alle-

[261] The warden of MCC denied Human Rights Watch's request in a November 30, 2001 letter that stated that the events of September 11 required the facility to minimize "activities not critical to the day-to-day operations of the institution." Gregory L. Parks, warden, Metropolitan Correctional Center. Letter to Human Rights Watch, November 30, 2001.

[262] First Opinion and Order, *United States of America v. Awadallah*.

[263] Government affidavit by U.S. Deputy Marshall Scott Shepard, cited in *United States of America v. Awadallah*, First Opinion and Order, p. 10.

[264] Government memorandum cited in *United States of America v. Awadallah*, First Opinion and Order, p. 10.

[265] Ibid, p. 11.

[266] Human Rights Watch telephone interview with Bah Isselou, Florida, October 6, 2001.

[267] International Covenant on Civil and Political Rights, Art. 10.

[268] Ibid., Art 7. The Human Rights Committee, in general comment no. 20, states that "prolonged solitary confinement" of the detained or imprisoned person may amount to acts of torture or cruel inhuman and degrading treatment in violation of article 7 of the ICCPR. This is especially true when it is accompanied by aggravating circumstances, such as lengthy

gations of abuse and inadequate detention conditions have prompted the Department of Justice's Office of the Inspector General to launch an investigation of the treatment of "special interest" detainees held at Passaic County Jail and the Metropolitan Detention Center.[269] Its report is scheduled to be released by October 2002.[270]

Some forms of mistreatment that many "special interest" detainees have endured are no different from those faced by other immigration detainees. A 1998 Human Rights Watch report concluded that many jails used by the INS to hold immigration detainees did not provide adequate detention conditions.[271] The report documented, among other findings, that INS detainees were held with and under the same punitive conditions as convicted criminals. Living quarters were often overcrowded; access to exercise was inadequate; food and clothing were sometimes limited; and medical and dental care was substandard. In addition, access to legal representatives, family, and friends was severely curtailed by strict jail rules that were inappropriate for administrative detainees. The report also documented the INS's failure to oversee appropriately the conditions under which the detainees lived.

One of the reasons for these inadequacies was the lack of national guidelines and standards for the treatment of immigration detainees. In part as a result of criticism by Human Rights Watch and other groups, the INS developed Detention Standards to be implemented in all facilities that house INS detainees to ensure minimum guarantees in their treatment. The precise timetable for the implementation of the Detention Standards is a mystery.[272] Our ongoing monitoring of the conditions under which INS detainees are confined indicates, however, that they continue to be held under inadequate conditions that fail to meet the Detention Standards. In addition, 54 percent of immigration detainees continue to be incarcerated in jails that are intended for accused or convicted criminal inmates, and often hold immigration detainees with those populations.[273]

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duration, incommunicado, small cell, or little light. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p. 187. In the case of *Campos v. Peru* (HRC, 577/94, para. 8.7), the Human Rights Committee found that three years of continued solitary confinement was a breach of article 7. See also, *Marais v. Madagascar* (49/79); and *El-Megreisi v. Libyan Arab Jamahiriya* (440/90).

[269] "DOJ Initiates Detainee Civil Rights Review," Announcement by the Department of Justice, April 2, 2002.

[270] Human Rights Watch met on April 25, 2002 with staff from the Office of the Inspector General to discuss the treatment of September 11 detainees and some of the findings of this report. Their timeline for the release of the report is included in "Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act," U.S. Department of Justice—Office of the Inspector General, July 15, 2002.

[271] Human Rights Watch, "Locked Away: Immigration detainees in jails in the United States," *A Human Rights Watch Report*, vol. 10, no. 1(G), September 1998. Most non-citizen detainees are confined in local jails because of a shortage of space in federal facilities.

[272] The INS's website states that implementation of the Detention Standards will take place in two phases over a period of two years. The first phase will cover INS Service Processing Centers (SPCs), Contract Detention Facilities (CDFs), and the nine largest state and local government facilities (IGSA facilities) and the second phase will cover the remaining IGSA facilities. All phase-one and phase-two facilities must be in compliance with all INS Detention Standards, by December 31, 2002. (See http://www.ins.gov/graphics/lawsregs/guidance.htm). However, in our February 6, 2002 visit to the Hudson County Correctional Center in New Jersey, one of the nine largest IGSA's, jail officials said that they only had to be in compliance with the Detention Standards by the end of the year. Human Rights Watch repeatedly asked the INS through phone calls and in writing, individually and through a coalition of NGO's, during a three-month period in early 2002, when specific facilities must be in compliance with the Detention Standards, but it received no clear answer.

[273] INS Detention Standards Presentation to various NGOs by the INS's Detention and Removal Office, June 7, 2001. The reason the INS holds individuals in its custody in local jails is its lack of adequate space in federal facilities to house the exponentially-growing population of immigration detainees. In 2001, the INS had 22,000 people in custody on an average day, compared to 6,700 per day in 1995.

Administrative Segregation

Scores of non-citizens detained in connection with the investigation of the September 11 attacks and charged with administrative violations, minor crimes, or held as material witnesses have been incarcerated for weeks and even months in segregated housing units designed for inmates with records of extremely dangerous or high security risk behavior. Some facilities kept the detainees isolated in their cells twenty-four hours a day, with only brief breaks for exercise outside of the cells a few times a week. They had restricted or no access to telephones, limited visitation rights, and were denied access to libraries, radio, and television. In some cases, the lights were kept on in their cells twenty-four hours a day.

Such harsh and punitive conditions are typically used to punish jail or prison inmates for violating disciplinary rules or to segregate inmates with a history of dangerous conduct or who might be at risk from other inmates ("administrative segregation"). They are completely unjustified for persons detained on material witness warrants because they may have information useful to a criminal investigation and who have not violated jail rules while incarcerated. They are equally unjustified for persons detained on immigration charges. According to the INS's Detention Standards, administrative segregation should be a "non-punitive form of separation from the general population" under which detainees should "receive the same general privileges as detainees in the general population, consistent with available resources and security considerations." These privileges include interaction with other detainees, visitation and access to recreation, television, board games, the law library, and reading materials, and telephone access similar to that of detainees not held in segregation.[274]

In November and December 2001, fifty-four to fifty-six men, the majority or all of whom were "special interest" cases, were incarcerated in the Special Housing Unit (SHU) of the Metropolitan Detention Center in New York. Some were doubled-up in one-person cells while others were held alone, according to the Legal Aid Society of New York.[275] Lights were kept on twenty-four hours a day at the SHU and the windows in some cells were covered so no sunlight filtered through.[276] Attorneys said that their clients complained that they were woken up every day in the middle of the night for head counts. They also said that detainees were only allowed one hour of outdoor exercise per day. Since the exercise period was scheduled for 6:00 a.m. and the detainees were not given winter clothes, many declined to leave their cells. Detainees were shackled, cavity-searched, and videotaped whenever they were moved outside their cells, and they were videotaped even when

[274] See Special Management Unit (Administrative Segregation) Detention Standard at http://www.ins.gov/graphics/lawsregs/smu_adm.pdf.

[275] Human Rights Watch telephone interview with Brian Lonegan, Legal Aid Society, New York, New York, April 15, 2002.
The number of "special interest" cases kept at the SHU decreased to eighteen by the end of March 2002, fourteen by mid-May, and seven a month later, after some detainees who had been held there were deported, moved with the general population, or transferred to other facilities. Human Rights Watch telephone interviews with attorney Bill Goodman, New York, New York, March 25, 2002; with attorney Lawrence Feitell, New York, New York, May 14, 2002; and with Adem Carroll, Islamic Circle of North America, New York, New York, June 13, 2002.

[276] Covering windows so that no natural light enters the cells is a violation of international standards. Rule 11 of the U.N. Standard Minimum Rules for the Treatment of Prisoners states: "In all places where prisoners are required to live or work, the windows shall be large enough to enable the prisoners to read or work by natural light." "Standard Minimum Rules for the Treatment of Prisoners," adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, Annex I, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).
The Human Rights Committee has determined that a cell constantly illuminated by artificial light contributed to conditions of detention that were considered inhuman under article 10 of the ICCPR. See, e.g. *Massiotti and Baritussio v. Uruguay*, Communication No. R.6/25/1978; *Lorrosa v. Uruguay*, Communication No. 88/1981.

they were talking to their attorneys. Lawyers told Human Rights Watch that they did not know for sure if the cameras recorded sound but their confidential conversations with their clients could certainly be lip-read. Attorneys have also alleged that some detainees held at the SHU were physically and verbally abused,[277] denied medical care,[278] allowed only very restricted access to telephones,[279] and deliberately prevented from observing certain mandatory religious practices.[280]

Detainees held in administrative segregation at other facilities endured similarly stringent conditions of detention. For instance, Uzi Bohadana said he was held seventeen days in solitary confinement at Concordia Jail in Ferriday, Louisiana, during which he could not make any phone calls or receive any visits. He said he was not allowed outside of his cell at all during this time. He said a nurse came to his cell regularly to treat the injuries he had received after being beaten by inmates at another facility. Bohadana said that sometimes correctional officers did not take him to the showers for a week. He had no radio, television, and no reading materials. When he protested the conditions of his detention, correctional officers said the FBI had ordered it.[281]

An undisclosed number of "special interest" cases were held in isolation at Denton County Jail in Texas. One of them was Ghassam Dahduli, a forty-one-year-old Palestinian man born in Saudi Arabia. Dahduli, who had lived in the United States since 1978, had been charged with an immigration violation before September 11 for taking a part-time job in network engineering when his visa allowed him to engage only in religious work.

Dahduli was free on bond while the case made its way through immigration courts. On September 22, 2001, fifteen to twenty FBI, police, and INS agents came to his house "with full media accompaniment," Dahduli said. The INS revoked his bail, arguing he was a flight risk and a danger to the community. Dahduli said that the officials told the media he had contacts with bin Laden, which he adamantly denied.

Dahduli was handcuffed, placed in belly chains and shackles, and transported to Denton County Jail, Texas, where he remained for sixty-six days in solitary confinement. He was held in a seven-by-ten-foot cell that had a shower and a toilet although it was "freezing." Dahduli was not given an additional blanket. He did not have access to television, radio, or newspapers; he received a Quran only two weeks before he was deported. Dahduli said he was only allowed out of his cell three times a week for an hour, when he was taken to an outdoor area where he stayed alone. He stated that he was usually let out at 6:30 or 7:00 a.m., when it was "freezing cold." He only had a short-sleeved shirt and was not permitted to take a blanket. When it was raining or had rained and the floor was wet he was not allowed outside.[282]

[277] Two plaintiffs in a class actions suit against the U.S. government—Asif-ur-Rehman Saffi and Syed Amjad Ali Jaffri—maintain they were physically abused by correctional officers at the MDC. *Ibrahim Tukmen v. John Ashcroft*, "Class Action Complaint and Demand for Jury Trial," April 17, 2002. See also the section, Physical and Verbal Abuse, in this report. The Legal Aid Society of New York said that they talked to two detainees who said they had been roughed up, spat on, pushed against the walls, and cursed by the correctional officers. Human Rights Watch telephone interview with Lonegan.

[278] Shakir Baloch was constipated for six to eight weeks and was not given any medication while being held at the SHU, according to his attorney. The attorney said that another of his clients incarcerated at the SHU was beaten by correctional officers and had his teeth chipped but received no dental care. Human Rights Watch interview with Goodman.

[279] See chapter, Denial of Access to Counsel, in this report.

[280] See section, Inability to Satisfy Religious Obligations, in this report.

[281] Human Rights Watch telephone interviews with Uzi Bohadana, Hollywood, Florida, November 13, 2001. Bohadana had been arrested on September 14, 2001 for working while on a tourist visa. He was released on bond on October 5.

[282] Human Rights Watch telephone interview with Ghassam Dahduli, Ammam, Jordan, December 19, 2001 and January 17, 2002.

Dahduli was deported on November 26, 2001. He was escorted to Jordan by an INS deportation and removal officer and by a Department of Justice investigator assigned to his case. Dahduli said that an FBI agent was waiting for him at the airport with Jordanian authorities. He was detained and placed in isolation in Jordan for fifteen days during which he was interrogated four times, but he said he was treated well while in custody. Dahduli has been released and he said he has not had any further contact with Jordanian or U.S. authorities.[283]

Some detainees from the Middle East, South Asia, or North Africa, who were in the custody of the INS before September 11 were moved to segregation after the terrorist attacks. For example, Mahtabuddin Ahmed, a citizen of Bangladesh, was placed in solitary confinement at the Central Virginia Regional Jail in Orange, Virginia, shortly after September 11 and only removed thirty-three days later in response to his lawyers' complaints. Ahmed said he had no hot water for a week and was not given access to cleaning products or a brush even though the toilets in his cell wing flooded repeatedly and the sewage stagnated in his cell. He was handcuffed and shackled when he was taken from his cell, one hour per day; the shackles were kept during his indoor recreational time and in the shower. He was not allowed outdoors at all. Ahmed said that he was told by the jail official in charge of inmate classification that he had placed him in administrative segregation for his own protection because of his last name. Ahmed said that there were other Muslims in the general population who were not placed in solitary confinement.[284]

[283] Dahduli also faced special restrictions on telephone use as a result of being in solitary confinement. He was allowed to make a phone call the day he was arrested but could not call for three days after that. Even though he had the right to three hours of phone use per day, he said that the correctional officers never brought the phone on time, and it had to be shared by ten detainees. Dahduli said that in reality he could only make a phone call once a day for about fifteen minutes.

Dahduli's case was shrouded in secrecy. He said he was never informed of his right to contact the Jordanian embassy. Proceedings were closed to the public and to his family. Hearings were conducted through videoconference so Dahduli did not leave the jail.

According to press reports, Dahduli's name appeared in an address book of an al-Qaeda member. Dahduli's attorney reportedly said that her client and the man belonged to the same mosque in the 1980s and had a brief encounter in 1998. Amy Bach, "Deported…Disappeared?" *The Nation*, December 24, 2001; Mary McKee, "Peers say arrest of Richardson man is a shock," *Fort Worth Star-Telegram*, September 26, 2001.

Dahduli also told Human Rights Watch that he had been confronted by two FBI agents in 2000. The agents allegedly threatened to take him away from his family, to deport him, and to call the Jordanian government and say that he was an informant unless he cooperated with them. His attorney at the time believed that they did not want any information but rather they wanted him to serve as their mole indefinitely. Dahduli did not agree to the FBI's demands.

"If I was a suspect, why wasn't I ever interrogated? I never saw an INS or an FBI officer while I was in jail," Dahduli told Human Rights Watch. His attorney said that Dahduli had not been interrogated since she was retained in January 2001.

Dahduli dropped the four applications he said he had with the INS to regularize his immigration status because he was told he would have to stay in jail during the process, which could take a year or more. He was deported to Jordan because he held a valid Jordanian passport, even though Dahduli was born in Saudi Arabia of Palestinian refugees. His Saudi Arabian travel documents expired when he was unable to travel there during the Gulf War, and he could not renew them after their expiration. Human Rights Watch telephones interview with Dahduli; and with attorney Karen Pennington, Dallas, Texas, January 15, 2002.

[284] Human Rights Watch telephone interview with Mahtabuddin Ahmed, Hanover, Virginia, on December 11, 2001; and letter from Mahtabuddin Ahmed's attorneys Thomas Elliot and Fabienne Chatain to INS Deportation Officer Sherryl Crenshaw, October 29, 2001. Ahmed, who is twenty-seven-years-old, came to the United States when he was four years old. He was convicted of drug possession with intention to distribute and served his sentence in 1998-99. On October 22, 1999, he was picked up by the INS, which initiated removal procedures against him, and moved him to Piedmond Regional Jail in Farmville, Virginia. Ahmed said he was ordered deported in November 2000, but he is still in detention because the INS is waiting for travel documents from the consulate of Bangladesh.

The criteria used to assign a detainee to administrative segregation are unclear. Many detainees were never told why they were subjected to such extreme conditions of detention.[285] When asked, some jail officials reportedly told detainees that they were kept in isolation for their own protection. While Human Rights Watch recognizes that some detainees may have needed protection from other inmates, such protection could be provided without depriving the detainees of access to phones, visits, reading material, radios, and the ability to interact with other non-criminal detainees.

The apparently arbitrary placement of some "special interest" detainees in segregated confinement is evidenced by the treatment of three pairs of "special interest" detainees at three different jails. In each case, the detainees were nationals of the same countries and were charged with the same immigration violations, but were nonetheless held under different detention conditions: One detainee kept in isolation and the other one held with the general prison population. One of the cases involves Osama Elfar, an Egyptian citizen, who was being held in solitary confinement for a week at Jennings Jail in Missouri, while another Egyptian citizen, Ibrahim Bayoumi, was not.[286] Both were charged with overstaying their visas. Elfar said that when he asked a correctional officer why he was held in isolation, he told him that the INS had ordered it for his own safety. However, this did not spare him from being harassed and verbally abused by inmates and correctional officers, who called him a terrorist and a member of Osama bin Laden's organization. Elfar was not allowed to take a shower for five days or leave his cell at all for several days. Even though he was told that visits were permitted two days a week, jail officials apparently told his father and some friends who had come to see him that the INS had ordered that Elfar not receive any visits.[287]

It appears that some "special interest" detainees were held in segregation not for their

[285] The INS's Detention Standards state that a copy of the Administrative Segregation Order, which details the reasons for placing a detainee under such a detention regime, shall be given to the detainee within twenty-four hours of placement in administrative segregation. Reviews shall be conducted seventy-two hours after the detainee was segregated, every week for the first month, and at least thirty days thereafter. The Detention Standards further state that a copy of the decision and justification for each review shall be given to the detainee. These procedures were not followed in the cases of the detainees interviewed by Human Rights Watch, none of whom received the detailed written communications the Detention Standards prescribe.

[286] Another case involves Elyes Glaissia and his roommate, both from Tunisia, who were incarcerated at the Seattle, Washington, INS Detention Center on charges of overstaying their visas. Glaissia was held in solitary confinement for ten days, while his roommate was held with the general population. Glaissia's cell had the lights on twenty-four hours a day and he was not allowed to go outdoors at all, according to his attorney. Glaissia reportedly was never told why he was kept under this regime. The men were arrested when another roommate accused Glaissia of making threatening comments against the United States, comments that Glaissia denied ever uttering. Human Rights Watch telephone interviews with attorney Vicky Dobrin, who represented the two men, Seattle, Washington, November 20, 2001 and January 31, 2002.

Similarly, two Saudi Arabian brothers were arrested at the Denver International Airport in Colorado and charged with immigration violations. They were held at the INS Detention Center in Denver, where the older brother was placed in solitary confinement for eight or nine days without being told why while the younger one was held with the general population, according to their attorney. Human Rights Watch telephone interview with Donna Lipinski, who represented the two brothers, Englewood, Colorado, October 23, 2001.

[287] Elfar was transferred to another jail only after his attorney complained about the conditions of his detention. An immigration judge granted Elfar voluntary departure with safeguards—meaning that he would leave the country straight from the detention facility—and gave an October 23 deadline to the INS for Elfar's removal. Elfar was only allowed to leave the country on December 4, 2001 after his attorney petitioned for an habeas corpus writ. He was arrested by Egyptian authorities upon his arrival to the North African country, and spent four or five days in their custody. Human Rights Watch telephone interviews with Osama Elfar, November 21, and 26, 2001, with his attorneys, Dorothy Harper, October 22, and October 24, and Justin Meehan, October 22, 23, 24, 2001, and February 25, 2002.

own protection or because there was any evidence that they were a danger to themselves or to others, but solely because they were under investigation in connection with the September 11 attacks. When Ali Alikhan protested being kept in isolation, a correctional officer reportedly told him, "they want to check if you are a bad person or not."[288] Alikhan's attorney said that he believed his client was placed in segregation for coercion and punishment.[289]

Extreme conditions of detention have taken their toll on detainees. A man interviewed by Human Rights Watch after being kept in solitary confinement for more than three months appeared to have memory problems, said he could not sleep for the first two months, and that he was depressed.[290] Another detainee said he was going "crazy" while in isolation.[291] These reactions to prolonged isolation are not uncommon. Psychiatrists say that some detainees who are held in solitary confinement for long periods may suffer from memory loss, severe anxiety, hallucinations, and delusions.[292]

Physical and Verbal Abuse

Several non-citizens detained in connection with the investigation of the September 11 attacks have alleged that law enforcement officials or correctional staff physically and verbally abused them while in custody. It is impossible to know, however, how prevalent the mistreatment of detainees has been due to lack of access to them and the secrecy that has shrouded the investigation. Human Rights Watch has documented two cases of physical abuse by public officials and three cases by criminal inmates where authorities failed to prevent the aggression or act to stop it. Three other detainees have alleged in two pending lawsuits filed against the U.S. government that officials beat them.[293] In addition, a third of the detainees interviewed by Human Rights Watch said that they had suffered verbal abuse from correctional officers and/or criminal inmates.

Cases of alleged physical abuse committed by law enforcement agents or jail staff include the following:

[288] Human Rights Watch telephone interview with Ali Alikhan, Vail, Colorado, March 11, 2002.

[289] Human Rights Watch interview with attorney Jim Salvator, Colorado, March 15, 2002.

[290] Human Rights Watch interview with Eyad Mustafa Alrababah, Alexandria City Jail, Virginia, February 5, 2002.

[291] Human Rights Watch telephone interview with Alikhan.

[292] A Human Rights Watch report on conditions at super-maximum security prisons concluded that prisoners subjected to prolonged isolation may experience depression, despair, anxiety, rage, claustrophobia, hallucinations, problems with impulse control, and/or an impaired ability to think, concentrate, or remember. The report also asserted that some inmates held in isolation develop clinical symptoms usually associated with psychosis or severe affective disorders. Human Rights Watch, "Out of Sight: Maximum Security Confinement in the United States," *A Human Rights Watch Report*, vol. 12, no. 1(G), February 2000, p. 2. See also, Human Rights Watch, *Cold Storage: Super-Maximum Security Confinement in Indiana*, (New York: Human Rights Watch, 1997), pp. 62-74.
For reports on this issue from other sources, see, for instance, Angie Hougas, "Psychological Death Row: Supermaximum Security Prisons, Sensory Deprivation and Effects of Solitary Confinement," October 2001, found at Amnesty International Chapter 139's website at http://danenet.danenet.org/amnesty/supermax.html; "Profile: Dispute over the effects of solitary confinement in Supermax prisons on inmates," *NPR's Weekly Edition*, January 8, 2000; James Patterson, "The Effects of Physical Isolation," *Indianapolis News*, January 16, 1999; and "Trend Toward Solitary Confinement Worries Experts," *CNN*, January 9, 1998.

[293] The U.S. press reported allegations of verbal and physical abuse in some other cases. See, for instance, the case of Mohammed Maddy, who sustained a bruise on his upper right arm allegedly inflicted by correctional officers at the Metropolitan Detention Center in Brooklyn. Graham Rayman, "Kennedy Ticket Agent Arrested," *Newsweek.com*, October 5, 2001; and Al-Badr Al-Hazmi, who claimed he was kicked on his back by a correctional officer at the Metropolitan Correctional Center, as reported by Deborah Sontag, "Who is This Kafka That People Keep Mentioning?" *New York Times Magazine*, October 21, 2001. See also, Anne-Marie Cusac, "Ill-Treatment on Our Shores," *The Progressive*, March 2002; and Richard A. Serrano, "Many Held in Terror Probe Report Rights Being Abused," *Los Angeles Times*, October 15, 2001.

- Tony Oulai, the citizen of the Ivory Coast, whose case is described above, told Human Rights Watch that interrogators beat him while he was detained in Baker County Detention Center, Florida. Oulai was alone in an unlit cell that had a bed but no sheets or blankets after midnight on September 17, 2001, when two men wearing jeans and t-shirts, and no identification or badges opened his cell. They put handcuffs and shackles on him, and took him to another cell for interrogation. They asked him if he was a Muslim and if he was from an Islamic country. He replied "no" to each question. Oulai said that one of the interrogators hit him from behind. He fell on the floor and curled up to protect himself. One of the men put a foot on Oulai's neck, while the other one hit him on the back and in the face repeatedly. "I was begging for my life," said Oulai. He estimated that the beating took less than an hour.

  Bleeding from his nose, mouth, and ears, Oulai was then taken by the two men to a cell where there was an Egyptian detainee. Oulai said he could not talk and he fell asleep. In the morning he gave his sister's name to the Egyptian man and asked him to call her. He complained to jail officers but said they told him, "They are going to take care of you where you're going." Oulai was then transferred to Bradenton Federal Detention Center in Manatee County.[294]

- A lawsuit against the government described instances of abuse Asif-ur-Rehman Saffi, a Pakistan-born French citizen, claimed he suffered at the Metropolitan Detention Center (MDC) in New York:

  At MDC, Mr. Saffi was dragged roughly from the van into the building. On the way, his face was slammed into several walls … [Correctional officers] bent back his thumbs, stepped on his bare feet with their shoes, and pushed him into a wall so hard that he fainted. After Mr. Saffi fell to the floor, they kicked him in the face. The lieutenant in charge …called Mr. Saffi a terrorist, boasting that Mr. Saffi would be treated harshly because of his involvement in the September 11th terrorist attacks and threatening to punish him if he ever smiled … [Correctional officers] swore at him, belittled and insulted his religion, and degraded him. They called him a religious fanatic and a terrorist.[295]

- Another plaintiff in the same lawsuit, Syed Amjad Ali Jaffri, a citizen of Pakistan, also claimed he was physically and verbally abused by correctional officers at the Metropolitan Detention Center:

  One [correctional officer], in the presence of [other officers], told [Jaffri]: "Whether you [participated in the September 11th terrorist attacks] or not, if the FBI arrested you, that's good enough for me. I'm going to do to you what you did." The [correctional officer] then slammed Mr. Jaffri's head into a wall, severely loosening his lower front teeth and causing him extreme pain. Mr. Jaffri felt pain and discomfort from that injury throughout his stay at MDC. He was never, however, allowed to see a dentist.[296]

[294] Human Rights Watch interview with Tony Oulai, Alexandria City Jail, Virginia, February 9, 2002. Oulai was arrested on September 14, 2001 and charged with overstaying his visa. Instead of being deported as an immigration judge had ordered, he was then held as a material witness, and when the material witness warrant was dismissed, he was charged with lying to federal agents the day of his arrest about whether he was living legally in the United States.

[295] *Tukmen v. Ashcroft*, pp. 23-24. The lawsuit was filed by the Center for Constitutional Rights as a class action suit on April 17, 2002 on behalf of Ibrahim Turkmen, Asif-ur-Rehman Saffi, and Syed Amjad Ali Jaffri, and other unnamed "special interest" detainees. Saffi was arrested on September 30, 2001 and charged with working without authorization. He was deported on March 5, 2002.

[296] Ibid, p. 28. Jaffri was arrested on September 17, 2001 and charged with working without authorization. He was deported on April 1, 2002.

- Osama Awadallah, a lawful permanent resident of the United States and a citizen of Jordan, maintained that he was mistreated at various detention facilities while he was being held as a material witness.[297] His allegations are included in a statement his attorney filed with the court on his behalf:

  The guards [at the San Bernardino County jail, California] forced [Awadallah] to strip naked before a female officer. At one point, an officer twisted his arm, forced him to bow and pushed his face to the floor.... The government transferred Awadallah to a federal facility in Oklahoma City on September 28.... While in Oklahoma, a guard threw shoes at his head and face, cursed at him and made insulting remarks about his religion...

  On October 1, 2001, Awadallah was shackled in leg irons and flown to New York City.... At the New York airport, the United States marshals threatened to get his brother and cursed "the Arabs".... The marshals then transported him to the Metropolitan Correctional Center in New York ("New York MCC") where he was placed in a room so cold that his body turned blue.... Awadallah was then taken to a doctor. After being examined, a guard caused his hand to bleed by pushing him into a door and a wall while he was handcuffed.... The same guard also kicked his leg shackles and pulled him by the hair to force him to face an American flag....

  The next day, October 2, 2001, the marshals transported Awadallah to [the] Court. With his hands cuffed behind his back and bound to his feet, the transporting marshals pinched his upper arms so hard that they were bruised... In the elevator, the marshals made his left foot bleed by kicking it and the supervising marshal threatened to kill him...[298] The U.S. government stated in an affidavit filed in court that "there is no dispute that Awadallah had bruises on his upper arms as of October 4, 2001."[299] A report by a Special Investigative Agent found that Awadallah had "multiple [bruises] on arms, right shoulder, [and] both ankles, a cut on his left hand, and an unspecified mark near his left eye."[300]

  Marvin Lee Owen, an attorney for the Metropolitan Correctional Center, testified at a hearing that he had seen photos of Awadallah's bruises and they were "consistent with being gripped firmly while being moved in and out of court," according to a press report.[301]

Detainees have also claimed they were verbally harassed and physically abused by jail inmates held on criminal charges. At least three have said they were beaten by inmates and that correctional officers failed to prevent the attacks or to act in a timely manner to stop them. Two of the detainees were held in Mississippi jails where immigration detainees were commingled with accused or convicted criminals.[302] In both cases, inmates somehow learned that the targeted detainees had been arrested in connection with the terrorist investigation. The Civil Rights Division of the FBI opened investigations in

[297] Awadallah was held as a material witness for twenty days and then charged with perjury for saying that he knew the name of one of the alleged hijackers but not of another one. He was released on bond eighty-three days after his September 20, 2001 arrest. Human Rights Watch telephone interview with attorney Jesse Berman, New York, New York, November 6, 2001.

[298] Cited in *United States of America v. Osama Awadallah*, 202 F. Supp. 2d 17, (S.D.N.Y. 2002).

[299] Government memorandum cited in First Opinion and Order, *United States of America v. Awadallah*, p. 11. The court where this government affidavit was filed reached no findings of fact regarding Awadallah's alleged mistreatment.

[300] Ibid.

[301] Patricia Hurtado, "Feds Testify in Jordanian's Hearing," *Newsday*, February 18, 2002.

[302] More than 50 percent of all immigration detainees are held in local jails where they often share living spaces with accused or convicted criminals.

these two cases but decided not to prosecute any of the alleged aggressors. Local law enforcement has also taken no action. A third man, Qaiser Rafiq, who was held on criminal charges in Connecticut, allegedly asked jail officials for protection after a local newspaper published a story linking him to terrorism. Jail staff took no measures to protect him. He said inmates beat him repeatedly. He was transferred out of the facility only after the third assault.

Cases of alleged physical abuse committed against September 11 INS detainees by inmates include:

- Uzi Bohadana, a twenty-four-year-old Jewish Israeli, was arrested on September 14, 2001, on immigration charges. He was held at the Madison County Jail in Canton, Mississippi. He told Human Rights Watch that he did not have any problems in jail for two days until someone—Bohadana suspects it was jail staff—spread the word he was a terrorist. At around 6:30 p.m. on September 16, he was sleeping on the floor when six inmates kicked him in the face and punched him. He said he passed out and then woke up hearing an inmate saying, "Come on, stop, leave him alone." Someone also said, "let's finish him," and he was beaten again. During the beating he was called a "fucking terrorist." Bohadana said he shouted for help and kicked the cell door. Prior to the attack, a correctional officer had always been stationed at a post about two feet away from the cell, but there was nobody there during the beating. At 9:15 p.m., more than two and a half hours after the beating, Bohadana said that correctional officers came in and took him out of the cell. His injuries required stitches on his right eye and lip, and surgery to treat his broken jaw.

  The next day, INS and FBI agents questioned Bohadana about the incident. Bohadana said that he identified the six men who attacked him from pictures that the officials showed him.[303] On December 27, 2001, he received a letter from the Civil Rights Division of the FBI stating: "We can take no action at this time because there is insufficient evidence to prove beyond a reasonable doubt the identity of the person or persons responsible for this crime."[304]

- Hasnain Javed, a twenty-year-old Pakistani, was arrested on September 19, 2001 for overstaying his visa and taken to the Stone County Correctional Facility in Wiggins, Mississippi. He was placed in a cell with five other INS detainees and about five accused or convicted criminals. Javed said that as he was making a phone call, a criminal inmate attacked him. According to Javed, "He gave an extremely powerful punch on my face and continued punching me so ferociously that he broke my front tooth. A second man then joined him, and they beat me up together for over five minutes." He rang an intercom bell and asked for help from a woman who answered. He was crying and pleaded, "Please come and save me." A third man also beat him. The attackers were shouting and calling him a terrorist, saying he was not from the United States. An inmate told him, "hey, bin Laden, this is the first round. There are gonna be ten rounds." "I have nothing to do with this man," Javed replied. "Too bad, you're Pakistani, you're too close," the inmate said. "They kept banging my head fiercely against the bars of the cell, and my left ear began to bleed," Javed said.[305] "I thought I was going to die. I was crying and praying for an officer to show up," he told Human Rights Watch. Javed said he went to his bunk, but the attackers would not leave him alone. They took his clothes off and beat him again. Everyone was cheering and laughing, and they shouted, "Kill him!" A

[303] Human Rights Watch telephone interviews with Bohadana; and with attorney Patricia Ice, Jackson, Mississippi, November 5, 2001.
[304] Letter from Albert N. Moskowitz, chief of the Criminal Section of the Civil Rights Division of the FBI, to Uzi Bohadana, December 27, 2001.
[305] Ibid.

man held him down naked while another one smacked him with a shoe. After being beaten for twenty or twenty-five minutes, correctional officers arrived at the cell. Javed had a tooth broken, bruised ribs, a split lip, a punctured eardrum, and a lacerated, swollen tongue. According to his lawyer, who saw him two days later, he could hardly speak. She said that Javed had to undergo therapy to deal with the emotional trauma stemming from the attack.

Javed did not know how the inmates knew his nationality since, he told Human Rights Watch, he is "very fair-skinned" and speaks perfect American English. In statements to the press, Stone County Sheriff Mike Ballard said that Javed taunted other detainees by saying, "Fuck the United States. I'm glad they hit the World Trade Center," an allegation that Javed denies. Ballard further asserted that Javed had attacked other inmates with a broom handle, so they reacted in self-defense. The sheriff did not explain why Javed would assault others naked. Ballard said the correctional officers were watching the assault on video and got to the cell in two or three minutes.[306]

Two days after the assault, once Javed was released on bond, his attorney took him to the New Orleans office of the FBI, where officials took pictures of his injuries, and to the local hospital. The FBI opened an investigation on the incident but it did not ask Javed to identify the attackers and it did not conduct any follow-up interview with him. His lawyer said that she offered the medical records but the FBI did not ask for them. She also informed the FBI, the INS district director, and law enforcement officials in Mississippi in an October 3 letter that several immigration detainees witnessed the assault.[307] When Human Rights Watch talked to the FBI agent in charge of the investigation at the end of November, he asked us if we knew the identities of those witnesses.[308] Javed's attorney told Human Rights Watch that to her knowledge, the FBI never contacted or interviewed these individuals.

She said that an FBI agent told her that the agency believed that no federal law had been broken and, thus, they would not take any action. By June 14, 2002, eight months after the assault, she had not received an official notification of this decision.[309] Local authorities have taken no action on the case.[310]

- Qaiser Rafiq, a national of Pakistan and a legal permanent resident charged with larceny, claimed he was beaten three times by inmates while in detention and that officials did nothing to prevent the attacks despite his complaints.[311] He was arrested in Colchester, Connecticut, on October 16, 2001, and spent three months at the Walker Reception Center without having any incident with any detainee. However, on January 7, 2002, a local newspaper story reported law enforcement agents' suspicions that Rafiq was

[306] For the sheriff's statements, see Josh Tyrangiel, "A beating on the way back home," *Time*, December 10, 2001; and Cusac, "Ill-Treatment on Our Shores."

[307] Letter to Christine Davis, INS district director, Louisiana, from Mary Howell, Esq., October 3, 2001.

[308] Human Rights Watch telephone call to FBI agent Berry Kowalski, Department of Justice Civil Rights Division, Criminal Section, November 23, 2001.

[309] Human Rights Watch telephone interview with Hasnain Javed, Texas, November 6, 2001; and with attorney Mary Howell, New Orleans, Louisiana, October 31, November 29, 2001, and June 14, 2002. Javed was released on bond on September 21, 2001, granted voluntary departure, and left the United States in early 2002.

[310] In a January 16 letter to Hasnain Javed's attorney, the local U.S. attorney's office said that it would communicate to her any charging decisions on the case, but that at that moment the FBI had not yet concluded its investigation. Letter to Mary Howell from Christopher L. Schmidt, assistant district attorney, Second Circuit Court District of Mississippi, January 16, 2002.

[311] Human Rights Watch telephone interviews with Qaiser Rafiq, Uncasville, Connecticut, March 14, 15, and 18, 2002. See also, Dave Altimari, "Enigmatic Suspect Raises Brows: Intriguing Clues Attract Investigators in Terrorism Probe," *Hartford Courant*, January 7, 2002; and Carole Bass, "Bloody Good Reading," *New Haven Advocate*, March 14, 2002.

linked to the September 11 attacks.[312] Rafiq told Human Rights Watch that fellow inmates read the article and he was then harassed and called a terrorist. He said he told the captain who managed the C1 block where he was confined that he felt threatened. The official replied that the process for a transfer to another facility was very long.

Rafiq told Human Rights Watch that he was first assaulted on January 18, when in the outdoors recreation area four men punched him nine or ten times in the neck, stomach, and chest. He said that a correctional officer was nearby but "looked the other way." Rafiq stated that he complained to the captain and asked to see a judge, but the captain told him, "I can't call the court if you're not bleeding."

Rafiq was beaten again four days later. He was in the day room when two men hit him multiple times in his neck, stomach, and back for three or four minutes. He complained to the captain who apparently did nothing.

Rafiq said he was beaten for a third time on February 5. He was in his cell after lunch when three men beat him on the back of the head and on the face and tried to choke him. One of them said, "We've read in the newspaper that you are a terrorist, and we are going to kill you." Rafiq said that the attack occurred in front of two correctional officers but they did not help him. He said that he had bruises on the eye and that his lip was cut and bled copiously. He was taken to the medical office where they took pictures of him, but he claimed that he did not receive any medical treatment. He insisted on filing an incident report with state police despite being told that he would probably be targeted by the inmates that he accused of attacking him if he did so.

Rafiq was transferred the same day to the Raymond L. Corrigan Correctional Institute in Uncansville, Connecticut. Upon arrival there he was kept four hours in isolation. He described his treatment in a letter he sent to President Parvaiz Musharraf of Pakistan:

> During these four hours almost every correction officer felt his job to harass, curse and threaten me, they threatened to kill me, they made abusive racist comments about myself, Pakistan, Pakistanis and Islam. I was told by one of the officers that I am the only Pakistani Terrorist in their hands and I have to pay for Daniel Pearl [an American journalist who was murdered in Pakistan]. They also showed me the Hartford Courant article and told me that they are going to pass this to all C.O.'s [correctional officers] and inmates and they are sure that someone will take the revenge of Daniel Pearl and kill you.[313]

Additionally, several of the detainees have claimed they were harassed by correctional officers and/or criminal inmates. Six detainees told Human Rights Watch that they had been harassed by law enforcement agents, and five by inmates. Non-citizens arrested in connection with the September 11 investigation were called terrorists, "Osama bin Laden," and told to go back to their countries. When harassment came from inmates, sometimes the detainees complained to correctional officers but the detainees claimed that officials failed to investigate their complaints, to punish or warn the inmates, or to take precautionary measures to protect the detainees from possible aggression by inmates.

Inadequate Health Care

In 1998, Human Rights Watch documented inadequate health care for INS detainees held in local jails. The INS subsequently specified minimum health care to be afforded to INS detainees as part of its Detention Standards.[314]

[312] Altimari, "Enigmatic Suspect Raises Brows…." See also, Bass, "Bloody Good Reading."

[313] Letter to General Parvaiz Musharraf, president of Pakistan, from Qaiser Rafiq, February 9, 2002

[314] The INS's Detention Standards grant all detainees the right to have access to medical services that "promote detainee health and general well being." To be in compliance with the Detention Standards,

Nevertheless, many "special interest" detainees have complained about inadequate health care while in detention.

International standards require that people in custody receive adequate health care. The U.N. Standard Minimum Rules for the Treatment of Prisoners ("Minimum Rules"), which apply to all people in detention, provide that detainees be examined upon their arrival to a detention facility and thereafter as necessary and be transferred to hospitals if they require specialist treatment at any point during their detention.[315] The Minimum Rules also assert: "The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed."[316] The U.N. Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment declares that all detainees are entitled to medical care and treatment free of charge.[317]

The most striking example of denial of health care involved Muhammed Butt who was detained at Hudson County Correctional Center in New Jersey. Butt, a fifty-five-year-old Pakistani national held on immigration charges, died at the facility on October 23, 2001. According to press reports, a preliminary autopsy determined that he died from unspecified "heart problems." Press reports also stated that he was treated for a gum infection with antibiotics from October 1 to October 6. No other pre-existing ailments were reported.

Mohammed Munir Gondal, Butt's cellmate, told Human Rights Watch that since Butt did not speak English, he and other detainees helped Butt fill out five or six request forms to see medical personnel beginning about ten days before his death. Butt would file one and after a couple of days, when he received no answer, he would submit another one. Gondal states that Butt never saw a doctor pursuant to these requests.

On October 23, Gondal and Butt had breakfast at 4:00 a.m. and then went back to sleep. Gondal slept above Butt's bunk. At about 6:00 a.m., Butt said he felt "pain." According to Gondal, Butt knocked on the cell door for five or ten minutes in an unsuccessful attempt to get an officer's attention. Butt then went back to sleep. After 9:00 a.m., Gondal woke up and called Butt, but he did not answer. Gondal shook him, but there was no response. Gondal alerted the correctional officers, and they took Butt away.[318]

Six days after Butt's death, Human Rights Watch wrote to the INS, the FBI, and the Hudson County prosecutor's office, requesting the release of information regarding Butt's health, and the circumstances and cause of his death. The FBI did not provide any clarification about the death but told Human Rights Watch that it

facilities holding INS detainees must provide initial medical screening, primary medical care, and emergency care and employ, at a minimum, a medical staff large enough to perform basic exams and treatments for all detainees. The Detention Standards further state: "The OIC [Officer-in-Charge] will …arrange for specialized health care, mental heath care, and hospitalization within the local community."

[315] U.N. Standard Minimum Rules for the Treatment of Prisoners, rules 24 and 22.

[316] U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 25.

[317] U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 24.

[318] Human Rights Watch interview with Mohammed Munir Gondal, INS's Elizabeth Detention Center, January 27, 2002.

Before Butt was taken to the Hudson County Correctional Center, he spent at least one night at the offices of the INS in New York City on September 19, 2001, according to Mohammed Sid Ahmid, a Sudanese man, who told Human Rights Watch that he was held in a cell across from Butt's there. Ahmid said that Butt's seven-by-thirteen-feet (two-by-four-meter) cell did not have a bed and he slept on the floor. Ahmid also said that Butt could not speak English and only ate bread. Human Rights Watch interview with Mohammed Sid Ahmid, Hudson County Correctional Center, New Jersey, February 6, 2002.

Gondal told Human Rights Watch that on October 15, 2001, he and Butt had a hearing and they were both granted voluntary departure.

would consider opening an investigation into the death. No findings stemming from such an inquiry have been released, however. In a response in early December, the INS stated that it could not release any information on the case "due to laws relating to privacy" unless Human Rights Watch had Butt's "written consent" and "written signature" authorizing the disclosure of his file.[319]

In a subsequent letter, the INS acknowledged its mistake in requesting the signature of a dead man, but still insisted on withholding all information unless it received consent by "an authorized party representing Mr. Butt's interests."[320] Butt did not have an attorney when he died and all close family members live in Pakistan. Human Rights Watch has been unable to locate his family to obtain their consent. The organization filed a FOIA request for the release of government documents concerning Butt on February 28, 2002, which is still pending.

Human Rights Watch understands that there is a legitimate privacy concern not to disclose personal medical records of detainees without their consent or the consent of someone representing their interests. However, international standards are clear that an inquiry should be conducted whenever an individual dies in custody and its findings should be released.[321] Such an investigation is particularly needed in Butt's case because he was not an average INS detainee. As a "special interest" case he was part of a group of individuals about whom there have been many reports of mistreatment and abuse. In Butt's case, all that the U.S. government has said to date is that he died of undefined "heart problems," a blatantly insufficient explanation in light of possible inadequate medical care.

Mohammed Munir Gondal himself also reported serious medical problems in detention that were not properly attended to. On November 30, 2001, after the 4:00 a.m. breakfast, Gondal felt pain in his heart and he began sweating. He called the correctional officers and was taken to the medical office. A nurse there instructed him to come back at 8:00 a.m. because the doctor was not in yet. The doctor examined him later that morning, told him he had not had a heart attack, and gave him an ointment for muscle pain. Gondal stated that his pain worsened, and later that Friday afternoon he went to the medical office again. The same nurse told him to come back on Monday because the doctor had already left the facility and there would be no doctor available on the weekend. He refused and insisted on seeing a doctor. Another nurse examined him and he was taken to a medical center in Jersey City, New Jersey, arriving there that evening. He was informed that he had indeed suffered a heart attack and spent a week in the hospital. On December 27 he felt pain again. This time he was promptly sent to the hospital. He had angioplastic surgery at Beth Israel Hospital in Newark, New Jersey.[322]

Other INS detainees have reported inadequate medical care. For instance, Bah Isselou told Human Rights Watch he had complained about a long-standing kidney problem while at Wallen County Jail, Kentucky, and was given an aspirin. He said he did not see a doctor and was

[319] Letter from David Venturella, assistant deputy executive associate commissioner, Office of Detention and Removal Operations, INS, to Human Rights Watch, December 6, 2001.

[320] Letter from Venturella to Human Rights Watch, January 17, 2002.

[321] Principle 34 of the U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment states:

> Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. *The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.* (Emphasis added.)

[322] Human Rights Watch interview with Gondal.

not provided clean water.[323] Some detainees have also complained that even after succeeding in seeing medical staff, the medical care that they receive is inadequate. Mohammed Tariq, a forty-nine-year-old Pakistani citizen, told Human Rights Watch that he informed medical personnel at Passaic County Jail, New Jersey, that he had a liver problem because he was infected with hepatitis B, which had been treated previously at a Bronx hospital. He was not given the special diet that he required nor given any medication for his condition.[324] Some also complained that jail officials refused to arrange for the specialized medical treatment they required. For example, Ebrahim Ali Nesiredin, a citizen of Ethiopia, has requested specialized medical care for injuries in his eye and foot since February 2002. According to a complaint he filed at the Krome Service Processing Center, Florida, and a letter from his attorney, the injuries were X-rayed at the facility but not treated.[325] He was just given painkillers. He has since been moved to the Middlesex County Adult Corrections Center, New Jersey, but as of this writing has still not been examined by specialist doctors.[326]

Some detainees have told Human Rights Watch that they received incomplete medical examinations upon arrival at their detention facilities. In Human Rights Watch's February 2002 tour of Hudson County Correctional Center, medical personnel told us that each detainee is screened by a nurse who asks them about allergies, conducts a head-to-toe body examination, a dental examination, performs a tuberculosis test, and listens to his or her heart. However, several detainees, including Gondal, who later had a heart attack, said that medical staff did not listen to their hearts during this initial health screening. A detainee held at Passaic County Jail said that a nurse conducted the health exam and administered the tuberculosis test upon his arrival there. However, he was placed with the general population the same day, without waiting the forty-eight to seventy-two hours necessary to know the results of the test.[327] Half an hour after the nurse's injection, the man was taken to a cell with thirty-two INS detainees and criminal inmates. The INS's standard procedure is to keep detainees in segregation until the results are known. The rates of tuberculosis among U.S. prisoners range from three to eleven times higher than those of the general population.[328] Sharing overcrowded living spaces, the conditions under which detainees said that they were held at Passaic County Jail, facilitates the transmission of the disease.

In one medical case, the detainee was kept in a hospital bed in restraints for fifteen days. Osama Salem was arrested in mid October 2001 in Jersey City, New Jersey for entering the country with a false passport. He was taken to the Hudson County Correctional Center, where he went through a health screening at which he was administered a tuberculosis test. He was placed in a room alone for thirty-two hours pending the results of the test, during which he was allowed outside for only one hour. "I had never been in jail, I started crying," he told Human Rights

[323] Human Rights Watch telephone interviews with Isselou; and attorney Dennis Clare, Louisville, Kentucky, October 23 and 31, 2001.

[324] Human Rights Watch interview with Mohammed Tariq, Passaic County Jail, New Jersey, December 20, 2001.

[325] Medical Grievance Form filed by Ebrahim Nesiredin Ali with the Krome Service Processing Center, Florida, February 6, 2002, and Letter to Supervisor Mike Meade, Krome Service Processing Center, from Rhonda Gelfman, Esq., January 31, 2002.

[326] Human Rights Watch telephone interviews with Ebrahim Nesiredin Ali, Krome Service Center, Florida, February 8, 2002 and Middlesex County Adult Corrections Center, New Jersey, June 3, 2002. On June 6, 2002, Human Rights Watch sent a letter to New Jersey INS District Director Andrea Quarantillo urging her to arrange for the specialized care that Ali requires and is entitled to receive. In her June 18, 2002 response, Quarantillo said that she would "look into this matter" but she was unable "to release any information ...regarding the matters you have written about" because the Privacy Act precludes her from doing so. We do not know if the detainee has received specialized health care.

[327] Human Rights Watch interview with Palestinian civil engineer, Paterson, New Jersey, December 20, 2001. The detainee's name has been withheld upon request.

[328] "Tuberculosis in Prisons," *Tuberculosis Epi Update*, vol. 2, no. 1, March 2001.

Watch. "I was crying; I was anxious; I felt so bad," he added. He said that doctors later told him that he had experienced "an attack of nerves." Salem told Human Rights Watch that he had had problems like that before but never as severely.

Salem was taken to a medical center in Jersey City on October 20, 2001, where he was treated for a nervous breakdown. Salem said that he spent fifteen days there lying in bed with his hands cuffed in the front and his feet shackled to the bed. He said he was only allowed out of bed to go to the bathroom. He was guarded by two police officers twenty-four hours a day. When he talked to Human Rights Watch on February 6, 2002, his right wrist had a scar that he said was produced by the continued use of handcuffs. A few weeks later he was charged with a rarely-prosecuted crime: misuse of entry documents. His attorney told reporters that the Department of Justice might be punishing him for speaking to human rights groups about the conditions of detention.[329]

Inability to Satisfy Religious Obligations

None of the Muslim and Jewish post-September 11 detainees interviewed by Human Rights Watch were able to comply fully with their religious obligations while in custody. Detention facilities did not provide meals that met their religious food restrictions and conditions made it difficult for some Muslim detainees to fulfill their daily prayer requirements.[330]

Muslims cannot eat pork and their meat has to be *halal*, i.e. prepared in accordance with certain religious requirements much like *kosher* food in Judaism. The vast majority of the 1,200-plus men detained in the investigation of the September 11 attacks were Muslim, but the facilities that held most of them for months—Passaic County, Hudson County, and Middlesex County jails in New Jersey, and the Metropolitan Correctional Center and the Metropolitan Detention Center in New York—did not offer halal meat on a regular basis.

Muslim detainees at the Hudson County Correctional Center were served pork without their knowledge at the beginning of the holy month of Ramadan, a particularly serious violation of their religious obligations, according to Sohail Mohammed, an attorney and community leader who toured the jail in December 2001. He told Human Rights Watch that when the detainees were told what they had eaten, they self-induced vomiting.[331] Unsure of the contents of the food being served, Muslim detainees stopped eating any meat. Muslim and Jewish detainees held in other facilities also said that they were given pork despite their complaints. For instance, four Muslim detainees from Mauritania did not eat for several days while being held at Wallen County Jail, Kentucky, because they were served pork, according to one of them.[332]

[329] From the medical center in Jersey City, Salem was taken to a South Carolina psychiatric hospital, where he spent two months and where he said he was treated well. He was then transferred back to Hudson County Correctional Center, where he was being held in a psychiatric unit when Human Rights Watch interviewed him. He was ordered deported on January 18, 2002 and was allegedly waiting for "clearance" to leave the country. He told Human Rights Watch he just wanted to go home. Human Rights Watch interview with Osama Salem, February 6, 2002. See also, Kareem Fahim, "Endgame," *Village Voice*, March 6-12, 2002.

[330] The INS Detention Standards provide guidance to what is required of facilities holding immigration detainees to accommodate their religious needs. Regarding religious practices, the Detention Standards state: "Detainees shall have the opportunity to engage in practices of their religious faith that are deemed essential by the faith's judicatory, consistent with the safety, security, and the orderly operation of the facility. No one may disparage the religious beliefs of a detainee." Concerning dietary needs, the INS Detention Standards state: "When a detainee's religion requires special food services, either daily or during particular periods that involve fasting, restricted diets, etc., staff will make all reasonable efforts to accommodate them. This will require, among other things, modifying menus to exclude certain foods or food combinations, providing meals at unusual hours, etc."

[331] Human Rights Watch interviews with attorney Sohail Mohammed, Clifton, New Jersey, November 5 and December 19, 2001.

[332] Human Rights Watch telephone interview with Isselou. The detainees were Bah Isselou, Sidi Mo-

Orin Behr and ten other Israelis did not eat any meat at Medina County Jail, Ohio, because they could not tell if the meat was pork.[333] Behr said that they were not given any extra vegetables and they went hungry every day during their two-to-three-week stay there. The Cleveland Jewish community offered to provide food for these detainees but officials turned down the offer.

During Human Rights Watch's tour of the Hudson County Correctional Center on February 6, 2001, jail officials said that they only served halal meat on certain religious holidays, while kosher food was available on a regular basis. Yet, on the same day, Abdul Karim, a forty-two-year-old Pakistani citizen who had been held there since his arrest on November 14, 2001, told Human Rights Watch that Muslim detainees were served neither kosher nor halal food.[334] Karim said that he had complained to the jail's social worker about the diet. He and about ten other detainees sent a letter of complaint to the director of the facility in early January, but had received no response a month later.

Detainees held at Passaic County Jail told Human Rights Watch that they went hungry during Ramadan when trying to observe their religious obligations. Officials reportedly told them that they would receive an extra tray of food at dinner if they chose to fast during the day, as their religion prescribes. The detainees told Human Rights Watch that they were only given half a cup of peanut butter, jelly, and chips as the extra meal.[335] Pakistani detainee Asif-Ur-Rehman Saffi alleged that jail staff refused to tell him the date while he was being held in isolation at the Metropolitan Detention Center, so he did not know when Ramadan began.[336]

Another common complaint by Muslim detainees was the difficulty in praying five times a day, a fundamental requirement of their faith.[337] Some Muslim detainees held at various facilities were not able to have watches; therefore, they had to ask correctional officers for the time so they would know when to pray. Several detainees told Human Rights Watch that some officers became upset about being asked the time so frequently and swore at the detainees or refused to tell them the time.[338] Some Muslim immigration detainees could only pray in the same spaces where other detainees or criminal inmates watched television, played games, or slept. This provoked frictions and some detainees reported being harassed and laughed at when trying to pray. Other detainees also complained that they had to pray in cells with open toilets and that they had to expose themselves to other detainees

hammed Ould Bah, Sidi Mohammed Ould Abdou, and Cheikh Melainine Ould Belal.

[333] Human Rights Watch telephone interviews with Orin Behr, Maryland, December 12, and attorney David Leopold, Cleveland, Ohio, December 10, 2001.

[334] Human Rights Watch interview with Abdul Karim, Hudson County Correctional Center, Kearny, New Jersey, February 6, 2002. Some of the same restrictions apply to the preparation of kosher and halal foods; thus, many Muslim detainees would prefer to eat a kosher diet to a regular diet if halal food were not available.

[335] Passaic County Jail officials did not talk about food during our tour of the facility on February 6, 2002, and they finished the visit without giving us the opportunity to ask them. Detainees held there said that they were not being given halal food. They also said that jail officials told them that the facility did not serve pork.

[336] *Tukmen v. Ashcroft.*

[337] The five daily ritual prayers, called *salah,* are one of the five "pillars" or basic requirements of Islam. The other pillars are: *shahadah*, the affirmation that "there is no god but God, and Muhammad is the Messenger of God"; *zakat*, the giving of alms; *sawm*, the dawn-to-sunset fast during the lunar month of Ramadan; and *hajj*, the pilgrimage to Mecca. *Columbia Encyclopedia,* Sixth Edition, 2000.

[338] Such problems apparently occurred at Denton County Jail in Texas, where Ghassam Dahduli and Mustafa Abu-Jdai were held. Human Rights Watch telephone interview with Dahduli; and with Pennington. At the Metropolitan Detention Center in Brooklyn, New York, correctional officers covered the windows of some of the cells in the Special Housing Unit, and detainees did not know the time when they should pray. Human Rights Watch telephone interview with Goodman. A correctional officer harassed detainees when they prayed at the Metropolitan Correctional Center in Manhattan, New York, according to a man held there. Human Rights Watch interviews with Alrababah.

when they went to the bathroom, actions prohibited by their religion.[339] Sohail Mohammed told Human Rights Watch that Muslim detainees held at Hudson County Correctional Center were not allowed to pray in congregation on the day celebrating the end of Ramadan, one of the two most important feasts in Islam.[340]

Commingling INS Detainees with Criminal Inmates

INS detainees often share living quarters with persons accused or convicted of criminal offenses, even though international standards require that people detained for civil or administrative reasons be kept separately from people imprisoned for criminal offenses.[341] "Special interest" cases have been no exception. The INS placed many of them in county and local jails where they are commingled with accused or convicted criminals, and a few have suffered assaults as a result, as detailed above. In those jails, "special interest" cases have been treated as criminals and bound by strict jail rules inappropriate for their administrative status as unaccused, non-criminal detainees.

Other Problems at Detention Facilities

Barriers to Communication with Families

The U.S. government has failed to meet international standards that grant detainees the right to notify family members promptly of the place of detention, receive visits from family members, and have an "adequate opportunity to communicate with the outside world."[342] Immigration detainees in general should be granted generous visitation and phone privileges that reflect their non-accused, non-criminal status.

Those held in incommunicado solitary confinement have suffered the greatest restrictions, but even detainees incarcerated with the general population have encountered difficulties in contacting their families and in accessing phones. Some people were denied access to phones upon their arrest and, thus, were unable to tell their loved ones where they were for many hours and, in some cases, days. For instance, Tahir Iqbal, a Pakistani national, said he was only allowed to telephone his family thirty hours after his arrest, despite his repeated requests.[343]

Some of the detainees' families lived abroad. The detainees were not able to communicate with them because the phones in some jails only allow domestic collect calls. For instance, when Human Rights Watch spoke with Afzal Khan, a detainee at Passaic County Jail,

[339] A Palestinian civil engineer said that he was held in a cell with an open toilet at the facility at 26 Federal Plaza in Manhattan, New York. He complained to correctional officers but had to spend the night there. Human Rights Watch interview with Palestinian civil engineer. Ali Al-Maqtari said that he was incarcerated for more than a month in a cell with an open toilet at West Tennessee Detention Facility in Mason, Tennessee, and he was allowed out only one hour per day. He told Human Rights Watch: "I covered the toilet with his towel and asked Allah for forgiveness." Al-Maqtari said that he was also kept in a cell with an open toilet at the jail in Franklin, Tennessee, for a week but there he was allowed outside to pray when he complained to the correctional officers. Human Rights Watch telephone interview with Ali Al-Maqtari, New Haven, Connecticut, November 29, 2001.

[340] Human Rights Watch interviews with Mohammed. The feast marking the end of Ramadan is called *Id al-Fitr*. The other crucial celebration in Islam is the *Eid*, which commemorates the end of the *hajj*, the yearly pilgrimage to Mecca. *Columbia Encyclopedia*, Sixth Edition, 2000.

[341] See rule 8(c) of the U.N. Standard Minimum Rules for the Treatment of Prisoners. Although the ICCPR does not specifically address commingling of administrative detainees, art. 10(2)(a) provides for the segregation, except in exceptional circumstances, of accused persons from convicted ones.

[342] Principle 19 of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[343] Iqbal was arrested on October 26, 2001 at a gas station in Long Island, New York where he had worked "seven days a week," he said, for the past ten years. When he was arrested he asked to call his wife, but one of the four INS and FBI agents who detained him said, "No, we'll bring you back in an hour." He was still in detention on February 6, 2002, when Human Rights Watch spoke to him. Human Rights Watch interview with Tahir Iqbal, Passaic County Jail, New Jersey, February 6, 2002.

he had not spoken to his family in Pakistan once during his 142 days in detention because he was not allowed to make international calls.[344] Besides Human Rights Watch staff, the only person outside the jail that he had spoken to was a nephew who lived in the United States, whom he called collect once. He did not have an attorney.

These difficulties in communicating with the outside have caused anguish for detainees and their families. "From where they are coming from, if you don't hear from someone after they go to jail, it means they're dead," Sohail Mohammed, a community leader and immigration attorney, told Human Rights Watch.[345]

Some detainees and their family members also complained that their visitation rights were not observed. For instance, Leoncied Ouayouro drove from her home in Virginia to Batavia, New York, to see her brother Tony Oulai, who was being held on immigration charges at the Buffalo Federal Detention Center. She had called the facility in advance and officials told her that her brother had to put her name on his visitation list. Ouayouro said that Oulai told her over the telephone that he had done so. However, when she arrived at the facility on October 3, officials told her she was not on Oulai's list. The next day, Oulai's attorney called the facility to obtain permission for Ouayouro to visit her brother, to no avail. She returned to Virginia without seeing him.[346]

Jail Handbooks

International standards require that detainees be informed of the disciplinary rules at detention facilities and be allowed to make requests or complaints regarding treatment or detention conditions.[347] The INS Detention Standards provide that all detainees must be given a handbook that explains their rights and obligations at each facility where they are held.[348] The Department of Justice has claimed that it has complied with this regulation in the cases of those detained in connection with the September 11 investigation. Viet D. Dinh, assistant attorney general, Office of Legal Policy, said in a hearing before the Senate: "Once taken into custody, aliens are given a copy of the 'Detainee Handbook,' which details their rights and responsibilities, including their living conditions, clothing, visitation, and access to legal materials."[349]

During Human Rights Watch's tour of the Hudson County Correctional Center on February 6, 2002, jail officials said that all detainees were given a copy of the jail handbook, available in English and Spanish, upon their arrival. Yet the detainees interviewed by Human Rights Watch at various facilities for this report, including Hudson County jail, said that they had not received such a handbook. One detainee held at Passaic County Jail said that he had found one handbook in the dormitory-like cell where he was held.[350] The INS failed to produce copies of

[344] Human Rights Watch interview with Afzal Kham, Passaic County Jail, New Jersey, February 6, 2002.

[345] Human Rights Watch interviews with Mohammed.

[346] Human Rights Watch telephone interview with Leoncied Ouayouro, Fairfax, Virginia, February 1, 2002, and March 25, 2002.

[347] Principle 30 of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that all detainees are entitled to the right to be informed of disciplinary rules prevailing in a given detention center, and to appeal any disciplinary action, and the right to make a request or complaint regarding treatment or detention conditions.

[348] The INS Detention Standards provide:

> Every OIC will develop a site-specific detainee handbook to serve as an overview of, and guide to, the detention policies, rules, and procedures in effect at the facility. The handbook will also describe the services, programs, and opportunities available through various sources, including the facility, INS, private organizations, etc. Every detainee will receive a copy of this handbook upon admission to the facility.
>
> Detainees are expected to behave in accordance with the rules set down in the handbook, and will be held accountable for violations.

[349] Testimony of Viet D. Dinh, assistant attorney general, Office of Legal Policy, before the Senate Judiciary Committee at a hearing on "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," December 4, 2001.

[350] The detainee who found the handbook told Human Rights Watch that after reading it he realized that he should have been given certain items, including sheets, a spoon, and a second clean towel. Human

the handbooks that are supposedly distributed at the Passaic and Hudson County jails despite several requests by Human Rights Watch.[351]

The INS and jail officials' failure to distribute jail handbooks to detainees is no small matter. The handbooks not only advise detainees about items or treatment to which they are entitled, but also inform them of the rules governing the facility. Detainees who do not know those rules are no less responsible for following them. As a result, those who lack language skills and those who are not informed of the rules are more likely to disobey them unintentionally, and then to be subjected to disciplinary punishment. For instance, Ossama Abdelall was speaking to his wife on the phone when the lights were switched off, which meant that the detainees were to finish their conversations.[352] He did not know this rule and continued talking. He was placed in solitary confinement for most of the day for breaking jail regulations. According to his attorney, Abdelall was not informed of the jail regulations beforehand. The failure to distribute jail handbooks also makes it unlikely that detainees will be able to resort to grievance procedures or file complaints.[353]

Recreation

The U.N. Standard Minimum Rules for the Treatment of Prisoners establishes that prisoners should be allowed at least one hour of outdoor exercise daily if the weather permits.[354] As administrative detainees, immigration detainees should enjoy more generous recreational rights. The INS Detention Standards, however, do not meet even the minimal international standard: "If outdoor recreation is available at the facility, each detainee shall have access for at least one hour daily, at a reasonable time of day, five days a week, weather permitting."[355]

Some of those held in solitary confinement have not been allowed out of their cells for days or even weeks.[356] Even those who were held with the general population had restricted access to recreational activities. While jail officials at Passaic County Jail said that detainees had access to a "day room" with games and to the roof gym daily, detainees told Human Rights Watch that they were kept in the same cell all of the time except for a couple of hours a week when they were allowed to go to the roof gym. Some detainees held at this and other facilities complained that they were allowed outside only

Rights Watch interview with Palestinian civil engineer.

[351] Human Rights Watch requested the handbooks during tours of the facilities and INS officials said it would provide them to us. We followed up with telephone calls and a fax sent on February 12, 2002 but never received the handbooks.

[352] Human Rights Watch telephone interview with attorney Audrey Carr, Place, Minneapolis, Minnesota, October 30, 2001.

[353] For instance, two detainees who independently described to Human Rights Watch an alleged physical assault of a fellow detainee by staff that they witnessed in their Passaic County Jail cell (cell 3G1) did not know they could file a complaint. They both said that they had not received the jail handbook. The men said that their cell held about sixty people, with a mix of accused or convicted criminals and immigration detainees. According to the two witnesses, a group of correctional officers came to the cell to conduct a search with dogs at 2:00 or 3:00 a.m. at the end of December 2001. The detainees were told to get up and stand against the wall. One detainee did not understand English and was slow to comply. An officer pushed the detainee's head against a wall. Another officer then twisted the detainee's arm and pushed his face onto a table. One of the witnesses claimed the officers also hit the detainee repeatedly with a food tray. After the incident, the man had a chipped tooth and complained of headaches. Before the correctional officers left, the detainee who suffered the attack asked for medical treatment through another detainee who translated for him. A correctional officer said there was no need for medical attention, and the detainee never saw a doctor. The detainees did not file a complaint. "Who would we complain to?" one of the witnesses told Human Rights Watch, "the guards? We didn't want more trouble." The detainee who was mistreated was deported twenty days after the incident occurred. The witnesses did not know his name. Human Rights Watch interview with Ali Saber, January 27, 2002 and February 6, 2002; and Mohammed Zaman, Passaic County Jail, New Jersey, January 27, 2002.

[354] U.N. Standard Minimum Rules for the Treatment of Prisoners, Rule 21(1).

[355] See Recreation Detention Standard at http://www.ins.gov/graphics/lawsregs/recreat.pdf.

[356] For more details see chapter, Conditions of Detention, in this report.

early in the morning or late in the evening, not "at a reasonable time of day," as the INS Detention Standards require. Some also said they were not provided with jackets to wear during cold weather.

Language Barriers

Officials at facilities holding INS detainees are often unable to communicate with detainees because jail staff lack relevant language skills. Even though the INS only detains non-citizens, it does not require that personnel at facilities that hold INS detainees speak the detainees' languages. At some jails and detention centers, there are staff members who speak a language other than English and may serve as ad-hoc translators, but they may not be available to detainees when they need their help. For instance, at the Hudson County Correctional Center jail officials said that there are "three or four" correctional officers who spoke Arabic, but no Urdu speakers. (The largest group of "special interest" detainees is from Pakistan and they speak Urdu). Hudson County jail officials said that they had a "translation phone" but that they rarely used it because "it was not needed." At Passaic County Jail, officials said they had Urdu speaking correctional officers, but detainees held there who spoke only Urdu told Human Rights Watch that no correctional officer spoke their language.

APPENDIX A

INS Special Interest List
Joint Terrorism Task Force Working Group

LIMITED OFFICIAL USE-----LAW ENFORCEMENT SENSITIVE

(b)(7)(A) (b)(7)(C)

A Number	Name	POB	Arrest Date	Arrest Location	Date Charging Document Served	Immigration Charge	Date filed w/EOIR	Custody Location	SIOC FBI Interest	Legally Sufficient
Federal Bureau of Investigation / Other Agencies 29										
[redacted]	[redacted]	Pakistan	9/22/2001	[redacted]	9/22/2001	237(a)(3)(D)	9/25/2001	[redacted]	[redacted]	[redacted]
JTTF Comments: [redacted]					Bond Info: [redacted]					
Counsel Comments:					DRO Comments: [redacted]					
[redacted]	[redacted]	Jordan	9/28/2001	[redacted]	9/30/2001	237(a)(1)(B)	10/1/2001	[redacted]	[redacted]	[redacted]
JTTF Comments: [redacted]					Bond Info: [redacted]					
Counsel Comments:					DRO Comments: [redacted]					
[redacted]	[redacted]	India	9/13/2001	[redacted]	9/17/2001	241(a)(5)		[redacted]	[redacted]	[redacted]
JTTF Comments: [redacted]					Bond Info. [redacted]					
Counsel Comments:					DRO Comments: [redacted]					
[redacted]	[redacted]	Egypt	10/31/2001	[redacted]	12/6/2001	237(a)(1)(B)		[redacted]	[redacted]	
JTTF Comments: [redacted]					Bond Info:					
Counsel Comments:					DRO Comments: [redacted]					

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APPENDIX B

United States Department of Justice
Executive Office for Immigration Review
Immigration Court

In Bond Proceedings:
RE: ALI ABUBAKR ALI AL-MAQTARI
(A# 79-516-343)

Pursuant to 28 U.S.C. § 1746, I, Michael E. Rolince, hereby declare as follows:

1. I have been employed by the Federal Bureau of Investigation (FBI) since September 1974 as a Special Agent, and since August 1998, I have been the Section Chief of the Counterterrorism Division's International Terrorism Operations Section (ITOS) at FBI Headquarters in Washington D.C.

2. My duties and responsibilities as the ITOS Section Chief include management oversight of international terrorism investigations conducted by any of the 96 offices of the FBI, which are located throughout the United States and around the world. As Section Chief, my responsibilities also include determining investigative priorities, monitoring manpower and resource requirements, and analyzing intelligence information, both classified and unclassified, which has been acquired by the FBI either through human or technical means.

3. As the ITOS Section Chief, I am personally involved in and have significant supervisory responsibilities for the nationwide FBI investigation initiated in response to a series of deadly terrorist attacks which occurred on September 11, 2001. As such, I am privy both to the broad scope of and to particular details from the investigation.

Attachment One

4. On the morning of Tuesday September 11, 2001, four commercial airplanes were hijacked, two after departing from Boston's Logan Airport, one after departing from Dulles Airport in northern Virginia, and one after departing from the Newark Airport in Newark, New Jersey. At 8:46 a.m., the first of the four hijacked airplanes crashed into the north tower of the World Trade Center in Manhattan's financial district. The second airplane struck the south tower of the World Trade Center, the third struck the Pentagon, and at 10:10 a.m., the attack ended with the crash of the fourth airplane in rural Pennsylvania. Both towers of the World Trade Center collapsed, and the Pentagon sustained heavy damage. A total of 266 passengers and flight crew members, including the hijackers, were also killed when the airplanes crashed. The confirmed death toll from the attack on the Pentagon is 189 and over 6,000 people are dead or missing from the attack on the World Trade Center.

5. The FBI has identified nineteen suspected hijackers, some of whose legal immigration status had expired. Based on a review of intelligence and other source information, the FBI has reason to believe that the hijackers were associated with al Qaeda, aka "the Base," an international network of terrorist cells controlled by Osama bin Laden, which has been formally designated by the Department of State as a foreign terrorist organization since October 8, 1999. Prior to the September 11, 2001 attacks, Osama bin Laden was being sought by the FBI in connection with the August 7, 1998 bombings of the United States embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya, which killed over 200 individuals.

6. At the direction of President George W. Bush and Attorney General John Ashcroft, the FBI has initiated a nationwide investigation to identify and apprehend individuals involved in the hijackings and to prevent future acts of terrorism within the United States. To date the FBI has received or generated more than 250,000 leads from its web site, special hot line, a toll-free WATTS line, and in the FBI field offices, and additional leads are coming in every day. The investigation has yielded over 300 searches, and more than 100 court orders and 3000 subpoenas. There is still a great deal of information to be collected before the FBI will be in a position to determine the full scope of the terrorist conspiracy and to determine the full extent of damage that the terrorists intended to cause.

7. The FBI has come to believe that associates of the hijackers with connections to foreign terrorist organizations may still be in the United States. The tips received and the leads developed in our field offices have enabled the FBI to identify individuals who may have information about these associates, or, in fact, be among the participants. As explained below, the number of people of interest to the FBI is constantly changing as leads are followed and more information is obtained.

8. Information available to the FBI indicates a potential for additional terrorist incidents. As a result, the FBI has requested that all law enforcement agencies nationwide be on heightened alert. When there is threat information about a specific target, the FBI shares that information with appropriate state and local authorities. Several city and state officials have been contacted over the last few weeks to alert them to potential threats.

9. On September 23, 2001, the FBI issued a nationwide alert based on information indicating the possibility of attacks using crop-dusting aircraft. The FBI assesses the uses of this type of aircraft to distribute chemical or biological weapons of mass destruction as potential threats to Americans. At this point, there is no clear indication of the intended time or place of any such attack. The FBI has confirmed that Mohammed Atta, one of the suspected hijackers, was acquiring knowledge of crop-dusting aircraft prior to the attacks on September 11th. At the request of the FBI, the Federal Aviation Administration grounded such aircraft. In addition to its own preventative measures, the FBI has strongly recommended that state, local and other federal law enforcement organizations take steps to identify crop-dusting aircraft in their jurisdictions and ensure that they are secured.

10. The investigation has also uncovered several individuals, including individuals who may have links to the hijackers, who fraudulently have obtained, or attempted to obtain, licenses to transport hazardous material.

11. In the context of this terrorism investigation, the FBI identified individuals whose activities warranted further inquiry. When such individuals were identified as aliens who were believed to have violated their immigration status, the FBI notified the Immigration and Naturalization Service (INS). The INS detained such aliens under the authority of the Immigration and Nationality Act. At this point, the FBI must consider the possibility that these aliens are somehow linked to, or may possess knowledge useful to the investigation of, the terrorist attacks on the World Trade Center and the Pentagon. The respondent,

Ali Abubakr Ali Al-Maqtari, A#79-516-343, (AL-MAQTARI) is one such individual.

12. As a result of a search previously described to the court, the FBI continues to download the hard drive of a computer. (The computer was found in a car belonging to Al-Maqtari's wife.) When interviewed by the FBI, Al-Maqtari said he had not used the laptop but purchased it used for $250 from a customer at the convenience store where he works. Al-Maqtari said that the customer obtained the computer from a third party. At present, the download of the hard drive is still running. Once this process is completed, the FBI will need several days to review the information obtained.

13. The FBI continues to actively pursue this investigation.

14. The business of counterterrorism intelligence gathering in the United States is akin to the construction of a mosaic. At this stage of the investigation, the FBI is gathering and processing thousands of bits and pieces of information that may seem innocuous at first glance. We must analyze all that information, however, to see if it can be fit into a picture that will reveal how the unseen whole operates. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to some may appear of great moment to those within the FBI or the intelligence community who have a broader context within which to consider a questioned item or isolated piece of information. At the present stage of this vast investigation, the FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individuals that have been detained. The Bureau is approaching that task with

unprecedented resources and a nationwide urgency. In the meantime, the FBI has been unable to rule out the possibility that respondent is somehow linked to, or possesses knowledge of, the terrorist attacks on the World Trade Center and the Pentagon. To protect the public, the FBI must exhaust all avenues of investigation while ensuring that critical information does not evaporate pending further investigation.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 11, 2001, in Washington, D.C.

Michael E. Rolince
Section Chief
International Terrorism Operations Section
Counterterrorism Division
Federal Bureau of Investigation

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This report was written by Cesar Muñoz Acebes, a Bloomberg fellow, based on research by Muñoz Acebes and Allyson Collins, associate director for the U.S. Program at Human Rights Watch. Jamie Fellner, U.S. program director edited the report. James Ross, senior legal advisor, provided legal review. Jonathan Horowitz and Alison Hughes provided research and production support.

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***

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The Road to Abu Ghraib

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Introduction

Since late April 2004, when the first photographs appeared of U.S. military personnel humiliating, torturing, and otherwise mistreating detainees at Abu Ghraib prison in Iraq, the United States government has repeatedly sought to portray the abuse as an isolated incident, the work of a few "bad apples" acting without orders. On May 4, U.S. Secretary of Defense Donald H. Rumsfeld, in a formulation that would be used over and over again by U.S. officials, described the abuses at Abu Ghraib as "an exceptional, isolated" case. In a nationally televised address on May 24, President George W. Bush spoke of "disgraceful conduct by a few American troops who dishonored our country and disregarded our values."

In fact, the only exceptional aspect of the abuse at Abu Ghraib may have been that it was photographed. Detainees in U.S. custody in Afghanistan have testified that they experienced treatment similar to what happened in Abu Ghraib -- from beatings to prolonged sleep and sensory deprivation to being held naked -- as early as 2002. Comparable -- and, indeed, more extreme -- cases of torture and inhuman treatment have been extensively documented by the International Committee of the Red Cross and by journalists at numerous locations in Iraq outside Abu Ghraib.

This pattern of abuse did not result from the acts of individual soldiers who broke the rules. It resulted from decisions made by the Bush administration to bend, ignore, or cast rules aside. Administration policies created the climate for Abu Ghraib in three fundamental ways.

First, in the aftermath of the September 11 attacks on the United States, the Bush administration seemingly determined that winning the war on terror required that the United States circumvent international law. Senior administration lawyers in a series of internal memos argued over the objections of career military and State Department counsel that the new war against terrorism rendered "obsolete" long-standing legal restrictions on the treatment and interrogation of detainees.

The administration effectively sought to re-write the Geneva Conventions of 1949 to eviscerate many of their most important protections. These include the rights of all detainees in an armed conflict to be free from humiliating and degrading treatment, as well as from torture and other forms of coercive interrogation. The Pentagon and the Justice Department developed the breathtaking legal argument that the president, as

commander-in-chief of the armed forces, was not bound by U.S. or international laws prohibiting torture when acting to protect national security, and that such laws might even be unconstitutional if they hampered the war on terror. The United States began to create offshore, off-limits, prisons such as Guantánamo Bay, Cuba, maintained other detainees in "undisclosed locations," and sent terrorism suspects without legal process to countries where information was beaten out of them.

White House legal counsel Alberto Gonzales, while suggesting that the Geneva Conventions be circumvented, did convey to President Bush the worries of military leaders that these policies might "undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat and could introduce an element of uncertainty in the status of adversaries." Those warnings were ignored, but proved justified. In May 2004, a member of the 377th Military Police Company told the *New York Times* that the labeling of prisoners in Afghanistan as "enemy combatants" not subject to the Geneva Conventions contributed to their abuse. "We were pretty much told that they were nobodies, that they were just enemy combatants," he said. "I think that giving them the distinction of soldier would have changed our attitudes toward them."[1]

Second, the United States began to employ coercive methods designed to "soften up" detainees for interrogation. These methods included holding detainees in painful stress positions, depriving them of sleep and light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, and depriving them of all clothing. News reports describe a case where U.S. personnel with official approval tortured a detainee held in an "undisclosed location" by submerging him in water until he believed he would drown. These techniques, familiar to victims of torture in many of the world's most repressive dictatorships, are forbidden by prohibitions against torture and other cruel, inhuman or degrading treatment not only by the Geneva Conventions, but by other international instruments to which the U.S. is a party and by the U.S. military's own long-standing regulations.

It is not yet clear which techniques of ill-treatment or torture were formally approved at which levels of the U.S. government and the degree of severity allowed in their application, or whether they were informally encouraged. What is clear is that they were used systematically both in Afghanistan and then in Iraq, and that they were also used on some scale at Guantánamo. It is also clear that the purpose of these techniques is to inflict pain, suffering and severe humiliation on detainees. Once that purpose was

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[1] Douglas Jehl and Andrea Elliott, "Cuba base sent its interrogators to Iraqi prison," *New York Times*, May 29, 2004.

legitimized by military and intelligence officials, it is not surprising that ordinary soldiers came to believe that even more extreme forms of abuse were acceptable. The brazenness with which some soldiers conducted themselves at Abu Ghraib, snapping photographs and flashing the "thumbs-up" sign as they abused prisoners, confirms that they felt they had nothing to hide from their superiors.

Third, until the publication of the Abu Ghraib photographs forced action, Bush administration officials took at best a "see no evil, hear no evil" approach to all reports of detainee mistreatment. From the earliest days of the war in Afghanistan and the occupation of Iraq, the U.S. government has been aware of allegations of abuse. Yet high-level pledges of humane treatment were never implemented with specific orders or guidelines to forbid coercive methods of interrogation. Investigations of deaths in custody languished; soldiers and intelligence personnel accused of abuse, including all cases involving the killing of detainees, escaped judicial punishment. When, in the midst of the worst abuses, the International Committee of the Red Cross complained to Coalition forces, Army officials apparently responded by trying to curtail the ICRC's access.

Concern for the basic rights of persons taken into custody in Afghanistan and Iraq did not factor into the Bush administration's agenda. The administration largely dismissed expressions of concern for their treatment, from both within the government and without. This, too, sent a message to those dealing with detainees in the field about the priorities of those in command.

The severest abuses at Abu Ghraib occurred in the immediate aftermath of a decision by Secretary Rumsfeld to step up the hunt for "actionable intelligence" among Iraqi prisoners. The officer who oversaw intelligence gathering at Guantánamo was brought in to overhaul interrogation practices in Iraq, and teams of interrogators from Guantánamo were sent to Abu Ghraib. The commanding general in Iraq issued orders to "manipulate an internee's emotions and weaknesses." Military police were ordered by military intelligence to "set physical and mental conditions for favorable interrogation of witnesses." The captain who oversaw interrogations at the Afghan detention center where two prisoners died in detention posted "Interrogation Rules of Engagement" at Abu Ghraib, authorizing coercive methods (with prior written approval of the military commander) – such as the use of military guard dogs to instill fear – that violate the Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment.

Unlike U.S. actions in the global campaign against terrorism, the armed conflict in Iraq was justified in part on bringing democracy and respect for the rule of law to an Iraqi population long-suffering under Saddam Hussein. Abusive treatment used against terrorism suspects after September 11 came to be considered permissible by the United States in an armed conflict to suppress resistance to a military occupation.

The Bush administration apparently believed that the new wars it was fighting could not be won if it was constrained by "old" rules. The disturbing information coming to light points to an official policy of torture and cruel, inhuman or degrading treatment.

The Bush administration has denied having a policy to torture or abuse detainees. Human Rights Watch calls on the administration to demonstrate conclusively that its public disavowal of torture and other mistreatment of detainees in U.S. custody was in fact the policy of the U.S. government, and to make public all relevant government documents. The administration should also detail the steps being taken to ensure that these abusive practices do not continue, and to prosecute vigorously all those responsible for ordering or condoning this abuse.

Ironically, the administration is now finding that it may be losing the war for hearts and minds around the world precisely because it threw those rules out. Rather than advance the war on terror, the widespread prisoner abuse has damaged efforts to build global support for countering terrorism. Indeed, each new photo of an American soldier humiliating an Iraqi could be considered a recruiting poster for al-Qaeda. Policies adopted to make the United States more secure from terrorism have in fact made it more vulnerable.

I. A Policy to Evade International Law

In the aftermath of the September 11 attacks on the United States, the Bush administration seemingly determined that winning the war on terror required that the United States circumvent international law. "There was a before-9/11 and an after-9/11," said Cofer Black, former director of the CIA's counterterrorist unit, in testimony to Congress. "After 9/11 the gloves came off."[2]

[2] John Barry, Michael Hirsh and Michael Isikoff, "The roots of terror," *Newsweek*, May 24, 2004.

The first public manifestation of a policy to circumvent normal detention rules came in January 2002, when the United States began sending persons picked up during the armed conflict in Afghanistan to its naval base at Guantánamo Bay, Cuba. Ultimately Guantánamo would hold more than 700 detainees from forty-four countries, many apprehended far from any conflict zone. Guantánamo was deliberately chosen in an attempt to put the detainees beyond the jurisdiction of the U.S. courts. Indeed, in response to a legal challenge by several detainees, the U.S. government later argued that U.S. courts would not have jurisdiction over these detainees even if they were being tortured or summarily executed.[3]

Circumventing the Geneva Conventions

Ignoring the deeply rooted U.S. military practice of applying the Geneva Conventions broadly, U.S. Defense Secretary Donald H. Rumsfeld labeled the first detainees to arrive at Guantánamo on January 11, 2002 as "unlawful combatants," automatically denying them possible status as prisoners of war (POWs). "Unlawful combatants do not have any rights under the Geneva Convention," Mr. Rumsfeld said, overlooking that the Geneva Conventions provide explicit protections to all persons captured in an international armed conflict, even if they are not entitled to POW status. Rumsfeld signaled a casual approach to U.S. compliance with international law by saying that government would "for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate."[4] On February 7, Rumsfeld questioned the relevance of the Geneva Conventions to current U.S. military operations: "The reality is the set of facts that exist today with the al-Qaeda and the Taliban were not necessarily the set of facts that were considered when the Geneva Convention was fashioned."[5]

At the same time, a series of legal memoranda written in late 2001 and early 2002 by the Justice Department helped build the framework for circumventing international law restraints on prisoner interrogation. These memos argued that the Geneva Conventions did not apply to detainees from the Afghanistan war.

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[3] See Gherebi v. Bush 9th Circuit, Dec. 18, 2003. The United States asserts the power "to do with [them] as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting [them] to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged. ... Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantánamo, the U.S. government has never before asserted such a grave and startling proposition. ...a position so extreme that it raises the gravest concerns under both American and international law."

[4] "Geneva Convention doesn't cover detainees," Reuters, January 11, 2002.

[5] See Jim Garamone, DefenseLink News (US Military), American Forces Press Service, February 7, 2002.

Alberto R. Gonzales, the White House counsel, in a January 25, 2002 memorandum to President Bush, endorsed the Justice Department's (and Rumsfeld's) approach and urged the president to declare the Taliban forces in Afghanistan as well as al-Qaeda outside the coverage of the Geneva Conventions. This, he said, would preserve the U.S.'s "flexibility" in the war against terrorism. Mr. Gonzales wrote that the war against terrorism, "in my judgment renders obsolete Geneva's strict limitations on questioning of enemy prisoners." Gonzales also warned that U.S. officials involved in harsh interrogation techniques could potentially be prosecuted for war crimes under U.S. law if the Conventions applied.[6] Gonzales said that "it was difficult to predict with confidence" how prosecutors might apply the Geneva Conventions' strictures against "outrages against personal dignity" and "inhuman treatment" in the future, and argued that declaring that Taliban and al-Qaeda fighters did not have Geneva Convention protections "substantially reduces the threat of domestic criminal prosecution."[7]

Gonzales did convey to President Bush the worries of military leaders that these policies might "undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat and could introduce an element of uncertainty in the status of adversaries."[8]

The Gonzales memorandum drew a strong objection the next day from Secretary of State Colin L. Powell. Powell argued that declaring the conventions inapplicable would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general."[9]

On February 7, 2002, in the face of growing international criticism,[10] President Bush announced that the U.S. government would apply the "principles of the Third Geneva Convention" to captured members of the Taliban, but would not consider any of them to be POWs because, in the U.S. view, they did not meet the requirements of an armed

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[6] Gonzales was referring to prosecution under the War Crimes Act of 1996 (18 U.S.C. Section 2441), which punishes the commission of a war crime, including torture and humiliating or degrading treatment, by or against a U.S. national, including members of the armed forces.

[7] Memorandum from Alberto R. Gonzales to the President, January 25, 2002.

[8] Ibid.

[9] Memorandum from Colin L. Powell to Counsel to the President, January 26, 2002.

[10] See, e.g,, Statement of High Commissioner for Human Rights on Detention of Taliban and al-Qaeda Prisoners at U.S. Base in Guantanamo Bay, January 16, 2002; Kieran Murray, "EU, Latin America condemn U.S. prison abuse in Iraq," Reuters, May 28, 2004. Rumsfeld dismissed the criticism as "isolated pockets of international hyperventilation." See "High Taliban official in U.S. custody," Associated Press, February 9, 2002.

force under that Convention. As for captured members of al-Qaeda, he said that the U.S. government considered the Geneva Conventions inapplicable but would nonetheless treat the detainees "humanely."

These decisions essentially reinterpreted the Geneva Conventions to suit the administration's purposes. Belligerents captured in the conflict in Afghanistan should have been treated as POWs unless and until a competent tribunal individually determined that they were not eligible for POW status. Taliban soldiers should have been accorded POW status because they openly fought for the armed forces of a state party to the Convention. Al-Qaeda detainees would likely not be accorded POW status, but the Conventions still provide explicit protections to all persons held in an international armed conflict, even if they are not entitled to POW status. Such protections include the right to be free from coercive interrogation, to receive a fair trial if charged with a criminal offense, and, in the case of detained civilians, to be able to appeal periodically the security rationale for continued detention.

Even after the Abu Ghraib scandal broke, Secretary Rumsfeld continued to take a loose view of the applicability of the Geneva Conventions. On May 5, 2004, he told a television interviewer the Geneva Conventions "did not apply precisely" in Iraq but were "basic rules" for handling prisoners.[11] Visiting Abu Ghraib on May 14, Rumsfeld remarked, "Geneva doesn't say what you do when you get up in the morning." In fact, the U.S. armed forces have devoted considerable energy over the years to making the Geneva Conventions fully operational by military personnel in the field. Various U.S. military operational handbooks and manuals provide the means for implementing Geneva Convention provisions, even where those provisions are vague. Decisions by foreign and international criminal courts and interpretations of customary international law provide other means for clarifying Geneva Convention requirements.

Undermining the Rules Against Torture

All the while, the Bush administration resisted publicly discussing the requirements for the treatment of detainees under international human rights law, in particular the U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the Convention Against Torture). That convention bars not only torture

[11] United States Department of Defense News Transcript, Secretary Rumsfeld Interview with Matt Lauer NBC "Today," http://www.dod.gov/transcripts/2004/tr20040505-secdef1425.html.

but "cruel, inhuman or degrading treatment or punishment which do not amount to torture."[12]

After the first reports of so-called "stress and duress" tactics against detainees appeared in the *Washington Post* in December 2002,[13] Human Rights Watch called on President Bush to investigate and condemn allegations of torture and other cruel and inhuman treatment.[14] In response, Department of Defense General Counsel William J. Haynes II stated that "United States policy condemns torture," but he did not acknowledge that the United States also had a legal obligation to refrain from cruel, inhuman or degrading treatment. He also failed to address whether the United States was using the "stress and duress" techniques reported in the press.[15] In June 2003, Senator Patrick Leahy wrote to National Security Advisor Condoleezza Rice asking if "stress and duress" techniques were being employed and urging the administration to issue a clear statement that cruel, inhuman, or degrading treatment of detainees will not be tolerated. Finally, in June 2003, in response to the Leahy letter, Haynes stated, correctly, that the Convention Against Torture prohibits (at the very least) interrogators overseas from using any technique that would be unconstitutional if employed in the United States.[16] There is no evidence, however, that this message was ever conveyed to U.S. commanders in the field.

Rather, at the same time that the administration was publicly rejecting the use of torture or cruel, inhuman, or degrading treatment, it was apparently laying the legal groundwork for the use of just such tactics. The *Washington Post* has reported that in August 2002, the Justice Department advised Gonzales, in response to a CIA request for guidance, that torturing al- Qaeda detainees in captivity abroad "may be justified," and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in the war on terrorism.[17] The memo added the doctrines of "necessity and

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[12] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and open for signature, ratification and accession by General Assembly resolution 39/46 of December 10, 1984, article 16.

[13] Dana Priest and Barton Gellman, "U.S. decries abuse but defends interrogations," *Washington Post*, December 26, 2002; see discussion *infra*.

[14] Human Rights Watch, "United States: Reports of Torture of Al-Qaeda Suspects," December 27, 2002, http://www.hrw.org/press/2002/12/us1227.htm.

[15] http://www.hrw.org/press/2003/04/dodltr040203.pdf.

[16] The Haynes letter to Leahy followed an earlier exchange with U.S.-based human rights groups, including Human Rights Watch, in which Haynes stated that "United States policy condemns torture," but did not acknowledge that the United States also had a legal obligation to refrain from cruel, inhuman or degrading treatment. See Human Rights Watch, "U.S. Sidesteps Charges of Mistreating Detainees," http://www.hrw.org/press/2003/04/us041703.htm; Timeline of Detainee Abuse Allegations and Responses, http://www.hrw.org/english/docs/2004/05/07/usint8556.htm

[17] Dana Priest and R. Jeffrey Smith, "Memo Offered Justification for Use of Torture," *Washington Post*, June 8, 2004.

self-defense could provide justifications that would eliminate any criminal liability" on the part of officials who tortured al-Qaeda detainees. The memo also took an extremely narrow view of which acts might constitute torture. It referred to seven practices that U.S. courts have ruled to constitute torture: severe beatings with truncheons and clubs, threats of imminent death, burning with cigarettes, electric shocks to genitalia, rape or sexual assault, and forcing a prisoner to watch the torture of another person. It then advised that "interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate law." The memo suggested that "mental torture" only included acts that resulted in "significant psychological harm of significant duration, e.g., lasting for months or even years."

The legal reasoning of the Justice Department memo re-appeared in an April 2003 memorandum from a working group appointed by Pentagon legal counsel Haynes that was headed by Air Force General Counsel Mary Walker and included senior civilian and uniformed lawyers from each military branch, and which consulted the Justice Department, the Joint Chiefs of Staff, the Defense Intelligence Agency and other intelligence agencies, according to the *Wall Street Journal*.[18] They contended that the president was not bound by the laws banning torture. According to a draft of the classified memo, the lawyers argued that the president had the authority as commander in chief of the armed forces to approve almost any physical or psychological actions during interrogation, up to and including torture, in order to obtain "intelligence vital to the protection of untold thousands of American citizens." The memo presented a number of legal doctrines, including the principles of "necessity" and "self-defense," and the inherent powers of the president which could be used to evade the prohibition on torture. The memo advised that the president issue a "presidential directive or other writing" that subordinates charged with torture could use as evidence that their actions were authorized, since authority to set aside the laws in wartime is "inherent in the president."

The Convention Against Torture provides, however, that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."[19] The International Covenant on Civil and Political Rights, which also bans torture and other mistreatment, considers the right to be free from torture and other cruel, inhuman or degrading treatment as nonderogable, meaning that it can never be suspended by a state, including during periods of public emergency.

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[18] Jess Bravin, "Pentagon Report Set Framework For Use of Torture," *Wall Street Journal, June 7, 2004.*

[19] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and open for signature, ratification and accession by General Assembly resolution 39/46 of December 10, 1984, article 16.

And, according to media accounts and Human Rights Watch interviews, senior officials in the Defense and Justice Departments and the Central Intelligence Agency approved a set of coercive interrogation techniques for use in Afghanistan and Iraq that violate the prohibition of cruel, inhuman, or degrading treatment and can amount to torture.[20] These techniques apparently include stripping detainees naked during interrogation, subjecting them to extremes of heat, cold, noise, and light, hooding them, depriving them of sleep, and keeping them in painful positions.[21]

The *New York Times*, citing current and former counterterrorism officials, reported that in one case CIA interrogators used graduated levels of force against Khalid Sheikh Mohammed, a detainee held in an "undisclosed location" (see *infra*), including a technique known as "water boarding," in which a prisoner is strapped down, forcibly pushed under water and made to believe he might drown. According to the *Times*, "these techniques were authorized by a set of secret rules for the interrogation of some 12 to 20 high-level al-Qaeda prisoners that were endorsed by the Justice Department and the CIA."[22]

Renditions

The Bush administration facilitated or participated directly in the transfer of an unknown number of persons without extradition proceedings, a practice known as "irregular rendition," to countries in the Middle East known to practice torture routinely. The *Washington Post* in December 2002 described the rendition of captured al-Qaeda suspects from U.S. custody to other countries, such as Syria, Uzbekistan, Pakistan, Egypt, Jordan, Saudi Arabia, and Morocco, where they were tortured or otherwise mistreated. Unnamed U.S. officials suggested that detainees were deliberately moved to countries known for

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[20] The *Washington Post* has reported that a "list of about 20 techniques was approved at the highest levels of the Pentagon and the Justice Department," techniques for use at the Guantánamo Bay prison. Dana Priest and Joe Stephens, "Pentagon approved tougher interrogations," *Washington Post*, May 9, 2004. Senior government officials had earlier told Human Rights Watch of the approval of a "72-point matrix." It is possible that this 72-point list was reduced to 20 in the approval process.

[21] According to Physicians for Human Rights: "Prolonged periods of sleep deprivation can result in confusion and psychosis, physical symptoms including headaches and dizziness, and chronic disruption of normal sleep patterns." Also, "deprivations or normal sensory stimulation (e.g. sound, light, sense of time, isolation, restrictions of sleep, food, water, toilet facilities bathing, motor activity, medical care, and social contacts) serve to disorient victims, to induce exhaustion and debility, difficulty concentrating, impair memory and instill fear, helplessness, despair, and, in some cases, can result in severe anxiety and hallucinations and other psychotic reactions." Physicians for Human Rights, "Interrogations, Torture and Ill Treatment: Legal Requirements and Health Consequences," May 14, 2004, at page 7-8, http://www.phrusa.org/research/pdf/iraq_medical_consequences.pdf.

[22] James Risen, David Johnston and Neil A. Lewis, "Scrutiny worries CIA interrogators," *New York Times*, May 13, 2004.

their use of torture to ease constraints on their interrogations. One official was quoted as saying, "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them." An official who had supervised the capture and transfer of accused terrorists said "If you don't violate someone's human rights some of the time, you probably aren't doing your job…I don't think we want to be promoting a view of zero tolerance on this." [23]

Tarek Dergoul, a Briton released from Guantánamo in March 2004, said that during interrogation there he was threatened with being sent to Morocco or Egypt, "where I would be tortured."

In one case, Maher Arar, a Syrian-born Canadian in transit from a family vacation through John F. Kennedy airport in New York, was detained by U.S. authorities. After holding him for nearly two weeks, U.S. authorities flew him to Jordan, where he was driven across the border and handed over to Syrian authorities, despite his repeated statements to U.S. officials that he would be tortured in Syria and his repeated requests to be sent home to Canada. Mr. Arar, whom the United States asserts has links to al-Qaeda, was released without charge from Syrian custody ten months later and has described repeated torture, often with cables and electrical cords, during his confinement in a Syrian prison.

In another case, Swedish television reported in May 2004 that in December 2001 a U.S. government-leased Gulfstream 5 jet airplane transported two Egyptian terrorism suspects who were blindfolded, hooded, drugged, and diapered by hooded operatives, from Sweden to Egypt. There the two men were tortured, including in Cairo's notorious Tora prison.[24] The plane was apparently the same one that had allegedly been used two months earlier to transport a Yemini suspect from Pakistan to Jordan.

In a third case, U.S. operatives reportedly managed the capture and transfer of Mohammed Haydar Zammar, a top al-Qaeda suspect and dual German-Syrian national, to Syria in June 2002, over the protests of the German government. The United States has reportedly provided questions to Syrian interrogators.[25]

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[23] Dana Priest and Barton Gellman, "U.S. decries abuse but defends interrogations," *Washington Post*, December 26, 2002.

[24] Swedish TV4 Kalla Fakta Program: "The Broken Promise," May 17, 2004. See English Transcript at http://hrw.org/english/docs/2004/05/17/sweden8620.htm.

[25] Murhaf Jouejati, Adjunct Professor at George Washington University, and an expert on Syria, told the National Commission on Terrorist Attacks Upon the United States that "Although US officials have not been able to interrogate Zammar, Americans have submitted questions to the Syrians." Statement of Murhaf Jouejati

"Disappearances"

Among the most disturbing cases, perhaps unprecedented in U.S. history, are the detainees who have simply been "disappeared."[26] Perhaps out of concern that Guantánamo will eventually be monitored by the U.S. courts, certainly to ensure even greater secrecy, the Bush administration does not appear to hold its most sensitive and high-profile detainees there. Terrorism suspects like Khalid Sheikh Mohammed, accused architect of the September 11 attacks, and Abu Zubaydah, a close aide of Osama bin Laden, are detained by the United States instead in "undisclosed locations," presumably outside the United States, with no access to the ICRC, no notification to families, no oversight of any sort of their treatment, and in most cases no acknowledgement that they are even being held. Human Rights Watch has pieced together information on 13 such detainees, apprehended in places such as Pakistan, Indonesia, Thailand, Morocco, and the United Arab Emirates, who have "disappeared" in U.S. custody. [27]

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to the National Commission on Terrorist Attacks Upon the United States, July 9, 2003, http://www.9-11commission.gov/hearings/hearing3/witness_jouejati.htm.

[26] According to the preamble of the Declaration on the Protection of all Persons from Enforced Disappearance, "enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, ... followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law..." [emphasis added]. General Assembly resolution 47/133 of December 18, 1992. "Enforced disappearance" has been defined by the Rome Statute of the International Criminal Court as the "arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time." Article 7 (2) (1).

[27] They are :1) Abdul Rahim al-Sharqawi (aka Riyadh the facilitator), arrested before April 2002, al-Qaeda member, allegedly coordinated logistics for attacks; 2) Ibn Al-Shaykh al-Libi, arrested before April 2002, allegedly al-Qaeda training camp commander; 3) Abd al-Hadi al-Iraqi, arrested before April 2002, allegedly al-Qaeda training camp commander; 4) Abu Zubaydah (aka Zubeida, aka Zain al-Abidin Muhahhad Husain), arrested in March 2002 in Faisalabad, Pakistan, al-Qaeda member, Palestinian (born in Saudi Arabia), allegedly senior al-Qaeda operational planner, potential heir to Bin Laden; 5) Omar al Faruq, arrested in June 2002 in Indonesia, al-Qaeda member, Kuwaiti, allegedly planned large-scale attacks against U.S. interests in Indonesia, Malaysia, the Philippines, etc.; 6) Abu Zubair al-Haili, arrested in June 2002 in Morocco, al-Qaeda member, Saudi, allegedly operational and military chief (deputy to Abu Zubaydah); 7) Ramzi bin al-Shibh, arrested in September 2002, al-Qaeda member, Yemeni, alleged conspirator in Sept. 11 attacks (former Atta roommate), meant to be 20th hijacker; 8) Abd al-Rahim al-Nashiri (aka Abu Bilal al-Makki), arrested in November 2002 in the United Arab Emirates, al-Qaeda member, Saudi or Yemeni, allegedly chief of operations in Persian Gulf and mastermind of USS Cole bombing and recent attack on the French oil tanker Limburg; 9) Mustafa al-Hawsawi, arrested March 1, 2003 (together with Khalid Sheikh M.) in Rawalpindi, Pakistan, al-Qaeda member, Saudi, allegedly financier; 10) Khalid Sheikh Mohammed (aka Shaikh Mohammed), arrested March 1, 2003 in Rawalpindi, Pakistan, al-Qaeda member, Kuwaiti (Pakistani parents), alleged mastermind behind Sept. 11 attacks as well as Pearl killing, USS Cole attack, etc.; 11) Waleed Mohammed Bin Attash (aka Tawfiq bin Attash or Tawfiq Attash Khallad), arrested in late April 2003 in Karachi, Pakistan, al-Qaeda member, Saudi (of Yemeni descent), alleged "top al-Qaida operative suspected of playing crucial roles in both the bombing of the U.S. destroyer Cole in 2000 and the Sept. 11 terror attacks;" 12) Adil al-Jazeeri, arrested June 17, 2003 in Peshawar, Pakistan, al-Qaeda member, alleged "leading member"; 13) Hambali (aka Riduan Isamuddin),

II. Guantánamo: America's "Black Hole"

The secrecy surrounding detention practices at the U.S. Naval Base at Guantánamo Bay, Cuba, the U.S. government's refusal to grant POW status to the Taliban detainees there or to even recognize that al-Qaeda detainees are covered by the Geneva Conventions, the approval of harsh interrogation techniques, and the allegations of abuse by some released detainees combine to raise concerns about mistreatment of detainees at the base. While Human Rights Watch has no information of Abu-Ghraib-level abuses at Guantánamo, there is a lot that remains to be learned.

The United States has carefully controlled information about the detainees at Guantánamo, barring them from most contact with the outside world.[28] As a result, little is publicly known about the more than 700 detainees from forty-four countries, including children as young as 13, who have been held at Guantánamo.[29] Human Rights Watch, and others, have had access only to detainees *released* from U.S. custody – and those released thus far are people whom U.S. authorities did not consider to be a security risk or indictable for criminal offenses. That is, none of them are the sort of high value or important detainees who might have been treated more harshly. What the world has been allowed to see of the Guantánamo detention facility are highly controlled tours for journalists (who have not been able to talk to detainees), and occasional video material released by the U.S. Department of Defense. Guantánamo has been described as a "legal black hole" by Lord Johan Steyn, a judicial member of Britain's House of Lords.[30]

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arrested August 11, 2003 in Aytthaya, Thailand, Jemaah Islamiyah (and al-Qaeda) member, Indonesian, allegedly organized/financed Bali nightclub bombing, Jakarta Marriot Hotel bombing, preparations for Sept. 11.

[28] Guantánamo detainees are visited by the ICRC, which does not report publicly, and some have been interviewed by representatives of their home governments.

[29] On January 29, 2004, the U.S. released three children believed to be between thirteen and fifteen years of age, but continued to hold an unspecified number of older children. For a more detailed discussion of the special risks to children held at Guantánamo see, Human Rights Watch, "Despite Releases, Children Still Held at Guantánamo," January 29, 2004, http://www.hrw.org/english/docs/2004/01/29/usint7117.htm, and Human Rights Watch, "Letter to Secretary Rumsfeld on Child Detainees at Guantanamo," April 24, 2003, http://www.hrw.org/press/2003/04/us042403ltr.htm.

[30] Johan Steyn, "Guantanamo: A monstrous failure of justice," *International Herald Tribune*, November 28, 2003.

Incommunicado detention has been consistently condemned by international human rights bodies as facilitating conditions under which torture and other mistreatment may take place.[31]

Statements by U.S. officials that the Geneva Conventions do not apply to al-Qaeda detainees -- indeed, the Bush administration's refusal to acknowledge that any law applies to them -- and that harsher methods of interrogation are therefore permissible, only heighten this concern. In his January 2002 memo to the president, for instance, White House counsel Gonzales endorsed not applying the Conventions to Guantánamo to avoid "Geneva's strict limitations on questioning of enemy prisoners."[32]

It was the failure to obtain sufficient information using non-coercive methods on Guantánamo detainees which reportedly led to the creation of the working group which informed Secretary Rumsfeld in April 2003 that the president, as commander in chief, could authorize torture notwithstanding domestic and international legal prohibitions.[33] According to the *Wall Street Journal*, a U.S. official who helped prepared the report said "We'd been at this for a year-plus and got nothing out of them [certain Guantánamo detainees] … we need to have a less-cramped view of what torture is and is not." According to the official, interrogation techniques including drawing on prisoners' bodies, putting women's underwear on their heads, and threatening imminent harm to their families had not borne fruit and there was a need to "ratchet up the pressure."[34]

The *Washington Post* reported that in April 2003, officials at the highest levels of the Defense and Justice Departments approved a list of about twenty interrogation techniques for use at Guantánamo Bay that permit, among other things, reversing the normal sleep patterns of detainees and exposing them to heat, cold and "sensory assault," including loud music and bright lights, according to defense officials. The use of the techniques, according to the *Post*, must be justified as "militarily necessary," and must be accompanied by "appropriate medical monitoring," and requires the approval of

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[31] The Human Rights Committee, the expert body established to monitor compliance with the International Covenant on Civil and Political Rights, in its authoritative interpretation of Article 7 prohibiting torture and cruel, inhuman or degrading treatment or punishment, has stated: "To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends." General Comment 20, para. 11.

[32] See, e.g., John Yoo, "Terrorists have no Geneva rights," *Wall Street Journal*, May 26, 2004.

[33] Jess Bravin, Pentagon Report Set Framework For Use of Torture, *Wall Street Journal, June 7, 2004*

[34] Ibid.

senior Pentagon officials, and in some cases, of the Defense Secretary.[35] CBS News reported that Secretary Rumsfeld had approved such treatment for Mohammed Khatani, who in August 2001 allegedly tried unsuccessfully to enter the United States as part of the 9-11 plot. The treatment included reversing Khatani's sleep patterns, cutting off his beard, playing loud music and subjecting him to interrogation sessions lasting up to twenty hours. The head of U.S. Southern Command, General James Hill, whose responsibilities include Guantánamo Bay, said in June 2004 that Rumsfeld approved unspecified intensive interrogation techniques on two prisoners at Guantánamo.[36] The *Wall Street Journal* has reported that interrogation methods now used at Guantánamo include "limiting prisoners' food, denying them clothing, subjecting them to body-cavity searches, depriving them of sleep for as much as ninety-six hours and shackling them in so-called stress positions."[37]

Human Rights Watch has examined the accounts of over a dozen people released from Guantánamo concerning their incarceration there. These include nine persons directly interviewed by Human Rights Watch in Afghanistan and Pakistan, a sworn statement by a British former detainee provided to Human Rights Watch by his legal representative, and comments to media sources by several others. None of these accounts includes descriptions of the range of coercive interrogation techniques that reportedly had been authorized. As noted above, none of the detainees released to date have included "high value" detainees; most were apparently not even members of al-Qaeda or the Taliban. Thus, it cannot be determined if the methods used on the interviewees are representative or not of methods used on more important detainees. Nevertheless, some do describe degrading treatment, beatings and some sexual humiliation.

Describing his experience of being chained to the floor for long periods in an interrogation room without actually being interrogated, Briton Tarek Dergoul, who was released in March 2004, stated: "Eventually I'd need to urinate and in the end I would try to tilt my chair and go on the floor. They were watching through a one-way mirror. As soon as I wet myself, a woman MP [military police] would come in yelling, 'Look what you've done! You're disgusting.'"[38]

In a joint statement issued on May 13, 2004, Shafiq Rasul and Asif Iqbal, who were also released in March 2004 and repatriated to Britain, recounted: "Shortly before we left, a new practice was started. People would be taken to what was called the 'Romeo' block

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[35] Dana Priest and Joe Stephens, "Pentagon approved tougher interrogations," *Washington Post*, May 9, 2004.

[36] Josh White, "Methods used on 2 at Guantanamo," *Washington Post*, June 4, 2004.

[37] Jess Bravin, "Pentagon Report Set Framework For Use of Torture," *Wall Street Journal, June 7, 2004*

[38] David Rose, "They tied me up like a beast and began kicking me," *The Observer*, May 16, 2004.

where they would be stripped completely. After three days they would be given underwear. After another three days they would be given a top, and then after another three days given trouser bottoms. Some people only ever got underwear. This was said to be for 'misbehaving.'"[39]

One detainee, "A.," in Afghanistan, told Human Rights Watch that he was threatened with electric shocks. Human Rights Watch is not aware, however, of any instances in which shocks were actually administered.

A number of those interviewed described physical duress, particularly being subjected to extreme cold in the camp's isolation wing. Former detainee Shah Mohammed Alikhil told Human Rights Watch: "It had a cold environment and cold weather [air conditioning] was blowing. Sometimes I was freezing cold, but we were denied blankets except during the night we were given blankets."[40] Mohammad Saghir from Pakistan,[41] also complained of the very cold conditions in the punishment cells, where he was twice held, caused by air conditioning. Former detainee A., from Afghanistan, stated: "The isolation room was for punishment. It was a dark room and cold air was blowing. I had two blankets but still I was feeling cold. I was there for a month each time."[42] Tarek Dergoul described being chained to a ring in the floor and left alone for up to eight hours each day for a month. He stated: "The air conditioning would really be blowing – it was freezing, which was incredibly painful on my amputation stumps." (Dergoul had his left arm amputated above the elbow and a big toe was amputated because of frostbite.)[43]

Many described being chained or shackled. Dergoul described restraint equipment referred to as the "short shackle" - steel bonds pulled tight to keep the subject bunched up, then chained to the floor: "After a while, it was agony."[44] Shafiq Rasul and Asif Iqbal, British detainees at Guantánamo, described interrogation practices as follows:

"Our interrogations in Guantánamo… were conducted with us chained to the floor for hours on end in circumstances so prolonged that it was practice to have plastic chairs…

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[39] Shafiq Rasul and Asif Iqbal, Open letter to the U.S. Senate Armed Services Committee, May 13, 2004.

[40] Human Rights Watch interview with Shah Mohammed Alikhil, January 3, 2004.

[41] Human Rights Watch interview with Mohammad Saghir, January 17, 2004.

[42] Human Rights Watch interview with A. [name withheld], February 6, 2004.

[43] David Rose, "They tied me up like a beast and began kicking me," *The Observer*, May 16, 2004.

[44] David Rose, "They tied me up like a beast and began kicking me," *The Observer*, May 16, 2004.

that could be easily hosed off because prisoners would be forced to urinate during the course of them and were not allowed to go to the toilet.

"One practice … was 'short shackling' where we were forced to squat without a chair with our hands chained between our legs and chained to the floor. If we fell over, the chains would cut into our hands. We would be left in this position for hours before an interrogation, during the interrogations (which could last as long as 12 hours), and sometimes for hours while the interrogators left the room. The air conditioning was turned up so high that within minutes we would be freezing. There was strobe lighting and loud music played that was itself a form of torture. Sometimes dogs were brought in to frighten us… Sometimes detainees would be taken to the interrogation room day after day and kept short-shackled without interrogation ever happening, sometimes for weeks on end."[45]

Other detainees interviewed by Human Rights Watch, however, did not describe any abuse during interrogations. For example, Abdul Razak told Human Rights Watch that

"In the thirteen months I was in Cuba, I was interrogated 10-12 times. I was interrogated in a separate room and always alone. I would be brought there and my legs would be shackled to a chair. One or two Americans in plain clothes interviewed me. A typical interrogation consisted of questions about my family, education record, language skills, background…what I intended to do in the future…Purpose of my missionary activity…who funded it…what I was doing in Afghanistan….The sessions lasted between one and two hours each and I was asked questions the whole time.[46]

Several detainees talked about beatings, although only one had been assaulted himself.. The Afghan former detainee A. told Human Rights Watch: "I saw some other prisoners who were beaten and blood was running from their heads. Specifically I saw two Arabs who were acting obstinately who were beaten."[47] Mohammad Saghir, from Pakistan, says he witnessed the beating by seven guards of an Arab prisoner for spitting at a guard: "They all went into the cell and were beating him and kicking him."[48] Shafiq Rasul and Asif Iqbal reported witnessing a number of assaults on prisoners by U.S. personnel, and that soldiers had spoken openly of conducting beatings in cells, boasting "we can do anything we want." Abdul Razak stated, "though I was never beaten, I heard from other

[45] Shafiq Rasul and Asif Iqbal, Open letter to the U.S. Senate Armed Services Committee, May 13, 2004.

[46] Human Rights Watch interview with Abdul Razak, June 3, 2004.

[47] Human Rights Watch interview with A. [name withheld], February 6,2004.

[48] Human Rights Watch interview with Mohammad Saghir, January 17, 2004.

prisoners that they had been. And I saw one prisoners with serious head injuries…gashes and congealed blood…who said the guards had done it."[49] Rasul and Iqbal recounted one beating in particular, of Bahraini prisoner Jummah Al-Dousari, who they described as having become "psychiatrically disturbed":

"[Jummah Al-Dousari] was lying on the floor of his cage immediately near to us when a group of eight or nine guards known as the ERF team (Extreme Reaction Force) entered his cage… They stamped on his neck, kicking him in the stomach even though he had metal rods there as a result of an operation, and they picked up his head and smashed his face into the floor. One female officer was ordered to go into the cell and kick him and beat him which she did, in his stomach. This is known as "ERFing."[50]

Briton Tarek Dergoul alleges that he was himself beaten, and had a chemical spray administered when he refused to comply with cell searches. He also said the cell searches were sometimes staged when prisoners were praying. He has stated:

"If I refused a cell search MPs would call the Extreme Reaction Force who came in riot gear with plastic shields and pepper spray. The Extreme Reaction Force entered the cell, ran in and pinned me down after spraying me with pepper spray and attacked me. The pepper spray caused me to vomit on several occasions. They poked their fingers in my eyes, banged my head on the floor and kicked and punched me and tied me up like a beast. They often forced my head into the toilet."[51]

The detainee accounts of excessive or malicious force centered primarily around the use of these special squads, which according to a Guantánamo spokesman are actually known as the "Initial Response Force."[52] As is common in U.S. prisons, Guantánamo apparently used specially outfitted groups of guards to enter the cells of detainees disobeying orders in order to secure compliance or subdue them as necessary. Standard use of force requirements mandate that no more force should ever be used against prisoners than necessary to achieve legitimate security or safety objectives.[53] In U.S. prisons, however, the special teams often use unnecessary or excessive force – using the

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[49] Human Rights Watch interview with Abdul Razak, June 3, 2004.

[50] Shafiq Rasul and Asif Iqbal, Open letter to the U.S. Senate Armed Services Committee, May 13, 2004.

[51] Statement by Tarek Dergoul made available to Human Rights Watch.

[52] "Videos Of Prisoner Treatment At Guantanamo Held By US," Dow Jones International News, May 21, 2004.

[53] See, e.g., U.N. Standard Minimum Rules for the Treatment of Prisoners (1955), Art. 54. (1) "Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary."

confrontation with a detainee as an opportunity to "teach him a lesson" or to engage in malicious beatings. A similar phenomenon may have happened at Guantánamo, despite military insistence that the IRF squads used the minimal force necessary. Under the rules of the prison, every use of the IRF squad is apparently videotaped. A review of all those tapes could confirm or disprove detainees' allegations of beatings by the IRF. Navy Vice Admiral Albert Church apparently reviewed some of the tapes in early May 2004.

The U.S. military has denied any serious abuse at Guantánamo. Following the release of the photographs showing the abuses at Abu Ghraib prison, Secretary of Defense Donald Rumsfeld sent the Navy's inspector general, Vice Adm. Albert T. Church, to Guantánamo in early May to undertake a review of possible abuses. According to Church, he found only eight instances of minor infractions involving contact dating back to 2002. Two guards were demoted in rank and a third was acquitted in a court martial. Church's findings were based on interviews with interrogators, guards, military civilians, and contractors. Somewhat surprisingly, he did not interview any detainees.

Following the emergence of the photographs from Abu Ghraib, some former Guantánamo detainees have also insisted that photographs and videotapes of practices inside Guantánamo exist. Britons Shafiq Rasul and Asif Iqbal stated: "[T]here were and no doubt still are cameras everywhere in the interrogation areas. We are aware that evidence that could contradict what is being said officially is in existence. We know that CCTV cameras, videotapes and photographs exist since we were regularly filmed and photographed during interrogations and at other times."[54]

III. Afghanistan: Impunity for Systematic Abuse

Since the fall of the Taliban government in Afghanistan, U.S.-led forces have arrested and detained at least one thousand Afghans and other nationals, some during military operations, others with no apparent connection to ongoing hostilities. The U.S. also used its facilities in Afghanistan as staging points for the transfer of detainees captured in Pakistan and, reportedly, Southeast Asia. U.S. officials have told journalists and Human Rights Watch that U.S military and intelligence personnel in Afghanistan employ

[54] Shafiq Rasul and Asif Iqbal, Open letter to the U.S. Senate Armed Services Committee, May 13, 2004.

an interrogation system that includes the use of sleep deprivation, sensory deprivation, and forcing detainees to sit or stand in painful positions for extended periods of time.[55]

Among the earliest images of the treatment of prisoners from the Afghan war were pictures of John Walker Lindh, a young American captured in December, 2001, held naked, bound by duct tape to a stretcher. According to an affidavit filed in U.S. court by his attorney, U.S. soldiers "blindfolded Mr. Lindh, and took several pictures of Mr. Lindh and themselves with Mr. Lindh. In one, the soldiers scrawled 'shithead' across Mr. Lindh's blindfold and posed with him. . . . Another told Mr. Lindh that he was 'going to hang' for his actions and that after he was dead, the soldiers would sell the photographs and give the money to a Christian organization."[56] According to legal documents filed on his behalf, Lindh was flown to a Marine airbase in the Afghanistan high desert dubbed Camp Rhino. According to a statement provided in government discovery, a Navy doctor claims that a U.S. Special Forces officer told him at Camp Rhino that "sleep deprivation, cold and hunger might be employed" while Lindh was interrogated.[57]

The United States has failed to adequately address charges of mistreatment of detainees by U.S. military and intelligence personnel in Afghanistan. Human Rights Watch warned U.S. officials repeatedly about these problems in 2003 and 2004. In a March report, *Enduring Freedom: Abuses by U.S. Forces in Afghanistan*, Human Rights Watch documented numerous cases of mistreatment of detainees at various detention sites in Afghanistan, including extreme sleep deprivation, exposure to freezing temperatures, and severe beatings.[58] Detainees complained about being stripped of their clothing and photographed while naked. Some of these abusive practices during interrogation were similar to those recently reported in Iraq. These allegations are consistent with other allegations received by the Afghan Independent Human Rights Commission, the United Nations Assistance Mission in Afghanistan, and numerous international journalists.[59]

As early as December 2002, the *Washington Post* had reported that persons being held in the CIA interrogation center at Bagram airbase who refuse to cooperate "are sometimes kept standing or kneeling for hours in black hoods or spray-painted goggles, according

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[55] U.S.: Systemic Abuse of Afghan Prisoners, http://www.hrw.org/english/docs/2004/05/13/afghan8577.htm.

[56] Seymour M. Hersh, "Chain of command; How the Department of Defense mishandled the disaster at Abu Ghraib," *The New Yorker*, May 17, 2004.

[57] http://www.lindhdefense.info/20020613_FactsSuppSuppress.pdf, p.18

[58] See Human Rights Watch Report, *Enduring Freedom: Abuses by U.S. Forces in Afghanistan* http://hrw.org/reports/2004/afghanistan0304/.

[59] For testimony from Afghan detainees gathered by Human Rights Watch, see http://hrw.org/english/docs/2004/05/13/afghan8577.htm.

to intelligence specialists familiar with CIA interrogation methods. At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights—subject to what are known as 'stress and duress' techniques."[60]

Many of those arrested by U.S. forces in Afghanistan have been detained for indefinite periods at U.S. military bases or outposts. While held, these detainees have no contact with relatives or others, although some detainees receive visits from the ICRC. Detainees have no opportunity to challenge the basis for their detention. Some detainees were sent to the U.S. detention center at Guantánamo Bay Naval Base in Cuba, while others have been kept in Afghanistan. Many have ultimately been released without being charged; but some detainees in Afghanistan have been held for over two years.

The U.S. military maintains some twenty detention facilities throughout Afghanistan. The main U.S. detention facility in Afghanistan is at the Bagram airbase, north of the capital Kabul. Other detention facilities in the country include bases in Kandahar, Jalalabad, and Asadabad. The U.S. Central Intelligence Agency (CIA) is also holding an unknown number of detainees, both at Bagram airbase and at other locations in Afghanistan, including in Kabul.

Afghans detained at Bagram airbase in 2002 have described being held in detention for weeks, continuously shackled, intentionally kept awake for extended periods of time, and forced to kneel or stand in painful positions for extended periods. Some say they were kicked and beaten when arrested, or later as part of efforts to keep them awake. Some say they were doused with freezing water in the winter. Similar allegations have been made about treatment in 2002 and 2003 at U.S. military bases in Kandahar and in U.S. detention facilities in the eastern cities of Jalalabad and Asadabad.

The United States has still not provided any adequate explanation for four, and possibly five, suspicious deaths of detainees that took place in Afghanistan in 2002 and 2003. The first two deaths, which took place at Bagram airbase in December 2002, were ruled homicides by U.S. military doctors who performed autopsies. In the case of 22-year-old detainee Dilawar, the military maintained for months that he had died of a heart attack. However, the military changed its position when the *New York Times* obtained copy of Dilawar's autopsy report, prepared by U.S. military physicians, concluding he died from "blunt force injuries to lower extremities complicating coronary artery disease." The

[60] Dana Priest and Barton Gellman, "U.S. decries abuse but defends interrogations," *Washington Post*, December 26, 2002.

mode of death was determined to be "homicide." Two Afghans arrested with Dilawar told the *New York Times* that they were held in isolation cells, black hoods were placed over their heads, and their hands at times were chained to the ceiling. They also alleged that they were forced to strip naked in the presence of female soldiers. A military spokesman at Bagram told the *New York Times* that the death of the other detainee, 30-year-old Habibullah, was ruled a homicide by a military pathologist, the cause being "pulmonary embolism [blood clot in the lungs] due to blunt force injury to the legs."[61]

Military officials in the Army Criminal Investigative Division told Human Rights Watch in late 2003 and early 2004 that investigations into the two homicides were "ongoing." But in April 2004, Human Rights Watch received credible information that preliminary results of a military investigation into the two deaths were in fact completed in early 2003, and that some disciplinary actions were taken against U.S. personnel, although no prosecutions were initiated. U.S. military officials have repeatedly refused to explain to Human Rights Watch the circumstances of the third detainee death, which took place in Asadabad, in eastern Afghanistan, in June 2003.

In March of this year, Human Rights Watch again called on the United States to release the results of its investigations into the three deaths. These requests have been ignored. The deaths of two other detainees in Afghanistan are under investigation. On June 21, 2003, Abdul Wali, held at Asadabad died under suspicious circumstances; according to the Associated Press, his death is under investigation by the C.I.A.'s inspector general.

On November 6, 2003, detainee Abdul Wahid died while in U.S. custody in Afghanistan. His death is attributed to multiple blunt force injuries that were complicated by a muscle condition. According to military death certificates released by the Pentagon, his death was ruled a "medical homicide," which means that the person died in connection with the actions or influence of another person. It does not necessarily mean a crime occurred.

A fifth incident, in which an Afghan detainee died due to hypothermia after he was doused with cold water and left shackled in an unheated cell overnight, has emerged in the press. According to the Los Angeles Times, this case was referred by the CIA to the Justice Department, but no investigation results have been made public.[62] While conditions at Bagram seem to have improved, especially in the last few months, serious

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[61] See Human Rights Watch, "Enduring freedom: Abuses by U.S. forces in Afghanistan," March 2004, http://hrw.org/reports/2004/afghanistan0304/.

[62] Bob Drogin, "Abuse Brings Deaths of Captives Into Focus," *Los Angeles Times*, May 16, 2004.

concerns remain about other U.S. detention facilities in Afghanistan. The Afghan Independent Human Rights Commission (AIHRC)—an autonomous institution within the Afghan government—has collected complaints alleging torture and mistreatment made by recently released detainees and families of persons still detained. The AIHRC also received numerous complaints about abuses by U.S. troops in 2003 and 2004 at its local offices in southern and eastern Afghanistan, where U.S. military operations occur regularly. The commission repeatedly raised concerns about abuses with U.S. officials in 2003 and 2004, as did local government representatives and officials with the United Nations Assistance Mission in Afghanistan.

The violations of detainees' rights are exacerbated by the almost complete opacity maintained by U.S. officials about the Bagram facility and other detention facilities in Afghanistan. The United States refuses to allow access to detainees' families, lawyers, or advocates, or to journalists or representatives of nongovernmental organizations (other than the ICRC). While the ICRC has access to the Bagram facility, none of the other U.S. facilities are currently monitored by outside observers. On May 10, 2004, the AIHRC formally requested access to U.S. detention sites in Afghanistan. Human Rights Watch has also made formal requests to visit U.S. detention sites in Afghanistan through 2003 and 2004, none of which received any response.

Almost nothing is known about U.S. investigations or prosecutions of U.S. military personnel for alleged violations of international humanitarian law in Afghanistan. Simply put, the United States operates its detention facilities in Afghanistan in a climate of almost total impunity. As noted, the Department of Defense has not even released the results of its investigations into the deaths of Afghan detainees at Bagram and Asadabad and has yet to explain adequately the circumstances of these deaths. Nor have U.S. officials adequately responded to inquiries about alleged mistreatment and torture by U.S. forces in Afghanistan.

The military intelligence unit that oversaw interrogations at the Bagram detention center where at least two prisoners' deaths were ruled homicides was later placed in charge of questioning at Abu Ghraib prison in Iraq.[63] Capt. Carolyn A. Wood, who served at Bagram from July 2002 to December 2003, brought to Iraq interrogation procedures developed during service in Afghanistan, according to Congressional testimony.[64] It was

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[63] Douglas Jehl and David Rohde, "Afghan deaths linked to unit at Iraq prison," *New York Times*, May 24, 2004.

[64] A senior Army lawyer, Col. Marc Warren, stated at a Senate Armed Services Committee hearing on May 19, 2004, that members of the 519th Military Intelligence Battalion from Fort Bragg, NC, including Carolyn Wood, "had served as interrogators in Afghanistan, where the American military runs detention centers at Bagram Air Base and at a site in Kandahar, in southern Afghanistan," and that the 519th was one of the several units that

apparently Capt. Wood who wrote the interrogation rules posted on the wall at Abu Ghraib.

One member of the 377th Military Police Company told the *New York Times* that the fact that prisoners in Afghanistan had been labeled as "enemy combatants" not subject to the Geneva Conventions had contributed to the abuse. "We were pretty much told that they were nobodies, that they were just enemy combatants," he said. "I think that giving them the distinction of soldier would have changed our attitudes toward them. A lot of it was based on racism, really. We called them hajis, and that psychology was really important."[65]

Military (but not necessarily CIA) detention facilities in Afghanistan are the subject of a "top-to-bottom" review by Brigadier General Charles Jacoby, the deputy operational commander of Bagram airbase. Gen. Jacoby's mandate is to ensure that procedures at all coalition detention facilities in Afghanistan "are in accordance with the spirit of the Geneva Conventions," according to the official CENTCOM press release announcing his assignment on May 24. The U.S. military has announced that only "some of the key conclusions" of Gen. Jacoby's report would be made public, but that findings regarding specific techniques and incarceration practices would be kept classified.[66]

IV. Iraq: Applying Counter-Terrorism Tactics during a Military Occupation

The United States, as an Occupying Power in Iraq under the Geneva Conventions, may deprive civilians in Iraq of their liberty in only two situations: for "imperative reasons of security," or for prosecution.[67] Since President Bush declared the end of major combat in Iraq in May 2003, more than 12,000 Iraqis have been taken into custody by U.S. forces and detained for weeks or months. Until very recently, the U.S. has failed to ensure that so-called security detainees received a proper review of their cases as is

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brought to Iraq "their own policies that had been used in other theaters." Douglas Jehl and Eric Schmitt, "The reach of war: The interrogators; Afghan policies on questioning landed in Iraq," *New York Times*, May 21, 2004.

[65] Douglas Jehl and Andrea Elliott, "Cuba base sent its interrogators to Iraqi prison, *New York Times*, May 29, 2004.

[66] Associated Press, "U.S. General: Details in probe of Afghan jails to stay secret," June 1, 2004.

[67] *See* Letter on HRW's Concerns About the Rights of Iraqi Detainees, February 10, 2004, http://hrw.org/english/docs/2004/02/10/iraq8471.htm.

required under the Geneva Conventions.[68] In its February 2004 report to Coalition forces, the International Committee of the Red Cross reported that military intelligence officers told the ICRC that 70 to 90 percent of those in custody in Iraq last year had been arrested by mistake.[69]

The U.S.'s treatment of detainees in Iraq was shrouded in secrecy from the beginning of the occupation. What is clear is that abusive treatment used after September 11 on suspects in the "war on terror" came to be considered permissible as well in an armed conflict to suppress resistance to a military occupation. Procedures used in Afghanistan and Guantánamo were imported to Iraq, including the use of "stress and duress" tactics and the use of prison guards to set the conditions for the interrogation of detainees.[70]

In the aftermath of the Abu Ghraib scandal, information has come to light which suggests that harsh and coercive interrogation techniques such as subjecting detainees to painful stress positions and extended sleep deprivation have been routinely used in detention centers throughout Iraq. Department of Defense officials said that military intelligence "Human Exploitation Teams" regularly used so called "50/10 tactics": 50 minutes in sun with a bag over the head in stressful positions followed by 10 minutes of rest.[71]

In its February 2004 report, the ICRC found that "methods of physical and psychological coercion were used by the military intelligence in *a systematic way* to gain confessions and extract information" (emphasis added). The methods cited by the ICRC included:

- hooding to disorient and prevent detainees from breathing freely
- being forced to remain for prolonged periods in painful stress positions

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[68] Douglas Jehl and Kate Zernike, "Scant evidence cited in long detention of Iraqis," *New York Times,* May 30, 2004.

[69] "Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during arrest, internment and interrogation," February 2004; Hereafter "ICRC report."

[70] As Maj. General Antonio Taguba noted in his report, recent intelligence collection in support of Operation Enduring Freedom [the war in Afghanistan] posited a template whereby military police actively set favorable conditions for subsequent interviews. Investigative report, on alleged abuses at U.S. military prisons in Abu Ghraib and Camp Bucca, Iraq by Maj. Gen. Antonio M. Taguba: "Article 15-6 Investigation of the 800th Military Police Brigade." Hereafter "Taguba report."

[71] Matt Kelley, "Military intelligence troops accused of abuses in four camps outside Abu Ghraib," May 29, 2004.

- being attached repeatedly over several days, for several hours each time to the bars of cell doors naked or in positions causing physical pain
- being held naked in dark cells for several days and paraded naked, sometimes hooded or with women's underwear over their heads
- sleep, food, and water deprivation
- prolonged exposure while hooded to the sun during the hottest time of day

The classified investigative military report of Maj. Gen. Antonio Taguba confirmed these findings. Taguba reported that "numerous incidents of sadistic, blatant, and wanton criminal abuses" were inflicted on several detainees. His catalogue was even longer than the ICRC's:

- Punching, slapping and kicking detainees; jumping on their naked feet;
- Videotaping and photographing naked male and female detainees;
- Forcibly arranging detainees in various sexually explicit positions for photographing;
- Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;
- Arranging naked detainees in a pile and then jumping on them;
- Positioning a naked detainee on a box, with a sandbag on his head, and attaching wires to his fingers, toes and penis to simulate electric torture;
- Writing "I am a Rapist" (sic) on the leg of a detainee alleged to have forcibly raped a 15-year-old fellow detainee, and then photographing him naked;
- Placing a dog chain or strap around a naked detainee's neck and having a female soldier pose with him for a picture;
- A male military police guard having sex with a female detainee;[72]
- Breaking chemical lights and pouring the phosphoric liquid on detainees;
- Threatening detainees with a loaded 9-mm pistol;
- Pouring cold water on naked detainees;
- Beating detainees with a broom handle and a chair;
- Threatening male detainees with rape;

[72] Interestingly, this was not referred to as "rape," although the threat to forcibly have sex with male detainees was referred to as rape.

- Allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell;
- Sodomizing a detainee with a chemical light and perhaps a broom stick;
- Using military working dogs (without muzzles) to frighten and intimidate detainees with threats of attack, and in at least one case biting and severely injuring a detainee;
- Forcing detainees to remove their clothing and keeping them naked for several days at a time;
- Forcing naked male detainees to wear women's underwear;
- Taking pictures of dead Iraqi detainees.[73]

There is additional evidence that interrogation methods in violation of international human rights and humanitarian law were commonplace in Iraq. According to a transcript obtained by the *New York Times*, Col. Thomas Pappas, commander of the 205th Military Intelligence Brigade, told Maj. General Antonio Taguba that intelligence officers sometimes instructed military police to strip detainees naked and to shackle them in preparation for interrogation when there was a "good reason" to do so. Lt. Col. Jerry Phillabaum, the former top military police commander in Abu Ghraib, said in a written statement that military interrogators routinely used sleep deprivation and other forms of psychological intimidation to elicit information from prisoners. "The purpose of that wing of the prison was to isolate prisoners with intelligence, so that they would provide it during MI [military intelligence] interrogations," Phillabaum said.[74] The Reuters news agency reported that three of its Iraqi employees were detained near Fallujah in January 2004 and subjected to sleep deprivation with bags over their heads, forced to remain stress positions for long periods, and beaten. A summary of the U.S. Army's 82nd Airborne Division's investigation provided to Reuters conceded that the detainees were "purposefully and carefully put under stress, to include sleep deprivation, in order to facilitate interrogation."[75]

Cases under Investigation

From the earliest days of the U.S. occupation of Iraq, the U.S. government has been aware of allegations of abuses, including the death of some 30 persons in detention. Yet soldiers accused of abuse have – until after the Abu Ghraib scandal broke – escaped

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[73] Taguba report.

[74] Sewell Chan and Thomas E. Ricks, "Iraq prison supervisors face army reprimand," *Washington Post*, May 4, 2004.

[75] Andrew Marshall, "Reuters staff abused by U.S. in Iraq," Reuters, May 18, 2004.

judicial punishment.[76] Several cases are still being investigated as possible homicides. To date, no one has been criminally charged in any of the cases.

Among the cases:

Camp Bucca

In one case dating from the first days of the occupation, three Army reserve MPs allegedly beat prisoners and encouraged others to do so at Camp Bucca in the southern city of Um Qasr on May 12, 2003. The commanding officer at Camp Bucca was Lt. Col. Jerry Phillabaum, later implicated in the Abu Ghraib abuses. Charges were brought against the military police but were ended with only their demotion and discharge. In his report, Maj. Gen. Taguba noted that "Following the abuse of several detainees at Camp Bucca in May 2003, I could find no evidence that BG [Brig. Gen.] Karpinski ever directed corrective training for her soldiers or ensured that MP Soldiers throughout Iraq clearly understood the requirements of the Geneva Conventions relating to the treatment of detainees."

Abed Hamed Mowhoush

Captured in October 2003, the former chief of Iraqi air defenses, Maj. Gen. Abed Hamed Mowhoush, died November 26, 2003, at a detention facility at Al Qaim. The Pentagon first released a death certificate reporting that Mowhoush had died "of natural causes" -- a news release added that "he did not feel well and subsequently lost consciousness." But following a report in the *Denver Post*[77] after the Abu Ghraib scandal erupted, the Pentagon acknowledged that, according to an autopsy report, Mowhoush died of "asphyxia due to smothering and chest compression" showing "evidence of blunt force trauma to the chest and legs" and said that a homicide investigation was underway. Reportedly, Chief Warrant Officer Lewis Welshofer and another officer slid a sleeping bag over Mowhoush's head and rolled him over and over while asking questions. Welshofer is accused of sitting on Mowhoush's chest and placing his hands over his mouth. According to the investigative summary, "approximately 24 to 48 hours prior to (Mowhoush's death), Mowhoush was questioned by 'other governmental agency

[76] Under the U.S. Uniform Code of Military Justice, military personnel may be subject to so-called non-judicial punishment via an article 15 administrative hearing or to prosecution by court martial. Article 15 punishments include up to one-year imprisonment, fines, loss of rank, and discharge from the military.

[77] Arthur Kane and Miles Moffeit, "Carson GI eyed in jail death Iraqi general died in custody," *Denver Post*, May 28, 2004.

officials,' [i.e. the CIA] and statements suggest that he was beaten during that interrogation."[78]

Karim 'Abd al-Jalil

A former lieutenant colonel in the Iraqi army, Kareem 'Abd al-Jalil died on January 9, 2004, at Forward Operating Base Rifles near al-Asad where he was being interrogated by Special Forces since January 4. The original death certificate stated that he died of "natural causes… during his sleep." But pictures taken by 'Abd al-Jalil's cousin of his body before burial seem to depict severe bruises on his abdomen as well as marks and cuts on his arms and legs, especially around the wrists. Spiegel TV, a German news organization, interviewed another detainee held with 'Abd al-Jalil who stated that during interrogation, American soldiers "would kick him ['Abd al-Jalil] a lot, cuff his hands and place them behind his neck. And they would also cuff his feet, then one of them would hold his feet up while the other pulled down his head. They tossed him on his back and stepped on him. They danced on his belly and poured cold water all over him."[79] A Pentagon memo obtained by the *Denver Post* and reported by NBC says 'Abd al-Jalil was held in isolation, his hands tied to a pipe that ran along the ceiling. When he was untied, he attacked his interrogators and later tried to escape. When recaptured, his hands were tied to the top of his cell door and his mouth gagged.[80] Five minutes later, a guard noticed 'Abd al-Jalil dead, hanging by his shackles. After these revelations, the Pentagon released another certificate calling 'Abd al-Jalil's death a homicide from "blunt force injuries and asphyxia."[81] The Pentagon also said those who interrogated him included members of an elite special forces unit, some of the most highly trained personnel in the U.S. military.[82]

Nagm Sadoon Hatab

Former Baath Party official Nagm Sadoon Hatab was found dead at Camp Whitehorse detention facility near the southern Iraqi city of Nasiriyah on June 6, 2003.[83] The autopsy

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[78] Robert Weller, "Soldier investigated in Iraqi general's death: Officer at Fort Carson says there is an 'agenda,'" Associated Press, May 29, 2004.

[79] Chris Hansen, "Profile: death in custody; investigation into death of Iraqi detainee Kareem Abdul Jaleel reveals more prison atrocities, NBC News Transcripts, May 23, 2004. Also see: "US troops tortured Iraqi prisoner to death: report," Agence France Presse, May 14, 2004.

[80] Editorial, "The Homicide Cases," *Washington Post*, May 28, 2004.

[81] Chris Hansen, "Profile: death in custody; investigation into death of Iraqi detainee Kareem Abdul Jaleel reveals more prison atrocities, NBC News Transcripts, May 23, 2004.

[82] Chris Hansen, "Profile: death in custody; investigation into death of Iraqi detainee Kareem Abdul Jaleel reveals more prison atrocities, NBC News Transcripts, May 23, 2004.

[83] Tom Squitieri and Dave Moniz, "3rd of detainees who died were assaulted; Shot, strangled, beaten, certificates show," *USA Today*, June 1, 2004.

record said he died from "strangulation." Military records state that Hatab was asphyxiated when a Marine guard grabbed his throat in an attempt to move him, accidentally breaking a bone that cut off his air supply. Another Marine is charged with kicking Hatab in the chest in the hours before his death - several of his ribs were broken.[84] Hatab was also covered with feces and left under the sun for hours. The Marines believed Hatab had taken part in the ambush of Pfc. Jessica Lynch's unit and reportedly were instituting some form of vigilante justice. Eight Marines were initially charged with various offenses related to Hatab's death; six later had the charges dropped or reduced to administrative punishment. The two men to be tried are Maj. Clarke Paulus, who commanded Camp Whitehorse when Hatab died, and Sgt. Gary Pittman, who was a guard there. They will be tried at Camp Pendleton in August and September 2004, respectively.[85]

Reports of Abuse Ignored

Prior to the publication of the Abu Ghraib photos, the U.S. government had multiple opportunities to take all necessary action to address what officials should have recognized was a serious and widespread problem. In fact, the ICRC report states that it alerted U.S. authorities to abuses orally and in writing throughout 2003. In May 2003, the ICRC sent a memorandum based on over 200 allegations of ill-treatment of prisoners of war during capture and interrogation at collecting points, battle group stations and temporary holding areas. That same month, the Special Representative of the United Nations Secretary-General, Mr. Sergio Vieira de Mello raised concerns about the treatment of detainees with the Coalition Administrator, Ambassador Paul Bremer.[86] In early July 2003, the ICRC presented a paper detailing approximately 50 allegations of ill-treatment in the military intelligence section of Camp Cropper, at Baghdad International Airport.

According to the ICRC these incidents included:

> "a combination of petty and deliberate acts of violence aimed at securing the co-operation of the persons deprived of their liberty with their interrogators; threats (to intern individuals indefinitely, to arrest

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[84] "Did abuses go beyond Abu Ghraib?" CBS News, May 29, 2004.

[85] Alex Roth and Jeff McDonald, "Iraqi detainee's death hangs over Marine unit," *San Diego Union-Tribune*, May 30, 2004; and Rick Rogers, "Abuse charges against Marine reservist are dismissed," *San Diego Union-Tribune*, April 13, 2004.

[86] See Report of the Secretary-General to the U.N. Security Council, July 17, 2003, S/2003/715, para. 47.

> other family members,[87] to transfer individuals to Guantánamo) against persons deprived of their liberty or against members of their families (in particular wives and daughters); hooding; tight handcuffing; use of stress positions (kneeling, squatting, standing with arms raised aver the head) for three or four hours; taking aim at individuals with rifles, striking them with rifle butts, slaps, punches, prolonged exposure to the sun, and isolation in dark cells. ICRC delegates witnessed marks on the bodies of several persons deprived of their liberty consistent with their allegations."

In one case, a detainee:

> "alleged that he had been hooded and cuffed with flexi-cuffs, threatened to be tortured and killed, urinated on, kicked in the head, lower back and groin, force-fed a baseball which was tied into the mouth using a scarf and deprived of sleep for four consecutive days. Interrogators would allegedly take turns ill-treating him. When he said he would complain to the ICRC he was allegedly beaten more. An ICRC medical examination revealed haematoma in the lower back, blood in urine, sensory loss in the right hand due to tight handcuffing with flexi-cuffs, and a broken rib."

> During a visit to Abu Ghraib prison in October 2003, ICRC delegates witnessed "the practice of keeping persons deprived of their liberty completely naked in totally empty concrete cells and in total darkness," the report said. "Upon witnessing such cases, the ICRC interrupted its visits and requested an explanation from the authorities. The military intelligence officer in charge of the interrogation explained that this practice was 'part of the process.'"[88]

> Rather than responding to these warning signals, however, according to one senior U.S. Army officer who served in Iraq, Army officials responded to the report of abuses at Abu Ghraib prison by trying to

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[87] In November 2003, Coalition Forces arrested the wife and daughter of General Izzat Ibrahim al-Douri, former vice-chair of Iraq's Revolutionary Command Council and a top Saddam Hussein associate, apparently as hostages, in violation of the Geneva Conventions. See Human Rights Watch Letter to Defense Secretary Donald Rumsfeld, January 12, 2004, http://www.hrw.org/english/docs/2004/01/12/usint6921_txt.htm.

[88] "Red Cross: Iraq abuse 'tantamount to torture': Agency says U.S. was repeatedly given details of mistreatment," MSNBC News, May 11, 2004.

curtail the ICRC's spot inspections, insisting that the ICRC should make appointments before visiting the cellblock.[89]

Guantánamo meets Afghanistan at Abu Ghraib

In August 2003, Defense Secretary Rumsfeld, through his top intelligence aide, Stephen A. Cambone, sent Maj. Gen. Geoffrey D. Miller, who oversaw the interrogation efforts at the U.S. military base at Guantánamo Bay, Cuba, to, in the words of Maj. Gen. Taguba, "review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence."[90] Miller was tasked in essence with "Gitmo-izing" interrogation practices in Iraq, although the Bush administration recognizes that the Geneva Conventions are "fully applicable" in Iraq[91] while it has said that they do not cover al-Qaeda detainees Guantánamo.[92]

As Taguba highlighted in his report, Miller recommended that "the guard force be actively engaged in setting the conditions for successful exploitation of the internees."[93] There is little clarity regarding what else Miller recommended.[94]

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[89] Douglas Jehl and Eric Schmitt, "Army tried to limit Abu Ghraib access," *New York Times*, May 20, 2004. The article also quotes Brigadier General Janis Karpinski, commander of the 800th Military Police Brigade, whose soldiers guarded the prisoners, as saying that senior officers in Baghdad had treated the ICRC

report in "a light-hearted manner."

[90] Taguba later decried Miller's idea of transporting interrogation techniques from Guantánamo to Iraq, noting that there were major differences between the status of the detainees in the two locations.

[91] Douglas Jehl and Neil A. Lewis, "US disputed protected status of Iraq inmates," *New York Times*, May 23, 2004. See also, Alberto R. Gonzales, "The Rule of Law and the Rules of War," *New York Times*, May

15, 2004 ("Both the United States and Iraq are parties to the Geneva Conventions. The United States recognizes that these treaties are binding in the war for the liberation of Iraq. There has never been any suggestion by our government that the conventions do not apply in that conflict.")

[92] Miller testified that "no program" at Guantánamo "has any of those techniques that are prohibited by the Geneva Convention." But Sanchez, said that the procedures Miller brought from Guantánamo to Iraq "have to be modified" because "the Geneva Convention was fully applicable" in Iraq, in contrast to Guantánamo. Editorial, "Reveal the Rules," *Washington Post*, May 23, 2004.

[93] Taguba took issue with this proposal and noted that it would be "in conflict with" the recommendations of the Ryder Report, a previous review of Iraqi prisons which stated that the engagement of military police in military interrogations to "actively set the favorable conditions for subsequent interviews runs counter to the smooth operation of a detention facility."

[94] According to Thomas Pappas, the U.S. army officer in charge of the prison cells at Abu Ghraib, one of Miller's recommendations was the use of military guard dogs in interrogations. Pappas also stated that the recommendation was approved by Lt. Gen. Ricardo S. Sanchez, the top U.S. military official in Iraq. Both Miller and Sanchez deny this. R. Jeffrey Smith, "General is Said to Have Urged Used of Dogs," *Washington Post*, May 26, 2004; Scott Higham, Joe Stephens and Josh White, "Prison Visits by General Reported in Hearing; Alleged Presence of Sanchez Cited by Lawyer," *Washington Post*, May 23, 2004.

On October 12, Sanchez implemented Miller's proposals, issuing a classified memorandum calling for interrogators at Abu Ghraib to work with military police guards to "manipulate an internee's emotions and weaknesses" and to assume control over the "lighting, heating . . . food, clothing, and shelter" of those they were questioning.[95] The full contents of the Sanchez memo have not been made public.

In addition, between three and five interrogation teams were sent in October from Guantánamo to the American command in Iraq ' "for use in the interrogation effort"' at Abu Ghraib.[96]

Capt. Carolyn A. Wood, who oversaw interrogations at the Bagram detention center in Afghanistan where two prisoners died, apparently prepared the document titled "Interrogation Rules of Engagement" that was posted at Abu Ghraib. According to the document, certain interrogation methods could be undertaken, but only if the "CG's" (Sanchez's) approval was sought and obtained in writing. Depending on their actual application, these methods would violate the Geneva Conventions prohibitions against abusive and coercive treatment of detainees. They included:

- Change of scenery down (moving to a more barren cell)
- Dietary manipulation
- Environmental manipulation
- Sleep adjustment (reverse schedule)
- Isolation for longer than 30 days
- Presence of military working dogs
- Sleep management (72 hours maximum)
- Sensory deprivation (72 hours maximum)
- Stress positions (no longer than 45 minutes)

The document also cautions that detainees "will NEVER be touched in a malicious or unwanted manner" and that the Geneva Conventions apply in Iraq.

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[95] See R. Jeffrey Smith, "Memo gave intelligence bigger role: increased pressure sought on prisoners," *Washington Post*, May 21, 2004.

[96] Douglas Jehl and Andrea Elliott, "Cuba base sent its interrogators to Iraqi prison, New York Times, May 29, 2004.

Even though his title appears on the document, which also carried the logo of Combined Joint Task Force-7, the U.S.-led coalition force in Iraq, General Sanchez denies having seen or approved the rules of engagement posted at Abu Ghraib (although he acknowledged that in twenty-five separate instances, he approved holding Iraqi prisoners in isolation for longer than thirty days, one of the methods listed in the posted rules). Keith B. Alexander, the head of the Army intelligence, however, said that they were the approved policy for interrogations of detainees in Iraq.[97]

What is clear is that U.S. military personnel at Abu Ghraib felt empowered to abuse the detainees. The brazenness with which the soldiers at the center of the scandal conducted themselves, snapping photographs and flashing the "thumbs-up" sign as they abused prisoners, suggests they felt they had nothing to hide from their superiors. The abuse was so widely known and accepted that a picture of naked detainees forced into a human pyramid was reportedly used as a screen saver on a computer in the interrogation room.[98] According to Maj. Gen. Taguba, "interrogators actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses. … [The] MP Brigade [was] directed to change facility procedures to "set the conditions" for military intelligence interrogations. Taguba cited the testimony of several military police: "One said the orders were 'Loosen this guy up for us. Make sure he has a bad night. Make sure he gets the treatment.'" Another stated that "the prison wing belongs to [Military Intelligence] and it appeared that MI personnel approved the abuse." That MP also noted that "[t]he MI staffs, to my understanding, have been giving Graner [an MP in charge of night shifts at Abu Ghraib] compliments on the way he has been handling the MI [detainees]. Example being statements like 'Good job, they're breaking down real fast.'"

General Sanchez announced on May 14, 2004, that he had barred the use of coercive interrogation techniques including "stress positions," "sleep deprivation," and the use of hoods, that had previously been available, though it is still not clear what he had previously approved.

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[97] Editorial, "Reveal the rules," *Washington Post*, May 23, 2004.

[98] Kate Zernike, "Only a few spoke up on abuse as many soldiers stayed silent," *New York Times*, May 22, 2004.

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Still at Risk:
Diplomatic Assurances No Safeguard Against Torture

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*Under each case title is the sending country and the receiving or requesting country; for example, Sweden expelled Ahmed Agiza and Mohammed al-Zari to Egypt. In some cases, the sending country attempted to return a person based on diplomatic assurances, but a court prohibited the return, ruling that the assurances were not an adequate safeguard against torture; for example, the Netherlands attempted to extradite Nuriye Kesbir to Turkey.

Executive Summary

The Security Council calls upon states to cooperate fully in the fight against terrorism…in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates [or] participates in…the commission of terrorist acts or provides safe havens.

- United Nations Security Council Resolution 1566

States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.

- United Nations Security Council Resolution 1566

The global effort to apprehend, interrogate, and prosecute persons suspected of involvement in terrorist activities is a vital project. It is incumbent on states to work individually and collectively to ensure that such persons, if proven guilty, are brought to justice. It is also incumbent on them, however, to ensure that basic rights are upheld.

There is substantial evidence that in the course of the global "war on terrorism," an increasing number of governments have transferred, or proposed sending, alleged terrorist suspects to countries where they know the suspects will be at risk of torture or ill-treatment. Recipient countries have included Egypt, Syria, Uzbekistan, and Yemen, where torture is a systemic human rights problem. Such transfers have also been effected or proposed to countries such as Algeria, Morocco, Russia, Tunisia, and Turkey, where members of particular groups—Islamists, Chechens, Kurds—are routinely singled out for the worst forms of abuse.

Because the international ban on torture is absolute and transfers to risk of torture are patently illegal, many sending governments have sought "diplomatic assurances" from the receiving country that the suspects would not be tortured or ill-treated upon return. In contexts where torture is a serious and persistent problem, or there is otherwise reason to believe that particular individuals will be targeted for torture and ill-treatment, diplomatic assurances do not and cannot prevent torture. Sending countries that rely on such assurances are either engaging in wishful thinking or using the assurances as a figleaf to cover their complicity in torture and their role in the erosion of the international norm against torture. The practice should stop.

The use of diplomatic assurances against torture is a global phenomenon, with sending countries in North America and Europe leading the charge. The issue of diplomatic

assurances against torture gained notoriety recently when U.S. officials acknowledged a large number of transfers of suspects to countries where torture is a serious human rights problem, claiming that U.S. authorities regularly sought and received diplomatic assurances of humane treatment from receiving governments prior to the transfers. In an increasing number of those cases, the suspects have credibly alleged that they were tortured.

But the problem is much broader. The Canadian government's "security certificate" regime permits deportations of alleged terror suspects to places where they are at risk of torture. To stem criticism in some of these cases, the government has sought assurances against torture from receiving states such as Morocco and Egypt. The December 2001 expulsions of two Egyptian asylum seekers from Sweden based on assurances against torture caused a national scandal after the men alleged that they had been tortured and ill-treated in Egyptian custody. The government of the United Kingdom recently proposed securing assurances against torture to transfer terrorist suspects to Algeria and Morocco, countries where persons labeled "terrorist" are routinely targeted for abusive treatment, including torture. Governments in the Netherlands, Austria, Germany and Georgia have also sought assurances to effect extraditions to countries such as Turkey and Russia, where terrorism suspects are at heightened risk of abusive treatment in detention.

The picture is not entirely bleak. As described below, some cases involving the reliability and sufficiency of assurances have come before courts in several different jurisdictions and some courts already are drawing the line and upholding the ban on sending people to torture. Still, there is great confusion even in the current court cases, reflecting insufficient appreciation of the dynamics of torture and of the hollow-shell that diplomatic assurances represent when applied in situations where there is a risk of torture and ill treatment.

This report draws on new research collected over the past year and from Human Rights Watch's April 2004 report *"Empty Promises:" Diplomatic Assurances No Safeguard against Torture* to illustrate the bankruptcy of existing rationalizations for the use of diplomatic assurances in the torture context.[1] It summarizes applicable international law, details the practical reasons why diplomatic assurances cannot be relied on in the torture context, and analyzes new cases from a number of jurisdictions in which courts have addressed the issue or are currently grappling with it.

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[1] Human Rights Watch Report, *"Empty Promises:" Diplomatic Assurances No Safeguard against Torture*, April 2004 [online] http://hrw.org/reports/2004/un0404/ (retrieved March 20, 2005).

This report begins with a summary of relevant law. The ban against torture is absolute and there is a concomitant absolute prohibition against sending persons—no matter what their crime or suspected activity—to a place where they would be at risk of torture or cruel, inhuman or degrading treatment or punishment (the *nonrefoulement* obligation). Every international treaty that addresses the issue is unambiguous on this point.

Because of the prominence diplomatic assurances have assumed in the counter-terrorism context, moreover, an increasing number of authoritative human rights experts have addressed the issue. All have expressed alarm that governments are using assurances to circumvent their most fundamental human rights obligations.

Significantly, sending states request assurances only when there is a perceived need. We have found that governments attempting to secure assurances against torture or ill-treatment seek such guarantees only from authorities in states where torture is systemic, where torture and ill-treatment are recalcitrant or endemic abuses, or where members of a particular ethnic, racial, religious, political, social, or other identifiable group are targeted and routinely tortured. We have yet to come across a case where assurances have been sought from a country in which torture and ill-treatment were not acknowledged human rights problems.

The second part of this report explains why diplomatic assurances cannot provide effective protection against torture and ill-treatment in such circumstances. First, they are based on trust that the receiving state will uphold its word when there is no basis for such trust. Governments in states where torture is a serious human rights problem almost always deny such abusive practices. It defies common sense to presume that a government that routinely flouts its obligations under international law can be trusted to respect those obligations in an isolated case. And indeed, as already noted, there is an increasing number of cases in which allegations of torture are emerging after individuals are returned based on such assurances.

Second, post-return monitoring mechanisms, on which some governments have relied to ensure compliance with diplomatic assurances, have proven no guarantee against torture. Torture is practiced in secret and its perpetrators are often expert at keeping such abuses from being detected. Post-return monitoring schemes often lack many basic safeguards, including private interviews with detainees without advance notice to prison authorities and medical examinations by independent doctors. Many detainees will refuse to speak of abusive treatment in any event due to fear of retribution from prison authorities.

Third, when diplomatic assurances fail to protect returnees from torture as they so often do, there is no way to hold the sending or receiving governments accountable. Diplomatic assurances have no legal effect and the person who they aim to protect has no recourse if the assurances are breached.

The final part of this report analyzes specific cases. This section begins with the United States due to its pervasive use of diplomatic assurances in rendition and immigration cases, and to effect returns of detainees from Guantánamo Bay. It does not address all rendition cases where evidence of torture has surfaced, but focuses on those where assurances have been a confirmed feature of the controversy. The next section on Canada details the use of assurances in both national security cases and asylum cases, an indication that their use in that country is also becoming routine. The final section on Europe documents an alarming and growing trend toward securing diplomatic assurances against torture and ill-treatment to effect extraditions, deportations, and expulsions, despite Europe's claim to having the most advanced human rights protection system in the world.

The cases illustrate that individual protection is consistently sacrificed to state interest, that even well-intentioned monitoring under diplomatic auspices is ineffectual, and that, in the end, sending and receiving states have a common interest in pretending assurances are meaningful rather than verifying that they actually are.

The cases also show that, in the last year, diplomatic assurances have emerged as an important issue for national governments and courts, and for public debate. Some governments put significant effort into securing and refining diplomatic assurances to avoid the perception that they are in breach of their human rights obligations. They are trying to perfect an inherently flawed device. In other cases, governments have resorted to patently unreliable assurances merely to facilitate a return, with little concern for the abusive practices of the government proffering the assurances, to give the veneer of compliance with international law.

Once a sending government acknowledges that a risk of torture exists in a specific country, it is incumbent upon it to refuse to transfer a person to that country. Sending governments cannot bypass this rule by securing unreliable and unenforceable diplomatic assurances against torture. Receiving governments must establish a verifiable record of compliance with international norms against torture to build confidence that they will not torture and ill-treat people upon return. Such confidence cannot and should not be gained from a simple offering of untrustworthy assurances.

The Legal Prohibition against Returns to Risk of Torture and Ill-Treatment

International law is clear: torture and cruel, inhuman or degrading treatment or punishment (hereinafter "ill-treatment") are prohibited absolutely, in all situations and at all times, as is the transfer of any person under any circumstances to a place where he or she would be at risk of such abuse. [2]

International Law

The absolute prohibition against torture and ill-treatment has been much discussed in the wake of revelations in April 2004 of detainee mistreatment at Abu Ghraib prison by U.S. military and intelligence personnel.[3] Far less public discussion has been dedicated to the concomitant and equally absolute prohibition against returning or transferring a person to a place where he or she would be at risk of torture and ill-treatment.[4] The prohibition against torture and ill-treatment, including the ban on such transfers, is absolute and permits no exceptions. The ban applies to every person, in times of armed conflict, disturbances, emergencies, or peace, no matter what past or current military or personal status obtains or what crimes or activities a person is suspected of having committed. States cannot derogate from or "opt out" of this obligation. The prohibition against torture is enshrined in numerous major international and regional human rights treaties as detailed below.[5] Authoritative interpretations of anti-torture provisions in key treaties indicate that the prohibition against torture and ill-treatment includes the *nonrefoulement* obligation, even where that obligation is not expressly stated.

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[2] The word "transfer" includes any process leading to the involuntary return of a non-national either to his or her country of origin or to a third country, including by deportation, removal, expulsion, extradition, rendition, or other transfer from the custody of one government to the custody of another government.

[3] See, Human Rights Watch Report, *The Road to Abu Ghraib*, June 2004 [online] http://www.hrw.org/reports/2004/usa0604/ (retrieved March 1, 2005).

[4] While much has been written about renditions by the U.S. of terrorist suspects to third countries for interrogation (see U.S. section below), there is far less discussion about the full range of transfers—deportation, removal, expulsion, extradition—and how many states in North America and Europe are using powers under both counter-terrorism and immigration laws to transfer alleged terrorist suspects and national security threats to their home or third countries. As documented below, many such transfers occur on the basis of reliance by the sending state on diplomatic assurances against torture and ill-treatment from the receiving state, which often has a well-documented record of torture.

[5] For the purposes of this paper, the word "torture" when used alone includes cruel, inhuman, or degrading treatment or punishment in conformity with the U.N. Human Rights Committee's General Comment No. 20 (1992), which states: "In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end."

U.N. Convention against Torture

The generally accepted definition of torture appears at article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention against Torture):

> [T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain is inflicted by or at the acquiescence of a public official or other person acting in an official capacity.[6]

Under the convention, it is expressly prohibited to transfer a person to a country where he or she would be at risk of torture. The ban thus maintains logical consistency: states cannot torture and cannot circumvent this obligation by sending people to governments that will. The obligation not to send a person to a place where he or she would be at risk of torture is clearly articulated in article 3:

> 1. No State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture…
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

In *Tapia Paez v. Sweden*, the Committee against Torture, authorized under the convention to consider individual cases, stated that the test of article 3 is absolute: "Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which

[6] One-hundred and thirty nine states have ratified the Convention against Torture, including all of the states referenced in this report as sending states: Austria, Canada, Georgia, Germany, Netherlands, Sweden, United Kingdom and United States. The Convention against Torture has also been ratified by all the countries referenced herein to which people have been transferred or have been threatened with transfer, including Algeria, China, Egypt, Morocco, Russia, Syria, Tunisia, Turkey, Uzbekistan, and Yemen.

the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention."[7]

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR), ratified by 154 states, provides in article 7 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[8] The Human Rights Committee, which oversees implementation by national governments of the ICCPR, has interpreted the Convention's torture prohibition to include the *nonrefoulement* obligation: "In the view of the Committee, State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."[9]

Moreover, in March 2004, the Human Rights Committee adopted General Comment No. 31 on ICCPR article 2 (concerning nondiscrimination) regarding "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant." Paragraph 12 reads in part:

> . . . the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [torture or cruel, inhuman or degrading treatment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.[10]

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[7] *Tapia Paez v. Sweden*, Communication No. 39/1996, April 28, 1997.

[8] ICCPR, article 7.

[9] U.N. Human Rights Committee General Comment No. 20 (1992).

[10] General Comment No. 31, CCPR/C/21/Rev.1/Add.13, March 26, 2004 (adopted on March 29, 2004) [online] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument (retrieved March 31, 2005). ICCPR article 2 reads: "Each State party to the present Covenant undertakes to respect and to ensure to all individuals with its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

It is important to note that such "irreparable harm," in accordance with ICCPR article 7, expressly includes cruel, inhuman, or degrading treatment or punishment.

1951 Convention Relating to the Status of Refugees

The *nonrefoulement* obligation is also a core principle of international refugee law. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) require that no state "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[11]

Unlike the Convention against Torture and ICCPR, the prohibition against *refoulement* under the Refugee Convention is not absolute and exceptions to its protections are permitted in very narrow circumstances.[12] Any person excluded from refugee status or continuing protection from *refoulement* as a result of any one of these exceptions, however, retains the right to claim protection from return or transfer to risk of torture or ill-treatment under other international instruments and customary international law.

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[11] 1951 Convention Relating to the Status of Refugees, article 33 [online] http://www.ohchr.org/english/law/refugees.htm (retrieved March 18, 2005); 1967 Protocol Relating to the Status of Refugees [online] http://www.ohchr.org/english/law/protocolrefugees.htm (retrieved March 18, 2005).

[12] A person seeking refugee status can be excluded from such status based on article 1F, which states that "the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that a) He has committed a crime against peace, a war crime, or a crime against humanity…b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

"The only exception to the principle of refoulement in the Refugee Convention is found in 33(2):

Article 33. Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

A refugee may be expelled on grounds of national security or public order in accordance with article 32, but not to a place where his or her life or freedom would be threatened, whether that be his/her country of origin or a third state:

Article 32. Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority…

International Humanitarian Law

International humanitarian law prohibits torture and ill-treatment of all combatants and civilians, in all circumstances of international and non-international armed conflict. The Geneva Conventions explicitly permit the transfer of prisoners of war (POWs) and civilians only to states that are parties to the conventions and willing to comply with the protections codified in them. The human rights norm against torture and ill-treatment, including *refoulement* to such abuse, continues to apply in all situations of armed conflict.

The Third Geneva Convention, article 13, states that "Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention."[13] Article 17 provides that: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." The Convention includes an express provision at article 12 regarding the transfer of a POW to a third state and requires that the receiving state be a party to the convention and fully protect the rights of POWs, including the prohibition against torture and ill-treatment.[14]

The Fourth Geneva Convention prohibits the torture and ill-treatment of civilians.[15] The convention also prohibits the unlawful transfer or deportation of civilians to states not party to the convention and requires the receiving state to ensure that the rights codified in the convention are applied to all transferred civilians.[16] Significantly, the convention states that: "In no circumstances shall a protected person [including civilians] be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."[17] Article 147 specifically classifies torture and

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[13]Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, article 13 [online] http://www.unhchr.ch/html/menu3/b/91.htm (retrieved March 17, 2005).

[14] Ibid. Article 12 states: "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody."

[15]Convention Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. 6 U.S.T. 3516, 75 U.N.T.S. 287 [online] http://www.icrc.org/ihl.nsf/0/6756482d86146898c125641e004aa3c5?OpenDocument (retrieved March 17, 2005). Article 31 prohibits coercive interrogation and article 32 prohibits physical suffering, including torture and corporal punishments.

[16] Ibid., article 45.

[17] Ibid.

inhumane treatment, and the unlawful deportation or transfer of protected persons, including civilians, as "grave breaches" or war crimes under the convention.[18]

Article 3, common to all of the Geneva Conventions, applies to detained civilians in internal conflict and prohibits cruel treatment, torture, and "outrages against personal dignity, in particular humiliating or degrading treatment."[19] Although Common Article 3 does not expressly address the transfer of detainees, the prohibition against inhumane treatment applies "in all circumstances" and "at any time and in any place whatsoever."[20] Common Article 3 is taken as a *de minimus* standard that states the customary international law imperative of humane treatment in all situations of conflict, even those that might arguably fall short of the threshold of the Geneva Conventions and their Protocols.[21]

Customary International Law

The prohibition against torture and ill-treatment has risen to the level of *jus cogens*, that is, a peremptory norm of international law. As such it is considered part of the body of customary international law that binds all states, whether or not they have ratified the

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[18] Article 147 states that "Grave breaches…shall be those involving any of the following acts, if committed against persons or property protected by the present Convention; willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or to health, unlawful deportation or transfer or unlawful confinement of a protected person…"

[19] Ibid. Article 3 reads: In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment…

[20] Ibid.

[21] Jean S. Pictet, ed. *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), Art. 3.1.A, p. 36:

> Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions…? We do not subscribe to this view. We think, on the contrary, that the scope of application of the article must be as wide as possible….What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?

See also, Association of the Bar of the City of New York and Center for Human Rights and Global Justice at NYU School of Law, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* October 2004, p. 65 and fn. 355, sources cited therein [online] http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf (retrieved March 9, 2005)

treaties in which the prohibition against torture is enshrined. Many governments, human rights experts, and legal scholars have also affirmed that the prohibition against *refoulement*, derivative of the absolute ban on torture and from which no derogation is permitted, shares its *jus cogens* character.[22] The U.N. Special Rapporteur on Torture has stated that "The principle of non-refoulement is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment."[23]

The norm against torture, moreover, is undoubtedly one of the "basic rights of the human person" that partake of an *erga omnes* character, that is, it is one in which all states have a legal interest in ensuring its protection.[24] The *erga omnes* character of the norm signals that states have a right to pursue remedies for its violation collectively as well as individually. Torture is a grave breach of the Geneva Conventions, which require states parties to "search for" persons committing such crimes regardless of their nationality and bring them to justice in their own courts.[25] It is moreover a crime of universal jurisdiction, and can also constitute a crime against humanity or a war crime under the jurisdiction of the International Criminal Court.[26] Implicit in such a general right of enforcement and remedy on the part of the whole international community is the principle that states also have an obligation not to facilitate violations, either by their

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[22] See, Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-refoulement," June 20, 2001 [online] http://www.unhcr.ch/cgi-bin/texis/vtx/home/+lwwBmeDyXM_wwwwxwwwwwwwhFqA72ZR0gRfZNtFqrpGdBnqBAFqA72ZR0gRfZNcFqewlQtDaZpoDodDadDaBrnalqdpnawDmagdDBnDBadhaBrna7GoDqopcnadhaNdDe2Rqxhd1cnMnDBaDzmxwwwwwww/opendoc.pdf; Rene Bruin and Kees Wouters, "Terrorism and the Non-Derogability of Non-Refoulement," *International Journal of Refugee Law*, Volume 15 No. 5 (2003), section 4.6 [The jus cogens nature of nonrefoulement]; Jean Allain, "The Jus Cogens Nature of Nonrefoulement," *International Journal of Refugee Law*, Vol. 13 (2001), p. 538; David Weissbrodt and Isabel Hörtreitere, "The Principle of Non-refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-refoulement Provisions of Other International Human Rights Treaties," *Buffalo Human Rights Law Review*, Vol. 5 (1999).

[23] Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, A/59/324, August 23, 2004, paras. 25-29, [online] http://daccessdds.un.org/doc/UNDOC/GEN/N04/498/52/PDF/N0449852.pdf?OpenElement (retrieved March 7, 2005).

[24] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33. Although the *Barcelona Traction* case did not specifically enumerate torture, it is widely accepted that the prohibition against torture and cruel, inhuman, or degrading treatment is a norm of such fundamental importance and universal acceptance that it falls into this class of obligations, and moreover, is a crime of universal jurisdiction. See, for example, *Restatement of the Law (Third): The Foreign Relations Law of the United States* (The American Law Institute: Washington, D.C.) 1986 at § 702 Comment (o) and M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*," Law & Contemp. Prob., 25 (1996), pp. 63, 68.

[25] See, e.g. arts. 146 and 147 to the Convention Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. 6 U.S.T. 3516, 75 U.N.T.S. 287 [online] http://www.icrc.org/ihl.nsf/0/6756482d86146898c125641e004aa3c5?OpenDocument (retrieved March 17, 2005).

[26] Rome Statute of the International Criminal Court, 1998, arts. 7(1)(f); 8(2)(ii); 8(2)(c)(i-ii); see also the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind, at articles 8 and 9, 1996 [online] http://www.un.org/law/ilc/texts/dccomfra.htm (retrieved March 31, 2005). This foundational document for the Rome Statute laid out torture as a crime of universal jurisdiction to which every state is obliged to extend its criminal jurisdiction regardless of where or by whom the crime was committed

own agents or agents of another state. Transferring individuals to states where they are at risk of torture and prohibited ill-treatment, under the rationale of unreliable diplomatic assurances, flies in the face of this principle.

Regional Human Rights Law

The general prohibition against torture is enshrined in a number of regional human rights treaties, including the African Charter on Human and Peoples' Rights[27] and the American Convention on Human Rights.[28] The focus of this report is on the law and jurisprudence in the Council of Europe region, governed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) since all of the sending states referenced in this report and in the "*Empty Promises*" report, with the exceptions of the U.S. and Canada, are in Europe.

European Convention on Human Rights

Article 3 of the European Convention on Human Rights (ECHR) states that "No person shall be subjected to torture or to inhuman or degrading treatment or punishment." It is in the case law of the European Court of Human Rights (which considers potential violations of the ECHR) that the prohibition against *refoulement* is recognized to derive from the general and absolute prohibition against torture. The *Soering* case established the general principle that the *nonrefoulement* obligation attaches to article 3.[29] The case of *Chahal v. United Kingdom*, however, remains the standard regarding the absolute prohibition against *refoulement* and against reliance on diplomatic assurances as a safeguard against torture and ill-treatment upon return.[30] The court ruled in *Chahal* that the return to India of a Sikh activist, suspected of involvement in terrorism, would violate the United Kingdom's obligations under ECHR article 3, despite diplomatic

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[27] Article 5: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

[28] Article 5: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." Article 22(8) of the American Convention also contains the *nonrefoulement* obligation: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions." The Inter-American Convention on Torture also includes an express prohibition on *refoulement* at article 13: "Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting state."

[29] *Soering v. United Kingdom*, 1/1989/161/217, July 7, 1989 [online] http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=soering%20%7C%20v.%20%7C%20united%20%7C%20kingdom&sessionid=1273279&skin=hudoc-en (retrieved March 1, 2005).

[30] *Chahal v. United Kingdom*, 70/1995/576/662, November 15, 1996 [online] http://www.worldlii.org/int/cases/IIHRL/1996/93.html (retrieved March 1, 2005).

assurances proffered by the Indian government that Chahal would not suffer mistreatment at the hands of the Indian authorities. The court noted:

> [T]he United Nations' Special Rapporteur on Torture has described the practice of torture upon those in police custody [in India] as "endemic" and has complained that inadequate measures are taken to bring those responsible to justice. . .The NHRC [Indian National Human Rights Commission] has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India. . .Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above, it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem. . .Against this background, the Court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety.[31]

The court thus established the standard that diplomatic assurances are an inadequate guarantee for returns to countries where torture is "endemic," or a "recalcitrant and enduring problem," as well as reaffirming the *nonrefoulement* obligation in European human rights law.

The Nexus between the Nonrefoulement Obligation and Diplomatic Assurances

Since April 2004, a number of eminent independent human rights experts have expressed alarm regarding the threat that reliance on diplomatic assurances poses to the integrity of the global ban on torture and on states' *nonrefoulement* obligation under international and regional law.

Council of Europe Commissioner for Human Rights

Council of Europe Commissioner for Human Rights Alvaro Gil-Robles expressed concern in July 2004 about the Swedish government's actions in the summary expulsions of two Egyptian asylum seekers in December 2001 following assurances against torture

[31] Ibid., paras. 104-105.

from the Egyptian authorities.[32] Gil-Robles stated that it is particularly important in cases where risk of torture is elevated that "proceedings leading to expulsion are surrounded by appropriate legal safeguards, at the very least a hearing in a judicial instance and right to appeal. Contrary proceedings clearly risk violating articles 3, 6, and 13 of the European Convention [on Human Rights]."[33] Moreover, Gil-Robles stated that the men's cases "clearly illustrate the risks of relying on diplomatic assurances:"[34]

> The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains…When assessing the reliability of diplomatic assurances, an essential criteria must be that the receiving state does not practice or condone torture or ill-treatment, and that it exercises effective control over the acts of non-state agents. In all other circumstances it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment.[35]

U.N. Special Rapporteur on Torture

In his September 2004 report to the United Nations General Assembly,[36] Theo van Boven, the outgoing special rapporteur on torture, expressed concern that reliance on diplomatic assurances is a "practice that is increasingly undermining the principle of non-refoulement."[37] He questioned "whether the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement, which…is absolute and nonderogable."[38] In his conclusions, the Special Rapporteur stated that, as a baseline, in circumstances where a person would be returned to a place where torture is systematic, "the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to."[39] He also noted that if a person is

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[32] Report by Mr. Alvaro Gil-Robles, Commissioner from Human Rights, on His Visit to Sweden, April 21-23, 2004. Council of Europe, CommDH(2004)13, July 8, 2004, at http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/pdf.CommDH(2004)13_E.pdf (retrieved February 22, 2005).

[33] Ibid., p. 9, para. 19. Article 3 provides for the absolute ban on torture and cruel, inhuman or degrading treatment; article 6 for fair trial guarantees; and article 13 for appropriate remedies for violations of the ECHR.

[34] Ibid.

[35] Ibid.

[36] Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, August 23, 2004, paras. 30-42.

[37] Ibid., para. 30.

[38] Ibid., para. 31.

[39] Ibid., para. 37.

a member of a specific group that is routinely targeted and tortured, this factor must be taken into account with respect to the *nonrefoulement* obligation.[40]

The current special rapporteur on torture, Manfred Nowak, echoed van Boven's conclusion against the use of assurances for returns to countries where torture is systematic in one of his first public statements on the issue:

> In the situation that there's a country where there's a systematic practice of torture, no such assurances would be possible, because that is absolutely prohibited by international law, so in any case the government would deny that torture is actually systematic in that country, and could easily actually give these diplomatic assurances, but the practice then shows that they are not complied with. And there's then no way or very, very little possibility of the sending country to actually—as soon as the person is in the other country—to make sure that this type of diplomatic assurances are complied with.[41]

Nowak's statement not only categorically rejects the use of assurances to countries where torture is systematic, it highlights some of the most obvious flaws inherent in enforcing such guarantees in any case where they might be used, including perfunctory denials by the receiving state and the inability of the sending state to monitor effectively for torture after a person is transferred to an abusive state.

U.N. Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism

The United Nations Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman, has also described as "troubling" states' increased reliance on diplomatic assurances to effect transfers of terrorist suspects.[42] In a February 2005 report, Goldman notes that "the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated."[43]

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[40] Ibid., para. 39.

[41] BBC Radio 4, *Today Programme*, [What would it mean for terrorist suspects if the government did get its Prevention of Terrorism Bill through parliament?], March 4, 2005, at 8:30 [online] http://www.bbc.co.uk/radio4/today/listenagain/zfriday_20050304.shtml (retrieved March 18, 2005).

[42] U.N. Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2005/103, February 7, 2005, para. 56, p. 19 [online] http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf (retrieved February 18, 2005).

[43] Ibid.

Invoking Theo van Boven's 2004 General Assembly report (see above), the independent expert details the problems associated with reliance on assurances: compliance with such guarantees cannot be verified in the same manner as assurances in death penalty cases;[44] diplomatic assurances against torture are not legally binding and include no sanctions for any breach; and post-return monitoring is often frustrated by lack of access to detention facilities and denials of requests for independent monitoring by doctors or lawyers.[45] He also comments on the dynamics of torture and how learning of violations "is further frustrated by the fact that persons subjected to torture are often reluctant to speak about the abuse out of fear of further torture as retribution for complaining."[46]

The independent expert also quotes the special rapporteur's conclusion regarding reliance on diplomatic assurances to effect returns to countries where torture is systematic: "in circumstances where a person would be returned to a place where torture is systematic, 'the principle of nonrefoulement must be strictly observed and diplomatic assurances should not be resorted to.'"[47] In his own conclusions, the independent expert states:

> Given the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent the nonrefoulement obligation.[48]

Diplomatic Assurances are No Safeguard against Torture

Diplomatic assurances—formal representations on the part of one government to another—are legally unenforceable though not always without political effect. When diplomatic assurances are made against torture or ill-treatment by states with a record of such abuse, they particularly lack credibility and effect. The damage is wrought not only

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[44] For information regarding the distinction between assurances against the death penalty and assurances against torture, see *"Empty Promises,"* p. 3, footnote 2 and pp. 18-19. In general, monitoring a government's compliance with assurances that it will not execute the death penalty is easier than monitoring compliance with assurances against torture, which is illegal and practiced in secret. As well, the death penalty is rarely carried out immediately after a person's return, thus any potential breach of the assurances (e.g. sentencing a person to the death penalty despite assurances to the contrary) can be identified and addressed before the human rights violation occurs. In cases where diplomatic assurances are proffered as a guarantee of protection against torture, however, sending states run the unacceptable risk of being able to identify a breach, if at all given the secrecy surrounding torture, only after torture or ill-treatment has already occurred.

[45] Report of Independent Expert, p. 20, para. 57.

[46] Ibid.

[47] Ibid., p. 20, para. 59.

[48] Ibid., p. 20, para. 61.

by the state with the record of abuse. The state that solicits such dubious representations undermines the absolute prohibition against *refoulement* and gives tacit sanction to the other state's policies and practices of torture. The arguments below illustrate why diplomatic assurances are an unreliable and ineffective safeguard against torture and prohibited ill-treatment.

The Limits of Diplomacy

Diplomacy entails the tactful management of foreign relations to promote the overall interests of the state. Human rights may be one of those interests, but it is seldom the only one, and as a consequence diplomacy cannot be an exclusive and reliable lever for human rights protection.

The tender arts of negotiation and compromise that characterize diplomacy can undermine straightforward and assertive human rights protection. The fundamental right to be free from torture, however, is not negotiable or permitting of compromise.

Diplomats are often quite candid that their top priority is to ensure friendly relations with other states, sometimes at the expense of confronting governments about possible human rights violations, including about breaches of pre-agreed diplomatic assurances. For example, when the former Swedish Ambassador to Egypt was asked why he let five weeks lapse before visiting two Egyptians expelled in December 2001 from Stockholm to Cairo following diplomatic assurances, he replied that the Swedes could not have visited the men immediately because that would have signaled a lack of trust in the Egyptian authorities.[49] The men were held incommunicado in police custody and subsequently credibly claimed that they had been brutally mistreated in the course of those five weeks (see section on Sweden below).

Likewise, the Canadian government has been criticized for its "so-called silent diplomacy" on behalf of Omar Khadr, a child detainee at Guantánamo Bay.[50] According to the Canadian Department of Foreign Affairs, when stories of mistreatment at Guantánamo Bay first surfaced, the Canadian government sought and received assurances of humane treatment for Khadr from the U.S. authorities.[51] But Khadr's

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[49] In an interview on Swedish television, former Swedish Ambassador to Egypt Sven Linder stated: "What do you think [would] have happened if I had come rushing in after four or five days and demanded to see those people? It had been to signal from the start that we don't trust you Egyptians." See Swedish TV 4 *Kalla Fakta Program*, May 17, 2004, English transcript [online] http://hrw.org/english/docs/2004/05/17/sweden8620.htm (retrieved March 1, 2005).

[50] Michelle Shephard, "'A Spectacular Failure:' Canada has Done Nothing for Teen Jailed, Tortured at Guantanamo Bay; Lawyers: Ottawa's 'So-Called Silent Diplomacy' Has Failed to Change Plight of Omar Khadr," *Toronto Star*, February 10, 2005.

[51] Ibid.

allegations of abusive treatment in detention—including being shackled in painful positions, threatened with rape, and being used as a "human mop" after he urinated on the floor during an interrogation—have led his lawyers to conclude that "Canada was more interested in helping the Americans get information from Khadr than confirming his well-being."[52]

Inter-state dynamics at the diplomatic level are by their very nature delicate, and diplomats often invoke the need for "caution" and "discretion" in diplomatic representations and negotiations. As a result, serious human rights issues—even those involving the absolute prohibition against torture—are often subordinated to diplomatic concerns. For example, in the case of Hani El Sayed Sabaei Youssef (see section on United Kingdom below), British Prime Minister Tony Blair expressed concern regarding the diplomatic fallout as a result of Home Office demands for watertight diplomatic assurances against torture and unfair trial as a *quid pro quo* for Youssef's return. Blair's Private Secretary detailed those concerns in an April 1999 letter to the Home Office stating, "[W]e are in danger of being excessive in our demands of the Egyptians…why [do] we need all the assurances proposed by the F[oreign] C[ommonwealth] O[ffice] and Home Office Legal advisers. Can we not narrow down the list of assurances we require?"[53]

There is also a profound lack of transparency in the process of seeking and securing assurances at diplomatic level, often in the interest of preserving foreign relations, that puts the person subject to return at a serious disadvantage in terms of challenging the adequacy and reliability of the guarantees. For example, in an October 2001 statement, a United States Department of State legal advisor argued that seeking, securing, and monitoring diplomatic assurances must be done on a strictly confidential basis, with no public or judicial scrutiny, in order not to undermine foreign relations and to reach "acceptable accommodations" with the requesting state (see section on United States below).[54]

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[52] Colin Perkel, "Canada 'Complicit' in Detention of Khadr," *Toronto Star*, February 9, 2005. Khadr's lawyer, Muneer Ahmad of American University in Washington, D.C., uncovered a "litany of abuses" during four days of meetings with Khadr in November 2004. Ibid.

[53] *Youssef v. The Home Office*, High Court of Justice, Queen's Bench Division, Case No: HQ03X03052 [2004] EWHC 1884 (QB), July 30, 2004, para. 18 [online] http://www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home_office.htm (retrieved March 1, 2005).

[54] Written Declaration of Samuel M. Witten, Assistant Legal Adviser for Law Enforcement and Intelligence in the Office of the Legal Adviser of the U.S. Department of State, *Cornejo-Barreto v. Seifert*, United States District Court for the Central District of California Southern Division, Case No. 01-cv-662-AHS, October 2001, paragraphs 11-13 [online] http://www.state.gov/documents/organization/16513.pdf (retrieved March 1, 2005).

With respect to diplomatic assurances against torture, diplomacy alone provides no guarantee against maltreatment.

Trusting States to Honor Unenforceable Assurances

International agreements between and among states have a generally high level of compliance.[55] The diplomatic and monetary consequences of non-compliance often provide the necessary incentive for states to comply with their obligations under these agreements.[56] Human rights treaties and international agreements dealing with human rights protections, however, often lack that incentive. As one commentator has remarked:

> [T]he major engines of compliance that exist in other areas of international law are for the most part absent in the area of human rights. Unlike the public international law of money, there are no "competitive market forces" that press for compliance. And, unlike in the case of trade agreements, the costs of retaliatory noncompliance are low to nonexistent, because a nation's actions against its own citizens do not directly threaten or harm other states. Human rights law thus stands out as an area of international law in which countries have little incentive to police noncompliance with treaties or norms.[57]

Diplomatic assurances against torture represent a set of "understandings" agreed in principle between two governments. They have no legal effect and the person who they aim to protect has no recourse if the assurances are breached.

Moreover, the governments involved in negotiating the assurances have little or no incentive to monitor for and highlight a breach of diplomatic assurances against torture or ill-treatment. In some cases, sending governments want the receiving state to use prohibited interrogation techniques against a person to extract information. In other cases, the sending state simply wants the receiving state to take responsibility for warehousing a suspect who is considered a national security threat in the sending state.

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[55] See, Jose E. Alvarez, "Why Nations Behave," 19 Mich. J. Int'l L. 303, Winter 1998. Alvarez quotes the now famous claim by international legal scholar Louis Henkin that "It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations all the time." Louis Henkin, *How Nations Behave*, (Columbia University Press, 2d ed., 1979), p. 47.

[56] See Beth A. Simmons, "Money and the Law: Why Comply with the Public International Law of Money?" 25 Yale J. Int'l L. 323 (2000).

[57] Oona Hathaway, "Do Human Rights Treaties Make a Difference?" 111 Yale L.J. 1935 (June 2002), p. 1938. Hathaway also quotes Louis Henkin, who admitted that "The forces that induce compliance with other law ... do not pertain equally to the law of human rights." Henkin, *How Nations Behave*, p. 235 in Hathaway, p. 1938.

In either situation, a sending government that discovers a breach of the assurances would have to acknowledge a violation of its own *nonrefoulement* obligation.

A receiving government also has little incentive to abide by assurances against torture and ill-treatment. All of the receiving states identified in this report routinely violate their legally binding human rights treaty obligations by employing torture to effect state policy.[58] They obviously believe that there is little to gain from observing those legal obligations. It is unlikely that governments that practice torture unconstrained by international legal commitments will rein in abuse on the basis of non-binding assurances.

Indeed, states that torture routinely accompany their flagrant violations with insistent denials of abuse, often despite overwhelming evidence to the contrary. Such denials also obtain in individual cases of abuse despite diplomatic assurances of protection. For example, amidst serious and credible allegations that the two Egyptian men expelled from Stockholm to Cairo in December 2001 were tortured, the Egyptian authorities simply issued a blanket denial that torture or ill-treatment had occurred. The Egyptian government "refuted the allegations [of torture] as unfounded" and communicated to the Swedish authorities that the Egyptian authorities were "of the opinion that further investigations are not necessary."[59] The Swedish government appears to have little recourse in the face of such denials. When Maher Arar, a Syrian-Canadian binational, credibly alleged that he had been tortured in Syria after his transfer there by U.S. and Jordanian operatives following assurances from the Syrians, the Syrian authorities simply claimed that his allegations were not true—and the U.S. government accepted the Syrian denial of torture at face value (see section below on the United States).[60] Taking the word of a government that routinely lies about torture only reinforces the value of denial over admission and correction.

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[58] Many states that continue to employ torture have ratified the Convention against Torture and other instruments that outlaw torture and ill-treatment, yet their governmental authorities often deny the existence of such abuses. These states, as documented in *"Empty Promises"* and this report, include Algeria, China, Egypt, Morocco, Philippines, Russia (primarily in the case of ethnic Chechens perceived to be involved in terrorism or the armed conflict in Chechnya), Sri Lanka, Syria, Tunisia, Turkey, Uzbekistan, and Yemen.

[59] Letter to Human Rights Watch from Hans Dahlgren, State Secretary for Foreign Affairs, Swedish Ministry for Foreign Affairs, September 20, 2004, copy on file with Human Rights Watch. Failing to commence an investigation into credible allegations of torture is itself a violation of article 12 of the Convention against Torture, which reads: "Each state Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

[60] The U.S. government "has officially welcomed statements by the Syrian government that Mr. Arar was not tortured." See Congressional Record, Case of Maher Arar, February 10, 2004, pp. S781-S785 [online] http://www.fas.org/irp/congress/2004_cr/s021004.html (retrieved March 12, 2005).

All of the texts of diplomatic assurances collected by Human Rights Watch reiterate the receiving country's existing treaty obligations—ones that they already routinely flout and routinely deny violating—as the basis for illustrating that they can be trusted to comply with non-legally binding diplomatic assurances when it comes to the treatment of the one individual in question.[61] For example, in January 2005, a Dutch court ruled that assurances from Turkey "added nothing" to the protection of a former PKK operative threatened with extradition because the guarantees merely restated Turkey's currently existing human rights obligations, which Turkey had not observed in general with respect to eradicating torture on the ground (see section below on The Netherlands). None of the assurances provide for a mechanism to challenge a breach of the assurances or any other remedy for a credible allegation that the agreement had been broken. Thus, if one or the other of the states involved violates the assurances, it literally has nothing to lose.[62]

The Tacit Acceptance of Torture

Most governments openly admit that they seek diplomatic assurances from states where torture is a serious problem. The phenomenon of one state requesting that another make an exception to its general policy of employing torture with respect to just one individual has deeply disturbing implications. Asking for the creation of such an island of protection comes dangerously close to accepting the ocean of abuse that surrounds it.[63] In a December 2004 decision, a U.S. immigration judge eloquently articulated the potential fallout from appearing to sanction torture when he stated:

> In light of the incontrovertible evidence of record, returning respondent to Yemen at this time where he is likely to be detained and tortured not only would be in abrogation of this country's commitments under the U.N. Torture Convention, but could also be construed as sanctioning Yemen's use of torture by its security forces thereby bringing the United States into disrepute in the international community.[64]

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[61] See section below containing case summaries.

[62] A striking example of a breach of trust allegedly underpinning diplomatic assurances occurred in the European Court of Human Rights case of *Shamayev, et al. v. Russia and Georgia*. Despite proffering diplomatic assurances directly to the European Court guaranteeing that a court delegation would have access to the Chechen detainees once they were returned to Russia, the Russian authorities subsequently denied the delegation access to the men. See *"Empty Promises,"* p. 24.

[63] Thanks to Yuval Ginbar, legal advisor to Amnesty International, for this observation.

[64] *In the Matter of Ashraf al-Jailani*, Executive Office for Immigration Review (EOIR), U.S. Immigration Court, York, Pennsylvania, File #A 73 369 984, December 17, 2004, p. 14, copy on file with Human Rights Watch.

The international community's efforts to promote compliance with human rights norms are generally addressed at the level of the overall system of protection. The human rights community advocates for changes to the laws, policies, and practices that facilitate abuses such as torture—and many governments worldwide have joined that effort. If the international community as a whole were to endorse assurances to protect one person, it would be perceived as ignoring those systematic failings, neglecting the obligation to address the endemic nature of the problem, and providing abusive governments with a device to falsely flaunt their human rights credentials without having to abide by their general legal obligations on torture.

The Limits of Post-Return Monitoring

The vast majority of written diplomatic assurances contain no provision for independent monitoring of a person after he or she is returned. Some governments that secure diplomatic assurances, however, also arrange with the receiving government to conduct post-return monitoring, either by diplomatic personnel or an independent monitoring body. For example, the Swedish government made such arrangements with the Egyptian authorities after the two Egyptian men were returned, and the International Committee of the Red Cross (ICRC) visited a man extradited from Austria to Dagestan, Russia based on such assurances (see Sweden and Austria sections below). By arranging for such monitoring, governments argue that they have provided the returned person with an additional measure of safety.

Thus, post-return monitoring is meant to serve as both a disincentive and an accountability mechanism: 1) the receiving government allegedly would not breach the assurances because of fear that the sending government's monitors would detect the abuse and 2) in the event of allegations or actual abuse, the sending government could hold the receiving government accountable for breaches of the assurances. These arguments, however, are based on a set of false assumptions.

False: Torture is Easy to Detect

Torture is illegal, criminal activity. It is practiced in secret, with the complicity of prison and detention facility staff and medical personnel, including physicians.[65] Indeed, monitoring by the ICRC at Abu Ghraib prison was often frustrated by the actions of prison staff. The U.S.'s own internal investigations into abuses at the prison confirm this

[65] See for example, Robert Jay Lifton, MD, "Doctors and Torture," *New England Journal of Medicine*, Vol. 351, No. 5, July 29, 2004, pages 415-416 [online] http://content.nejm.org/cgi/content/full/351/5/415 (retrieved March 1, 2005).

by detailing how some detainees were moved by military guards at the prison to hide them from a visiting ICRC delegation.[66]

Torture often occurs within a highly sophisticated system specifically designed to keep abuses from being detected. Advanced forms of torture—for example, electric shock—are virtually undetectable to an untrained eye. Other forms of torture that often go undetected include submersion in water, sexual violence, and various forms of psychological torture. Untrained diplomatic staff attempting to monitor a detainee would be unlikely to detect anything but the most obvious signs of physical torture.

Moreover, persons subjected to torture are often reluctant to speak about the torture they have suffered out of fear of further abuse as retribution for complaining. Often this fear emanates from threats by the abusers directed at the detainee or at a detainee's family members. For example, according to the ICRC, one detainee interrogated at a facility in the vicinity of Camp Cropper in Iraq alleged that he had been hooded; cuffed with flexicuffs; threatened with death; urinated on; kicked in the head, groin and lower back; had a baseball inserted into his mouth; and was deprived of sleep for four consecutive days. When the detainee threatened to complain to the ICRC, he was beaten more.[67] According to Ahmed Agiza's family members, he was threatened with more abuse after he revealed to Swedish embassy officials that he had been tortured in Egyptian custody after being expelled from Sweden following assurances against torture from the Egyptian authorities (see section below on Sweden). [68]

Human Rights Watch's research reveals that pre-agreed monitoring schemes subsequent to returns based on diplomatic assurances lack sufficient safeguards to ensure that torture is detected, including video and audio recording of all interrogations in the presence of a lawyer; expert monitors, trained in detecting signs of both physical and psychological torture and ill-treatment; meetings with a detainee in total privacy; routine

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[66] Major General Antonio M. Taguba, "Article 15-6 Investigation of the 800th Military Police Brigade," Part Two: Findings and Recommendations, para. 33, pp. 26-27, February 2004, [online] http://www.npr.org/iraq/2004/prison_abuse_report.pdf (retrieved February 24, 2005). The report concluded that "This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law." Ibid.

[67] International Committee of the Red Cross, *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004, para. 34 [online] http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf (retrieved March 1, 2005).

[68] Swedish NGO Foundation for Human Rights and Swedish Helsinki Committee for Human Rights, "Alternative Report to 'Comments by the Government of Sweden on the Concluding Observations of the Human Rights Committee' (CCPR/CO/74/SWE)," July 4, 2003, p. 25, para. 104, copy on file with Human Rights Watch: "According to the families, the men were threatened with further torture if they told anyone what they had been subjected to. After the first visit when Agiza had complained of his treatment to the Swedish ambassador, he was subjected to cruel and inhuman treatment as soon as the ambassador had left the prison. As a consequence of this, he has subsequently chosen not to tell anything, according to his family."

forensic medical examinations by an independent physician not associated with the detention facility; confidentiality when transmitting allegations of torture so that the detainee and his or her family do not suffer further retribution for having spoken out; and the ability of the monitors to visit and have unhindered access to a detainee at any time, without having to provide advance notice.[69]

In the vast majority of countries where torture is a serious problem, these arrangements would be impossible (that is, they would never be approved or tolerated by the government or other actors responsible for acts of torture) thus making the project of designing an effective post-return monitoring scheme a highly dubious exercise. Indeed, in many of the countries of return referenced in this report, no independent monitoring of detention facilities is permitted, and often family members and lawyers are routinely denied access.

False: Monitoring Provides an Accountability Mechanism

The notion that post-return monitoring can serve as an accountability mechanism is also not borne out by our research. In instances where there is credible evidence of torture, the sending government will simply place blame on the receiving government as the party that has violated the assurances. For example, while the government of Sweden has stated its concern over breaches of the diplomatic assurances with Egypt, it remains insistent that it is Egypt's responsibility and that if torture did occur, the Swedish government is not responsible.[70] Moreover, in the face of Egyptian breaches of the assurances, the Swedish authorities appear to have very little influence with the Egyptian authorities in terms of persuading them to initiate an investigation into the torture allegations. In a December 2004 speech addressing the theme "Security under the Rule of Law," Minister of Foreign Affairs Laila Freivalds stated that although the Swedish

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[69] International standards for effective prison monitoring include: The United Nations Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules) [online] http://www.unhchr.ch/html/menu3/b/h_comp34.htm (retrieved March 12, 2005); U.N. Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (Body of Principles) [online] http://www.unhchr.ch/html/menu3/b/h_comp36.htm (retrieved March 12, 2005); Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [To establish a system of visits undertaken by independent international and national bodies to places where people are deprived of their liberty; not yet in force.] [online] http://www.unhchr.ch/html/menu2/6/cat/treaties/opcat.htm (retrieved March 12, 2005); and the European Prison Rules [online] http://www.uncjin.org/Laws/prisrul.htm (retrieved March 12, 2005). See also U.N. Special Rapporteur on Torture, General Recommendations, E/CN.4/2003/68, para. (f) regarding prison monitoring and private visits [online] http://www.unhchr.ch/html/menu2/7/b/torture/recommendations.doc (retrieved March 19, 2005); and International Committee of the Red Cross, "How Visits by the ICRC can Help Prisoners Cope with the Effects of Traumatic Stress," Section on Private and Confidential Interviews with Prisoners, January 1, 1996 [online] http://www.icrc.org/web/eng/siteeng0.nsf/iwpList302/219CF73383F594D2C1256B660059956E (retrieved March 19, 2005).

[70] Human Rights Watch meeting with Swedish officials in the Ministry of Foreign Affairs, Stockholm, June 2, 2004. Notes on file with Human Rights Watch.

government has requested that the Egyptian government carry out a thorough and independent inquiry, "We have still not received a satisfying response to our request."[71]

Indeed, the sending government has no incentive to find that torture or ill-treatment has occurred because by doing so it makes an admission that it has violated its own *nonrefoulement* obligation. In May 2004, Human Rights Watch obtained a classified report detailing the first post-return monitoring visit by Swedish diplomats to the two Egyptians expelled from Stockholm in December 2001.[72] The classified version of the report included allegations by the men that they had been physically abused by Swedish police officers, and had been seriously physically abused and ill-treated by Egyptian security police in the first five weeks of incommunicado detention upon return to Cairo. These allegations had been delered from the publicly available version of the monitoring report. The Swedish authorities also did not make the classified version with the allegations of abuse available to various United Nations mechanisms examining the men's cases.[73]

Moreover, the idea that confidential monitoring alone can exert sufficient pressure to forestall abuses is misguided. The April 2004 Abu Ghraib scandal further reveals the limits of confidential monitoring.[74] Although the ICRC had access to the Abu Ghraib prison, military and intelligence personnel deliberately obstructed monitors' efforts to meet with and evaluate certain detainees. When the ICRC confidentially transmitted its concerns regarding the ill-treatment of some detainees, the United States government virtually ignored those complaints.

The challenges of monitoring for torture indicate that even the most expert monitors cannot provide the necessary safeguards against, and accountability for, acts of torture perpetrated in secrecy.

The Principle: Diplomatic Assurances Undermine the Nonrefoulement Obligation

Reliance upon diplomatic assurances signals an erosion of the absolute obligation not to return or transfer a person to a place where he or she is at risk of torture or ill-treatment.

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[71] Speech by Foreign Minister Laila Freivalds, "Security under the Rule of Law," on the occasion of the visit to Stockholm of U.N. High Commissioner for Human Rights Louise Arbour, December 1, 2004, copy on file with Human Rights Watch.

[72] Copy on file with Human Rights Watch.

[73] One of the men's lawyers subsequently forwarded a copy of the classified report to the U.N. Committee against Torture in August 2004.

[74] Human Rights Watch, *The Road to Abu Ghraib*, June 2004.

In seeking assurances against abusive conduct, governments acknowledge that a risk of torture and ill-treatment exists in the country of return. The risk derives from the fact that many receiving states have failed to implement effective measures to halt and prevent the torture of their own citizens and others within their jurisdiction, and to hold accountable those responsible for such abuses. It may also arise from the particular characteristics and circumstances of the person vulnerable to transfer.

Once a sending government acknowledges that a risk of torture exists in a specific country, it is incumbent upon its authorities to refuse to transfer a person to that country. If sending governments want to ensure that they are able to transfer suspects to any jurisdiction while respecting their *nonrefoulement* obligation, they should focus their energy on assisting receiving governments in reform efforts to eradicate torture and ill-treatment, rather than trying to bypass the rules by relying on assurances. Receiving governments can facilitate such transfers only by complying with their obligations under the Convention against Torture, the International Covenant on Civil and Political Rights, and customary law to prevent and halt acts of torture, and by implementing accountability mechanisms to address torture abuses. A verifiable record of compliance with international norms against torture by the receiving state is the most effective way to reduce the risk of torture and ill-treatment upon return, not an offering of unreliable and vague assurances.

Developments Regarding Diplomatic Assurances Since April 2004

North America

United States

Reliance on diplomatic assurances when transferring persons at risk of torture is an increasingly common practice by the United States. United States law permits the use of assurances in immigration cases, and authorities have disclosed that it is U.S. policy to seek them as well in so-called "extraordinary rendition" cases and to effect transfers of detainees from custody at Guantánamo Bay.

Since "*Empty Promises*" was finalized in April 2004, further evidence has come to light that the U.S. government is transferring persons suspected of terrorist activities to countries where torture is a serious human rights problem. Many such transfers take place without any procedural safeguards—that is, completely outside the law. These transfers, so-called "extraordinary renditions," have occurred both from U.S. territory and from other countries, either by the direct seizure of foreign nationals on foreign territory by U.S. agents, or the transfer of foreign nationals to third countries by the host

authorities facilitated by the use of U.S. aircraft and/or personnel.[75] In February 2005, high-level U.S. officials defended this renditions program and claimed that it is U.S. policy to seek and secure assurances from the receiving state that a rendered person will be treated humanely upon return (see section Renditions and Assurances below). Persons subject to such renditions have no ability to challenge the legality of their transfers, including any assurances against torture or ill-treatment that the U.S. government may have been proffered by a receiving state.

The use of assurances against torture is expressly provided for in U.S. law only in immigration cases in which a person subject to removal raises a claim under the Convention against Torture.[76] According to the code of federal regulations (C.F.R.), 8 C.F.R. § 208.18(c), the secretary of state may secure assurances from a government that a person subject to return would not be tortured. In consultation with the secretary of state, the attorney general determines whether the assurances are "sufficiently reliable" to allow the transfer in compliance with the obligations of the United States under the Convention against Torture. Once assurances are approved, any claims a person has

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[75] See, CBS 60 Minutes, "CIA Flying Suspects to Torture?" March 6, 2005 [online] http://www.cbsnews.com/stories/2005/03/04/60minutes/main678155.shtml (retrieved March 7, 2005); Douglas Jehl and David Johnson, "Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails," *New York Times*, March 6, 2005 [online] http://www.nytimes.com/2005/03/06/politics/06intel.html (retrieved March 7, 2005); Channel 4 TV (U.K.), "Torture: The Dirty Business," (Part 3 of series on the U.S. government's war on terror and the implications for the global ban on torture), March 1, 2005, post-production transcript on file with Human Rights Watch, [online] http://www.channel4.com/news/microsites/T/torture/cases.html (retrieved March 8, 2005); Jane Mayer, "Outsourcing Torture," *The New Yorker*, February 7, 2005; Stephen Grey, "CIA Prisoners 'Tortured' in Arab Jails," File on 4, BBC Radio, February 8, 2005 [online] http://news.bbc.co.uk/1/hi/programmes/file_on_4/4246089.stm (retrieved February 15, 2005); Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: Harper-Collins), September 2004.

[76] The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) is the implementing legislation that codifies the U.S.'s obligations as a party to the Convention against Torture. The legislation includes safeguards against transfer to a country where he or she is at risk of torture: ""It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." FARRA §1242(a). Section 2242 (Public Law 105-277; 8 U.S.C. 1231 note) All types of transfers are thus covered by this provision, including extra-territorial renditions. As noted below, the regulations implementing the FARRA include provisions for diplomatic assurances only in immigration cases.

under the convention will not be given further consideration by U.S. authorities.[77] The reliability assessment of the assurances is not reviewable by a court.[78]

The U.S. government has also stated that it seeks and secures assurances against inhumane treatment before transferring detainees from Guantánamo Bay to their home countries or to third countries.[79] To date, the detainees have no right to challenge the reliability or sufficiency of such assurances before an independent tribunal.

Case of Yemeni Detainees and Transfers from Guantánamo Bay

The inability to challenge assurances of fair treatment upon return has arisen in the context of returns of so-called "enemy combatants" from Guantánamo Bay. In March 2005, a group of Yemeni men currently in detention at Guantánamo Bay filed a motion for thirty days' advance notice of any intention to remove them from U.S. custody to Yemen.[80] The men argued that in the event they were transferred directly to Yemeni authorities, they would be at risk of torture and ill-treatment in detention there, and sought notice in order to challenge their transfers on human rights grounds. They also argued that their currently pending petitions for *habeas corpus* in U.S. courts would become moot if they were transferred back to Yemen.

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[77] 8 C.F.R. § 208.18(c) - Diplomatic assurances against torture obtained by the Secretary of State.

(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention against Torture…

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

[78] 8 C.F.R. § 208.18(c)(3)

[79] The Department of Defense General Counsel's Office has stated in the past that transfers within its purview, including the transfers of detainees from Guantánamo Bay back to their home countries or to third countries, only occur with assurances against torture. See letter from William J. Haynes II to Senator Patrick Leahy, June 25, 2003 [online] http://www.hrw.org/press/2003/06/letter-to-leahy.pdf (retrieved March 25, 2005): "Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country." See also letter from William J. Haynes II to Kenneth Roth, Executive Director of Human Rights, April 2, 2003 [online] http://www.hrw.org/press/2003/04/dodltr040203.pdf (retrieved March 25, 2005): "If the war on terrorists of global reach requires transfer of detained enemy combatants to other countries for continued detention on our behalf, U.S. Government instructions are to seek and obtain appropriate assurances that such enemy combatants are not tortured."

[80] United States District Court for the District of Columbia, *Mahmoad Abdah, et al. v. George W. Bush*, Civil Action No. 04-CV-1254 (HHK), March 1, 2005.

The U.S. government responded that it is U.S. policy not to send any detainee to a place where it is more likely than not that the detainee would be tortured upon return.[81] It also claimed that in cases where there was a risk of torture, the government sought and secured diplomatic assurances against such treatment.[82] The U.S. government argued, however, that none of the information regarding negotiations for transfers out of Guantánamo Bay should be made public, including information related to the reliability or sufficiency of assurances against torture, nor should it be subject to judicial review:

> If the Court were to entertain petitioners' claims, it would inject itself into the most sensitive of diplomatic matters. Such judicial review could involve scrutiny of United States' officials judgments and assessments on the likelihood of torture in a foreign country, including judgments on the reliability of information and representations or the adequacy of assurances provided, and confidential communications with the foreign government and/or sources therein. Disclosure and/or judicial review of such matters could chill important sources of information and interfere with our ability to interact effectively with foreign governments. In particular, the foreign government in question [Yemen], as well as other governments, would likely be reluctant to communicate frankly with the United States in the future concerning

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[81] United States District Court for the District of Columbia, *Mahmoad Abdah, et al. v. George W. Bush*, Civil Action No. 04-CV-1254 (HHK), Respondents' Memorandum in Opposition to Petitioners' Motion for Order Requiring Advance Notice of any Repatriations or Transfers from Guantanamo, March 8, 2005, p. 4, copy on file with Human Rights Watch. This memorandum draws heavily from two affidavits appended to it: one from Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes, and Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs in the U.S. Department of Defense. The ultimate approval for transfer of any Guantánamo detainee to the control of another government is made by a senior Department of Defense official, in consultation with the State Department and various other agencies. According to Prosper's affidavit, he has played a key role in maintaining diplomatic dialogue, including negotiating diplomatic assurances, with foreign governments whose nationals are detained at Guantánamo Bay. Copies of affidavits on file with Human Rights Watch.

[82] *Mahmoad Abdah, et al. v. George W. Bush, et al.*, Respondents' Memorandum in Opposition to Petitioners' Motion for Order Requiring Advance Notice of any Repatriations or Transfers from Guantanamo, p.4-6. The issue of seeking assurances against torture before transferring detainees back to their home countries has also arisen in the case of a group of Uighurs currently detained at Guantánamo Bay. The U.S. government had stated publicly that it would not send the Uighurs back to China, where they are at risk of torture. See Amnesty International, "USA: 'Double Jeopardy' for Some Guantánamo Detainees," September 30, 2004 [Closing an urgent action on behalf of Uighurs in detention at Guantánamo Bay after United States Secretary of State Colin Powell said that ethnic Uighurs in military custody at Guantánamo will not be sent back to China] [online] http://web.amnesty.org/pages/usa-070104-a action-eng (retrieved March 13, 2005). On March 16, 2005, however, it was reported that a senior administration official stated that because European governments had refused to take the Uighurs for resettlement, the U.S. may be "forced to reconsider sending them back to China." The official stated that the Uighurs would be repatriated only upon receipt of "iron-clad" guarantees that they would not be tortured. Demetri Sevastopulo, "Uighurs Face Return to China from Guantanamo," *Financial Times*, March 16, 2005. See also Human Rights Watch Press Release, "U.S.: Don't Send Detainees Back to China," November 26, 2003 [online] http://www.hrw.org/press/2003/11/us112603.htm (retrieved March 13, 2005).

> torture and mistreatment concerns. This chilling effect would jeopardize the cooperation of other nations in the war on terrorism.[83]

A U.S. federal judge issued a temporary restraining order (TRO) on March 12, 2005, forbidding the government from transferring the Yemeni detainees until a March 22, 2005 hearing on their motion for advance notice could be heard.[84] The judge noted that press reports indicated that transfers from Guantánamo were being planned,[85] but that U.S. authorities currently gave no advance notice regarding them. She ruled that the Yemeni detainees, who feared being transferred in the "dark of night"[86] directly into the hands of the Yemeni authorities for continued detention, could suffer irreparable harm if such transfers were effected.[87]

On March 29, 2005, a federal judge granted the Yemeni petitioners a preliminary injunction requiring the U.S. government to give him and the detainees' attorneys thirty-days' advance notice before any of the men could be removed from Guantánamo Bay.[88] The judge granted injunctive relief, in the main, because the men's transfers to another nation would deprive the court of its jurisdiction over the men's *habeas corpus* petitions, thereby effectively extinguishing those claims.[89] The judge stated that "The government's invocation of sudden exigency requiring their transfer now cannot trump [the men's] established due process rights to pursue their habeas action in federal court."[90] The judge also noted that any alleged injury the government might suffer with respect to its efforts to negotiate detainee transfers with foreign governments, including seeking and securing assurances against inhumane treatment upon return, did "not outweigh the imminent threat facing [the men] with respect to the *entirety* of their claims before the court [emphasis in the original]."[91]

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[83] *Mahmoad Abdah, et al. v. George W. Bush, et al.*, Respondents' Memorandum, pp. 15-16.

[84] *Mahmoad Abdah, et al. v. George W. Bush, et al.*, Temporary Restraining Order, Civil Action No. 04-1254 (HHK) (RMC), March 12, 2005, copy on file with Human Rights Watch. See also, Siobhan McDonough, "Judge Blocks Transfer from Cuba of 13 Yemeni Detainees," *Associated Press*, March 14, 2005, p. A15.

[85] See, Douglas Jehl, "Pentagon Seeks to Shift Inmates from Cuba Base," *New York Times*, March 11, 2005, p. 1.

[86] *Mahmoad Abdah, et al. v. George W. Bush, et al.*, Temporary Restraining Order (Quoting from Petitioners' *Ex Parte* Motion for Temporary Restraining Order to Prevent Respondents from Removing Petitioners from Guantanamo until Petitioners' Motion for Preliminary Injunction is Decided), p. 2.

[87] *Mahmoad Abdah, et al. v. George W. Bush, et al.*, Temporary Restraining Order, p. 9

[88] *Mahmoad Abdah, et al., v. George W. Bush, et al.*, Memorandum Opinion, Civil Action No. 04-1254 (HHK), March 29, 2005. See also "U.S. Judge Bars Transfer of 13 Guantanamo Detainees," *Reuters*, March 29, 2005.

[89] *Mahmoad Abdah, et al., v. George W. Bush, et al.*, Memorandum Opinion, p. 9.

[90] Ibid., p. 11, fn 5.

[91] Ibid., p. 11

It remains unclear whether the U.S. government will be required at some point in the future to reveal information regarding assurances against torture from states to which Guantánamo detainees will be transferred. It is increasingly clear, however, that the U.S. government is limited in its ability to monitor and enforce any such assurances. On March 16, 2005, Pentagon spokesman Lieutenant Commander Flex Plexico admitted as much when he stated that although the government seeks assurances from countries that Guantánamo detainees will be treated humanely upon return, "[w]e have no authority to tell another government what they are going to do with a detainee."[92]

Update: Case of Maher Arar

The U.S. government has also refused to release any information regarding the assurances against torture it claims it received from Syria in the case of Maher Arar. In September 2002, U.S. authorities apprehended Arar, a dual Canadian-Syrian national, in transit from Tunisia through New York to Canada, where he has lived for many years.[93] After holding him for nearly two weeks, and failing to provide him with the ability to effectively challenge his detention or imminent transfer, U.S. immigration authorities flew Arar to Jordan, where he was driven across the border and handed over to Syrian authorities. The transfer was effected despite Arar's repeated statements to U.S. officials that he would be tortured in Syria and his repeated requests to be sent home to Canada. The U.S. government has claimed that prior to Arar's transfer, it obtained assurances from the Syrian government that Arar would not be subjected to torture upon return.[94]

Arar was released without charge from Syrian custody ten months later and has credibly alleged that he was beaten by security officers in Jordan and tortured repeatedly, often with cables and electrical cords, during his confinement in a Syrian prison.[95] The U.S. government has not explained why it sent Arar to Syria rather than to Canada, where he resides, or why it believed Syrian assurances to be credible in light of the government's well-documented record of torture, including designation as a country where torture is a serious abuse by the U.S. Department of State's 2001 (issued March 4, 2002) Country

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[92] "Freed Pakistanis Jailed at Home," *Associated Press*, March 29, 2005.

[93] See, *"Empty Promises"*, pp. 16-17.

[94] Letter from Terry A. Breese, director, Office of Canadian Affairs, U.S. Department of State, to Stephen Rickard, Human Rights Executive Directors Working Group, in response to human rights groups' concerns about the reliability of assurances from the Syrian government, November 26, 2003. Copy on file with Human Rights Watch. Human Rights Watch is a member of the Working Group. The letter stated: "Your letter notes the Secretary's...statement regarding assurances that detainees will not be tortured. Attorney General Ashcroft has publicly stated that the United States Government received appropriate assurances from Syrian officials prior to Mr. Arar's deportation."

[95] Maher Arar's complete statement to media, CanWest News Service, November 4, 2003. See also, CBS News, "His Year in Hell," January 21, 2004 [online] http://www.cbsnews.com/stories/2004/01/21/60II/main594974.shtml (retrieved February 22, 2005).

Reports on Human Rights Practices.[96] It remains unclear whether the immigration regulations that should govern cases like Arar's were followed.

In November 2003, just days after Maher Arar was released from Syrian custody, President Bush claimed in a speech that instead of restoring national honor, the government of Syria had left "a legacy of torture, oppression, misery, and ruin."[97] In January 2005, the Bush administration named Syria as a country that actively sponsors terrorism and encouraged the Syrian government to "open the door to freedom."[98] As one commentator has noted:

> From the U.S. perspective, Syria is led by a gangster regime that has among other things, sponsored terrorism, aided the insurgency in Iraq, and engaged in torture. So here's the question. If Syria is such a bad actor—and it is—why would the Bush administration seize a Canadian citizen at Kennedy Airport in New York, put him on an executive jet, fly him in shackles to the Middle East and then hand him over to the Syrians, who promptly tortured him?[99]

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[96] See United States Department of State Country Reports on Human Rights Practices for 2001: Syria published on March 4, 2002 [online] http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8298.htm (retrieved March 29, 2005). Maher Arar was transferred to Syria in September 2002 and this report would have been an indicator at that time of Syria's torture practices. The report stated that "torture methods include administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine. In September [2001] Amnesty International published a report claiming that authorities at Tadmur Prison regularly torture prisoners, or force prisoners to torture one another. Although torture occurs in prisons, torture is most likely to occur while detainees are being held at one of the many detention centers run by the various security services throughout the country, and particularly while the authorities are attempting to extract a confession or information regarding an alleged crime or alleged accomplices…There have been reports that security personnel force prisoners to watch relatives being tortured in order to extract confessions." Subsequent Country Reports of 2002-2005 state that torture is an on-going serious human rights problem in Syria. For example, the 2005 State Department Country Reports on Human Rights Practices stated that torture in Syria is frequent and a common occurrence and documents the same torture methods as the 2001 report. It also states that "[t]orture was most likely to occur while detainees were being held at one of the many detention centers run by the various security services throughout the country, particularly while the authorities were attempting to extract a confession or information." See United States Department of State Country Reports on Human Rights Practices for 2004: Syria, published on February 28, 2005 [online] http://www.state.gov/g/drl/rls/hrrpt/2004/41732.htm (retrieved March 1, 2005).

[97] Remarks by the President George W. Bush on the Occasion of the 20th Anniversary of the National Endowment for Democracy, November 6, 2003 [online] http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html (retrieved March 25, 2005).

[98] President George W. Bush, 2005 State of the Union Address, February 2, 2005 [online] http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_020205.html#syria (retrieved February 22, 2005).

[99] Bob Herbert, "Our Friends, the Torturers," *New York Times*, February 18, 2005 [online] http://www.nytimes.com/2005/02/18/opinion/18herbert.html?ex=1109653200&en=c5874c0077dd21bc&ei=5070 (retrieved February 22, 2005).

Despite numerous lawsuits and inquiries into the case, the U.S. government has consistently refused to answer that question and has declined to release any information regarding Arar's apprehension and transfer to Syria. The Bush administration has ignored numerous requests for a specific explanation regarding the reliability and credibility of Syrian diplomatic assurances, but former CIA counterterrorism official Vincent Cannistraro has remarked: "You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they were making claims to the contrary."[100]

Arar filed suit in U.S. Federal Court on January 22, 2004, alleging that U.S. officials and agents involved in his transfer violated the 5th amendment to the U.S. Constitution; the U.S. government's treaty obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Torture Victim Protection Act of 1991.[101] In seeking to dismiss the lawsuit, the U.S. Department of Justice employed the rarely invoked "state secrets privilege"[102] and filed a motion in January 2005 stating that the release of any official information concerning Arar's transfer to Syria could jeopardize the intelligence, foreign policy, and national security interests of the United States.[103] The U.S. government claimed that the disclosure of classified information in the Arar case "reasonably could be expected to cause exceptionally grave or serious damage to the national security interests of the United States" and to its diplomatic relations.[104] It is disturbing that the U.S. appears to be using the "state secrets privilege" to shield governmental conduct from public scrutiny. A ruling on the Justice Department's motion is pending.

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[100] Shannon McCaffrey, "Canadian Sent to Syria Prison Disputes U.S. Claims against Torture," *Knight Ridder*, July 28, 2004 [online] http://www.realcities.com/mld/krwashington/9264400.htm (retrieved March 1, 2005). See also Dana Priest, "Man was Deported after Syrian Assurances," *Washington Post*, November 20, 2003, page A24: "Spokesmen at the Justice Department and the CIA declined to comment on why they believed the Syrian assurances to be credible."

[101] The full text of the Arar complaint can be found [online] http://www.ccr-ny.org/v2/legal/september_11th/docs/ArarComplaint.pdf (retrieved February 22, 2005).

[102] The privilege is not enshrined in any one U.S. law, but arises from a series of precedents involving national security concerns. See Andrew Zajac, "Bush Wielding Secrecy Privilege to End Suits: National Security Cited against Challenges to Anti-Terror Tactics," *Chicago Tribune*, March 3, 2005, p. 1: "The use of the state secrets privilege, critics say, is part of President Bush's forceful expansion of presidential secrecy, including…curtailment of information on individuals rounded up in the war on terrorism."

[103] *Arar v. Ashcroft*, Declarations of James B. Comey, Acting Attorney General (January 18, 2005) and Tom Ridge, Secretary of the U.S. Department of Homeland Security (January 17, 2005), C.A. No. 04-CV-249-DGT-VVP [online] http://www.fas.org/sgp/jud/arar-notice-011805.pdf (retrieved February 21, 2005). According to the Department of Justice web site, "The state secrets privilege is well-established in federal law. It has been recognized by U.S. courts as far back as the 19th century, and allows the Executive Branch to safeguard vital information regarding the nation's security or diplomatic relations. In the past, this privilege has been applied many times to protect our nation's secrets from disclosure, and to require dismissal of cases when other litigation mechanisms would be inadequate. It is an absolute privilege that renders the information unavailable in litigation" [online] http://www.usdoj.gov/opa/pr/2002/October/02_ag_605.htm (retrieved March 1, 2005).

[104] *Arar v. Ashcroft*,, Declarations of Comey and Ridge, p.4, paras. 5-6.

The United States government has also flatly refused to cooperate with the Canadian commission of inquiry investigating the role of Canadian police and security organizations in Arar's apprehension and transfer by U.S. authorities.[105] In response to a June 2004 request from the Canadian inquiry's lead counsel for information and other forms of cooperation, William H. Taft, IV, the U.S. State Department legal adviser, wrote:

> The United States government declines to provide documents in response to your request, or to provide statements by individuals involved in the case, or to facilitate witnesses appearing before the commission. We would note that as your inquiries focus on the actions of Canadian authorities, many of those questions should best be directed to the Government of Canada, rather than to the United States government.[106]

The U.S. Department of Homeland Security (DHS) Inspector General initiated an internal review of the Arar case in January 2004 to determine what role U.S. immigration officials played in Arar's apprehension and transfer.[107] The review will seek to answer the crucial question of why Arar was sent to Syria. Whether the DHS review will provide a complete picture of U.S. government conduct will depend in large part on whether the Inspector General can secure the cooperation of other arms of the U.S. government involved in handling Arar's case, in particular the Department of Justice and the Central Intelligence Agency (CIA).

Renditions and Assurances: U.S. Acknowledges "No Control" Post-Transfer

While the DHS review offers some hope of revealing new information about the Arar case, the overall lack of transparency in the aftermath of Arar's release has reinforced

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[105] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar [online] http://www.ararcommission.ca/ (retrieved February 21, 2005). The Canadian inquiry has been riddled with delays and other problems. Few of the hearings have taken place in public. For national security reasons, the Canadian government has requested in-camera hearings and heavily redacted summaries of such hearings for public disclosure, giving rise to the criticism that the inquiry is not in fact a public one. See, for example, Commission of Inquiry Press Release, "Commission of Inquiry Blocked from Full Release of Documents; Government Raises New National Security Objections; Commissioner is Concerned that Public is being Denied Information in Arar Case," December 20, 2004 [online] http://www.ararcommission.ca/eng/ReleaseFinal_dec20.pdf (retrieved February 22, 2005).

[106] Letter from William H. Taft, IV, Legal Adviser to the U.S. Secretary of State, to Paul Cavalluzzo, Lead Commission Counsel, Maher Arar Commission of Inquiry, September 16, 2004, copy on file with Human Rights Watch.

[107] Letter from Clark Kent Ervin, DHS Inspector General, to Hon. John Conyers, January 9, 2004, copy on file with Human Rights Watch.

concerns that diplomatic assurances are being used in some cases as justification to transfer persons suspected of having information regarding terrorism-related activities to countries where torture is routinely used, sometimes specifically to extract such information. A spate of U.S. government revelations in February and March 2005 regarding the U.S. renditions program indicates that those concerns are not unwarranted.

High-level U.S. administration officials have defended the practice of transferring detainees by rendition in the "war on terrorism" to other countries for interrogation, but have also insisted that in all such cases they seek assurances that the detainees will not be tortured. On February 16, 2005, Director of Central Intelligence Porter J. Goss testified before Congress and defended the CIA's participation in such transfers.[108] Goss also admitted that the United States had a limited capacity to enforce diplomatic assurances against torture:

> We have a responsibility of trying to ensure that they are properly treated, and we try and do the best we can to guarantee that. But of course once they're out of our control, there's only so much we can do.[109]

Newly-appointed U.S. Attorney General Alberto Gonzales also said in a March 2005 interview that the U.S. State Department and CIA secure assurances that detainees subject to transfer will be treated humanely upon return, but that once a detainee is in custody in another country, "We can't fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us… If you're asking me, 'Does a country always comply?' I don't have an answer to that."[110]

These striking admissions by U.S. government officials acknowledge that once a detainee is transferred there is no way to enforce diplomatic assurances or fully guarantee a returnee's safety. In response to Goss's claim that assurances are "checked and double-checked" the *New York Times* concluded:

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[108] Testimony of the Director of Central Intelligence Porter J. Goss before the Senate Select Committee on Intelligence, "Global Intelligence Challenges 2005: Meeting Long-Term Challenges with a Long-Term Strategy," February 16, 2005 [online] http://www.cia.gov/cia/public_affairs/press_release/2005/pr02172005.html (retrieved March 9, 2005)

[109] Tracy Wilkinson and Bob Drogin, "Missing Imam's Trail Said to Lead from Italy to CIA; Prosecutors in Milan are Investigating Whether an Egyptian-born Suspected Militant was Spirited Away by the U.S. Using a Disputed Tactic," *Los Angeles Times*, A-1, March 3, 2005. See also, Douglas Jehl and David Johnston, "Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails," *New York Times*, March 6, 2005.

[110] Mark Sherman, "Gonzales: No Guarantee Captives aren't Tortured," *Associated Press*, March 8, 2005.

> Those assurances are worthless, and the Bush administration surely knows it. In normal times, the governments of these countries have abysmal standards for human rights and humane treatment, and would have no problem promising that a prisoner wouldn't be tortured—right before he was tortured. And these are not normal times.[111]

The Bush administration, however, has continued to defend the practice of relying on assurances against torture, even from the government of Uzbekistan, a country in which torture is systematic.[112] At a press conference on March 16, 2005, President George W. Bush stated that one way to protect the American people and their friends from attack post-September 11 was "to arrest people and send them back to their country of origin with the promise that they won't be tortured."[113] In response to a reporter's follow-up question, "…what is it that Uzbekistan can do in interrogating an individual that the United States can't?" the President simply responded, "We seek assurances that nobody will be tortured when we render a person back to their home country."[114]

No Effective Opportunity to Challenge Reliability of Assurances

The most glaring deficiency in U.S. law and policy lies precisely in the absence of express provision for procedural guarantees for the person subject to transfer, including any opportunity to challenge the credibility or reliability of diplomatic assurances before an independent judicial body. This deficiency applies with equal force to immigration cases, which are governed by the procedures set forth in federal regulations; to renditions outside of any legal framework, which lack even the basic and flawed process set forth in the immigration regulations; and to returns from any place of detention within U.S. jurisdiction or effective control, including Guantánamo Bay.

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[111] Editorial, "Torture by Proxy," *New York Times*, March 8, 2005. See also Editorial, "Torture by Proxy," *Los Angeles Times*, March 11, 2005, p. B-12: "The CIA says with a straight face that it gets those assurances before delivering suspects to jailers in Egypt, Syria, Saudi Arabia, Jordan and Pakistan—countries that have such abysmal human rights records that promises of decent treatment are a joke." See also Dana Priest, "CIA's Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges," *Washington Post*, March 17, 2005, p. A1.

[112] The 2004 U.S. Department of State Country Reports on Human Practices documents the following types of torture at the hands of the Uzbek authorities: suffocation, electric shock, rape and sexual abuse, beatings. The country report also referenced a February 2003 report by the U.N. Special Rapporteur on Torture, which concluded that torture or similar ill-treatment was systematic. See Report of the Special Rapporteur on Torture, Mission to Uzbekistan, E/CN.4/2003/68/add.2, February 3, 2003 [online] http://daccessdds.un.org/doc/UNDOC/GEN/G03/107/66/PDF/G0310766.pdf?OpenElement (retrieved March 19, 2005).

[113] Press Conference by the President, March 16, 2005 [online] http://www.whitehouse.gov/news/releases/2005/03/20050316-2.html (retrieved March 19, 2005).

[114] Ibid.

It is striking that the executive branch and intelligence services have sole discretion for seeking, securing, and determining the reliability and sufficiency of diplomatic assurances. The verification and reliability assessment required by the immigration regulations lies with the Secretary of State and Attorney General and is completely discretionary. In rendition cases, the State Department and CIA apparently are tasked with securing and evaluating assurances.[115] In returns from Guantánamo Bay, the Department of Defense, in consultation with the State Department and other government agencies, assumes that responsibility. Thus, although the reliability of assurances to protect against torture is central to determining whether a transfer is lawful, there is no provision for judicial review or other independent evaluation of assurances in any transfer effected by the U.S. government based on them. The executive branch essentially decides for itself whether its transfer of a person to the custody of another government is legal.[116]

Access to due process is a cornerstone of both U.S. law and international human rights standards. As the Association of the Bar of the City of New York has correctly pointed out:

> [T]he unfettered discretion the Executive Branch exercises in seeking diplomatic assurances and making the unilateral decision to transfer an individual pursuant to those assurances leaves the individual with no due process protection or the safeguard of judicial oversight. This procedural shortcoming likely violates international law. The United States has an

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[115] Mark Sherman, "Gonzales: U.S. Won't Send Detainees to Torturers; Attorney General Alberto Gonzales Said the United States does not Send Detainees to Nations Allowing Torture, but Once They are Transferred, Can't Ensure Good Treatment," *Miami Herald*, March 8, 2005, p. 7: "Gonzales said the State Department and the CIA obtain assurances that people will be humanely treated. In the case of countries with a history of abusing prisoners, the United States 'would, I would think in most cases, look for additional assurances that that conduct won't be repeated'." Ibid.

[116] The inability to challenge executive decisions regarding transfers to risk of torture based on diplomatic assurances has been played out in other fora as well. In October 2004, a majority of the twenty-five active judges in the Ninth Circuit Court of Appeals (San Francisco) voted to order a re-hearing of the *Cornejo-Barreto* case before an eleven-judge panel. A three-judge panel ruled previously in the case that federal judges had no authority to review an extradition proceeding for the possibility that an extraditee would be at risk of torture if returned to the country that issued the extradition warrant. That court ruled that authority to make such determinations regarding risk of torture lies exclusively with the secretary of state. Although the regulations that govern the implementation of the Convention against Torture in extradition cases contain no express provision for the use of diplomatic assurances against torture, such guarantees were a feature of this case and would presumably have been one of the aspects of the extradition proceeding that would have been reviewable for reliability and sufficiency if the appeals court had had an opportunity to rule that extradition proceedings can be challenged in federal court for compliance with the U.S.'s Convention against Torture obligations. See *Cornejo-Barreto v. Siefert*, 386 F.3d 938 (9th Cir., *en banc*, 2004). The case became moot when the foreign government seeking Cornejo-Barreto's extradition withdrew its request. See *Cornejo-Barreto v. Siefert*, 389 F3d 1307 (9th Cir. 2004).

> obligation to provide detainees in its custody an effective opportunity to challenge the reliability and adequacy of diplomatic assurances.[117]

Moreover, neither U.S. policy nor the immigration law requires the executive to reject as inherently unreliable assurances from governments in countries where torture is a serious human rights problem or where specific groups are routinely targeted for torture and ill-treatment and a person subject to return based on assurances is a member of such group. Under current U.S. law and policy, the government could transfer or remove a person at high risk of torture or ill-treatment based on the simplest and vaguest of promises from governments that routinely violate the law.

Legislative Initiatives

The Abu Ghraib torture scandal, the Arar case, "renditions" to torture, and revelations of torture and ill-treatment by U.S. forces in Afghanistan and at Guantánamo Bay have given rise to a public debate about the U.S.'s obligations under international law and the imperative to halt and prevent torture and ill-treatment at home and abroad. In this context, some lawmakers have proposed new legislation to address the prohibition against torture, including the absolute ban on returning a person to a place where he or she would be at risk of torture or ill-treatment. Several key proposals have addressed the ban on transfers to risk of torture and the issue of whether or not diplomatic assurances are an effective safeguard against torture and ill-treatment.

9/11 Recommendations Implementation Act

In September 2004, the Republican party leadership in the U.S. House of Representatives introduced a bill titled "9/11 Recommendations Implementation Act (H.R. 10)," intended to implement the recommendations of the U.S. 9/11 Commission. The bill would have authorized the U.S. government to deport non-citizens who it labeled as national security threats or criminal aliens to countries where they would be at grave risk of torture, in clear violation of the U.S.'s obligations under the Convention against Torture. Human rights groups, including Human Rights Watch, strongly opposed the bill, stating that it would violate the U.S.'s Convention against Torture

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[117] Association of the Bar of the City of New York and Center for Human Rights and Global Justice at NYU School of Law, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* October 2004, p. 89 [online] http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf (retrieved March 9, 2005): "This obligation [to afford procedural guarantees] is grounded in Convention against Torture Article 3 (prohibiting torture and CID) and Article 2 (requiring state parties to implement judicial and administrative measures to prevent torture); and ICCPR Article 7 (prohibiting torture and CID) and Article 2(1) (interpreted by the Human Rights Committee as requiring state parties 'to respect and to ensure' ICCPR protections through prevention and provision of judicial or administrative review)." Ibid.

obligations and U.S. domestic law and have "immediate and damaging consequences."[118] In the face of strong public criticism, the House Republican leadership amended this section of the bill and deleted the exemption from the Convention against Torture protection against *refoulement* to torture. Instead, they included a provision that retained the ban on removals that would violate the Convention against Torture, but added draconian detention provisions for certain classes of non-citizens who are granted this protection. These detention provisions lacked adequate standards and failed to provide for judicial review to safeguard against abuse.[119] The provisions were not included in the legislation that was eventually passed in January 2005.[120]

Torture Outsourcing Prevention Act: Markey Bill

Representative Edward J. Markey, a member of the U.S. House of Representatives from the Democratic Party, has been a leading opponent of the practice of renditions in the U.S. Congress and has also argued that diplomatic assurances from abusive regimes are inherently unreliable. In February 2005, Markey introduced a bill entitled the "Torture Outsourcing Prevention Act (H.R. 952)".[121] The bill reaffirms the absolute prohibition against torture and *refoulement* and states that "it is critically important for that all transfers of individuals to other countries occur with full due process of law and in conformity with the obligations of the United States under article 3 of the Convention against Torture."[122] The bill specifically addresses the ineffectiveness of diplomatic assurances against torture:

> The reliance on diplomatic assurances from a government that it will not torture or ill-treat a person returned to that government is an ineffective safeguard for protecting persons from torture or ill-treatment. Assurances from a government known to engage in systematic torture are inherently unreliable. There is strong evidence that governments such as Egypt, Syria, and Uzbekistan have violated such assurances they have provided.[123]

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[118] Letter to members of the U.S. House of Representatives from Human Rights Watch, Amnesty International, Human Rights First, Physicians for Human Rights and other human rights groups asking members to oppose the offending provisions and have them struck from the bill, September 30, 2004, copy on file with Human Rights Watch.

[119] 9/11 Recommendations Implementation Act of 2004 (H.R. 10) [online] http://thomas.loc.gov/cgi-bin/query/D?c108:1:./temp/~c108Qm13YF:: (retrieved April 6, 2005).

[120] Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, January 7, 2005 [online] http://thomas.loc.gov/cgi-bin/query/D?c108:4:./temp/~c1088oKsSS:: (retrieved March 29, 2005).

[121] Press Release, "Markey Introduces Bill to Prevent Outsourcing of Torture," February 17, 2005 [online] http://www.house.gov/markey/Issues/iss_human_rights_pr050217.pdf (retrieved February 23, 2005).

[122] Torture Outsourcing Prevention Act (H.R. 952), F:\M9\MARKEY_017.XML, Sec. 2(14) [online] http://www.theorator.com/bills109/hr952.html (retrieved April 6, 2005).

[123] Ibid., Sec. 2(15).

The bill would supplement the existing legal prohibition on returning individuals to countries where they are likely to be tortured by requiring the State Department to establish a list of countries that commonly use torture in detention and interrogation. It would prohibit U.S. officials or contractors from transferring any person in their custody to a country on the list, unless those transfers occur as part of an immigration or extradition proceeding where the individual has an opportunity to raise a Convention against Torture claim in a judicial forum, including the opportunity to challenge the reliability and sufficiency of any diplomatic assurances.

Under the bill, the Secretary of State could waive the prohibition if she could certify that a country on the list had "ended" the acts of torture and ill-treatment that were the basis for the inclusion of the country on the list and that there was a verifiable mechanism in place to ensure that any person transferred to said country would not be tortured or ill-treated. Written or oral assurances against torture from a government would not be sufficient to constitute such a verifiable mechanism. In all cases, the bill would prevent reliance on diplomatic assurances as the basis for determining that an individual is not at risk of torture.

To ensure compliance with these provisions, the bill would require the Secretary of Homeland Security to revise the immigration regulations implementing article 3 of the Convention against Torture:

> …to ensure that written or verbal assurances made by a country that a person in immigration proceedings in the United States (including asylum proceedings) will not be tortured or subjected to cruel, inhuman or degrading if the person is removed by the United States to the country are not, standing alone, a sufficient basis for believing that the person would not be tortured or subjected to such treatment if the alien were removed to the country.[124]

It would also require the other government agencies to issue regulations regarding the responsibilities of U.S. government officials and contractors to comply with article 3 of the Convention against Torture both within and outside the U.S.

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[124] Ibid., p. 14.

Significantly, the bill would require the U.S. to allow a person subject to return based on assurances an opportunity to challenge the reliability of assurances in an independent judicial forum.[125] The bill would thus address the glaring absence of procedural guarantees to effectively challenge diplomatic assurances secured by the U.S. in its efforts to effect returns based on them.

On March 16, 2005, Rep. Markey proposed an amendment to a supplemental appropriations bill that prohibited any of the funds made available by the act to be used for any activities that would contravene the U.S.'s obligations under the Convention against Torture.[126] In his statement introducing the amendment, Markey directly referenced the U.S. renditions program and said:

> The Administration maintains that it is in full compliance with the Convention against Torture. Compliance, they say, is guaranteed by the dubious practice of asking countries known to torture prisoners for "promises" that they will not torture *our* prisoners. These so-called "diplomatic assurances" then provide the cover for sending a suspect to that country to undergo interrogation. . . "[D]iplomatic assurances" not to torture are not credible, and the Administration knows it."[127]

The amendment passed in the House of Representatives by an overwhelming majority of 420 to 2, and was an important first step in addressing the U.S. practice of handing people over to governments that torture.[128]

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[125] Ibid., pp. 12-13: The bill would require all U.S. agencies to promulgate regulations regarding "the process by which a person may raise and adjudicate in an independent judicial forum a claim that his or her transfer would be in violation of article 3 of the [Convention against Torture]...including the process by which the individual being transferred can challenge any diplomatic assurances received from the government to which the individual would be returned that the individual would not be subjected to torture or ill-treatment."

[126] Amendment to H.R. 1268, as Reported, Offered by Mr. Markey of Massachusetts, F:\M9\MARKEY_033.XML, March 15, 2005.

[127] Statement by Representative Edward J. Markey on Amendment to Stop Funds for the Outsourcing of Torture, March 15, 2005 [online] http://www.house.gov/markey/Issues/iss_human_rights_st050315.pdf (retrieved March 19, 2005).

[128] See, Human Rights Watch Statement by Wendy Patten, U.S. Advocacy Director, at the March 10, 2005 "Rally to Stop Renditions" convened by Rep. Markey [online] http://hrw.org/english/docs/2005/03/10/usint10294.htm (retrieved March 19, 2005). Human Rights Watch stated, "[W]e support efforts by the Congress, led by Rep. Markey in the House of Representatives, to put a stop to renditions to torture and, as part of that vital effort, to prevent the Bush administration from papering over its illegal conduct with diplomatic assurances from governments that torture."

Convention against Torture Implementation Act 2005: Leahy Bill

On March 17, 2005 Senator Patrick Leahy introduced the "Convention against Torture Implementation Act 2005 (S. 654)" in the U.S. Senate.[129] This legislation is similar in substance and scope to the Markey bill.

The bill would prohibit the transfer of any person in U.S. custody to a country that appeared on a designated list of states where torture was a serious human rights problem. It would also prohibit such a transfer where "there are otherwise substantial grounds for believing that the person would be in danger of being subjected to torture" even if the country of return did not appear on the designated list. The secretary of state could waive the prohibition if the acts that were the basis for a particular country's inclusion on the list "have ended" and a verifiable mechanism was in place to ensure that a person transferred to that country would not be tortured. Transfers made through lawful extradition of immigration proceedings would not be subject to the list of countries, but would still have to meet the standard set forth in article 3 of the Convention against Torture in each individual case.

The U.S. would be prohibited from relying on diplomatic assurances as justification for any transfer of a person to another country:

> (c) Assurances Insufficient—Written or verbal assurances made to the United States by the government of a country that persons in its custody or control will not be tortured are not sufficient for believing that a person is not in danger of being subjected to torture.

The Leahy bill would prohibit the use of diplomatic assurances as a sufficient safeguard against torture in immigration and extradition cases, as well as in rendition cases. In his statement in the Senate, Senator Leahy pointed to this provision of the bill as the most significant:

> Most importantly, the bill closes the diplomatic assurances loophole. We would no longer accept assurances from governments that we know engage in torture. Our past reliance on diplomatic assurances is blatantly hypocritical. How can our State Department denounce countries for

[129] Convention against Torture Implementation Act 2005 (S. 654), O:\DAV\DAV05197.xml, March 17, 2005 [online] http://thomas.loc.gov/cgi-bin/query/D?c109:3:./temp/~c109YjXemX:: (retrieved March 25, 2005).

engaging in torture while the CIA secretly transfers detainees to the very same countries for interrogation?[130]

Case of Ashraf al-Jailani

The case of Ashraf al-Jailani is emblematic of the impact that some of these positive legislative initiatives could have in the future. While most of the proposed legislation is keyed toward the phenomenon of renditions that occur outside U.S. territory, the bills also address the use of diplomatic assurances in ordinary immigration proceedings in the U.S. An immigration judge in the *al-Jailani* case ruled that returning a person to a risk of torture not only violates the U.S.'s Convention against Torture obligations, but could have far-reaching policy implications for creating the perception that the U.S. condones the practice of torture for countries fighting against terrorism. Disturbingly, the judge also found that securing credible diplomatic assurances against torture could be a condition for al-Jailani's return to Yemen, despite the country's well-documented and even admitted use of torture.

In December 2004 an immigration judge ruled that al-Jailani, a national of Yemen suspected by the Federal Bureau of Investigation (FBI) of terrorist activity, could not be removed to Yemen because his fears of torture and ill-treatment upon return were well-founded.[131] The decision recounted in some detail the voluminous credible evidence of Yemen's targeting of Islamists or suspected terrorists for especially abusive practices, including mass arrest; incommunicado detention; torture and ill-treatment in detention facilities with no independent oversight of conditions or practices therein; and denial of access by detainees to lawyers and independent courts.[132]

The judge also noted that Yemen admits that torture is a serious problem, but that Yemeni officials justify such abuses in light of the urgent need to combat terrorism.[133] Moreover, the judge took into account the May 2004 conclusions of the Committee against Torture regarding Yemen's "failure to address in adequate detail the practical

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[130] Statement of Senator Patrick Leahy on the Convention against Torture Implementation Act, March 17, 2005 [online] http://leahy.senate.gov/press/200503/031705a.html (retrieved March 19, 2005)

[131] *In the Matter of Ashraf al-Jailani*, Executive Office for Immigration Review (EOIR), U.S. Immigration Court, York, Pennsylvania, File #A 73 369 984, December 17, 2004, p. 14, copy on file with Human Rights Watch.

[132] The decision references the U.S. Department of State Country Reports on Human Rights Practices, Amnesty International and Human Rights Watch reports, and an April 2003 report by the U.S. Bureau of Citizenship and Immigration Services (BCIS) detailing human rights violations against those suspected as Islamic militants or associated with terrorist activity.

[133] *Al-Jailani*, p. 11.

implementation of the Torture Convention, and further failure to comply with the reporting guidelines of the Committee in this regard."[134]

The judge, however, went further than merely assessing al-Jailani's individual risk of torture or ill-treatment. He concluded that sending al-Jailani back would also have broader policy implications. Returning al-Jailani would not only violate the U.S.'s Convention against Torture obligations, "but could also be construed as sanctioning Yemen's use of torture by its security forces thereby bringing the United States into disrepute in the international community."[135]

Despite all this, the judge determined that assurances that al-Jailani would not be tortured would be sufficient to justify his removal to Yemen if they could be deemed credible. It is difficult to see how any assurances from a government with Yemen's record of torture could be considered credible or reliable. But the loopholes noted above with respect to the U.S. regulations almost surely account for this apparently contradictory ruling. When the judge found that credible assurances would permit al-Jailani's removal to Yemen, he was simply following the regulations that apply in immigration proceedings.[136] The executive branch's discretion to secure and evaluate diplomatic assurances leave open the very real possibility that it would deem assurances from Yemen to be credible. Also, because al-Jailani enjoys no procedural rights in relation to diplomatic assurances under the regulations, he would not be entitled to challenge the assurances in a court.

Yemen not only routinely violates the prohibition against torture, but as noted in the *al-Jailani* decision, openly admits that it deems such abuses to be necessary in its efforts to combat terrorism. Under these circumstances, diplomatic assurances from the Yemeni authorities would be inherently unreliable and should not be acceptable as a safeguard against torture. Moreover, if the U.S. were to return al-Jailani to Yemen based on assurances, the policy considerations so eloquently articulated in the decision still obtain: accepting assurances for the protection of one person could be perceived as sanctioning Yemen's abusive practices for the vast majority of persons vulnerable to torture and ill-treatment.

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[134] Ibid., p. 12: "The Committee faults Yemen for invoking any justification for using torture, including its fight against terrorism and difficulties associated with this serious problem. Of particular interest to this court is the Committee's concern that Yemen has failed to establish a comprehensive definition of torture, and faulted the government for the lack of transparency in its detention centers operated by its security forces."

[135] Ibid., p. 14

[136] 8 C.F.R. § 208.18(c)(3) - Diplomatic assurances against torture obtained by the Secretary of State.

The Department of Homeland Security has appealed the al-Jailani ruling. At the time of writing, it remained unclear if the U.S. government will seek assurances from the Yemeni authorities or if it will simply argue that al-Jailani would not be at risk of torture upon return, even in the absence of assurances.

Canada

The Canadian government seeks and secures diplomatic assurances for returns in some cases where there is an acknowledged risk of torture, including for persons subject to "security certificates." Such certification by the executive authorizes the government to detain a person—suspected of being a threat to the security of Canada—for an unspecified period without charge or trial; present secret evidence, not available to anyone except the government and a judge, in closed hearings to which detainees and their lawyers do not have access; and to deport him or her.[137] At the time of writing, there were several hearings and judicial reviews scheduled, and decisions pending, to determine the validity of some security certificate cases. Some of these procedures address the issue of whether security certificates in individual cases are "reasonable" and others review prior assessments of the risk of torture that detainees subject to security certificates might face if deported. Canadian courts have not yet been willing to permit the government to breach the absolute ban on *refoulement* in these particular cases.

Human rights groups and various segments of civil society have severely criticized the continuing use of security certificates, correctly pointing out that the process violates the prohibition against indefinite detention, internationally recognized procedural guarantees, and the absolute obligation not to send a person to a country where he or she would be at risk of torture.[138]

Prior to deportation, Canadian immigration authorities normally conduct a protection assessment to determine whether an individual would be at risk of torture upon return. However, if a security certificate is deemed "reasonable" by a judge, the ability to

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[137] Immigration and Refugee Protection Act 2001 (IRPA), Division 9 (sections 76-87) [online] http://laws.justice.gc.ca/en/I-2.5/text.html (retrieved March 2, 2005). The law does not expressly provide for the indefinite detention of foreign nationals suspected of posing a national security threat to Canada. The law permits the government to detain with the intention of deporting a suspect. A judge can release a suspect if a deportation cannot be effected within a reasonable time if the person does not pose a danger to national security. If a judge determines that a person would pose a threat to national security and deportation cannot be effected, then indefinite detention is a possibility given the loopholes in the law.

[138] See, Amnesty International Canada, "Take Action: Security Certificates, Time for Reform," March 2005 [online] http://www.amnesty.ca/take_action/actCertificates_300305.php (retrieved March 31, 2005). See also Letter from Amnesty International Canada to Minister of Public Safety Anne McLellan, March 31, 2004, in which Amnesty criticized the use of security certificates and "urges Canada to adopt a response to security concerns that does not result in violations of such fundamental human rights as the protections against arbitrary detention and torture." Copy on file with Human Rights Watch.

successfully claim protection from deportation based on Canada's *nonrefoulement* obligations is significantly reduced. In the 2002 case of *Suresh v. Canada*, the Supreme Court of Canada acknowledged that international law bans absolutely returns to countries where there is a risk of torture, but in an extraordinary departure from that law, stated, "We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified:"[139]

> Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because article 3 of the Convention against Torture directly constrains the actions of the Canadian government, but because the fundamental justice balance under s[ection] 7 of the *[Canadian] Charter [of Rights and Freedoms]* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of the exceptional discretion to deport to torture, if any, must await future cases.[140]

One can only assume that by securing assurances for controversial deportations, the Canadian government is seeking to avoid invoking the disturbing "exception" carved out by the *Suresh* court. The Canadian government has openly acknowledged that some persons subject to security certificates would be at risk of torture or ill-treatment upon return (see Charkaoui and Mahjoub cases below), thus triggering the *nonrefoulement* obligation. The government then seeks assurances from the receiving country, ostensibly to reduce the risk of abusive treatment. Diplomatic assurances, however, do nothing to mitigate that risk. As a result, relying on diplomatic assurances, an ineffective safeguard against torture, to effect such deportations in fact would place the Canadian government within the terms of the *Suresh* "exception" and would violate the absolute prohibition against torture and *refoulement*.

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[139] *Manickavasagam Suresh v. Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v. Canada)*, 2002, SCC 1. File No. 27790, January 11, 2002, para. 78 [online] http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0003.html (retrieved February 25, 2005). In the April 2004 *"Empty Promises"* report, Human Rights Watch did not highlight security certificate cases. The *Suresh* case was featured in that report for what the judgment said about diplomatic assurances, namely "Where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances." Suresh was granted a new deportation hearing after the court concluded that his original hearing did not provide the procedural safeguards necessary to protect his right not to be deported to a place, in this case India, where he was at risk of torture, including the opportunity to challenge the validity of diplomatic assurances. See *"Empty Promises,"* pp. 18-19.

[140] *Suresh v. Canada*, para. 78.

Recent cases, however, indicate that despite the *Suresh* "exception," the courts have been appropriately reluctant to permit the government to breach the absolute ban on torture, including the *nonrefoulement* obligation, even in cases where security certificates have been issued.

Case of Adil Charkaoui

The government of Canada is currently holding four Arab men in prison without charge based on secret evidence under security certificates.[141] A fifth man, Adil Charkaoui, a Moroccan national, was released on bail on February 17, 2005, after a judge determined that any alleged imminent threat he posed to Canada—based on suspicions that he was associated with suspected terrorists—had been "neutralized" due to Charkaoui's twenty-one month detention in prison.[142] Together the men constitute the so-called "secret trial five."

Charkaoui's release was a rare development as he is only the second person ever released while still subject to a security certificate. While the court imposed release conditions, such as regular reporting to the police, the decision is striking insofar as it determines that despite the security certificate, any potential danger Charkaoui presented had "eased with time."[143]

Denied Protection

While Charkaoui was still in custody, Canadian immigration officials and government authorities determined that he would be at risk of abusive treatment if deported. In August 2003, Canadian immigration authorities completed a pre-removal risk assessment confirming that Charkaoui would be at risk of torture, and possibly death, if returned to Morocco.[144] A "security review" conducted in August 2004 by the Immigration Intelligence Division of the Canadian Border Services Agency, however, concluded that the government should not grant protection to Charkaoui, labeling him a danger to the security of Canada.[145]

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[141] The four men and their countries of origin are: Mohammad Mahjoub (Egypt); Mahmoud Jaballah (Egypt); Hassan Almrei (Syria); and Mohamed Harkat (Algeria). Mahjoub has been in prison since June 2000, Jaballah since August 2001, Almrei since October 2001, and Harkat since December 2002.

[142] *In re Charkaoui*, [2005] CF 248, DES-3-03, February 17, 2005.

[143] The judge also noted that Charkaoui's verbal agreement to abide by his bail conditions, coupled with numerous sworn statements from a variety of people from all walks of life who supported his release, gave the court an opportunity to evaluate its trust in him. Ibid.

[144] *Opinion sur les risques avant renvoi*, Adil Charkaoui, Dossier: 2948-DSC-40, ID: 3109 4479, Montreal, Quebec, August 21, 2003, copy on file with Human Rights Watch.

[145] *Décision ERAR dans le dossier de M. Charkaoui*, No. Dossier SSOBL: 3109 4479, Examen sécuritaire (RZTZ), Renseignement immigration, Agence des services frontaliers du Canada, Ottawa, Ontario, August 6, 2004, copy on file with Human Rights Watch.

The security review concluded that deportation proceedings could commence. The decision was based in large part on written assurances from Morocco that it would not torture or ill-treat Charkaoui upon return. The government acknowledged that some torture takes place in Morocco, but concluded it was not systematic. Discounting reports that the Moroccan authorities targeted persons labeled as terrorists or security threats for mistreatment, the government decided that Charkaoui was under no individual threat. Moreover, the government claimed that the assurances proffered by the Moroccan government were evidence that he would face no risk if sent back.

Morocco's Assurances

The assurances themselves were of the most basic sort. In a letter to the Moroccan authorities dated February 18, 2004, the Canadian Ministry of Foreign Affairs explicitly identified Charkaoui as a "threat to the security of Canada," and then posed three questions: 1) Will the government of Morocco ensure that Mr. Charkaoui is not tortured or subject to cruel, inhuman and degrading treatment, in conformity with Morocco's obligations under the Convention against Torture?; 2) Will the government of Morocco confirm in writing that it will conform with its obligations under the International Covenant on Civil and Political Rights (ICCPR)?; and 3) Will the government of Morocco confirm in writing that Mr. Charkaoui will not be subject to the death penalty?[146]

The assurances from Morocco, dated April 18, 2004, stated that Charkaoui would receive fair treatment upon return, including protection against torture and ill-treatment, in accordance with the Moroccan constitution and international human rights treaties, including the ICCPR and the Convention against Torture. Thus, the Moroccan authorities simply restated that they would abide by their currently existing treaty obligations, which the Moroccan authorities, security officers, and police routinely violate in their dealings with suspected Islamic militants and those suspected of engaging in terrorist activities.

Morocco's Record of Abuse

Adil Charkaoui's protection assessment documents the record of abusive practices perpetrated by the Moroccan police and security service in the aftermath of the May 16, 2003 Casablanca bombings, including mass arrests, secret detentions, incommunicado detention, disappearances, lack of procedural guarantees, unfair trials, and torture and ill-

[146] Copies of letters on file with Human Rights Watch (originals in French).

treatment.[147] In March 2004, Human Rights Watch submitted a letter on Charkaoui's behalf for use in the security review based on primary research undertaken in Morocco in January-February 2004. The letter concluded that Charkaoui would be at risk of torture and ill-treatment if returned to Morocco. A lengthy report issued by Human Rights Watch in October 2004, based on field research in Morocco, charged the government with "backsliding" on human rights progress and detailed serious rights abuses, including torture and ill-treatment, targeting suspected terrorists in violation of Morocco's international treaty obligations:

> Morocco must do far more to reverse the deterioration in human rights that has occurred in the treatment of persons suspected of involvement in terrorist crimes. Given the pattern of human rights violations emanating from the crackdown on suspected Islamist militants and the application of the 2003 counter-terror law, Moroccan authorities should take immediate steps to bring all practices and laws into compliance with both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (CAT). Above all, law enforcement agents must be held accountable when they violate laws governing the detention and treatment of suspects.[148]

The United States Department of State Country Reports on Human Rights Practices, released on February 28, 2005, also contains details of torture, mistreatment, and denial of rights during the judicial process of detainees in the aftermath of the May 2003 terrorist attacks in Casablanca. The report states, "The Government [of Morocco] generally rejected these allegations" and "[t]here was no indication that the Government took any further action in response to claims of torture, made at the Court of Appeal in Fez, by 29 persons accused of terrorism, and reportedly judicial authorities refused to order any medical examinations."[149]

Assurances from the Moroccan government that it will comply with its international human rights obligations cannot be trusted in the face of substantial evidence to the contrary. The Canadian government cannot point to the Moroccan government's unconvincing promises as evidence of Canada's or Morocco's general commitment to

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[147] Charkaoui submitted evidence of such abuses from Human Rights Watch and Amnesty International, among other human rights groups.

[148] Human Rights Watch, *Morocco: Human Rights at a Crossroads*, October 2004 [online] http://hrw.org/reports/2004/morocco1004 (retrieved March 1, 2005).

[149] U.S. Department of State Country Report on Human Rights Practices 2004: Morocco, February 28, 2005 [online] http://www.state.gov/g/drl/rls/hrrpt/2004/41728.htm (retrieved March 2, 2005).

human rights or concern for the individual safety and well-being of Adil Charkaoui. In order to deport Mr. Charkaoui to Morocco, the Canadian government would have to invoke the *Suresh* "exception" to the international ban on torture and *refoulement*, and send him back to the risk of torture. In fact, the August 2004 security review itself arrived at the very same conclusion. Anne Arnott, the minister's delegate writing for the government, concluded that even if the government has underestimated the risk to Charkaoui, the "extraordinary danger" he constitutes to Canada's security justifies sending him back to Morocco.[150]

In February 2005 the Canadian government acknowledged an outstanding Moroccan arrest warrant for Charkaoui. In light of this, Canadian immigration officials agreed to re-evaluate the August 2004 security review that concluded that Charkaoui could be deported.[151]

Hearings to determine whether Charkaoui's security certificate is "reasonable" were held in February and March 2005. The hearings were suspended at the time of writing, pending issuance of the new risk assessment.

Case of Mohamed Zeki Mahjoub

On February 1, 2005, a Canadian federal court ruled that the Canadian government was prohibited from deporting one of the "secret trial five"—Egyptian national Mohamed Zeki Mahjoub, a recognized refugee alleged to be a member of the Vanguards of Conquest, a faction of Egyptian al-Jihad al-Islamiya.[152] The judge in *Mahjoub* ruled that it was "patently unreasonable" for the government to deport Mahjoub when the minister's delegate who made the determination did not have access to confidential informational in the government's dossier.[153] The court ruled that an independent and proper assessment of the risk Mahjoub posed to Canada's security required a review of at least some of that information.

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[150] *Décision ERAR dans le dossier de M. Charkaoui*, p. 20: "Dans l'éventualité où j'aurais sous-estimé le risque auquel M. Charkaoui est confronté, je suis convaincu qu'il répond au critère établi dans l'arrêt *Suresh* et que le danger extraordinaire qu'il constitue pour law sécurité du Canada l'emporte sur le risque qu'il court advenant son retour au Maroc. Par conséquent, on ne doit pas lui permittre de rester au Canada."

[151] Letter from the Canadian Department of Justice to the Canadian Federal Court in the Matter of Adil Charkaoui, March 14, 2005, stating that a new risk assessment would be conducted and Charkaoui would have a new opportunity to make submissions to the Minister's delegate regarding his risk of torture or ill-treatment if returned to Morocco. Copy on file with Human Rights Watch. See also Sue Montgomery, "Canada Won't Enforce Moroccan Arrest Warrant," *The Montreal Gazette*, March 16, 2005, A2.

[152] *Mahjoub v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 173, January 31, 2005 [online] http://decisions.fct-cf.gc.ca/fct/2005/2005fc156.shtml (retrieved February 26, 2005).

[153] The delegate was appointed by the Minister of Citizenship and Immigration.

The judge determined that the issue of "whether circumstances would ever justify deportation to face torture" as per the *Suresh* "exception" must be decided on the basis of a proper evidentiary record, which did not exist in the *Mahjoub* case. The court therefore decided to remit the case for a redetermination. The judgement is nonetheless instructive on the issues of the delegate's finding that Mahjoub would, in fact, be at risk of torture and ill-treatment if returned to Egypt, and the Canadian government practice of securing diplomatic assurances to justify deportations where there is an acknowledged risk of such abuse.

The delegate's report stated that Mahjoub would be taken into custody immediately upon return to Egypt and subjected to a retrial for an April 1999 conviction *in absentia* for terrorist activities. The report concluded:

> In consideration of the reports regarding human rights violations in Egypt towards members of VOC [Vanguards of Conquest] and AJ [al-Jihad], it is my opinion that on the balance of probabilities, Mr. Mahjoub could suffer ill-treatment and human rights abuses soon after he is detained.[154]

In light of this acknowledgement of Mahjoub's risk of torture and ill-treatment, the Canadian government sought and secured diplomatic notes on three separate occasions, in which Egyptian officials confirmed that if returned, Mahjoub "would be treated in full conformity with constitutional and human rights laws."[155] The court decision noted:

> Mr. Mahjoub had argued that these assurances would not be respected, and submitted general reports concerning human rights abuses in Egypt, as well as reports from Amnesty International, Human Rights Watch, and an expert in Islamic law. The reports documented the experience of other Egyptians accused of similar terrorist activities who were sent back to Egypt from other countries and who, notwithstanding assurances, were subjected to alleged human rights abuses, ill-treatment and *incommunicado* detention.[156]

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[154] *Mahjoub v. Canada*, para. 30.
[155] Ibid., para. 31.
[156] Ibid., para. 32.

In a striking admission, the minister's delegate concluded that the reports "presented a credible basis for calling into question the extent to which the Egyptian government would honor its assurances."[157]

Those reports included information from Human Rights Watch and others regarding the December 2001 expulsion from Sweden of Ahmed Agiza, an Egyptian asylum seeker, who was subsequently held incommunicado, tortured and subjected to an unfair retrial upon return to Egypt. The Egyptian authorities had given the Swedish government assurances that Agiza would not be tortured and would be afforded a fair trial. The delegate in the *Mahjoub* case alleged that Mahjoub and Agiza were associates. Agiza was also tried *in absentia* in Egypt in April 1999 (see section below on Sweden).

Despite the government's admission of Mahjoub's risk of torture, the delegate determined that Mahjoub should not be allowed to remain in Canada because he posed an "extraordinary danger" to Canada's security and thus fell within the provisions of the *refoulement* exception to Canada's Immigration and Refugee Protection Act.[158]

In quashing the delegate's determination and sending the case back for redetermination with a view to establishing a proper evidentiary record, the judge in *Mahjoub* expressed skepticism about the *Suresh* "exception:"

> The Supreme Court of Canada has left the issue open by not excluding the possibility that, in exceptional circumstances, such deportation may be justified, either as a consequence of the balancing process required by section 7 of the Charter or under section 1 of the Charter. There are, however, powerful indicia that deportation to face torture is conduct fundamentally unacceptable; conduct that shocks the Canadian conscience and therefore violates fundamental justice in a manner that can not be justified under…the Charter.[159]

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[157] Ibid., para. 33.

[158] Section 115. [Principle of Non-Refoulement] (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

Exceptions [to the Principle of Non-Refoulement] (2) Subsection (1) does not apply in the case of a person

(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

[online] http://laws.justice.gc.ca/en/I-2.5/ (retrieved February 26, 2005).

[159] *Mahjoub*, para. 64.

A decision on Mahjoub's application for bail was pending at the time of writing.

Case of Lai Cheong Sing and Family

The use of diplomatic assurances in Canadian asylum cases is another disturbing development. Assurances have been sought in cases involving persons who do not have a security profile, but who were unsuccessful in their efforts to seek asylum.

The case of the Lai family illustrates the danger that the use of diplomatic assurances in terrorism or national security cases poses to a broader pool of people subject to forced return. Lai Cheong Sing, his wife Tsang Ming Na, and three children were excluded from refugee status in June 2002 on the ground that there were reasons to believe they had committed serious non-political offenses, namely bribery and smuggling, in Hong Kong and China prior to arrival in Canada in 1999.[160] In its ruling, the court overlooked substantial evidence that torture was pervasive in the Chinese criminal justice system and that persons interrogated in China regarding the Lai family's activities had been ill-treated. It also issued the controversial ruling, now on appeal, that China's assurances against torture did not have to be evaluated separately from its assurances against the death penalty.

The panel that made the decision to exclude the Lais from consideration for full refugee status did so based in part on assurances from the Chinese authorities that if returned, the Lais would not face the death penalty or torture; these assurances were assessed together and amounted to the following:

> In accordance with…Article 199 of the Criminal Procedure Law of the People's Republic of China which stipulates that "death sentences shall be subject to approval by the Supreme People's Court," the appropriate criminal court will not sentence him [Lai] to death and even if it does, the verdict will not be approved by the Supreme People's Court, therefore, he will not be executed in any case if returned to China.
>
> At the same time, China is a state party to the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

[160] *Lai v. Minister of Citizenship and Immigration (Lai v. Canada)*, Federal Court of Canada, IMM-3194-02, 2004 FC 179, February 3, 2004 [online] http://decisions.fct-cf.gc.ca/fct/2004/2004fc179.shtml (retrieved February 26, 2005). The Lais were excluded from refugee status for the commission of serious non-political crimes outside the country of refuge prior to their admission to Canada.

> Punishment. According to the provisions of the relevant Chinese laws, during the period of investigation and trial of Lai after his repatriation and, if convicted, during his term of imprisonment, Lai will not be subject to torture and other cruel, inhuman or degrading treatment or punishment.[161]

In February 2004, the federal court dismissed the Lais application for judicial review of their refugee status determination and certified a set of questions for consideration by the federal court of appeal. The questions included: "When does there need to be an assessment of a foreign state's assurance to avoid torture of refugee claimants separate from its assessment not to impose the death penalty?"[162]

The federal court concluded that since there was no persuasive evidence of torture or degrading treatment following return in cases similar to the Lais, the decision not to assess the assurances against torture separately was justified.[163] The Lais lawyers, however, argued that some of the persons interrogated by the Chinese authorities about the Lais were ill-treated and coerced into giving false information. They also argued that the *Suresh* case established that the sole criterion for the need for a separate assessment for assurances against torture is that the state "has engaged in illegal torture or allowed others to do so on its territory in the past."[164] Because of the compelling nature of the evidence directly linked to the Lais and the general evidence that torture was routinely used to extract confessions in Chinese criminal proceedings, the court should have conducted a separate assessment of the Chinese government's assurances against torture.

The *Suresh* court articulated the operational problems inherent in relying on assurances in torture risk cases:

> A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with

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[161] *Lai v. Canada*, February 2004, para. 46.

[162] *Lai v. Canada*, Public Memorandum of Fact and Law of the Appellants, Federal Court of Appeal, IMM-3194-02, Court No. A-191-04, July 26, 2004, copy on file with Human Rights Watch.

[163] *Lai v. Canada*, February 2004, para. 50.

[164] Ibid., para. 25.

> the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.[165]

The assurances against torture in the Lai case simply restate the government of China's currently existing treaty obligations. They should be assessed in a separate and rigorous manner, taking into account the distinct differences between determining the credibility and reliability of assurances against the death penalty and assurances against criminal activities amounting to torture and ill-treatment.

The Federal Court of Appeal heard the Lai appeal on March 14-15, 2005 in Vancouver. At the time of writing, a decision on the appeal was pending.

Europe

Sweden

Update: Cases of Ahmed Agiza and Mohammed al-Zari

The December 2001 transfers of asylum seekers Ahmed Agiza and Mohammed al-Zari[166] from Sweden to Egypt aboard a U.S. government-leased airplane remain among the most controversial cases involving the use of diplomatic assurances by a European government.[167] The cases provide the clearest illustration to date of the inherently flawed nature of diplomatic assurances and of post-return monitoring mechanisms.

Sweden expelled Agiza and al-Zari, suspected of terrorist activities, following written assurances from the Egyptian authorities that they would not be subject to the death penalty, tortured or ill-treated, and would receive fair trials. Swedish and Egyptian authorities also agreed on a post-return monitoring mechanism involving visits to the

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[165] Ibid., para. 124.

[166] For a discussion of the asylum and refugee protection dimension of the men's cases see Brian Gorlick, "The Institution of Asylum after September 11," in *Mänskliga Rättigheter: från forskningens frontlinjer*, Iustus Förlag, Uppsala, 2003, pp. 2-4.

[167] See, *"Empty Promises"*, pp. 33-36. The so-called "torture plane"—a Gulfstream jet—upon which the men were transferred to Egypt has been spotted in numerous European, Middle Eastern and Asian countries. According to press reports and the jet's logs, which were acquired by journalists, the plane has also landed at Guantánamo Bay. See Dana Priest, "Jet is an Open Secret in Terror War," *Washington Post*, p. A1, December 27, 2004; and John Crewdson, "Mysterious Jet Tied to Torture Flights: Is Shadowy Firm Front for CIA?" *Chicago Tribune*, January 8, 2005.

men in prison. The men had no opportunity under Swedish law to challenge the legality of their expulsions or the reliability of the Egyptian assurances.

Agiza and al-Zari were held incommunicado for five weeks after their return. Despite monthly visits thereafter by Swedish diplomats, none of them in private, both men credibly alleged to their lawyers and family members—and, indeed, to Swedish diplomats as well (see below)—that they had been tortured and ill-treated in detention.[168] Agiza remains in prison to date after a patently unfair retrial in April 2004. Al-Zari was released without charge or trial in October 2003, remains under surveillance by Egyptian security forces, and reports regularly to the police. He is not permitted to speak with journalists or human rights groups.

When Human Rights Watch last reported on the cases in April 2004, many of the details of the men's transfers were still unknown. In May 2004, a Swedish television news program, *Kalla Fakta*, revealed that the two men were apprehended and physically assaulted by Swedish police; handed over to the custody of hooded U.S. operatives at Bromma airport who cut off the men's clothing and blindfolded, hooded, diapered, and drugged them; and then transported aboard a U.S. government-leased Gulfstream jet to Cairo.[169] The involvement of the U.S. in the men's transfers has since been confirmed by the Swedish government.[170]

Call for International Investigation into the Men's Transfers

In the aftermath of these revelations, the Swedish government called for an "international inquiry" into the men's treatment. According to Laila Freivalds, Swedish Minister of Foreign Affairs, the Swedish government "has requested the Egyptian government that a thorough and independent inquiry, including international experts, is carried out regarding these allegations."[171] To date, the Egyptian authorities have denied the men's allegations and refused to commence an investigation. Inquiries from Human

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[168] The visits occurred roughly on a monthly basis. According to the Swedish government, twenty-five visits took place between January 2002 and December 1, 2004. See Speech by Swedish Minister of Foreign Affairs Laila Freivalds (Freivalds Speech), "Security under the Rule of Law," December 1, 2004, copy on file with Human Rights Watch.

[169] See, "The Broken Promise" (English Transcript), *Kalla Fakta*, Swedish TV4, May 17, 2004 [online] http://hrw.org/english/docs/2004/05/17/sweden8620.htm (retrieved March 3, 2005); "The Broken Promise, Part II" (English Transcript), May 24, 2004 [online] http://hrw.org/english/docs/2004/05/24/sweden9219.htm (retrieved March 3, 2005); "The Broken Promise, Part IV," (English Transcript), November 22, 2004 [online] http://hrw.org/english/docs/2004/11/22/sweden10351.htm (retrieved April 1, 2005).

[170] The Swedish security police released two memorandums in late May 2004 confirming the U.S.'s involvement in the transfers and the fact that the Swedish Ministry of Foreign Affairs was aware of U.S. involvement. Copies of memoranda on file with Human Rights Watch. Journalist Seymour Hersh has argued that the men's transfers were effected with the assistance of U.S. operatives in the Department of Defense-sponsored "special access program," a program that conducts counter-terrorism operations outside the bounds of U.S. and international law. See, Hersh, *Chain of Command*, pp. 53-55.

[171] Freivalds Speech, December 1, 2004.

Rights Watch regarding the men's treatment and Egypt's obligation under the Convention against Torture to commence an investigation into their torture allegations have gone unanswered.[172] The Swedish government has denied all responsibility for having abdicated on its *nonrefoulement* obligation and for putting the men directly in harm's way.

In May 2004, Human Rights Watch called for an international inquiry under the auspices of the U.N. High Commissioner for Human Rights (OHCHR) in order to "ensure…the necessary independence, expertise, and transparency."[173] The involvement of the three governments in the men's transfers raised serious concerns that only an international inquiry could get to the root of all three states' actions, including, but not limited to, the men's allegations of torture and ill-treatment. The Swedish government has said that it would cooperate with such an inquiry, but in a letter to Human Rights Watch conditioned such cooperation on Egypt's participation and the approval of both men.[174] In December 2004, however, Foreign Minister Laila Freivalds stated that "The Swedish government would welcome further efforts by the U.N. system to investigate the matter and stands ready to fully cooperate in such endeavors."[175]

Torture Despite Assurances

Despite Egypt's well-documented record of systematic torture and failure to comply with its legally-binding international human rights treaty obligations, the Swedish government continues to assert that "[t]here were no substantial grounds for believing that they [Agiza and al-Zari] would be subjected to torture."[176] The government points to both the written assurances and the fact that Egypt subsequently agreed to post-return monitoring as evidence to support that belief. In this case, however, the inherent lack of reliability of assurances from Egypt, the general nature of the assurances themselves,[177] and the inadequate post-return monitoring mechanism are all indicative of

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[172] Human Rights Watch letter to President Hosni Mubarak, July 26, 2004, copy on file with Human Rights Watch.

[173] Human Rights Watch Press Release, "Sweden: Torture Inquiry Must be under U.N. Auspices: Independent Panel must Probe Abuses by Sweden, Egypt, and U.S. Operatives," May 27, 2004 [online] http://hrw.org/english/docs/2004/05/27/sweden8621.htm (retrieved March 3, 2005).

[174] Letter to Human Rights Watch from Hans Dahlgren, State Secretary for Foreign Affairs, September 20, 2004, copy on file with Human Rights Watch.

[175] Freivalds Speech, December 1, 2004.

[176] Ibid.

[177] In response to a December 12, 2001 letter from the Swedish government asking for assurances that the men would "not be subjected to inhuman treatment or punishment of any kind," not subjected to the death penalty, and afforded fair trials, the Egyptian authorities responded:

We, herewith, assert our full understanding to all the items of this memoire, concerning the way of treatment upon repatriate [sic] from your government, with full respect to their persons and human rights. This will be done according to what the Egyptian constitution, and law stipulates.

Copies of letters on file with Human Rights Watch.

the fact that the practice of reliance upon diplomatic assurances threatens the international ban on torture, including the *nonrefoulement* obligation.

Moreover, there is credible, and in some instances overwhelming, evidence that the assurances were breached. A confidential government memorandum detailing the first visit by Swedish diplomats with Agiza and al-Zari included information from the men that they had been brutalized by the Swedish police, blindfolded during interrogations in Cairo, placed in very small cells, denied necessary medication, beaten by prison guards on the way to and from interrogations, and threatened by interrogators with repression against family members if a confession was not forthcoming.[178] This passage was omitted from the censored version of the monitoring report that the government made available to the public, but the men's lawyers eventually were able to access the uncensored version.[179] Agiza and al-Zari have made serious allegations of torture, including electric shock, to family members and their Egyptian and Swedish lawyers.[180] In a December 2004 radio interview, Carl Henrik Ehrenkrona, chief legal adviser to the Swedish Ministry of Foreign Affairs, claimed that one reason for not communicating the men's torture allegations to the Egyptian authorities was to protect them from the Egyptian police (see text box.)[181]

The Swedish authorities claim that they have made twenty-five visits to the men.[182] They fail to note: that no visit was made until five weeks after the men were returned, during which time the men were held incommunicado; that no prison visits were conducted in private; and that advance notification to the prison authorities was required. The authorities also fail to acknowledge that the men have claimed that they were threatened with retribution if they complained about mistreatment. The inherent weaknesses of monitoring under such conditions are apparent (see Limits of Post-Return Monitoring section above).

Unfair Trial Despite Assurances

The assurances of fair trial were likewise violated. In April 2004, Ahmed Agiza, convicted *in absentia* in Egypt in 1999, was retried in a military court, despite the fact that internationally-recognized procedural guarantees are significantly abridged in such

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[178] Copy of memorandum on file with Human Rights Watch.

[179] Human Rights Watch did not obtain the memo from the men's lawyers.

[180] Human Rights Center for the Assistance of Prisoners (Cairo), "Governmental Deportation: Egyptian Nationals as Islamic Activists," April 1, 2003, p. 6. See also Swedish NGO Foundation for Human Rights and Swedish Helsinki Committee for Human Rights, "Alternative Report to 'Comments by the Government of Sweden on the Concluding Observations of the Human Rights Committee'," op. cit., fn 56, p. 25, para. 101.

[181] Sveriges (Swedish) Radio, *Ekot Programme*, December 10, 2004, copy of transcript on file with Human Rights Watch. See text box on p. 64.

[182] Freivalds Speech, December 1, 2004.

tribunals. A trial monitor from Human Rights Watch attended all four of the trial's hearings. Swedish government representatives were denied access to the first two hearings.

Human Rights Watch documented a catalogue of fair trial violations in the course of Agiza's retrial, including the rights to a speedy trial and to a trial by a competent, independent and impartial tribunal. [183] The trial also violated Agiza's right to defend himself, including by adequate access to counsel and with adequate time and facilities to prepare the defense, his right to call and examine witnesses, and his right to appeal the verdict to an independent tribunal. Egyptian authorities relied upon secret evidence, which was not made available to Agiza's lawyers. Defense lawyers were not permitted adequate access to the case file, nor were they granted sufficient time to obtain documents and prepare materials critical to the defense. The defendant was not permitted sufficient time to consult with his lawyers, and was sometimes granted consultations of only ten to fifteen minutes immediately before commencement of a hearing. The court also refused the defense's request to allow witnesses to give testimony to counter the government's charges.

Although Agiza testified in the military court proceedings that he had been tortured in prison, the court permitted Agiza to be examined only by a prison doctor. The prison doctor's report indicated that Agiza had sustained physical injuries while in prison, but the court denied the defense's request for a forensic examination to establish how such injuries occurred and failed to commence an investigation into the torture allegations.

Agiza also testified in court that after having filed a formal complaint about the torture he suffered in Mazra`t Tora prison, he was transferred to another prison, Abu Za'bal, where he was put in "punitive isolation." He spent a total of forty-six days in Abu Za'bal before being transferred back to Mazra`t Tora. At the April 20 military court hearing, Agiza told his defense lawyers that an officer of the Egyptian security forces (*mabahith*) warned him after his hearing on April 13 not to mention his torture or ill-treatment again in court.

Agiza was convicted and sentenced to twenty-five years in prison for membership in an organization whose aim is to overthrow the Egyptian government by violent means. His was the first-ever retrial in Egypt of a person convicted in absentia by a military court.

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[183] Human Rights Watch Press Release, "Sweden Implicated in Egypt's Abuse of Suspected Militant: Egypt Violated Diplomatic Promises of Fair Trial and No Torture for Terrorism Suspect," May 5, 2004 [online] http://hrw.org/english/docs/2004/05/05/egypt8530.htm (retrieved March 3, 2005). All the details regarding the trial are from the Human Rights Watch monitor's notes, originals on file with Human Rights Watch.

Agiza does not have the right to challenge the decision, and only Egypt's President, Hosni Mubarak, can overturn the military court verdict. His sentence was subsequently reduced to fifteen years, apparently upon the intervention of the Swedish authorities.

One Swedish official told a Human Rights Watch representative that trials in military courts in Egypt can be fair.[184] This claim is all the more disturbing given the fact that the Swedish government itself has criticized military tribunals for violating procedural rights.[185] In a radio interview in December 2004, Swedish Prime Minister Göran Persson erroneously concluded that Agiza's trial "evidently was reliable" because al-Zari had been released by the same body. When reminded that al-Zari had never even been to trial, but was released in October 2003, Persson apologized.[186]

Sweden's Responsibility

The Swedish government continues to claim that if there were any breaches of the assurances, responsibility lies solely with Egypt.[187] This claim ignores Sweden's absolute obligation not to return a person to a place where he or she would be at risk of torture or ill-treatment. In a telling interview on March 4, 2005, Hans Dahlgren, Sweden's State Secretary for Foreign Affairs stated:

> Actually, we don't really know whether these guarantees have been adhered to by the Egyptian government. As you know, there have been accusations that they were broken. First of all, that both men have been subject to maltreatment, of the kind that would not be permissible under the guarantees that were given. However, the government of Egypt itself denies these allegations quite strongly.[188]

Dahlgren's admission of uncertainty is a stark reminder that diplomatic assurances are inherently unreliable and ineffective safeguards against torture and ill-treatment. In order to prove that no risk of torture or ill-treatment obtains, the Swedish authorities must be

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[184] In a June 2004 meeting with a representative of Human Rights Watch, one Swedish official from the Ministry of Foreign Affairs (MFA) claimed that "trials in military courts can be fair and trials in civilian courts can be unfair." Notes on file with Human Rights Watch.

[185] The Swedish government's own human rights reports have noted that special courts provide the Egyptian authorities with an opportunity to circumvent key rights provisions, including access to counsel and the right to appeal, that are provided in civilian courts. See Regeringskansliet Utrikesdepartementet, Mänskliga rättigheter i Egypten 2004, [Ministry of Foreign Affairs 2004 Report on Human Rights in Egypt], copy on file with Human Rights Watch.

[186] Swedish Radio, *Ekot* Program, December 25, 2004.

[187] Human Rights Watch meeting with MFA officials, June 2, 2004, noted on file with Human Rights Watch.

[188] BBC Radio 4, *Today Programme*, [What would it mean for terrorist suspects if the government did get its Prevention of Terrorism Bill through parliament?], March 4, 2005, at 8:30 [online] http://www.bbc.co.uk/radio4/today/listenagain/zfriday_20050304.shtml (retrieved March 18, 2005).

able to state with absolute confidence that the diplomatic assurances have been honored. Apparently, the Swedish authorities cannot do so.[189]

A report released on March 22, 2005, by the Swedish Parliamentary Ombudsman, Mats Melin, leveled unusually harsh criticism at Swedish authorities for conducting an illegal operation in the course of expelling Agiza and al-Zari.[190] The report confirmed the presence at Bromma Airport of U.S. officials and operatives, some "in disguise."[191] It faulted the Swedish Security service and airport police for "display[ing] a remarkable subordinance to the American officials"[192] and "losing control of the situation"[193] thus relinquishing their responsibility to ensure that the men were treated in compliance with Swedish law and Sweden's obligations under the European Convention on Human Rights (ECHR).[194] The Ombudsman concluded that the men's treatment was inhumane and thus may indicate a violation of ECHR article 3.[195] Despite these findings of illegal criminal activity, the Ombudsman has not called for the prosecutions of the Swedish security service and police personnel involved in the illegal operation or possible violations of the ban on cruel, inhuman or degrading treatment or punishment.[196]

A separate investigation by the Committee on the Constitution regarding whether or not the expulsion operation violated Swedish constitutional law is currently underway.[197]

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[189] In an unfortunate turn of events, the European Court of Human Rights ruled in October 2004 that Mohammed al-Zari's application against Sweden (alleging, among other things, that Sweden violated its *nonrefoulement* obligation under article 3 of the European Convention on Human Rights) was inadmissible on a procedural technicality. The Court ruled that al-Zari had not submitted his application within a reasonable time after the alleged violation had occurred. The court did not rule on the substance of the alleged violation.

[190] Chefsjustitieombudsmannen Mats Melin, Avvisning till Egypten - en granskning av Säkerhetspolisens verkställighet av ett regeringsbeslut om avvisning av två egyptiska medborgare [Expulsion to Egypt: A review of the execution by the Security Police of a government decision to expel two Egyptian citizens], Reference Number: 2169-2004, March 22, 2005, copy on file with Human Rights Watch.

[191] Ibid., section 3.2.2

[192] Ibid.

[193] Ibid., section 3.3

[194] Ibid., section 3.2.2

[195] Ibid.

[196] Mattias Karen, "Security Police Broke Law Allowing Americans to Handle Extradition of Egyptians," *Associated Press*, March 22, 2005.

[197] The Committee on the Constitution is investigating whether or not the government violated Swedish constitutional law. NGOs have not been invited to make formal presentations before the Committee on the Constitution. Members of the Swedish parliament from six parties have called for an international investigation under the auspices of the OHCHR, as well as a full and independent domestic inquiry. For information regarding the four fundamental laws that comprise Swedish constitutional law, see http://www.riksdagen.se/english/work/constitution.asp.

In May 2005, the Committee against Torture is scheduled to decide Agiza's application in which he claims that Sweden violated Convention against Torture article 3 by sending him back to Egypt and risk of torture.

Human Rights Watch reiterates its call for an independent, international investigation of the actions of all three governments involved under the auspices of the U.N. High Commissioner for Human Rights.

The exchange below between an interviewer from Swedish Radio's *Ekot* program and Carl Henrik Ehrenkrona, chief legal adviser to the Swedish Ministry of Foreign Affairs, is instructive. The interviewer begins by asking Ehrenkrona about the allegations of mistreatment put forward by Ahmed Agiza to Swedish authorities at the first monitoring visit in January 2002. It appears that the Swedish authorities had fears that if they communicated allegations of mistreatment to United Nations bodies, including the Committee against Torture, they would put the men at even greater risk and possibly damage diplomatic relations with the Egyptians. The original Swedish is included for verification purposes against the English translation (E is for Ehrenkrona, I is for Interviewer):

[Rättschef Carl Henrik Ehrenkrona förklarar hur tankegångarna gick.

Director-General for Legal Affairs Carl Henrik Ehrenkrona explains what the train of thought was.]

E: Om man sprider den typen av uppgifter så bedömdes det att de också kunna skada honom själv och dessutom skada förhållandet till Egypten. Det handlade helt enkelt om att Agiza fortfarande var under utredning och om det då spreds obekräftade uppgifter om att han skulle ha sagt att han hade blivit torterad eller utsatt för omänsklig behandling så kunde det vara negativt för honom själv.

E: It was thought that if one spreads information of this kind then it might not only cause damage to him but in addition cause damage to the relationship with Egypt. It was quite simply about Agiza still being under investigation and that if unconfirmed information about him having said that he had been tortured or exposed to inhuman treatment was spread, then it could be negative for him.

I: Varför skulle det vara negativt för honom själv?

I: Why would it be negative for him?

E: Därför att man kunde inte veta hur det skulle hanteras av den egyptiska polisen.

E: Because one could not know how this would be handled by the Egyptian police.

I: Varför inte då?

I: Why is that?

E: Det kunde man inte veta i den situationen. Det finns alltid en risk och och det fanns ingen anledning att utsätta en person för den risken.

E: One could not know in that situation. There is always a risk and there was no reason to expose a person to that risk.

I: Men Sverige hade ju fått en garanti om att han inte skulle torteras?

I: But Sweden had received guarantees that he would not be tortured?

E: Sekretessregeln är en sak och den säger att när det gäller uppgifter om utlänningar som kan vara till skada för dem, så får sådana uppgifter inte lämnas ut, det är huvudregeln i sekretesslagen.

E: The confidentiality rule is one thing and it says that when it concerns information about foreigners, that may be harmful to them, then such information must not be revealed, this is the main rule in the Secrecy Law.

I: Men ni hade ju fått garantier av Egypten att han inte skulle torteras. Trodde ni inte på de garantierna?

I: But you had received guarantees from Egypt that he would not be tortured. Did you not believe the guarantees?

E: Det handlar ju inte bara om att han kunde torteras. Det kunde ju vara till men för honom på annat sätt.

E: The matter was not only that he might be tortured. It could be damaging to him in other ways.

I: Så det var för att skydda honom mot de egyptiska myndigheterna som man inte skulle berätta att han hade berättat att han hade blivit torterad?

I: So it was to protect him against the Egyptian authorities that one should not reveal that he had said that he had been tortured?

E: Och för att dessutom inte riskera att komma i svårigheter med Egypten genom att sprida obekräftade uppgifter av det slaget.

E: And in addition not to risk getting into difficulties with Egypt by spreading unconfirmed information of such nature.

Sveriges Radio: *Ekot* Program, December 10, 2004, transcript on file with Human Rights Watch

United Kingdom

Foreign Nationals Formerly Subjected to Indefinite Detention without Charge

The issue of diplomatic assurances has also arisen in the context of the United Kingdom's attempts to develop alternatives to the indefinite detention of foreign nationals suspected of terrorism-related activity. Britain's highest court, the Law Lords, ruled in December 2004 that the indefinite detention without charge or trial of foreigners suspected of terrorism was incompatible with the U.K.'s Human Rights Act and the European Convention on Human Rights.[198]

As a result of the Lords ruling, the U.K. government announced a "twin track" set of alternatives to indefinite detention,[199] including recourse to "control orders" limiting the movement and activities of any person, foreigner or national, who is suspected of terrorist-related activities, and the use of diplomatic assurances to deport to their home countries foreign nationals who would be at risk of torture or ill-treatment upon return. The remaining foreign nationals in indefinite detention were released in March 2005, and immediately subject to control orders under the Prevention of Terrorism Act 2005.[200]

In its written submission to the Law Lords in the indefinite detention case, the government claimed that it had been "exploring the possibility of removing foreign nationals to states where there are fears of Article 3 treatment [sic]…with a view to establishing memoranda of understanding which could provide sufficient safeguards to allow return."[201] Charles Clarke, U.K. Home Secretary, made specific reference to the government's on-going efforts to secure diplomatic assurances against torture when he

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[198] See, Human Rights Watch Press Release, "U.K.: Law Lords Rule Indefinite Detention Breaches Rights," December 16, 2004 [online] http://hrw.org/english/docs/2004/12/16/uk9890.htm (retrieved February 28, 2005). Human Rights Watch and numerous intergovernmental and nongovernmental organizations had roundly criticized the U.K. for the indefinite detention provisions of its 2001 Anti-Terrorism Crimes and Security Act (ATCSA), passed in the aftermath of the September 11 attacks on the United States. See Human Rights Watch Briefing Paper, "Neither Just nor Effective: Indefinite Detention without Trial in the United Kingdom under Part 4 of the Anti-Terrorism, Crime and Security Act 2001," June 24, 2004 [online] http://hrw.org/backgrounder/eca/uk/index.htm (retrieved February 28, 2005).

[199] See, Hansard (House of Common Debates), "Measures to Combat Terrorism," Statement of the Secretary of State for the Home Department (Mr. Charles Clarke), January 26, 2005, Column 307, [online] http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmhansrd/cm050126/debtext/50126-04.htm#50126-04_spmin0 (retrieved February 28, 2005).

[200] For Human Rights Watch's critique of these alternatives, see Human Rights Watch Briefing Paper, "Commentary on the Prevention of Terrorism Bill 2005," March 1, 2005 [online] http://hrw.org/backgrounder/eca/uk0305 (retrieved March 2, 2005).

[201] *A and Others v. Secretary of State for the Home Department*, Case for the Secretary of State [submission to House of Lords], September 13, 2004, p. 10, footnote 2.

announced the government's plans to replace indefinite detention to the House of Commons:

> [Regarding] deportation with assurances. As the House knows, we have been trying for some time to address the problems posed by individuals whose deportation could fall foul of our international obligations by seeking memorandums of understanding with their countries of origin. We are currently focusing our attention on certain key middle-eastern and north African countries. I am determined to progress this with energy. My noble friend [Foreign Office Minister] Baroness Symons of Vernham visited the region last week. She had positive discussions with a number of countries, on which we are now seeking to build.[202]

In late February 2005, it was reported that Baroness Symons had traveled to Algeria, Morocco, and Tunisia to negotiate agreements for the return of terrorist suspects from the U.K. to those countries.[203] The U.K. government acknowledges that the men formerly held in indefinite detention would be at risk of torture if they were to be returned to their countries of origin.[204] In addition to their individual risk, the men come from countries where torture is a serious endemic problem. In some countries—Egypt, for example—torture is systematic. In other countries—Algeria, Morocco, and Jordan—persons suspected of terrorist activity or labeled as such are specifically targeted for abusive treatment, including torture. All of the countries routinely violate their international human rights obligations.

The process by which the U.K. will go about seeking and securing diplomatic assurances, and what procedural guarantees persons subject to return based on assurances will enjoy, remains unclear. In November 2004, the U.N. Committee against Torture expressed its concern at "the State party's [U.K.] reported use of diplomatic assurances in the 'refoulement' context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees followed [sic], are not wholly clear…"[205] The Committee requested that within one year, the U.K. provide it "with details on how many cases of extradition or removal subject to receipt of diplomatic assurances or

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[202] Hansard (House of Common Debates), "Measures to Combat Terrorism," Statement of the Secretary of State for the Home Department (Mr. Charles Clarke), January 26, 2005], Column 307.

[203] Nick Fielding, "Foreign Office in Talks to Deport Terror Suspects," *The Sunday Times (London)*, February 27, 2005, p. 8.

[204] All the men are subject to deportation orders in the U.K., and would have already been deported if it were not for the U.K.'s obligations under article 3 of the ECHR.

[205] See, Committee against Torture, "Conclusions and Recommendations: Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland," CAT/C/CR/33/3, December 10, 2004, section 4(d) [online] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.33.3.En?OpenDocument (retrieved March 2, 2005).

guarantees have occurred since 11 September 2001, what the State party's minimum contents are for such assurances or guarantees and what measures of subsequent monitoring it has undertaken in such cases."[206]

The government of the U.K. has openly acknowledged that all the men formerly subjected to indefinite detention are at risk of torture upon return. That admission led to the men's detentions in the first place; the U.K. authorities knew they could not derogate from the U.K.'s *nonrefoulement* obligation—and nothing has changed since then. Most of the governments in the detainees' home countries have a long history of practicing torture and there is a significant risk that the men will be tortured if they are returned, whatever promises their home governments may offer.[207]

Case of Hani El Sayed Sabaei Youssef and Others

The U.K. government first proposed the use of assurances to deport suspected terrorists at risk of torture in their home countries in a February 2004 Home Office consultation paper. The paper claimed that the purpose of diplomatic assurances, termed "framework agreements," is "to protect the deportees' human rights following departure from the U.K."[208] Closer inspection of the U.K.'s record of seeking and securing assurances for returns to risk of torture, however, indicates that a detainee's safety post-return has not been a primary consideration. The July 2004 case of *Hani Youssef v. Home Office* offers an account of the sheer determination of the Prime Minister to send Mr. Youssef and three others to Egypt, despite clear evidence that their transfers, assurances included, would violate the U.K.'s *nonrefoulement* obligation.[209]

The High Court decision of July 2004 held that Mr. Youssef had been unlawfully detained after it was clear to the authorities that there was no possibility to return him to Egypt in conformity with the U.K.'s *nonrefoulement* obligation. The ruling revealed numerous disturbing details regarding the British government's attempts throughout 1999 to deport the men, all asylum seekers determined to have had a well-founded fear

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[206] Ibid., Section 5(i).

[207] Human Rights Watch Press Release, "U.K.: Promises on Torture Don't Work," [online] http://hrw.org/english/docs/2004/10/06/uk9459.htm (retrieved February 28, 2005). See also, Human Rights Watch Briefing Paper, "Commentary on the Prevention of Terrorism Bill 2005," pp. 9-11.

[208] Home Office Discussion Paper, "Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society," para. 38, February 2004 [online] http://www.homeoffice.gov.uk/docs3/CT_discussion_paper.pdf (retrieved February 28, 2005).

[209] *Hani El Sayed Sabaei Youssef and The Home Office*, Case No: HQ03X03052, 2004 EWHC 1884 (QB), July 30, 2004 [online] http://www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home_office.htm (retrieved February 28, 2005). For an excellent summary of the *Youssef* case, see Migration News Sheet, (Brussels: Migration Policy Group), December 2004, at pp. 13-14. See also, Statewatch, "U.K. Egyptian National 'Unlawfully Detained' after Intervention by Prime Minister," August-October 2004 [online] http://www.statewatch.org/news/2004/nov/03blair.htm (retrieved February 28, 2005).

of persecution should they be returned to Egypt.[210] The men were suspected of membership in al-Jihad al-Islamiya and involvement in terrorism-related activities. Most alarming was the repeated insistence of Prime Minister Tony Blair that diplomatic assurances against the torture of Mr. Youssef that might be sought from Egypt should be taken at face value based simply on Egypt's accession to the Convention against Torture and the fact that torture was prohibited under Egyptian law. Blair advocated that an entire package of assurances be narrowed down to one—a simple promise by the Egyptians not to torture the men upon return.[211]

Prime Minister Blair's eagerness to accept such guarantees—which, in the end, the Egyptian authorities refused to offer—was remarkable not only because of Egypt's proven record of systematic torture, but also because legal advisors in the Home Office (Interior Ministry) and Foreign and Commonwealth Office (FCO) repeatedly advised the Prime Minister that seeking and accepting such guarantees would clearly violate the U.K.'s obligations under article 3 of the European Convention on Human Rights. In a February 1999 memo, the Home Office warned that "there are a number of factors which suggest that assurances [from Cairo] would do little or nothing to diminish the Article 3 risk:"

> The main problem is that the Egyptian authorities' record in the treatment of political opponents is, by any standards not good…In particular as you will see, abuse and torture are widespread despite the prohibition by the constitution of infliction of physical harm upon those arrested or detained. My first question therefore is whether in the face of this evidence, the Home Secretary might reasonably conclude that assurances from the Egyptians could be sufficiently authoritative and credible to diminish the Article 3 risk sufficiently to make removal to Egypt a realistic option.[212]

Despite this early and correct assessment (and continuing reservations by the Home Office about the dubious legality of deporting the men), the Prime Minister personally intervened on numerous occasions throughout 1999 (for example, in April, May and June) in an attempt to have the Home Office secure assurances from the Egyptian

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[210] Ibid., para. 8: The men "submitted plausible claims of harassment and torture at the hands of the Egyptian authorities. In refusing their applications we acknowledge that theirs were cases where the Secretary of State *might ordinarily have granted asylum.*" [emphasis in original High Court decision]

[211] Ibid., para. 38: "The Prime Minister's view is that we should now revert to the Egyptians to seek just one assurance, namely that the four individuals, if deported to Egypt, would not be subjected to torture. Given that torture is banned under Egyptian law, it should not be difficult for the Egyptians to give such an undertaking."

[212] Ibid., para. 8.

authorities. In a letter dated April 19, 1999, the Prime Minister's Private Secretary wrote: "In general, the Prime Minister's priority is to see these four Islamic Jihad members returned to Egypt. We should do everything possible to achieve it."[213]

The *Youssef* judgment includes details regarding negotiations with the Egyptian authorities, including that the Egyptians refused a number of assurances originally proposed by the U.K. to ensure respect for the men's right to be free from torture, and to have a fair trial and full procedural rights. In the midst of the exchanges, the Prime Minister's private secretary wrote that, "He [the Prime Minister] believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chance in the courts."[214]

The inherent weaknesses of post-return monitoring notwithstanding (see section above), the Prime Minister was even willing to forgo a weak assurance that the men's safety would be monitored after return: "There is no obvious reason why British officials need to have access to Egyptian nationals held in prison in Egypt, or why the four should have access to a UK-based lawyer. Can we not narrow down the list of assurances we require?"[215]

In the end, the Egyptian authorities refused to permit Mr. Youssef and the other men access to British officials once returned or to U.K.-based lawyers. The Foreign and Commonwealth Office (FCO) reported:

> In the FCO's view there was no alternative to access by British officials. The ICRC had a permanent presence there but had been refused access to prisoners; it would not visit particular prisoners without a general agreement allowing it access to all prisoners and would not get involved in any process which could in any way be perceived to contribute to, facilitate, or result in the deportation of individuals to Egypt.[216]

The *Youssef* case illustrates an alarming disregard for the U.K.'s international and regional treaty obligations when seeking to remove from its territory foreign nationals suspected of terrorism. It depicts the very "end run" around the *nonrefoulement* obligation that Human Rights Watch has warned against in its reporting on diplomatic assurances.

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[213] Ibid., para. 20.
[214] Ibid., para. 38.
[215] Ibid., para. 18.
[216] Ibid., para. 26.

Prime Minister Blair's imperative to "get them back" signals a single-minded purpose: to remove the men at whatever cost, including threats to their fundamental human rights.[217] Securing the men's most fundamental human rights was not the purpose of attempts to secure diplomatic assurances. The assurances were simply a way of gaining "cover" should the government be questioned about violating the absolute ban on torture and *refoulement*.[218]

In the end, Hani Yousef and the three other men were not deported because the Egyptian authorities were unwilling to proffer the assurances, not because the U.K. government was unwilling to accept such inherently unreliable assurances.

The Netherlands

Case of Nuriye Kesbir

Diplomatic assurances from Turkey were the subject of a court decision in The Netherlands in January 2005. An appeals court there ruled on January 20, 2005 against the extradition of a woman who was an official of the Kurdish Workers' Party (PKK, now known as Kongra-Gel). The court concluded that diplomatic assurances could not guarantee that she would not be tortured or ill-treated upon return to Turkey.

Nuriye Kesbir, a PKK official and minority Yezidi Kurd, was subject to an extradition warrant from Turkey alleging that she had committed war crimes as a PKK military operative during the time she fought in the civil war in Turkey's southeast. In May 2004, a Dutch court determined that although her fears of torture and unfair trial in Turkey were not completely unfounded, there were insufficient grounds to halt the extradition. The court gave exclusive authority to the government to either grant or reject the extradition request, but advised the Dutch Minister of Justice to seek enhanced diplomatic assurances against torture and unfair trial from Turkey.[219]

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[217] The Prime Minister wrote "Get them back" across one letter from the Home Office informing the U.K. of the Egyptian authorities' negative response to on-going attempts to secure assurances. Ibid., para. 15.

[218] The case of Metin Kaplan, a radical Muslim cleric, is also instructive. Kaplan, labeled a threat to national security, was deported from Germany to Turkey in October 2004. In May 2003, however, a German court halted his extradition based on human rights concerns, including the insufficiency of diplomatic assurances against torture and unfair trial from the Turkish authorities. In response to the judgement, the German authorities vowed that they would find a way to remove Kaplan and sought enhanced assurances from the Turkish government. See *"Empty Promises,"* pp. 31-32. Kaplan lost a series of legal challenges to his subsequent deportation, but the German government justified Kaplan's removal by claiming that it had secured written assurances from the Turkish Foreign and Justice Ministries that Kaplan would get a fair trial. See "German Interior Ministry: 'Turkey Assured Us of Kaplan's Fair Trial,'" *Andalou Agency*, October 13, 2004 and Richard Bernstein, "Germany Deports Radical Long Sought by Turks," *New York Times*, October 13, 2004. Kaplan was taken into custody immediately upon return to Turkey. His trial on terrorism-related charges commenced in Turkey in December 2004 but was adjourned the same month until April 2005.

[219] *Advies inzake N. Kesbir*, Hoge Raad der Nederlanden, EXU 2002/518, 02853/02/U-IT, May 7, 2004, copy on file with Human Rights Watch. The Turkish authorities had offered written assurances in February 2004, but the

Turkey's Record of Abuse

Numerous human rights bodies, including the U.N. Special Rapporteur on Torture,[220] intervened with the Dutch government on behalf of Kesbir. In three separate letters to the Dutch Minister of Justice, Human Rights Watch argued that torture in Turkey continues, affecting PKK detainees in particular; the Turkish authorities had not developed and implemented effective supervisory mechanisms to ensure that law enforcement officers on the ground—police, in particular—were observing recent legal reforms; and that as a woman, Kesbir would be at increased risk of torture and ill-treatment in the form of sexual violence.[221] Human Rights Watch also argued that any assurances from Turkey allegedly guaranteeing Kesbir's safety could not be trusted:

> [T]orture and ill-treatment persist in Turkey—especially in cases where a detainee has been labeled a suspected terrorist—despite some recent improvements in law and practice. Torture continues as a result of Turkey's negligence in supervising and monitoring compliance with legal safeguards to prevent torture; indeed, such monitoring systems are either moribund or do not exist at all. As a result, Turkish authorities do not maintain effective control over those persons—police, gendarmes, and security forces—primarily responsible for on-going acts of torture in Turkey. Diplomatic assurances from Turkish officials that Ms. Kesbir would not be tortured or ill-treated could not be relied upon because the authorities offering such guarantees have not developed systems that actually control and hold accountable those forces that perpetrate such abuses.
>
> Continuing irregularities in the system, such as denial of lawyers' access to detainees, failure to inform detainees' families of detentions, and problems with accessing and authenticating medical reports indicate a lack of transparency that undermines the reliability of any assurances that a person will not be tortured or ill-treated…In the face of such irregularities and continuing governmental passivity, diplomatic

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Supreme Court did not deem them sufficient. Letter from Consular Affairs Department, Legal Consular Affairs Division, Ministry of Foreign Affairs of the Netherlands to the Embassy of Turkey, Reference No. CJ/GJ-04/299, May 19, 2004, copy on file with Human Rights Watch.

[220] The Special Rapporteur on Torture sent an urgent and confidential communication calling on the Dutch authorities to secure "unequivocal guarantees," including a plan for effective and adequate post-return monitoring in the event that Kesbir were to be extradited.

[221] See, Human Rights Watch Letters to Piet Heit Donner, Dutch Minister of Justice, in the matter of Nuriye Kesbir, dated May 24, 2004 [online] http://www.hrw.org/english/docs/2004/05/24/turkey10316.htm (retrieved March 18, 2005); October 28, 2004 [online] http://www.hrw.org/english/docs/2004/10/28/turkey10317.htm (retrieved March 18, 2005), and December 17, 2004 [online] http://www.hrw.org/english/docs/2004/12/17/turkey10318.htm (retrieved March 18, 2005).

assurances from the Turkish authorities that Ms. Kesbir would not be tortured would be inherently unreliable.[222]

Turkey's Assurances

In response to the May court decision, the Dutch authorities sought and received an additional letter of guarantee from the Turkish authorities stating that: "[T]here should be no question as to Turkey's adherence to its obligations emanating from the international instruments that she is party to on issues that the Supreme Court has expressed its sensitivity."[223] Apparently not satisfied with this response, the Dutch authorities requested an explicit confirmation that the rights deriving from Turkey's human rights obligations be guaranteed in the specific case of Ms. Kesbir.[224] In a terse reply, the Turkish authorities complained that the Dutch authorities' request for additional guarantees specific to Ms. Kesbir were "rather redundant and unnecessary," but that "there should not be any doubt that she will receive a fair trial under the guarantee of the ECHR and enjoy the full rights emanating from the said Convention."[225]

On September 7, 2004, the Dutch Minister of Justice decided to order Kesbir's extradition based on the assurances. Kesbir immediately appealed and requested the Dutch Minister of Justice to justify the extradition decision in light of human rights concerns, including the reliability of Turkey's assurances against torture and unfair trial. On November 8, 2004, a Dutch court halted Kesbir's extradition. The court concluded that, despite some reforms, Turkey continued to breach human rights, and that the Dutch authorities should not have accepted as sufficient the general assurances offered by the Turkish authorities.

The Dutch government appealed, producing one additional assurance from the Turkish authorities stating that "Ms. Kesbir will be brought before the Turkish Court without delay in accordance with relevant laws and have the unimpeded right of access to her lawyers when extradited to Turkey."[226] Human Rights Watch wrote in a December 2004 letter to Piet Hein Donner, Dutch minister of justice:

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[222] Human Rights Watch Letter to Piet Hein Donner, May 24, 2004.

[223] Letter from Embassy of Turkey to the Dutch Ministry of Foreign Affairs, Reference No. 2004/Lahey BE/7356, May 25, 2004, copy on file with Human Rights Watch.

[224] Letter from Consular Affairs Department, Legal Consular Affairs Division, Ministry of Foreign Affairs of the Netherlands to the Embassy of Turkey, Reference No. CJ/CG-04/399, July 12, 2004, copy on file with Human Rights Watch.

[225] Letter from Embassy of Turkey to the Dutch Ministry of Foreign Affairs, Reference No. 184, July 26, 2004, copy on file with Human Rights Watch.

[226] Letter from Embassy of Turkey to the Dutch Ministry of Foreign Affairs, Reference No. 2004/Lahey BE/15949, November 18, 2004, copy on file with Human Rights Watch.

> [The assurances from Turkey] are so vague as to render them virtually meaningless. They merely paraphrase what is clearly provided for in existing Turkish law. The promise to facilitate Ms. Kesbir's appearance before a judge [upon return] has little or no bearing on what treatment she will receive at the hands of law enforcement officers once she is in detention, particularly given the absence of supervision of these officers for acts or torture and ill-treatment.[227]

High Court Halts Extradition: Assurances not Sufficient

On January 20, 2005, the Dutch high court concluded that "torture in Turkey is not a thing of the past" and that Kesbir, as a woman and prominent PKK member, could not be extradited because she would be at increased risk of torture during her detention in Turkey.[228] Regarding the general assurances from Turkey, the court held:

> [I]n view of the real risks that she [Kesbir] runs, there can only be a question of adequate assurances if concrete guarantees are given that the Turkish authorities will ensure that during her detention and trial, [Kesbir] will not be tortured or exposed to other humiliating practices by police officers, prison staff or other officials within the judicial system. None of the aforementioned assurances meets this requirement. These assurances imply no more than that [Kesbir] will be treated in accordance with the applicable human rights conventions and Turkish law. So not only do these assurances add nothing to the situation that would have prevailed without them…but they do not offer any solace for the above-mentioned problem that these laws and conventions apparently are not enforced at all times and in every respect.[229]

Nuriye Kesbir was released from custody on January 20, 2005. The Dutch government, however, appealed the High Court ruling halting her extradition to the Dutch Supreme Court (Hoge Raad). At the time of writing, Kesbir's asylum process had been suspended pending the outcome of the Supreme Court appeal.

The Kesbir decision comes at an important time in the history of Turkish-European Union (E.U.) relations. Turkey periodically seeks the extradition of Kurdish political

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[227] Letter from Human Rights Watch to Piet Hein Donner, December 17, 2004.

[228] *De Staat der Nederlanden (Ministerie van Justitie) tegen N. Kesbir*, Het Gerechtshof's Gravenhage, LJN: AS3366, 04/1595 KG, January 20,2005.

[229] Ibid., para. 4.4 (unofficial English translation on file with Human Rights Watch).

activists, former PKK operatives and officials, and Islamic militants in exile in Europe.[230] Governments of member states—particularly those in favor of Turkey's accession to the E.U.—inclined toward honoring these extradition requests must take into consideration the continuing use of torture and ill-treatment against Kurds and PKK members, and the individual circumstances of any person subject to return to Turkey.[231] In doing so, E.U. member states must comply with their absolute obligation not to send any person, no matter what their past crimes or current status, to a country where she or he would still face a risk of torture and ill-treatment.

Austria

Case of Akhmed A.

The acceptance of general assurances of protection against torture was also an issue in the case of Akhmed A., a citizen from Russia's southern republic of Dagestan, extradited in February 2004 from Austria to Russia.[232] The case also raises the troubling issue of the nexus between extradition and asylum as A. was extradited while his asylum claim in Austria was still pending.

Akhmed A. applied for asylum in Austria in February 2001, claiming that he would suffer persecution if returned. The claim was based on his ethnic origin (Kumücke) and prior ill-treatment suffered in detention in Moscow in 1995 based on accusations that he had assisted Chechen rebels while working for the police in Dagestan near the Chechen border.[233] His first claim was denied in June 2001, but A. lodged an appeal with the Independent Federal Asylum Review Board. In May 2003, while that appeal was still pending, Austrian authorities detained A. based on a Russian extradition request to face charges of abducting members of the Russian military and illegal weapons possession.[234]

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[230] See, for example, appeal on behalf of Remzi Kartal from Human Rights House, Oslo, Norway [online] http://www.humanrightshouse.org/dllvis5.asp?id=2956 (retrieved February 28, 2005). Kartal, an official of Kongra-Gel, was detained in Germany in January 2005 pending an extradition request from Turkey. Kartal was released from custody on March 1, 2005, after a court determined that the Turkish authorities had not produced documentation to support the extradition request. See BBC Monitoring Service (Europe), "Kurdish Activist Kartal Released from German Prison," March 2, 2005 [Excerpt from report by German-based Kurdish newspaper *Ozgur Politika* based on report from Mesopotamia News Agency's Tulay Balci, "Abandon Policies Indexed to Turkey" March 2, 2005].

[231] See footnote above regarding the case of Metin Kaplan, deported from Germany to Turkey in October 2004. In the aftermath of Kaplan's deportation to Turkey for trial on terrorism-related charges, the *Aksam* newspaper hailed the transfer as "A great gesture from Germany to Turkey as it tries to enter the E.U." See Baris Atayman, "Turk Court Charges Cleric Extradited by Germany," *Reutuers*, October 13, 2004.

[232] Akhmed A. remains in detention and there have been claims of torture and ill-treatment. In order to maintain some measure of confidentiality, Human Rights Watch uses his first name only as an identifier.

[233] Human Rights Watch is grateful to Andrea Huber of Amnesty International Austria for her assistance with gathering information regarding the A. case. The factual information in this section, unless otherwise noted, comes from AI Austria's dossier on the case.

[234] See, Amnesty International, "Europe and Central Asia: Summary of Concerns in the Region, January-June 2004," September 1, 2004 [online] http://web.amnesty.org/library/Index/ENGEUR010052004?open&of=ENG-

During the extradition proceedings, a Vienna court acknowledged that A. was at risk of torture and ill-treatment if returned to Russia, but held that the risk was mitigated because the Russian authorities gave diplomatic assurances that he would be fairly treated.[235] According to Amnesty International, the assurances were included in a letter from the Procurator General to the Austrian Ministry of Justice and stated simply:

> We affirm that according to the norms of international law, all the rights required to present a defense will be available to Mr. A.; and he will not be subjected to torture, cruel, inhuman or degrading treatment or punishment (Article 3 ECHR and equivalent conventions of the United Nations, the Council of Europe and amending protocols).[236]

The court ordered that A.'s extradition could commence. His lawyers lodged an urgent appeal with the European Court of Human Rights, requesting that the court communicate an order for interim measures enjoining the Austrian authorities from extraditing A. until the court had an opportunity to review his application. Without explanation, the European Court declined to communicate a request for interim measures and A. was extradited to Russia on February 24, 2004.

A. is currently in detention in Dagestan. Amnesty International has expressed concern regarding inadequate monitoring of A. post-return.[237] The International Committee of the Red Cross has made one visit to A. in detention, but due to its confidentiality policy, cannot reveal its findings.[238] Thus, there is no independent, transparent mechanism to ensure that the Russian authorities are complying with the general assurances they proffered.

The fact that A.'s appeal on his asylum claim was still pending at the time of his extradition is a troubling feature of this case. According to Austrian asylum law, expulsion and deportation are not permitted during any stage of a pending asylum procedure. The Austrian Ministry of Justice, however, has determined that since the law does not expressly include the word "extradition," transfers resulting from an extradition procedure in the course of an asylum procedure are permissible. This interpretation runs

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AUT (retrieved February 28, 2005). See also, ITAR-TASS News Agency, "Russia Obtains Extradition from Austria of Soldiers' Kidnapping Suspect," February 24, 2004.

[235] The Vienna Higher Regional Court (Oberlandesgericht).

[236] Translation provided by Amnesty International Austria.

[237] Amnesty International, "Europe and Central Asia: Summary of Concerns in the Region, January-June 2004," September 1, 2004.

[238] ICRC Letter [confirming A.'s registration with the organization and the one visit to him], July 23, 2004, copy on file with Human Rights Watch.

contrary to the United nations High Commissioner for Refugees' (UNHCR) conclusion that "in general, a refugee claim must be determined in a final decision before execution of any extradition order."[239] Otherwise, the extraditing state runs the risk of breaching the *nonrefoulement* obligation. As one analyst has emphasized:

> Where an extradition request concerns an asylum seeker, the requested state will not be in a position to establish whether extradition is lawful unless the question of refugee status is clarified. The determination of whether or not the person concerned has a well-founded fear of persecution must therefore precede the decision on extradition. This does not of itself require the suspension of the extradition procedure. It does mean, however, that the decision on extradition should be made after the final determination on refugee status, even if extradition and asylum procedures are conducted in parallel.[240]

Certainly, once a person has been recognized as a refugee, extradition can be refused on the grounds that it would breach the *nonrefoulement* obligation (to which the only narrow exception in the Refugee Convention is article 33(2)). Furthermore, the absolute prohibition against the risk of torture remains a crucial ground for denial of an extradition request.

In A.'s case, the Austrian authorities relied on two ineffective and inadequate devices to circumvent their *nonrefoulement* obligation under international refugee and human rights law. First, in the course of the extradition proceedings, the Austrian court accepted woefully inadequate assurances from the Russian authorities as an alleged safeguard against A.'s risk of torture. The diplomatic assurances proffered by the Russian Procurator General simply reiterated Russia's existing legal obligations, which A. claimed the Russian authorities violated the first time they detained and ill-treated him. The Russian assurances thus cannot be considered an effective safeguard against torture and ill-treatment.

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[239] United Nations High Commissioner for Refugees, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," para. 102 [online] http://migration.ucdavis.edu/rs/printfriendly.php?id=130_0_3_0 (retrieved March 2, 2005).

[240] Sibylle Kapferer, *The Interface between Extradition and Asylum*, Legal and Protection Policy Research Series, Department of International Protection, United Nations High Commissioner for Refugees, PPLA/2203/05, November 2003, para. 291 [online] http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&id=3fe84fad4&page=protect (retrieved March 1, 2005).

Second, the Austrian authorities determined that A.'s asylum procedure was not an impediment to extradition. This closed off yet another avenue for A. to have his claims of fear of persecution, including risk or torture and ill-treatment, fully considered in Austria. In the end, A. was extradited to Russia without a full and fair asylum determination proceeding, in violation of his right to seek asylum—and on the basis of inadequate diplomatic assurances in violation of his right not to be sent back to a place where he would be at risk of torture or ill-treatment.

Turkey

Update: Mamatkulov and Askarov v. Turkey

In February 2005, the European Court of Human Rights' Grand Chamber issued a decision in the case of *Mamatkulov and Askarov v. Turkey*.[241] The two men were extradited from Turkey to Uzbekistan in 1999 based on assurances against torture and unfair trial from the Uzbek authorities. The men were transferred to Uzbekistan despite a request to the Turkish authorities from the European Court of Human Rights to delay the extraditions until the court had an opportunity to review the men's applications. The men's applications to the court alleged, among other things, that Turkey violated the ban on *refoulement* under article 3.

It was anticipated that the Grand Chamber might rule on the reliability and/or sufficiency of diplomatic assurances against torture from the government of Uzbekistan,[242] but the court determined that it did not have sufficient information before it to rule that article 3 of the ECHR had been violated.[243] The court did not engage in a discussion of the reliability or sufficiency of the assurances.

The decision was a landmark ruling, nonetheless, because it concluded that the European Court's request to Turkey to delay the men's extraditions was binding on Turkey. In the *Mamatkulov* case, the court determined that Turkey violated article 34, the right to individually petition the court, when its authorities ignored the court's request to stay the extraditions to Uzbekistan of Mamatkulov and Askarov pending the court's examination of their applications.

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[241] See, *"Empty Promises"*, pp. 26-29.

[242] See Human Rights Watch and AIRE Center, *Amicus Curiae* Brief to the European Court of Human Rights in the Case of *Mamatkulov and Askarov v. Turkey*, January 28, 2004 [online] http://hrw.org/backgrounder/eca/turkey/eu-submission.pdf (retrieved March 13, 2005).

[243] European Court of Human Rights Judgment, *Mamatkulov and Askarov v. Turkey*, February 4, 2005 [online] http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=mamatkulov&sessionid=1559995&skin=hudoc-en (retrieved March 20, 2005).

Recommendations

To All Governments

- Reaffirm the absolute nature of the obligation under international law not to expel, return, extradite, or otherwise transfer any person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or cruel, inhuman, or degrading treatment or punishment (prohibited ill-treatment).

- Prohibit reliance upon diplomatic assurances against torture and ill-treatment if any of the following circumstances prevail in the receiving country:
  - there is substantial and credible evidence that torture and prohibited ill-treatment in the receiving country are systematic, widespread, endemic, or recalcitrant or persistent problems;
  - governmental authorities do not have effective control over the forces in their country that perpetrate acts of torture and prohibited ill-treatment;
  - the government consistently targets members of a particular racial, ethnic, religious, political or other identifiable group for torture or prohibited ill-treatment and the person subject to transfer is associated with that group;
  - in any case where there is a risk of torture or prohibited ill-treatment upon return directly related to a person's particular circumstances.

- Ensure that any person subject to transfer has the right prior to removal to challenge its legality before an independent tribunal. Any legal review must include an examination of the reliability of any diplomatic assurances provided by the receiving country. Persons subject to transfer must have access to an independent lawyer and a right of appeal with suspensive effect.

- Include in required periodic reports to the Committee against Torture, the Human Rights Committee, and other relevant international and regional monitoring bodies detailed information about all cases in which requests for diplomatic assurances against the risk of torture or other cruel, inhuman, or degrading treatment have been sought or secured in respect of a person subject to transfer.

To the Government of the United States:

- Cease accepting diplomatic assurances against torture to justify "renditions" on human rights grounds. Halt immediately the practice of rendering alleged terrorism suspects (via extradition, removal, or any other form of transfer) to countries where torture is a serious human rights problem. No such transfers should be effected from U.S. territory, diplomatic premises, or military bases, including from the U.S. Naval Base at Guantánamo Bay, Cuba. The U.S. government and all its agencies should not order, participate in, or facilitate such transfers under any circumstances from the territories of other countries.

- Reform U.S. law and policy to reflect a firm commitment to the government's obligations under the Convention against Torture, including prohibiting the seeking and securing of diplomatic assurances for any transfer (rendition, extradition, removal, or any other transfer from custody, including from Guantánamo Bay) of any person to a country where there are substantial grounds for believing that such person would be in danger of being subjected to torture or cruel, inhuman, or degrading treatment or punishment.

- Repeal 8 C.F.R. §208.18(c) [Diplomatic Assurances against Torture by the Secretary of State], which provides for reliance upon diplomatic assurances against torture to remove from United States territory persons raising claims under the Convention against Torture in immigration proceedings without an effective opportunity to challenge the assurances in an independent judicial forum.

- Provide all persons subject to transfer (rendition, extradition, removal, or other transfer from custody, including from Guantánamo Bay) the ability to challenge the legality of the transfer, including the reliability of any diplomatic assurances, for compliance with the U.S.'s obligations under the Convention against Torture. The procedure governing such challenges should be specified in law and should provide for review in an independent forum prior to transfer.

- Cooperate in a full and transparent manner with the Canadian Commission of Inquiry into the Maher Arar case. Release information regarding interactions between U.S. and Canadian officials on this case and regarding the diplomatic assurances against torture secured by the U.S. government from the Syrian authorities, including the text of the assurances.

- Disclose information relevant to the Maher Arar case for scrutiny in his federal lawsuit against the U.S. government officials responsible for his transfer to Syria.

- Ensure that the "state secrets privilege" is not abused to limit court access to any information relevant to the assessment of the risk of torture or ill-treatment that a person might be subjected to upon transfer to another country.

- Support the establishment by the U.N. High Commissioner for Human Rights (OHCHR) of an international, independent inquiry into the cases of Ahmed Agiza and Mohammad al-Zari to investigate the respective roles of the Swedish, U.S., and Egyptian governments in possible human rights violations against the men. Cooperate in a full and transparent manner with any such international inquiry under the auspices of the OHCHR.

- Submit as a matter of urgency the U.S. government's long overdue state report to the Committee against Torture including, but not limited to, detailed information regarding all cases where the U.S. government has ordered, participated in, or otherwise facilitated the transfer of a person to any country based on diplomatic assurances against torture.

- Enact legislation currently pending in the United States Senate (S. 654) and House of Representatives (H.R. 952) that prohibits the practice of rendition to torture and reliance upon diplomatic assurances to effect transfers to countries where torture is a serious human rights problem.

To the Government of Canada:

- Repeal as a matter of urgency Division 9 (sections 76-87) of the Immigration and Refugee Protection Act (IRPA), providing for the use of security certificates authorizing the government to detain and deport, based on secret evidence presented in *ex parte* hearings and without procedural guarantees, persons determined to be an imminent danger to Canada's security, including potentially effecting such transfers to countries where a person would be at risk of torture or ill-treatment.

- Reform Canadian law and policy to reflect a firm commitment to Canada's obligations under the International Convenant on Civil and Political Rights, Convention against Torture, and the fundamental legal freedoms enshrined in

sections 7-15 of the Canadian Charter of Rights and Freedoms, which prohibit arbitrary detention or imprisonment; provide internationally recognized procedural guarantees upon arrest and detention; guarantee freedom from torture and ill-treatment, including deportation to risk of such abuse; and prohibit discrimination.

- Prohibit reliance upon diplomatic assurances against torture or ill-treatment for the transfer of any person, no matter what his or her status, to a country where he or she is at risk of torture or ill-treatment, in accordance with the Canadian Charter of Rights and Freedoms and the Convention against Torture.

- Assure in the upcoming Canadian state report to the Committee against Torture for the May 2005 CAT session that the government of Canada will strictly observe in practice the absolute ban under article 3 of the convention on sending a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman, or degrading treatment or punishment. Reform Canadian law accordingly.

- Submit detailed documentation to the Committee against Torture regarding any cases where the Canadian government has sought and secured diplomatic assurances against torture in order to expel, return, extradite, or otherwise transfer a person to a country where he or she would be at risk of such abuse.

To the Government of Sweden:

- Hold accountable all those security service and law enforcement officials who had decision-making authority or who participated in the transfers of Ahmed Agiza and Mohammad al-Zari as documented in the Parliamentary Ombudsman's March 2005 report, which concluded that the operation effecting the men's transfers was illegal and that the treatment the men were subjected to may have violated article 3 of the European Convention on Human Rights. Implement the recommendations in the Ombudsman's report to ensure that such illegal operations do not recur on Swedish territory.

- Reform the Swedish law to provide all persons subject to expulsion, return, extradition, or other transfer from Sweden with an effective opportunity prior to transfer to challenge the legality of the transfer, including the reliability of any diplomatic assurances against torture or cruel, inhuman, or degrading treatment or punishment, in an independent judicial forum with full procedural guarantees and the right to appeal.

- Cooperate in a full and transparent manner with the Committee against Torture in its May 2005 review of the individual application of Ahmed Agiza. Cooperate as well with any reviews of the men's cases by other U.N. human rights bodies, including the Human Rights Committee.

- Seek the good offices of the U.N. High Commissioner for Human Rights (OHCHR) in establishing an international, independent inquiry into the cases of Ahmed Agiza and Mohammad al-Zari to investigate the respective roles of the Swedish, U.S., and Egyptian governments in possible human rights violations against the men. Cooperate in a full and transparent manner with any such international inquiry under the auspices of the OHCHR.

- Establish a concomitant independent, comprehensive, and transparent national inquiry into the cases of Ahmed Agiza and Mohammad al-Zari as requested by members of six of the political parties represented in the Swedish parliament.

- Cooperate in a full and transparent manner with the ongoing investigation of the Committee on the Constitution into possible violations of Swedish constitutional law that may have occurred in the course of the transfers of Ahmed Agiza and Mohammad al-Zari.

- Press the Egyptian authorities to grant Ahmed Agiza a fresh trial in a civilian court subject to full procedural guarantees.

- Press the Egyptian government to end all restrictive measures aimed at prohibiting Mohammad al-Zari from moving freely within Egypt or leaving the country in recognition of the fact that Egyptian authorities have declared that he is not suspected of any crime and released him from detention in October 2003. Press the Egyptian authorities to ensure that al-Zari is not prohibited in any way, including by threats or harassment of him or his family members, from making complaints about the handling of his case and his treatment in detention before national and international bodies.

To the Government of the United Kingdom:

- Halt immediately all negotiations with the governments of Algeria, Tunisia, Morocco, and any other countries on "framework agreements" and diplomatic assurances in relation to torture or cruel, inhuman, or degrading treatment, designed

to facilitate the deportation of foreign nationals suspected of terrorism. Such persons include those foreign nationals currently subject to control orders under the Prevention of Terrorism Act 2005 and acknowledged by the U.K. government to be at risk of torture if returned to their home countries.

- Submit to the Committee against Torture within one year the details of all cases in which the U.K. authorities have sought or secured diplomatic assurances against torture in its efforts to deport or otherwise transfer terrorist suspects. Such reporting was requested in the Committee's 2004 Recommendations and Conclusions on the U.K.'s Fourth Periodic Report.

To the Government of the Netherlands:

- Abide by the Gerechtshof's-Gravenhage (Hague Court) decision of January 20, 2005 prohibiting the extradition of Nuriye Kesbir to Turkey based on insufficient diplomatic assurances against torture and ill-treatment from the Turkish authorities.

To the Government of Austria:

- Request that the Russian federal and Dagestani authorities facilitate the availability of independent information about Akhmed A.'s situation, including by ensuring regular access to him by legal representatives of his choosing, medical personnel and family members. Make representations to the Russian authorities if information suggests that the assurances proffered in respect of Akhmed A. are not being satisfied.

- Reform Austrian asylum law to prohibit the transfer, including by extradition, of an asylum seeker with a pending claim to another country. Such transfers, including extradition, should not be effected until a full and fair asylum determination procedure has been concluded.

To the Government of the Russian Federation:

- Ensure that all appropriate conditions exist for unhindered independent oversight of and reporting on the treatment of Akhmed A. at his place of detention in Dagestan. These conditions should include access to him by legal representative of his choosing, medical personnel, and family members.

To the Government of Egypt:

- Support the establishment by the U.N. High Commissioner for Human Rights (OHCHR) of an international, independent inquiry into the cases of Ahmed Agiza

and Mohammad al-Zari to investigate the respective roles of the Swedish, U.S., and Egyptian governments in possible human rights violations against Agiza and al-Zari. Cooperate in a full and transparent manner with any such international inquiry under the auspices of the OHCHR.

- Grant Ahmed Agiza a new trial in a civilian court with full procedural guarantees and in conformity with Egypt's obligations under the Convention against Torture regarding Agiza's allegations of torture.

- End all restrictive measures aimed at prohibiting Mohammad al-Zari from moving freely within Egypt or outside the country in recognition of the fact that Egyptian authorities have declared that he is not suspected of any crime and released him from detention in October 2003. Ensure that al-Zari is not prohibited in any way, including by threats or harassment to him or his family members, from making complaints about the handling of his case and his treatment in detention before national and international bodies.

To the Government of Syria:

- Cooperate in a full and transparent manner with the Canadian Commission of Inquiry into the case of Maher Arar.

- Provide to Maher Arar's Canadian and U.S. legal teams all relevant information related to his transfer and subsequent treatment in Syria, including the form and content of the diplomatic assurances against torture transmitted to the U.S. authorities.

To United Nations Bodies:

To the Committee against Torture

- Reaffirm at the May 2005 session of the Committee (and regularly thereafter) the absolute and non-derogable nature of the prohibition against torture and the corresponding absolute and non-derogable obligation not to expel, return, extradite or otherwise transfer any person to a country where there are substantial grounds for believing that he or she would be at risk of torture or cruel, inhuman, or degrading treatment or punishment (the ban on *refoulement*).

- Reaffirm in express terms that the absolute prohibition against torture and the prohibition against *refoulement* include the prohibition against cruel, inhuman, or degrading treatment or punishment.

- Reject any attempt to establish minimum standards for the use of diplomatic assurances against risk of torture and ill-treatment as incompatible with the obligation under article 3 of the Convention against Torture. Emphasize the inherently unreliable nature of diplomatic assurances and the fact that they are an ineffective safeguard against torture and ill-treatment in the circumstances described in the second recommendation of this report.

- Require that states' periodic reports to the Committee include detailed information about all cases in which requests for diplomatic assurances against the risk of torture or other cruel, inhuman or degrading treatment have been sought or secured in respect of a person subject to transfer.

To the High Commissioner on Human Rights

- Establish as a matter of urgency an international, independent inquiry into all aspects of the cases of Ahmed Agiza and Mohammed al-Zari, including investigating the respective roles and conduct of the Swedish, United States and Egyptian governments. Conduct the inquiry in a comprehensive manner and make the findings of the inquiry public.

To the U.N. Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment

- Reaffirm in all the rapporteur's activities and related documents that diplomatic assurances in relation to torture or cruel, inhuman, or degrading treatment are inherently unreliable and their use by states undermines the *nonrefoulement* obligation enshrined in article 3 of the Convention against Torture.

- Collect information in the course of relevant country visits on the situation of persons threatened with return or actually returned on the basis of diplomatic assurances against torture and ill-treatment.

To the U.N. Independent Expert on Protection of human rights and fundamental freedoms while countering terrorism

- Reaffirm in all the expert's activities and related documents that diplomatic assurances in relation to torture or cruel, inhuman, or degrading treatment are inherently unreliable and their use by states undermines the *nonrefoulement* obligation enshrined in article 3 of the Convention against Torture. Reaffirm that states' use of diplomatic assurances against risk of torture is incompatible with Security Council resolutions and official statements of the U.N. Secretary General and the U.N. High Commissioner for Human Rights requiring that counter-terrorism measures conform with states' obligations under international human rights, refugee, and humanitarian law.

To the Counter-Terrorism Committee

- Request from states information about compliance with the absolute ban on torture and *refoulement* in the extradition, deportation, removal or other transfer of persons suspected of involvement in terrorism, including reliance upon diplomatic assurances against torture to effect such transfers. Ensure that states comply fully with their obligations to respect human rights while countering terrorism in accordance with Security Council resolutions 1373, 1456, and 1566. Any information collected should be made public.

To the United Nations High Commissioner for Refugees (UNHCR)

- Undertake as a matter of urgency an analytical study on states' increasing reliance on diplomatic assurances against torture and ill-treatment to effect transfers of asylum seekers and refugees to places where they would be at risk of such abuse. Adopt clear legal and policy guidance for states on this practice.

- Require all UNHCR field offices to record and monitor cases in which refugees, asylum seekers, and persons excluded from refugee status based on national security grounds are subject to return or other transfer following reliance on diplomatic assurances against torture and ill-treatment. Intervene directly with the governments when it is clear that any such person would be at risk of torture and ill-treatment.

- Establish within the Department of International Protection (DIP) a focal point for urgent communications regarding any asylum seeker, refugee, or person excluded from refugee status on national security grounds subject to transfer based on diplomatic assurances against torture and ill-treatment.

To Council of Europe Bodies:

To the Committee of Ministers

- Decline to adopt the new European Convention on the Prevention of Terrorism unless and until Article 21 ("Discrimination Clause") is revised in line with the wording contained in draft Article 18*bis*, point 2 in Opinion No.255 of the Parliamentary Assembly of the Council of Europe (PACE) on the draft Convention ("Grounds for refusing extradition or mutual legal assistance"): "States Parties shall refuse to comply with requests for extradition made in relation to the offences set forth in Articles 4-7 where there are substantial grounds for believing that complying with the request would result in the person concerned facing a real risk of:

(…)

c. being subjected to torture or to inhuman or degrading treatment or punishment."

To the Parliamentary Assembly of the Council of Europe (PACE)

- Deplore the failure of the CODEXTER experts group, in drafting the European Convention on Prevention of Terrorism, to follow the recommendation of the PACE in its opinion No.255 (2005) on the draft Convention, affirming the absolute *nonrefoulement* obligation in respect of extradition requests of persons facing a real risk of torture or inhuman or degrading treatment or punishment.

- Task the Committee on Legal Affairs and Human Rights to undertake a study into all cases to date where Council of Europe member states have sought or have been requested to provide diplomatic assurances against torture or cruel, inhuman, or degrading treatment or punishment in extradition, return, expulsion, or other transfer cases.

To the European Committee for the Prevention of Torture

- Reaffirm the absolute nature of the *nonrefoulement* obligation in the course of confidential discussions with governments. Emphasize that diplomatic assurances in relation to torture or cruel, inhuman, or degrading treatment are inherently unreliable and that their use by states undermines the *nonrefoulement* obligation enshrined in article 3 of the European Convention on Human Rights.

- Collect information in the course of country visits on the situation of persons threatened with return based on diplomatic assurances against torture and ill-treatment and on the situation of persons who have been returned to the country of

visitation based on such assurances and the respective governments' compliance with the assurances.

To the Council of Europe Commissioner for Human Rights

- Continue to reaffirm that the state practice of seeking diplomatic assurances that a person will not be tortured or subjected to cruel, inhuman, or degrading treatment or punishment undermines the *nonrefoulement* obligation enshrined in article 3 of the European Convention on Human Rights.

To Bodies of the Organization for Security and Co-operation in Europe:

To the Chairman-in-Office

- Put forward for adoption at the 2005 Ministerial Conference a declaration reaffirming the absolute nature of the obligation under international law not to expel, return, extradite, or otherwise transfer any person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or prohibited ill-treatment, consistent with the importance attached in the OSCE Copenhagen commitments (Article 16) to accession to and respect for the Convention against Torture.

- Actively promote the recognition that diplomatic assurances against torture and ill-treatment are unreliable and ineffective safeguards against torture and prohibited ill-treatment, and press OSCE participating states to give up their use.

To the Secretary General and to the Director of the Office for Democratic Institutions and Human Rights (ODIHR)

- Task the Action against Terrorism Unit of the OSCE Secretariat and the Anti-terrorism Coordinator at the ODIHR to monitor adherence by OSCE participating states to their *nonrefoulement* obligations, including any instances of recourse to diplomatic assurances, which should be reported to the Chairman-in-Office.

- Ensure that technical assistance to OSCE participating states in support of drafting anti-terrorism legislation and strengthening existing legislation directs states away from the use of diplomatic assurances against torture and ill-treatment. Emphasize through assistance in support of implementation of relevant U.N. Security Council resolutions, U.N. conventions and protocols the absolute nature of the *nonrefoulement* obligation.

To European Union Bodies:

To the Counter-terrorism Coordinator

- Reaffirm in all the Coordinator's activities and related documents, including in communications to the European Council, that diplomatic assurances in relation to torture or cruel, inhuman, or degrading treatment are inherently unreliable and do not provide an effective safeguard against abusive treatment. Reaffirm that the use of diplomatic assurances against risk of torture and ill-treatment undermines the *nonrefoulement* obligation enshrined in international law.

To the European Parliament

- Ensure that any draft resolution coming before the Parliament which refers to actions to combat terrorism makes appropriate reference to member states' absolute obligation not to expel, return, extradite, or otherwise transfer any person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or cruel, inhuman, or degrading treatment or punishment (prohibited ill-treatment).

To the European Commission

- Include in the June 2005 progress report requested from the Commission and the Council's General Secretariat by the Brussels European Council of December 2004 the recommendation for a declaration that reliance upon diplomatic assurances against torture and ill-treatment is unacceptable in the circumstances described in the second recommendation of this report.

To the Inter-American Commission on Human Rights:

- Affirm the inherently unreliable nature of diplomatic assurances against torture and ill-treatment and recommend that all Organization of American States (OAS) member states desist from reliance upon such assurances.

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Getting Away with Torture?

Command Responsibility for the U.S. Abuse of Detainees

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Executive Summary

It has now been one year since the appearance of the first pictures of U.S. soldiers humiliating and torturing detainees at Abu Ghraib prison in Iraq. Shortly after the photos came out, President George W. Bush vowed that the "wrongdoers will be brought to justice."

In the intervening months, it has become clear that torture and abuse have taken place not solely at Abu Ghraib but rather in dozens of U.S. detention facilities worldwide, that in many cases the abuse resulted in death or severe trauma, and that a good number of the victims were civilians with no connection to al-Qaeda or terrorism. There is also evidence of abuse at U.S.-controlled "secret locations" abroad and of U.S. authorities sending suspects to third-country dungeons around the world where torture was likely to occur.

To date, however, the only wrongdoers being brought to justice are those at the bottom of the chain-of-command. The evidence demands more. Yet a wall of impunity surrounds the architects of the policies responsible for the larger pattern of abuses.

As this report shows, evidence is mounting that high-ranking U.S. civilian and military leaders — including Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, Lieutenant General Ricardo Sanchez, formerly the top U.S. commander in Iraq, and Major General Geoffrey Miller, the former commander of the prison camp at Guantánamo Bay, Cuba — made decisions and issued policies that facilitated serious and widespread violations of the law. The circumstances strongly suggest that they either knew or should have known that such violations took place as a result of their actions. There is also mounting data that, when presented with evidence that abuse was in fact taking place, they failed to act to stem the abuse.

The coercive methods approved by senior U.S. officials and widely employed over the last three years include tactics that the United States has repeatedly condemned as barbarity and torture when practiced by others. Even the U.S. Army field manual condemns some of these methods as torture.

Although much relevant evidence remains secret, a series of revelations over the past twelve months, brought together here, already makes a compelling case for a thorough, genuinely independent investigation of what top officials did, what they knew, and how they responded when they became aware of the widespread nature of the abuses.

We know, for example, that the coercive interrogation methods approved by Secretary of Defense Donald Rumsfeld for use on prisoners at Guantánamo — including the use of guard dogs to induce fear in prisoners, "stress" techniques such as forced standing and shackling in

painful positions, and removing their clothes — "migrated to Afghanistan and Iraq, where they were neither limited nor safeguarded," and contributed to the widespread and systematic torture and abuse at U.S. detention centers there. Inquiries established by the U.S. Department of Defense itself have shown as much, though they did not explicitly say so.

We know that some detainees in the "global war on terror" have even been "disappeared" after entering U.S. custody: the U.S. Central Intelligence Agency (CIA) continues to hold al-Qaeda suspects in prolonged *incommunicado* detention in "secret locations," reportedly outside the United States, with no notification to their families, no access to the International Committee of the Red Cross (ICRC) or oversight of any sort of their treatment, and in some cases no acknowledgement that they are even being held. It is widely reported that some of these "disappeared detainees" have been tortured through techniques such as "waterboarding," in which the prisoner's head is submerged into water or covered with a wet cloth until he believes that he is drowning.

We also know that some 100-150 detainees have been "rendered" by the United States for detention and interrogation by governments in the Middle East such as Syria and Egypt, which, according to the U.S. State Department, practice torture routinely. Such rendition is, again, a violation of U.S. and international law. In an increasing number of cases, there is now credible evidence that rendered detainees have in fact been tortured.

Despite these revelations and findings, the United States has not engaged in a serious process of accountability. Officials have denounced the most egregious abuses, rhetorically reaffirmed the U.S. commitment to uphold the law and respect human rights, and belatedly opened a number of prosecutions for crimes committed against detainees in Afghanistan and Iraq. To date, however, with the exception of one major personally implicated in abuse, only low-ranking soldiers — privates and sergeants — have been called to account.

While there are obviously steep political obstacles in the way of investigating a sitting defense secretary and other high-ranking officials, the nature of crimes is so serious, and mounting evidence of wrongdoing is now so voluminous, that it would be an abdication of responsibility for the United States not to push this to the next level.

The Price of Impunity

Unless those who designed or authorized the illegal policies are held to account, all the protestations of "disgust" at the Abu Ghraib photos by President George W. Bush[1] and others will be meaningless. If there is no real accountability for these crimes, for years to come the perpetrators of atrocities around the world will point to the U.S.'s treatment of prisoners to deflect criticism of their own conduct.

Indeed, when a government as dominant and influential as the United States openly defies laws against torture, it virtually invites others to do the same. Washington's much-needed credibility as a proponent of human rights was damaged by the torture revelations and will be further damaged if torture continues to be followed by complete impunity for the policy-makers.

Torture, unfortunately, can occur anywhere. What matters, and what determines whether torture is a mere aberration or state policy, is how a government responds. Secretary Rumsfeld recognized this when, shortly after the first public revelations, he "[said] to the world: Judge us by our actions. Watch how Americans, watch how a democracy deals with wrongdoing and scandal and the pain of acknowledging and correcting our own mistakes and weaknesses."[2] Then-Secretary of State Colin Powell recognized this, too, when he told foreign leaders: "Watch America. Watch how we deal with this. Watch how America will do the right thing."[3]

Regrettably, however, the United States is not doing the right thing. Rather, it is doing what dictatorships do the world over when their abuses are discovered — loudly proclaiming its respect for human rights while covering up and shifting blame downwards to low-ranking officials and "rogue actors."

Official Responses to Date

To the extent that officials have addressed the issue of accountability for the pattern of abuse, they have either argued that the military justice system must be given time to run its course, or they have pointed to the many Department of Defense and related investigations that have been undertaken.[4]

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[1] Thom Shanker and Jacques Steinberg, "Bush Voices 'Disgust' at Abuse of Iraqi Prisoners," *The New York Times*, May 1, 2004.

[2] Donald Rumsfeld, "Congressional Testimony of Secretary of Defense Donald Rumsfeld," Hearing of the Senate Armed Services Committee on Mistreatment of Iraqi Prisoners, Federal News Service, May 7, 2004.

[3] "Abuse Scandal 'Terrible' for U.S., Powell Concedes," *MSNBC*, May 17, 2004 [online], http://www.msnbc.msn.com/id/4855930/.

[4] On March 29, 2005, Secretary Rumsfeld was asked on *National Public Radio* (NPR) "whether it's right or wrong ... that no senior military official has been disciplined, fired or prosecuted for the allegations of abuse and torture in Iraq and elsewhere?" The interview continued:

While it is true that the Pentagon established no fewer than seven investigations in the wake of Abu Ghraib, not one has had the independence or the breadth to get to the bottom of the prisoner-abuse issue. All but one involved the military investigating itself, and was focused on only one aspect or another of the treatment of detainees. None took on the task of examining the role of civilian leaders who might have had ultimate authority over detainee treatment policy. None looked at the issue of renditions. The CIA has reportedly also initiated a number of self-investigations, but no details have been made public.

What is more, these investigations effectively defined detainee abuse as any treatment *not approved* by higher authorities. To the Pentagon's investigators, treatment that followed approved policies and techniques could not, by definition, have been torture. With this logical sleight of hand, they thus rendered themselves incapable of finding any connections between policies approved by senior officials and acts of abuse in the field. But that does not mean such connections did not exist.

Grounds for Investigation

This report provides a new look at the evidence made public to date about the role played by senior leaders most responsible for setting U.S. interrogation policies, including Secretary Rumsfeld, CIA Director Tenet, Gen. Sanchez, and Gen. Miller. Human Rights Watch expresses no opinion about the ultimate guilt or innocence of these or other officials, particularly because so much evidence has been withheld and so many questions remain unanswered. We also do not

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> *Rumsfeld*: I mean I think the fact that the United States has had over nine or ten or eleven different investigations, there have been over 300 investigations or prosecutions, in some cases convictions. Not 300 convictions. But there have been people of varying ranks that have been punished for wrongdoing.
>
> *NPR*: Mostly lower ranks.
>
> *Rumsfeld*: The Inspector General of the Army still has the obligation of looking at the people in the more senior ranks and making a judgment and recommendation or not recommendation to his superiors and that process is yet to play out.

("Secretary Rumsfeld Interview with *National Public Radio*'s Steve Inskeep for 'Morning Edition,'" news transcript, U.S. Department of Defense, March 29, 2005 [online], http://www.defenselink.mil/transcripts/2005/tr20050329-secdef2401.html.)

Secretary Rumsfeld had a similar exchange on *NBC*'s "Meet the Press" the previous month:

> *NBC*: Did you think you had done something wrong?
>
> *Rumsfeld*: No. Obviously the country has to be deeply concerned that people were not treated right. And I was secretary of defense when that happened. And we've had eight or 10 investigations. We have had dozens of criminal trials, and people have pled guilty to doing things they shouldn't do. And obviously you just feel terrible about that. That is not the way our country behaves. And it was a most unfortunate thing that it happened. And I was secretary of Defense [sic].

("Secretary Rumsfeld Interview with *NBC*, Meet the Press," news transcript, U.S. Department of Defense, February 6, 2005 [online], http://www.defenselink.mil/transcripts/2005/tr20050206-secdef2102.html.)

purport to offer a comprehensive account of the possible culpability of these men, let alone a legal brief. More evidence is needed for that. What we do conclude, a conclusion that we believe is compelled by the evidence, is that a criminal investigation is warranted with respect to each.

Secretary Rumsfeld may bear legal liability for war crimes and torture by U.S. troops in Afghanistan, Iraq, and Guantánamo under the doctrine of "command responsibility" — the legal principle that holds a superior responsible for crimes committed by his subordinates when he knew or should have known that they were being committed but fails to take reasonable measures to stop them. Having created the conditions for U.S. troops to commit war crimes and torture by sidelining and disparaging the Geneva Conventions, approving interrogation techniques for Guantánamo that violated the Geneva Conventions and the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture"), and hiding detainees from the ICRC, Secretary Rumsfeld should have been alert to the possibility that troops would commit these crimes.

Indeed, from the early days of the war in Afghanistan, Secretary Rumsfeld must have been on notice through briefings, ICRC reports, human rights reporting, and press accounts that some U.S. troops were committing war crimes and acts of torture. Nevertheless, there is no indication that at any time over a three-year period of mounting evidence of abuse did he exert his authority and warn those under his command that the mistreatment of prisoners must stop. Had he done so, many of the crimes committed by U.S. forces certainly could have been avoided.

Secretary Rumsfeld might also, in addition to command responsibility, bear direct legal liability as the instigator of crimes against detainees if the illegal interrogation techniques that he approved for Guantánamo were actually used to inflict inhumane treatment on detainees there before he rescinded his blanket approval and required that he be consulted before the techniques were used. Similarly, if Secretary Rumsfeld approved a secret program that encouraged physical coercion and sexual humiliation of Iraqi prisoners, as alleged by the journalist Seymour Hersh, Secretary Rumsfeld would bear direct legal liability.

Under George Tenet's direction, and reportedly with his specific authorization, the CIA is said to have tortured detainees using waterboarding and by withholding medicine. Other tactics reportedly used include feigning suffocation, "stress positions," light and noise bombardment, sleep deprivation, and making a detainee believe that he was being interrogated by a government known to practice torture. Under Director Tenet's direction, the CIA also: "disappeared" detainees, holding them in long-term *incommunicado* detention in secret locations without informing or letting anybody know about their fate or whereabouts; "rendered" detainees to countries in which they were apparently tortured; hid detainees from the ICRC; and transferred detainees out of Iraq for interrogation in violation of the Geneva Conventions.

Lt. Gen. Ricardo Sanchez, the top U.S. commander in Iraq with command responsibility for Abu Ghraib and other detention centers in Iraq, approved illegal interrogation methods — again including the use of guard dogs to frighten prisoners — which were then applied by soldiers at Abu Ghraib. As reports of abuse mounted, Gen. Sanchez failed to intervene to stop soldiers under his direct command from commissioning war crimes and torture. This potentially exposes him to liability under the command responsibility doctrine.

Gen. Geoffrey Miller, as commander at Guantánamo Bay, may bear responsibility for the war crimes and acts of torture and other inhuman treatment of detainees that took place there, particularly since the tightly-controlled nature of that prison camp made it likely that the commander was acutely aware of what his troops were doing.

There is also evidence that other officers may have been complicit in the crimes. For the crimes at Abu Ghraib alone, such individuals include Major General Walter Wojdakowski, Brigadier General Janis Karpinski, Major General Barbara Fast, Colonel Marc Warren, Colonel Stephen Boltz, Colonel Thomas Pappas, and Lieutenant Colonel Stephen L. Jordan. This list is not intended to be exhaustive.

The material compiled in this report is drawn from publicly available evidence including the official inquiries described above, Human Rights Watch's own field reports, press accounts, and documents declassified by the government or released pursuant to litigation under the Freedom of Information Act (FOIA).

Recommendations

Recommendation to the U.S. Attorney General

Appoint a special counsel to investigate any U.S. officials — no matter their rank or position — who participated in, ordered, or had command responsibility for war crimes or torture, or other prohibited ill-treatment against detainees in U.S. custody. The special counsel should have, in accordance with U.S. regulations, full power and resources, and independent authority to exercise all investigative and prosecutorial functions necessary for the completion of the task. He or she should be a lawyer with no current connection to the U.S. government, a reputation for integrity and impartiality, and experience sufficient to ensure that the investigation will be conducted ably.

A special counsel is necessary because the prospect for accountability through ordinary avenues is severely compromised. U.S. Attorney General Alberto Gonzales who, as head of the Department of Justice, sits atop the prosecutorial machinery, was himself deeply involved in the policies leading to these alleged crimes, and thus may not only have a conflict of interest but also he, himself, may have a degree of complicity in those abuses. Similarly, Secretary Rumsfeld sits atop the military justice system, thus all but ruling out accountability though that channel for policies he set in motion. U.S. Department of Justice regulations call for the appointment of a "special counsel" when a conflict exists and the public interest warrants a prosecutor from outside the government.

To allow the special prosecutor to have full authority to investigate and prosecute both federal law and Uniform Code of Military Justice violations, **the Secretary of Defense should appoint a consolidated convening authority** for all armed services, to cooperate with the appointed civilian special prosecutor.

Recommendation to the U.S. Congress

Create a special commission, along the lines of the 9/11 commission, to investigate the issue of prisoner abuse, including all the issues described above. Such a commission would hold hearings, have full subpoena power, and be empowered to recommend the creation of a special prosecutor to investigate possible criminal offenses, if the Attorney General had not yet named one. A special commission could also compel evidence that the government has continued to conceal, including President Bush's reported authorization for the CIA to set up secret detention facilities and to "render" suspects to other countries, and details on Secretary Rumsfeld's role in the chain of events leading to the worst period of abuses at Abu Ghraib.

I. Official Sanction of Crimes against Detainees

On April 28, 2004, the first pictures were broadcast of U.S. soldiers humiliating and torturing detainees at Abu Ghraib prison in Iraq. The pictures have since taken on iconic status: an Iraqi detainee standing on a box draped in a hood and poncho, his arms outstretched with wires attached to his extremities and genitals; a bored-looking female American soldier holding a naked, Iraqi detainee on the floor at the end of a leash; naked, and even dead, Iraqi detainees in a variety of positions with American soldiers laughing and flashing thumbs up.

When the pictures first appeared, the United States government sought to portray the abuse as an isolated incident, the work of a few "bad apples" acting without orders. On May 4, 2004, U.S. Secretary of Defense Donald H. Rumsfeld, in a formulation that would be used over and over again by U.S. officials, described the abuses at Abu Ghraib as "an exceptional, isolated" case. In a nationally televised address on May 24, 2004, President Bush spoke of "disgraceful conduct by a few American troops who dishonored our country and disregarded our values."

While some of the acts portrayed in the pictures may be attributed to individual or group sadism, the widening record reveals that the only truly exceptional aspect of the horrors at Abu Ghraib was that they were photographed. Abu Ghraib was, in fact, only the tip of the iceberg. Detainees in U.S. custody in Afghanistan had experienced beatings, prolonged sleep and sensory deprivation, forced nakedness and humiliation as early as 2001. Comparable — and, indeed, more extreme — cases of torture and inhuman treatment had been extensively documented by the International Committee of the Red Cross and by journalists at numerous locations in Iraq outside Abu Ghraib. In other parts of the world, detainees in U.S. custody have been "disappeared" or "rendered" to countries where torture is routine.

As became increasingly obvious in the months after the photos came to public light, this pattern of abuse did not result from the acts of individual soldiers who broke the rules. It resulted from decisions made by the Bush administration to bend, ignore, or cast rules aside. Administration policies created the climate for Abu Ghraib and for abuse against detainees worldwide in a number of ways. [5]

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[5] See Human Rights Watch, "The Road to Abu Ghraib," *A Human Rights Watch Report*, June 2004 [online], http://www.hrw.org/reports/2004/usa0604/.

Changing the paradigm

First, in the aftermath of the September 11, 2001 attacks on the United States, the Bush administration determined that winning the war on terror required that the United States circumvent fundamental principles of human rights and humanitarian law.

On September 16, 2001, Vice President Dick Cheney said in a television interview on NBC's "Meet the Press":

> We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.

In prepared testimony to Congress in 2002, Cofer Black, former director of the CIA's counterterrorist unit, said, "There was a before-9/11 and an after-9/11. After 9/11 the gloves came off."[6]

Senior administration lawyers, led by then-White House Counsel, and current Attorney General, Alberto Gonzales, in a series of legal memoranda written in late 2001 and early 2002 helped build the framework for circumventing international law restraints on prisoner interrogation.

In particular, these memos argued that the Geneva Conventions did not apply to detainees from the Afghanistan war. Mr. Gonzales urged the president to declare the Taliban forces in Afghanistan as well as al-Qaeda outside the coverage of the Geneva Conventions. This, he said in a memo dated January 25, 2002, would preserve the U.S.'s "flexibility" in the war against terrorism. Mr. Gonzales wrote that the war against terrorism, "in my judgment renders obsolete Geneva's strict limitations on questioning of enemy prisoners." Gonzales also warned that U.S. officials involved in harsh interrogation techniques could potentially be prosecuted for war crimes under U.S. law if the Conventions applied.[7] Gonzales said that "it was difficult to predict with confidence" how U.S. prosecutors might apply the Geneva Conventions' strictures against "outrages against personal dignity" and "inhuman treatment" in the future, and argued that declaring that Taliban and al-Qaeda fighters did not have Geneva Convention protections "substantially reduces the threat of domestic criminal prosecution." Gonzales did convey to

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[6] Cofer Black, testimony, Hearing before the U.S. House and Senate Intelligence Committees on Pre-9/11 Intelligence Failures, 107th Congress, p. 6 (2002).

[7] Gonzales was referring to prosecution under the War Crimes Act of 1996 (18 U.S.C. Section 2441), which punishes the commission of a war crimes and other serious violations of the laws of war, including torture and humiliating or degrading treatment, by or against a U.S. national, including members of the armed forces.

President Bush the worries of military leaders that these policies might "undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat and could introduce an element of uncertainty in the status of adversaries." Those warnings were ignored, but proved justified.

The Gonzales memorandum drew a strong objection the next day from Secretary of State Colin L. Powell. Secretary Powell argued that declaring the conventions inapplicable would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general."[8]

On February 7, 2002, President Bush announced that while the U.S. government would apply the "principles of the Third Geneva Convention" to captured members of the Taliban, it would not consider any of them to be prisoners of war (POWs) because, in the U.S. view, they did not meet the requirements of an armed force under that Convention. As for captured members of al-Qaeda, he said that the U.S. government considered the Geneva Conventions inapplicable but would nonetheless treat the detainees "humanely."[9]

These decisions essentially reinterpreted the Geneva Conventions to suit the administration's purposes. Belligerents captured in the conflict in Afghanistan should have been treated as POWs unless and until a competent tribunal individually determined that they were not eligible for POW status. Taliban soldiers should have been accorded POW status because they openly fought for the armed forces of a state party to the Convention. Al-Qaeda detainees would likely not be accorded POW status but the Conventions and customary law still provide explicit protections to all persons held in an armed conflict, even if they are not entitled to POW status. Even persons who are not entitled to the protections of the 1949 Geneva Conventions are protected by the "fundamental guarantees" described in article 75 of Protocol I of 1977 to the Geneva Conventions. The United States has long considered article 75 to be part of customary international law (a widely supported state practice accepted as law). Article 75 prohibits murder, "torture of all kinds, whether physical or mental," "corporal punishment," and "outrages upon personal dignity, in particular humiliating and degrading treatment, … and any form of indecent assault."[10]

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[8] From Colin L. Powell to Counsel to the President, "Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan," memorandum, January 26, 2002. The memorandum can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), p. 122.

[9] President George W. Bush to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs and Chairman of the Joint Chiefs of Staff, memorandum, "Humane Treatment of al Qaeda and Taliban Detainees," February 7, 2002. The memorandum can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), p. 134.

[10] See Human Rights Watch, "Summary of International and U.S. Law Prohibiting Torture and Other Ill-treatment of Persons in Custody," *A Human Rights Watch Backgrounder*, May 24, 2004 [online],

Approval of Mistreatment and Torture

Second, senior officials approved illegal coercive methods of interrogation.

Army *Field Manual 34-52* ("FM 34-52") on intelligence interrogation has long served as the reference for the types of interrogation techniques considered permissible and effective, in accordance with the Geneva Conventions. As the first detainees were being captured, however, the CIA sought the opinion of the Department of Justice Office of the Legal Counsel (OLC) as to what additional interrogation techniques would be allowable.[11]

The OLC — in a now-infamous memo prepared by Assistant Attorney General Jay S. Bybee (now a federal appeals court judge) — replied on August 1, 2002 that torturing al-Qaeda detainees in captivity abroad "may be justified," and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in the war on terrorism. The memo added that the doctrines of "necessity and self-defense could provide justifications that would eliminate any criminal liability" on the part of officials who tortured al-Qaeda detainees. The memo also took an extremely narrow view of which acts might constitute torture. It referred to seven practices that U.S. courts have ruled to constitute torture: severe beatings with truncheons and clubs, threats of imminent death, burning with cigarettes, electric shocks to genitalia, rape or sexual assault, and forcing a prisoner to watch the torture of another person. It then advised that "interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate law." The memo asserted that "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." The memo also suggested that

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http://www.hrw.org/english/docs/2004/05/24/usint8614.htm. This view is shared by the ICRC and other international observers. See, e.g., International Committee of the Red Cross (ICRC), "Geneva Convention on Prisoners of War," February 9, 2002 [online], http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/26D99836026EA80DC1256B6600610C90 ("International Humanitarian Law foresees that the members of armed forces as well as militias associated to them which are captured by the adversary in an international armed conflict are protected by the Third Geneva Convention. There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status."); See also High Commissioner Mary Robinson, "Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantánamo Bay," January 16, 2002 [online], http://www.unhchr.ch/huricane/huricane.nsf/0/C537C6D4657C7928C1256B43003E7D0B?opendocument ("All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949."); International Commission of Jurists (ICJ), "Rule of Law Must Be Respected in Relation to Detainees in Guantánamo Bay," January 17, 2002 [online], http://www.icj.org./news.php3?id_article=2612&lang=en; Secretary Rumsfeld dismissed the criticism of President Bush's decision as "isolated pockets of international hyperventilation" ("High Taliban Official in U.S. Custody," Associated Press, February 9, 2002).

[11] The Honorable James R. Schlesinger, Hon. Harold Brown, Hon. Tillie K. Fowler, Gen. Charles A. Homer, and Dr. James A. Blackwell, Jr., *Final Report of the Independent Panel to Review DoD Detention Operations* ("Schlesinger report"), August 2004, pp. 6-7.

"mental torture" only included acts that resulted in "significant psychological harm of significant duration, e.g., lasting for months or even years."[12]

A few months later, in October 2002, the Guantánamo authorities sent a letter to Secretary Rumsfeld requesting permission to employ harsher interrogation techniques on prisoners. The requested techniques were reviewed by Department of Defense General Counsel William J. Haynes, who recommended that Secretary Rumsfeld approve 16 of the requested techniques for use in interrogations at Guantánamo. On December 2, 2002, Secretary Rumsfeld approved this recommended list, which included such techniques as hooding, stress positions, isolation, stripping, deprivation of light, removal of religious items, forced grooming, and use of dogs.[13] As described below, these techniques, which violate not only the Geneva Conventions but the laws against torture and other prohibited ill-treatment, later "migrated" to Iraq and Afghanistan where they were regularly applied to detainees.

On January 15, 2003, following criticism from the Navy general counsel, Secretary Rumsfeld rescinded the December 2 guidelines, stating that harsher techniques in those guidelines could be used only with his approval.[14] Secretary Rumsfeld then ordered the establishment of a working group to examine which interrogation techniques should be allowed for prisoners in Guantánamo.[15] The portions of the working group's report that have been made available make clear that in reviewing interrogation techniques, they relied heavily on the logic of the president's February 7, 2002 memo regarding the applicability of the Geneva Conventions to al-Qaeda and Taliban prisoners, as well as the August 1, 2002 OLC memo on evading sanction for interrogation techniques that might be deemed illegal under treaty obligations and U.S. law.[16] The results of this study led to Secretary Rumsfeld's promulgation, on April 16 2003, of a memo outlining techniques that could only be applied to interrogations of "unlawful combatants" held at Guantánamo.[17]

In addition, the Justice Department and the White House apparently gave the CIA the authority to use additional techniques, such as "waterboarding," in which the detainee is strapped down,

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[12] Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, memorandum, "Standards for Conduct of Interrogation under 18 U.S.C. Sections 2340-2340A," August 1, 2002 [online], http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf (This memorandum has since been repudiated by the administration).

[13] William J. Haynes II to the Secretary of Defense, memorandum, "Counter-Resistance Techniques," November 27, 2002.

[14] Schlesinger report, p. 7.

[15] Ibid., p. 8.

[16] "Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," U.S. Department of Defense, Center for Defense Information: International Security Law Project, March 6, 2003 [online], http://www.cdi.org/news/law/pentagon-torture-memo.pdf.

[17] Schlesinger report, p. 8. (The memo no longer authorized stress positions, stripping and the use of dogs. It did allow isolation, removing privileges from detainees, and "attacking or insulting the ego of a detainee.")

forcibly pushed under water, and made to believe he might drown.[18] The president also apparently authorized the CIA to "disappear" certain prisoners, placing leading al-Qaeda suspects in long-term secret *incommunicado* detention in "undisclosed locations."[19]

After the Abu Ghraib photos were made public, the United States repudiated the August 1, 2002 OLC memo and later replaced it with a revised memo.[20] In January 2005, however, Attorney General-designate Alberto Gonzales claimed in a written response during his confirmation hearings that CAT's prohibition on cruel, inhuman or degrading (CID) treatment does not apply to U.S. personnel in the treatment of non-citizens abroad, indicating that no law would prohibit the CIA from engaging in CID treatment when it interrogates non-Americans outside the United States.[21]

II. A World of Abuse

As a consequence of these policies, which were approved at least by cabinet-level officials of the U.S. government, the United States has been implicated in crimes against detainees across the world — in Afghanistan, Iraq, Guantánamo Bay, Cuba, and in secret detention centers, as well as in countries to which suspects have been rendered. At least 26 prisoners are said to have died in American custody in Iraq and Afghanistan since 2002 in what Army and Navy investigators have concluded or suspected were acts of criminal homicide.[22] Overall, according to a compilation by the Associated Press, at least 108 people have died in U.S. custody in Afghanistan and Iraq.[23]

What follows is a brief summary of what is now known:

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[18] Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004; James Risen, David Johnston and Neil A. Lewis, "Harsh CIA Methods Cited in Top Qaeda Interrogations," *The New York Times*, May 13, 2004.

[19] John Barry, Michael Hirsh and Michael Isikoff, "The Roots of Torture," *Newsweek*, May 24, 2004 [online], http://msnbc.msn.com/id/4989422/site/newsweek/ ("According to knowledgeable sources, the president's directive authorized the CIA to set up a series of secret detention facilities outside the United States, and to question those held in them with unprecedented harshness.")

[20] Daniel Levin, Acting Assistant Attorney General, to James B Comey, Deputy Attorney General, memorandum, "Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A," December 30, 2004 [online], http://www.usdoj.gov/olc/dagmemo.pdf.

[21] Eric Lichtblau, "Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.," *The New York Times*, January 19, 2005, p. A17.

[22] Douglas Jehl and Eric Schmitt, "The Conflict in Iraq: Detainees; U.S. Military Says 26 Inmate Deaths May Be Homicide," *The New York Times*, March 16, 2005, p. A1.

[23] "US Detainee Death Toll 'Hits 108'" *BBC News World Edition*, March 16, 2005 [online], http://news.bbc.co.uk/2/hi/americas/4355779.stm.

Afghanistan

Nine detainees are now known to have died in U.S. custody in Afghanistan — including four cases already determined by Army investigators to be murder or manslaughter. Former detainees have made scores of other claims of torture and other mistreatment.

In March 2004, prior to the publication of the Abu Ghraib photos, Human Rights Watch released an extensive report documenting cases of U.S. military personnel arbitrarily detaining Afghan civilians, using excessive force during arrests of non-combatants, and mistreating detainees. Detainees held at military bases in 2002 and 2003 described to Human Rights Watch being beaten severely by both guards and interrogators, deprived of sleep for extended periods, and intentionally exposed to extreme cold, as well as other inhumane and degrading treatment.[24] In December 2004, Human Rights Watch raised additional concerns about detainee deaths, including one alleged to have occurred as late as September 2004.[25] In March 2005, *The Washington Post* uncovered another death that occurred in CIA custody, noting that the case was under investigation but that the CIA officer implicated had been promoted.[26]

Guantánamo Bay, Cuba

There is growing evidence that detainees at Guantánamo have suffered torture and other cruel, inhuman, or degrading treatment. Reports by FBI agents who witnessed detainee abuse — including the forcing of chained detainees to sit in their own excrement — have recently emerged, adding to the statements of former detainees describing the use of painful stress positions, extended solitary confinement, use of military dogs to threaten them, threats of torture and death, and prolonged exposure to extremes of heat, cold and noise.[27] Videotapes of riot squads subduing suspects reportedly show the guards punching some detainees, tying one to a gurney for questioning and forcing a dozen to strip from the waist down.[28] Ex-detainees said they had been subjected to weeks and even months in solitary confinement — which was at times either suffocatingly hot or cold from excessive air conditioning — as punishment for failure to cooperate during interrogations or for violations of prison rules.[29]

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[24] See Human Rights Watch, "Enduring Freedom: Abuses by U.S. Forces in Afghanistan," *A Human Rights Watch Report*, March 2004 [online], http://hrw.org/reports/2004/afghanistan0304/.

[25] Human Rights Watch to Secretary of Defense Donald Rumsfeld, open letter, December 13, 2004 [online], http://hrw.org/english/docs/2004/12/10/afghan9838.htm.

[26] Dana Priest, "CIA Avoids Scrutiny of Detainee Treatment; Afghan's Death Took Two Years to Come to Light," *The Washington Post*, March 3, 2005.

[27] See Human Rights Watch, "Guantánamo: Detainee Accounts," *A Human Rights Watch Backgrounder*, October 2004 [online], http://www.hrw.org/backgrounder/usa/gitmo1004/; Center for Constitutional Rights, "Composite Statement: Detention in Afghanistan and Guantanamo Bay; Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed," August 4, 2004 [online], http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf.

[28] Paisley Dodds, "Guantánamo Tapes Show Teams Punching, Stripping Prisoners," Associated Press, February 1, 2005.

[29] See Human Rights Watch, "Guantánamo: Detainee Accounts," *A Human Rights Watch Backgrounder*, October 2004 [online], http://www.hrw.org/backgrounder/usa/gitmo1004/; Center for Constitutional Rights, "Composite Statement: Detention in Afghanistan and Guantanamo Bay; Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed," August 4, 2004 [online], http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf.

According to press reports in November 2004, the International Committee of the Red Cross told the U.S. government in confidential reports that its treatment of detainees has involved psychological and physical coercion that is "tantamount to torture."[30]

Iraq

Harsh and coercive interrogation techniques such as subjecting detainees to painful stress positions and extensive sleep deprivation have been routinely used in detention centers throughout Iraq. A panel appointed by the Secretary of Defense noted 55 substantiated cases of detainee abuse in Iraq, plus twenty instances of detainee deaths still under investigation.[31] The earlier investigative report of Maj. Gen. Antonio Taguba found "numerous incidents of sadistic, blatant, and wanton criminal abuses" constituting "systematic and illegal abuse of detainees" at Abu Ghraib.[32] Another Pentagon report documented 44 allegations of such war crimes at Abu Ghraib.[33] An ICRC report concluded that in military intelligence sections of Abu Ghraib, "methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information."[34]

CIA "Disappearances" and Torture

At least eleven al-Qaeda suspects, and most likely many more, have "disappeared" in U.S. custody. The CIA is holding the detainees in undisclosed locations, with no notification to their families, no access to the International Committee of the Red Cross or oversight of any sort of their treatment, and in some cases, no acknowledgement that they are even being held,[35] effectively placing them beyond the protection of the law. One detainee, Khalid Shaikh Muhammed (a presumed architect of the 9/11 attacks), was reportedly subjected to waterboarding. It was also reported that U.S. officials initially withheld painkillers from detainee Abu Zubayda, who was shot during his capture, as an interrogation device.[36]

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[30] Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo," *The New York Times*, November 30, 2004, p. A1.

[31] Schlesinger report, pp. 12-13.

[32] Major General Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade* ("Taguba report"), p. 16.

[33] Major George R. Fay, *Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* ("Fay report"), p. 7.

[34] ICRC, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004, para. 24. A copy of the report, whose existence was first disclosed by *The Wall Street Journal* on May 7, 2004, can be found at http://www.health-now.org/mediafiles/mediafile50.pdf.

[35] See Human Rights Watch, "The United States' 'Disappeared': The CIA's Long-term 'Ghost Detainees,'" *A Human Rights Watch Briefing Paper*, October 2004 [online], http://www.hrw.org/backgrounder/usa/us1004/; The Israeli newspaper *Haaretz* reported that the detainees are being held in a top-secret interrogation facility in Jordan (Yossi Melman, "CIA Holding Al-Qaida Suspects in Secret Jordanian Lockup," *Haaretz*, October 13, 2004).

[36] See Human Rights Watch, "The United States' 'Disappeared': The CIA's Long-term 'Ghost Detainees,'" *A Human Rights Watch Briefing Paper*, October 2004 [online], http://www.hrw.org/backgrounder/usa/us1004/.

"Extraordinary Renditions"

The CIA has regularly transferred detainees to countries in the Middle East, including Egypt and Syria, known to practice torture routinely. There are reportedly 100 to 150 cases of such "extraordinary renditions."[37] In one case, Maher Arar, a Syrian-born Canadian in transit in New York, was detained by U.S. authorities and sent to Syria. He was released without charge from Syrian custody ten months later and has described repeated torture, often with cables and electrical cords. In another case, a U.S. government-leased airplane transported two Egyptian suspects who were blindfolded, hooded, drugged, and diapered by hooded operatives, from Sweden to Egypt. There the two men were held *incommunicado* for five weeks and have given detailed accounts of the torture they suffered (e.g. electric shocks), including in Cairo's notorious Tora prison.[38] In a third case, Mamdouh Habib, an Egyptian-born Australian in American custody, was transported from Pakistan to Afghanistan to Egypt to Guantánamo Bay. Now back home in Australia, Habib alleges that he was tortured during his six months in Egypt with beatings and electric shocks, and hung from the walls by hooks.[39]

"Reverse Renditions"

Detainees arrested by foreign authorities in non-combat and non-battlefield situations have been transferred to the United States without basic protections afforded to criminal suspects. `Abd al-Salam `Ali al-Hila, a Yemeni businessman captured in Egypt, for instance, was handed over to U.S. authorities and "disappeared" for more than a year-and-a-half before being sent to Guantánamo Bay Naval Base in Cuba.[40] Six Algerians held in Bosnia were transferred to U.S. officials in January 2002 (despite a Bosnian high court order to release them) and were sent to Guantánamo.

III. Getting Away with Torture

From the earliest days of the war in Afghanistan and the occupation of Iraq, top U.S. government officials have been aware of allegations of abuse. Yet, until the publication of the Abu Ghraib photographs forced action, many Bush administration officials took at best a "see

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[37] Douglas Jehl and David Johnston, "Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails," *The New York Times*, March 6, 2005 (late edition), Section 1, p. 1.

[38] "The Broken Promise," *Kalla Fakta Program*, Swedish TV4, May 17, 2004 [English transcript online], http://hrw.org/english/docs/2004/05/17/sweden8620.htm; Craig Whitlock, "A Secret Deportation of Terror Suspects: 2 Men Reportedly Tortured in Egypt," *The Washington Post*, July 25, 2004 (These cases and nine others are compiled from news reports in Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law, 2004)).

[39] Raymond Bonner, "Australian's Long Path in the U.S Antiterrorism Maze," *The New York Times*, January 29, 2005 (late edition), p. A4.

[40] Human Rights Watch, "Cairo to Kabul to Guantánamo," *A Human Rights Watch Backgrounder*, March 2005 [online], http://hrw.org/english/docs/2005/03/28/usint10379.htm.

no evil, hear no evil" approach to all reports of detainee mistreatment, including those described above, while others were ordering or acquiescing in the abuses.

While reports of abuse had already been coming in for a year, it was a seminal article in *The Washington Post* on December 26, 2002 that provided a wake-up call on U.S. tactics in the "global war on terror."[41] Citing unnamed U.S. officials, it reported that detainees in Afghanistan were subject to "awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights — subject to what are known as 'stress and duress' techniques." The *Post* also reported being told by U.S. officials that "[t]housands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners" and described the rendition of captured al-Qaeda suspects from U.S. custody to other countries where they are tortured or otherwise mistreated. One official was quoted as saying, "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."[42]

As Human Rights Watch Executive Director Kenneth Roth noted in releasing a letter to President Bush the next day:

> The allegations made by *The Washington Post* put the United States on notice that acts of torture may be taking place with U.S. participation or complicity. That places a heightened duty on senior Bush administration officials to take preventive steps immediately.[43]

Human Rights Watch pointed out that "should senior U.S. officials become aware of acts of torture by their subordinates and fail to take immediate and effective steps to end such practices, they would be criminally liable under international law for 'command responsibility.'"

Yet no action was taken then, nor was any action taken during two more years of mounting allegations of detainee abuse. At no time did President Bush, Secretary Rumsfeld, Director Tenet, or any other senior leader exert his authority and warn that the mistreatment of prisoners must stop. Instead, until the Abu Ghraib pictures were revealed, investigations of deaths in custody and other abuse languished. Soldiers and intelligence personnel accused of crimes, including all cases involving the killing of detainees in Afghanistan and Iraq, escaped judicial punishment.

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[41] Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities," *The Washington Post*, December 26, 2002, p. A1.

[42] Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *The Washington Post*, December 25, 2002, p. A1.

[43] Human Rights Watch to President George W. Bush, open letter, December 27, 2002 [online], http://www.hrw.org/english/docs/2002/12/27/usint9381_txt.htm.

Even *after* the Abu Ghraib photos, however, the United States' reaction has been fundamentally one of damage control rather than a search for truth and accountability. This stands in marked contrast to the high-minded promises made by top U.S. officials in the wake of the revelations.

Secretary Rumsfeld, for instance, told a Congressional hearing on May 7, 2004:

> Mr. Chairman, I know you join me today in saying to the world: Judge us by our actions. Watch how Americans, watch how a democracy deals with wrongdoing and scandal and the pain of acknowledging and correcting our own mistakes and weaknesses. And then after they have seen America in action — then ask those who preach resentment and hatred of America if our behavior doesn't give the lie to the falsehood and slander they speak about our people and way of life. Ask them if the resolve of Americans in crisis and difficulty — and, yes, the heartache of acknowledging the evil in our midst — doesn't have meaning far beyond their code of hatred.[44]

In a similar vein, then-Secretary of State Colin Powell said that he told foreign leaders: "Watch America. Watch how we deal with this. Watch how America will do the right thing."[45]

But America is not doing the right thing. Rather than rigorously prosecuting those responsible for the policies that resulted in torture, U.S. authorities have shielded them. They have done this in two ways:

- By refusing to allow an independent inquiry of prisoner abuse. Instead, the Department of Defense has established a plethora of investigations, all but one in-house, looking *down* the chain of command at one aspect or another of the treatment of detainees. No investigation had the independence or the breadth to get to the policies at the heart of the prisoner abuse.

- By failing to undertake criminal investigations against those leaders who by commission or omission allowed the widespread criminal abuse of detainees to develop and persist. Prosecutions have commenced only against low-level soldiers and contractors. Only one officer higher than the rank of sergeant — a major personally implicated in abuse — has

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[44] Donald Rumsfeld, "Testimony of Secretary of Defense Donald H. Rumsfeld before the Senate and House Armed Services Committees," U.S. Senate Armed Services Committee, May 7, 2004 [online], http://armed-services.senate.gov/statemnt/2004/May/Rumsfeld.pdf.

[45] "Abuse Scandal 'Terrible' for U.S., Powell Concedes," *MSNBC*, May 17, 2004 [online], http://www.msnbc.msn.com/id/4855930/.

been charged with a crime. No civilian leader at the Pentagon, the CIA or elsewhere in the government has been charged with a crime.

In-house Investigations down the Chain of Command

In the wake of the Abu Ghraib abuses, the Pentagon established no fewer than seven investigations, summarized below.[46] Almost all of them involved the military investigating itself. None of the military probes was aimed higher up the chain of command than Gen. Sanchez, the top U.S. soldier in Iraq. None of the investigations had the task of examining the role of the CIA or of civilian authorities.[47]

After the abuses at Abu Ghraib were reported to the chain of command, but before the photos entered the public domain, **Major General Antonio M. Taguba** was appointed by General John Abizaid, commander of United States Central Command (CENTCOM), at the request of Gen. Sanchez, commander of the Coalition Joint Task Force Seven (CJTF-7), to investigate the performance of the 800th Military Police (MP) Brigade,[48] a portion of the personnel who staffed Abu Ghraib.[49] Despite Gen. Taguba's limited mandate, his findings were nevertheless very important in placing the acts captured on camera, as well as others, in their local context.[50]

Gen. Taguba reported that "numerous incidents of sadistic, blatant, and wanton criminal abuses" were inflicted on several detainees. The Taguba report described these abuses as "systemic."[51] Gen. Taguba traced the abuses in part to the recommendation of Gen. Miller on a visit from Guantánamo that detention be used as "an enabler for interrogation," and that "the guard force be actively engaged in setting the condition for the successful exploitation of internees."[52] As a result, according to Gen. Taguba, "interrogators actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses.… [The] MP Brigade [was] directed to change facility procedures to 'set the conditions' for MI [military intelligence] interrogations." The report also cited the presence of other government agencies ("OGAs") — typically used, as here, to refer to the CIA without explicitly naming it — in the detention

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[46] See Human Rights Watch, "Military Investigations into Treatment of Detainees in U.S. Custody," *A Human Rights Watch Backgrounder*, July 16, 2004 [online], http://www.hrw.org/campaigns/torture/investigations.htm.

[47] For another critique of these probes, see Human Rights First, "Getting to Ground Truth: Investigating U.S. Abuses in the "War on Terror," September 2004 [online], http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf.

[48] Taguba report, p. 6.

[49] Ibid., pp. 12-13.

[50] General Taguba's confidential findings were first reported by journalist Seymour Hersh the day after the Abu Ghraib photographs were aired on *CBS-TV*'s "Sixty Minutes II."

[51] Taguba report, p. 16.

[52] Taguba noted that this was "in conflict with" the recommendations of the Ryder report, a previous review of Iraqi prisons, which stated that the engagement of military police in military interrogations to "actively set the favorable conditions for subsequent interviews runs counter to the smooth operation of a detention facility."

facilities as a factor contributing to the abuses, and first raised the issue of "ghost detainees" kept hidden from the ICRC.[53]

Lt. Gen. Paul T. Mikolashek, Army Inspector General, was asked to examine Army doctrine, training, and prison procedures throughout the Central Command area of operation in February 2004. After reviewing 94 confirmed cases of detainee abuse in Afghanistan and Iraq, Gen. Mikolashek somehow concluded that the abuses did not result from any policy and were not the fault of senior officers but rather were "unauthorized actions taken by a few individuals."[54] The report's summary and conclusions blame only low-ranking soldiers for the abuses, even though its text identifies numerous problems that were obviously rooted in decisions made by senior commanders and officials. The inspector general apparently made no effort to investigate actions taken high in the chain of command, or to consider sources of information outside the military. Among the problems identified in the report were:

- Troops received "ambiguous guidance from command on the treatment of detainees";
- Established interrogation policies were "not clear and contained ambiguity";
- Commanders in Iraq and Afghanistan approved interrogation techniques that went beyond Army doctrine, based in part on guidelines approved by the Secretary of Defense for use in Guantánamo;
- The decision by senior commanders to rely on the Guantánamo guidelines "appears to contradict" the terms of Rumsfeld's decision, which explicitly stated that the guidelines were applicable only to interrogations at Guantánamo; and
- This led to the use of "high risk" interrogation techniques that "left considerable room for misapplication, particularly under high-stress combat conditions."

The next two reports, the "Final Report of the Independent Panel to Review DoD [Department of Defense] Detention Operations" ("**The Schlesinger report**") and the "AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade" and "AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade" (jointly, "**The Fay/Jones report**,") were released almost simultaneously in late August.

The reports contained important and disturbing information on the torture and mistreatment of prisoners at Abu Ghraib, and to a lesser extent elsewhere in Iraq and in Afghanistan. Yet both

[53] Taguba report, p. 27.

[54] Lt. Gen. Paul T. Mikolashek, "The Mikolashek Report," Department of the Army, July 21, 2004. The report can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), pp. 630-907.

reports shied away from the logical conclusion that high-level military and civilian officials should be investigated for their role in the crimes committed at Abu Ghraib and elsewhere

The Fay/Jones inquiry was charged with examining the alleged misconduct of personnel assigned to or attached to the 205th Military Intelligence Brigade, which was in charge of the Abu Ghraib prison. Investigations began in April 2004 with Gen. George R. Fay, deputy chief of staff of the Army intelligence, as chief investigator. Fay, an insurance company executive who had been on active duty for five years, was a contributor to Republican campaigns.[55] On June 17, Army Gen. Paul J. Kern, Army Materiel Command, was given oversight responsibility for the investigation, and, at his request, Acting Army Secretary Les Brownlee subsequently announced that Gen. Anthony R. Jones would be brought into the investigation to question Gen. Sanchez.[56]

Like the Taguba report, and earlier reports, the Fay/Jones report was specific to Abu Ghraib. But it finally put to rest the Bush administration claim that the abuse was the work of a few "bad apples." The report found that military intelligence officers — not solely military police guards — played a major role in directing and carrying out the abuses at Abu Ghraib. The report listed those abuses in detail — the use of unmuzzled dogs in a "game" of making detainees urinate and defecate in fear, forced participation in group masturbation, stripping detainees of their clothes, and beatings.

The report also made clear that the illegal techniques were not limited to Iraq. "The techniques employed in [Guantánamo] included the use of stress positions, isolation for up to thirty days, removal of clothing and the use of detainees' phobias (such as the use of dogs). […] From December 2002, interrogators in Afghanistan were removing clothing, isolating people for long

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[55] Walter Pincus, "Prison Investigator's Army Experience Questioned," *The Washington Post*, May 26, 2004, p. A18.

[56] A lead investigator was needed who was at least equal in rank to the Sanchez, a three-star general. Fay is a two-star general. Jones technically is senior to Sanchez because he has held his three-star rank slightly longer. According to Scott Horton, chair of the Committee on International Law of the Association of the Bar of the City of New York, who is a critic of the interrogation policies but has spoken directly with soldiers interviewed by Fay, Fay's draft report to General Sanchez in May 2004 "was such a whitewash on the role of military personnel that it stood no chance of gaining acceptance." The report, he says, was then "broadly re-written." Nevertheless, Horton alleges,

> As noted to me by senior officers, certain senior figures whose conduct in this affair bears close scrutiny, were explicitly "protected" or "shielded" by withholding information from investigators or by providing security classifications which made such investigations possible. The individuals "shielded," I was informed, included MG Geoffrey Miller, MG Barbara Fast, COL Marc Warren, COL Steven Bolz, LTG Sanchez and LTG William ("Jerry") Boykin. In each case, the fact that these individuals possessed information on Rumsfeld's involvement was essential to the decision to "shield" them.

(Scott Horton, "Expert Report" ("Scott Horton report"), Center for Constitutional Rights, January 31, 2005 [online], http://www.ccr-ny.org/v2/legal/september_11th/docs/ScottHortonGermany013105.pdf, paras. 14-15).

periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation."[57]

The generals recommended punishments for the top two military intelligence officers at the prison, Col. Thomas M. Pappas and Lt. Col. Steven L. Jordan, as well as three other intelligence officers, and implicated 29 other military intelligence soldiers in at least 44 cases of abuse. The report found that Gen. Sanchez was not "directly involved" in the abuse, but faulted him and his deputy, Gen. Walter Wojdakowski, for failing "to ensure proper staff oversight of detention and interrogation operations."[58] It criticized Sanchez for his "inconsistent" and "confusing" guidelines on interrogations and said that his orders led interrogators to think that they could use guard dogs on prisoners, which they subsequently did in ways that violated the Geneva Conventions.[59] But the reports failed to take the obvious but politically dangerous step of stating plainly that Gen. Sanchez and other commanders were responsible for what happened. "We did not find General Sanchez culpable but we found him responsible for the things that did or did not happen," Gen. Paul J. Kern, who oversaw the report, told reporters.[60]

The Schlesinger panel was chosen by Secretary Rumsfeld on May 7, 2004 and included: former Defense Secretary James Schlesinger (Chair); Tillie Fowler, former representative from Florida; retired Air Force Gen. Charles Horner; and Harold Brown, former Secretary of Defense. The panel was asked to review Department of Defense detention operations and to advise the Secretary of Defense on the "cause of the problems and what should be done to fix them." Issues to be examined included:

> force structure, training of regular and reserve personnel, use of contractors, organization, detention policy and procedures, interrogation policy and procedures, the relationship between detention and interrogation, compliance with the Geneva Conventions, relationship with the International Committee of the Red Cross, command relationships, and operational practices.

According to Secretary Rumsfeld, the team was to "examine the pace, the breadth, the thoroughness of the existing investigations and to determine whether additional investigations or studies need to be initiated." Rumsfeld also noted that "Issues of personal accountability will be resolved through established military justice procedures," although he would "welcome" any information the panel developed. The panel's unpaid executive director, James Blackwell, had reportedly done Pentagon consulting as an employee of Science Applications International

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[57] Fay report, p. 29.

[58] LTG Anthony R. Jones, *Article 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade* ("Jones report"), p. 24.

[59] Ibid., p. 4.

[60] Eric Schmitt, "Abuses at Prison Tied to Officers in Intelligence," *The New York Times*, August 26, 2004.

Corporation of San Diego, the seventh-largest recipient of defense contract awards in fiscal 2002, with $2.1 billion.[61]

The Schlesinger panel — alone among the probes — interviewed top military and Pentagon officials, but otherwise conducted no independent research.

The Schlesinger panel found that the techniques that Secretary Rumsfeld had put into play "migrated" from Guantánamo to Afghanistan and Iraq. As the report put it, "Law of war policy and decisions germane to [Operation Enduring Freedom] migrated, often quite innocently, into decision matrices for [Operation Iraqi Freedom]."[62] In particular, when Gen. Geoffrey Miller, who oversaw the interrogation efforts at the U.S. military base at Guantánamo Bay, Cuba, went to Iraq in order step up the hunt for "actionable intelligence," he "brought to Iraq the secretary of defense's policy guidelines for Guantánamo" "as a potential model" which he gave to Gen. Sanchez.[63] These techniques formed the basis for the subsequent contradictory policy memos signed by Sanchez that contributed to detainee abuse.[64] In addition, the Schlesinger report noted, when on September 14 "Sanchez signed a memorandum authorizing a dozen interrogation techniques beyond" the standard Army practice under the Geneva Conventions, including "five beyond those approved for Guantánamo," he did so "using reasoning from the President's Memorandum of February 7, 2002," which he believed justified "additional, tougher measures."[65]

Secretary Schlesinger, in his oral remarks upon releasing the report, regrettably focused on the particular bizarre acts pictured at Abu Ghraib, rather than the context that gave rise to them, speaking of "freelance activities on the part of the night shift," and describing the situation as "a kind of 'Animal House.'"[66] He later said that the abuses were due to "just pure sadism."[67] In addition, Schlesinger stated, "if hypothetically somebody had suggested these kinds of abuses, the last thing that would have been ordered would be that there be photographic evidence of it."[68] Schlesinger also suggested his own bias by stating that Rumsfeld's resignation "would be a boon to all America's enemies."

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[61] Craig Gordon, "Prison Abuse Investigations: Critics Say Scope Too Narrow," *Newsday*, June 6, 2004

[62] Schlesinger report, p. 82.

[63] Ibid., p. 37.

[64] Ibid., p. 37.

[65] Ibid., p. 10.

[66] Bradley Graham and Josh White, "Top Pentagon Leaders Faulted in Prison Abuse," *The Washington Post*, August 25, 2004.

[67] The Hon. James R. Schlesinger, Testimony before Senate Armed Services Committee, September 9, 2004, p. 13.

[68] Ibid., p. 28. There was speculation, however, that photographing detainees in situations thought to be especially humiliating in Arab culture might have been part of a deliberate strategy to get detainees to talk to interrogators for fear of having the photos released. See, e.g., Seymour M. Hersh, "The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib," *The New Yorker*, May 24, 2004; "The Pictures: Lynndie England," *CBSNews.com*, May 12, 2004; Edward Epstein, "Senators Suspect Higher-ups Directed Abuses at Abu Ghraib: They Query General Who Investigated," *The San*

The Schlesinger report talked about management failures when it should have been more forthright about policy failures. Indeed, it seemed to go out of its way not to find any relationship between Secretary Rumsfeld's approval of interrogation techniques designed to inflict pain and humiliation and the widespread mistreatment and torture of detainees in Iraq, Afghanistan, and Guantánamo.

Vice Adm. Albert T. Church, Navy Inspector General was ordered by Secretary Rumsfeld to investigate prisoner operations and intelligence gathering practices. When initiated in early May 2004, the investigation was limited to activities in Guantánamo Bay and the Naval Consolidated Brig in Charleston, South Carolina. Rumsfeld then widened the scope of the inquiry on May 25 to include prison operations in Iraq and Afghanistan. The report was completed in late 2004, but it was only in March 2005 that an unclassified 21-page executive summary was released,[69] and a classified 400-page report was given to the Senate Armed Services Committee.

The Church report was supposed to be the definitive report on the development of interrogation techniques and detainee abuse in the "global war on terror" but the unclassified summary suggests a careful attempt — months after the Schlesinger and Fay/Jones report put the Pentagon on the defensive — to present a version of the facts that would not cause any trouble for the hierarchy. Time and again, the summary goes out of its way to rebut any inference that government policy was to blame, to the point of straining credibility and flatly contradicting the earlier reports. The report concluded that there was "no single, overarching explanation" for the "few" cases in which detainees had not been treated humanely.

Although Secretary Rumsfeld and General Sanchez both approved the use of guard dogs to strike fear in detainees, and although guard dogs were featured prominently in the Abu Ghraib photos, the Church executive summary states that "it is clear that none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater." Indeed, the *only* mention of dogs in the entire summary is the patently false statement that in Afghanistan and Iraq "interrogators clearly understood that abusive practices and techniques — such as … terrorizing detainees with unmuzzled dogs … — were at all times prohibited."

Adm. Church told a congressional hearing that it was "not in my charter" to determine individual responsibility because the Schlesinger panel had such a mandate — even though, as noted above, "issues of personal accountability" were specifically excluded from that panel's

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Francisco Chronicle, May 12, 2004; "Hardball with Chris Mathews," *MSNBC.com*, May 13, 2004 [online], http://www.msnbc.msn.com/id/4979082/; Robin Cook, "George Bush's Contempt for International Law Damages Both America and Britain," *The Independent (UK)*, June 26, 2004; and Eli Lake, "CIA Gets Its Turn in the Hot Seat on Hill," *The New York Sun*, May 14, 2004.

[69] "Executive Summary," U.S. Department of Defense, available to the public since March 2005 [online], http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf ("Church report').

remit. Speaking to journalists, Adm. Church added "I don't think you can hold anyone accountable for a situation that maybe if you had done something different, maybe something would have occurred differently."

In addition to these probes, there are a number of investigations which are still underway or have been completed but not yet made public:

Brig. Gen. Charles Jacoby: This inquiry was ordered in mid-May 2004 by Lt.-Gen. David Barno, the commander of U.S. forces in Afghanistan, to investigate the conditions at around 20 U.S. jails in Afghanistan, including the main facility at Bagram. Jacoby's job in Afghanistan was "to ensure internationally accepted standards of handling detainees are being met."[70] Jacoby's report was reportedly completed in July 2004, but has yet to be released. According to *The Washington Post,* the report found a wide range of shortcomings in the military's handling of prisoners in Afghanistan.[71] In February 2005, a U.S. military spokesman said that "The report is still under review and once the review is complete it will be released."[72] Gen. Jacoby refused to meet with Human Rights Watch, even though the organization had conducted some of the only independent investigations of detainee abuses in Afghanistan.

Furlow/Schmidt: On January 5, 2005, following the release of the FBI e-mails relating to detainees treatment at Guantánamo, U.S. Southern Command headquarters appointed Army Brigadier General John Furlow to direct "an internal investigation into recently disclosed allegations by members of the Federal Bureau of Investigation of detainee abuse" at Guantánamo. On February 28, 2005, after criticism that the one-star Furlow would be unable to question senior officers such as Gen. Miller, Air Force Lieutenant General Randall M. Schmidt took over the investigation. Schmidt was directed to complete the investigation by March 31.[73]

Brig. Gen. Richard P. Formica is heading an inquiry into the detention activities of Special Operations forces. That report has not yet been released.

Central Intelligence Agency inspector general: The CIA's inspector general is also reportedly conducting a half-dozen inquiries into possible misconduct within the agency involving the detention, interrogation, and rendition of suspected terrorists.[74] No details have been made public.

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[70] "U.S. to Review Afghan Prisons," Associated Press, May 22, 2004.

[71] R. Jeffrey Smith, "General Cites Problems at U.S. Jails in Afghanistan," *The Washington Post*, December 3, 2004.

[72] "U.S. Rejects U.N. Expert's Afghan Rights Concerns," Reuters, February 12, 2005.

[73] "Three-Star General Appointed to Lead Investigation," A US Southern Command News Release, February 28, 2005 [online], http://www.southcom.mil/pa/Media/Releases/PR050228.pdf.

[74] Douglas Jehl and David Johnston, "Rule Change Lets C.I.A. Freely Send Suspects Abroad," *The New York Times*, March 6, 2005.

Prosecuting Some Soldiers, Belatedly

Until the publication of the Abu Ghraib photographs forced action, almost all military investigations into deaths and mistreatment in custody were languishing. No one implicated in the abuse of persons in custody in Afghanistan, Iraq or elsewhere, including in the killing of detainees, had been criminally prosecuted. Many personnel appear to have had their cases shelved or have been given inappropriate administrative reprimands, instead of facing criminal prosecution.

In the aftermath of the Abu Ghraib pictures, the United States initiated the prosecution of a number of soldiers and contactors for alleged crimes committed in Iraq (particularly Abu Ghraib)[75] and Afghanistan. Pentagon officials told Human Rights Watch in March 2005 that out of 300 investigations initiated into abuse allegations, only 14 persons have been convicted by court-martial. And although 33 additional soldiers have been referred to trial by court-martial, 70 have received only "non-judicial punishments," such as reprimands, rank reductions, or discharge from the military, though many of the alleged abuse cases involved serious abuses and homicides.[76] Earlier, in December 2004, the Pentagon told journalists that 130 American troops had been punished or charged for abuse of prisoners, a figure which apparently includes non-judicial punishments.[77]

Homicide investigations have been extremely slow. As of February 2005, Army criminal investigators were reported to have conducted 68 detainee death investigations with 79 possible victims.[78] Yet only two homicide cases have resulted in recommended courts martial for homicide; one has been postponed and in another, most of the implicated personnel were brought before non-judicial administrative hearings instead of court-martial, and most received only administrative punishments. Many cases involving detainee deaths in Afghanistan in 2002, over two-and-a-half years ago, have gone unresolved. In one case from Afghanistan, it appears that an army captain who "murdered" a detainee was simply discharged from the military, and his case was closed.[79]

Meanwhile, no criminal investigations appear to have been commenced for abuses committed at Guantánamo Bay, at US-run "secret locations" around the world or in connection with the

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[75] The Fay/Jones report implicated 31 military intelligence soldiers in the abuse of Iraqi prisoners at Abu Ghraib. The Taguba report listed military police implicated in the abuses at Abu Ghraib. Thus far, however, only seven U.S. army soldiers have been charged and only two convicted and sentenced.

[76] E-mail from Lt. Col. John Skinner, Pentagon spokesperson, to Human Rights Watch researcher, April 8, 2005.

[77] "Pentagon: 130 Troops Punished for Abuse," *USA Today*, December 15, 2004.

[78] Douglas Jehl and Eric Schmitt, U.S. Military Says 26 Inmate Deaths May Be Homicide," *The New York Times*, March 16, 2005.

[79] Human Rights Watch to Secretary of Defense Donald Rumsfeld, open letter, December 13, 2004 [online], http://hrw.org/english/docs/2004/12/10/afghan9838.htm; R. Jeffrey Smith, "Army Reprimand Reported in Slaying; Officers Allegedly Killed Afghan in '02," *The Washington Post*, December 14, 2004.

rendition of persons to third countries where they were likely to be tortured. With respect to CIA abuses, Porter J. Goss, who replaced George Tenet as director of Central Intelligence, told the Senate Intelligence Committee in February 2005 that "a bunch of other cases" were now under review by the CIA's inspector general. No CIA officers have been charged in relation to alleged mistreatment, with the single exception of a CIA contractor charged in the death of detainee in Afghanistan in 2003.

IV. Impunity for the Architects of Illegal Policy

To date, with the exception of one major directly implicated in abuse, only low-ranking soldiers — privates and sergeants have been prosecuted. No officer has been charged in connection with detainee abuse by people under his command. No civilian leader at the Pentagon or the CIA has been investigated.

Commanders and superiors can be held criminally liable if they order, induce, instigate, aid, or abet in the commission of a crime. This is a principle recognized both in U.S. law[80] and international law.[81]

In addition, the doctrine of "command responsibility" or "superior responsibility" holds that individuals who are in civilian or military authority may under certain circumstances be criminally liable not for their actions, but rather for the crimes of those under their command. As explained in the annex to this report, three elements are needed to establish such liability:

1. There must be a superior-subordinate relationship;
2. The superior must have known or had reason to know that the subordinate was about to commit a crime or had committed a crime; and
3. The superior failed to take necessary and reasonable measures to prevent the crime or to punish the perpetrator.

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[80] See, e.g., 18 U.S.C. § 2 ("(a) Whoever commits an offense against the United States or aids, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.")

[81] The Rome statute of the International Criminal Court provides in article 25 that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; [etc]"; See also Geneva I, art 49, Geneva II, art. 50; Geneva III, art. 129; Geneva IV, art. 146. ("The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, ... the grave breaches." Emphasis added.)

The crimes discussed below — war crimes and torture — are punished respectively by the War Crimes Act of 1996, 18 U.S.C. § 2441, and the Anti-Torture Act of 1996, 18 U.S.C. § 2340.

The War Crimes Act provides criminal punishment for whomever, inside or outside the United States, commits a war crime, if either the perpetrator or the victim is a member of the U.S. Armed Forces or a national of the United States. A "war crime" is defined as any "grave breach" of the Geneva Conventions or acts which violate common Article 3 of those pacts.[82] "Grave breaches" include "willful killing, torture or inhuman treatment" of prisoners of war (POWs) and of civilians qualified as "protected persons." Common Article 3 prohibits, *inter alia*, murder, mutilation, cruel treatment and torture, and "outrages upon personal dignity, in particular humiliating and degrading treatment."

The Anti-Torture Act criminalizes acts of torture — including attempts to commit torture and conspiracy to commit an act of torture — occurring *outside* the United States' territorial jurisdiction regardless of the citizenship of the perpetrator or victim.[83] In the case of torture committed *within* the United States, as for instance at Guantánamo, prosecution would be possible under several federal statutes, among them the civil rights laws, which bar government employees from using excessive force, and laws against homicide, battery, and the like.[84] Similarly, state criminal laws could be invoked for any abuse taking place within particular states.

The USA Patriot Act expanded U.S. federal criminal jurisdiction to, among other things, U.S. military bases and U.S. government properties abroad. This is the jurisdictional basis for the criminal case against a CIA contractor.

In addition, the Uniform Code of Military Justice (UCMJ),[85] which provides procedures for courts martial, applies to the conduct of all persons serving in the U.S. Armed Forces,[86]

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[82] 18 U.S.C. §§ 2401, 2441.

[83] 18 U.S.C. § 2340 A (a). Section 2340(3) defined the "United States" as including "all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49." The USA Patriot Act broadened the scope of section 7, extending jurisdiction under that section to foreign diplomatic, military and other facilities. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 amends section 2340(3) to define the "United States" as "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States" (H.R.4200, 108th Cong. §1089 (2004)).

[84] The United States reported to the U.N. Committee against Torture that "Where acts constituting torture under the Convention are subject to federal jurisdiction, they fall within the scope of such criminal offences as assault, maiming, murder, manslaughter, attempt to commit murder or manslaughter, or rape. See 18 U.S.C. §§ 113, 114, 1111, 1113, 2031. Conspiracy to commit these crimes, and being an accessory after the fact, are also crimes. See 18 U.S.C. §§ 3, 371 and 1117" (U.N. Committee against Torture, "Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Initial Reports of State Parties due in 1995; Addendum; United States of America" (Geneva: United Nations, 2000), CAT/C/28/Add.5, para. 178).

[85] 10 U.S.C. §§801-941 (1994 and Supp. IV, 1999).

including the officers identified below. (These officers are thus potentially subject to the concurrent jurisdiction of civilian courts and the UCMJ.) The UCMJ applies worldwide.[87] It comprises a set of criminal laws, which include many crimes punished under civilian law (e.g., assault, manslaughter, murder, rape, etc.), as well as offenses such as cruelty and maltreatment [88]and dereliction of duty [89](these are separate offenses under 10 U.S.C. §892). In addition, a service member whose conduct is alleged to violate a federal criminal law, such as the Anti-Torture Statute, could be prosecuted under Article 134 of the UCMJ.

Human Rights Watch expresses no opinion about the ultimate guilt or innocence of the four officials listed below, or of any other officials, particularly because so much evidence has been withheld and so many questions remain unanswered, but does believe that a *prima facie* case exists that warrants the opening of a criminal investigation with respect to each.

Secretary of Defense Donald Rumsfeld

> "These events occurred on my watch. As Secretary of Defense I am accountable for them. I take full responsibility."
>
> - Donald Rumsfeld[90]

Secretary Rumsfeld should be investigated for war crimes and torture by US troops in Afghanistan, Iraq, and Guantánamo under the doctrine of "command responsibility." Secretary Rumsfeld created the conditions for U.S. troops to commit war crimes and torture by sidelining and disparaging the Geneva Conventions, by approving interrogation techniques that violated the Geneva Conventions as well as the Convention against Torture, and by approving the hiding of detainees from the International Committee of the Red Cross. From the earliest days of the war in Afghanistan, Secretary Rumsfeld was on notice through briefings, ICRC reports, human rights reports, and press accounts that U.S. troops were committing war crimes, including acts of torture. However, there is no evidence that he ever exerted his authority and warned that the mistreatment of prisoners must stop. Had he done so, many of the crimes committed by U.S. forces could have been avoided.

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[86] 10 U.S.C.. §802 (1994). The term "armed forces" is defined in section 101(a)(4) to mean the "Army, Navy, Air Force, Marine Corps, and Coast Guard" (10 U.S.C. §101(a)(4) (1994)). The UCMJ applies to civilians accompanying the armed forces only during a congressionally declared war.

[87] 10 U.S.C. §805.

[88] 10 U.S.C. §893

[89] 10 U.S.C. §892. This offense, which applies to personnel who know of offenses by others and fail to report them, as well as failure to obey orders, has been frequently used against soldiers involved in recent prisoner abuse.

[90] Donald Rumsfeld, "Testimony of Secretary of Defense Donald H. Rumsfeld before the Senate and House Armed Services Committees," U.S. Senate Armed Services Committee, May 7, 2004 [online], http://armed-services.senate.gov/statemnt/2004/May/Rumsfeld.pdf.

An investigation would also determine whether the illegal interrogation techniques that Secretary Rumsfeld approved for Guantánamo were actually used to inflict inhuman treatment on detainees there before he rescinded his approval to use them without requesting his permission. It would also examine whether Secretary Rumsfeld approved a secret program that encouraged physical coercion and sexual humiliation of Iraqi prisoners, as alleged by the journalist Seymour Hersh. If either were true, Secretary Rumsfeld might also, in addition to command responsibility, incur liability as the instigator of crimes against detainees.

Secretary Rumsfeld is the top civilian official in the Pentagon. By law and in fact, he has command authority over all geographic and functional military commands.[91]

Secretary Rumsfeld created the conditions for U.S. troops to commit war crimes and torture and thus should have known that crimes were likely to occur

Secretary Rumsfeld denigrated the Geneva Conventions

Secretary Rumsfeld has been central to the Bush Administration's effort to redefine and minimize the protections due to prisoners captured in the "global war on terror." Ignoring the deeply rooted U.S. military practice of applying the Geneva Conventions broadly, Secretary Rumsfeld labeled the first detainees to arrive at Guantánamo from Afghanistan on January 11, 2002 as "unlawful combatants," denying them possible status as POWs. "Unlawful combatants do not have any rights under the Geneva Convention," Secretary Rumsfeld said,[92] overlooking that the Geneva Conventions provide explicit protections to all persons captured in an international armed conflict, even if they are not entitled to POW status. Secretary Rumsfeld signaled a casual approach to U.S. compliance with international law by saying that the government would "for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate."[93] On January 27, Secretary Rumsfeld visited Guantánamo and said that the detainees there were not POWs.[94]

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[91] "Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs — (1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command" (10 U.S.C. § 162(b)). For charts and organigrams, see "Chapter 24: National Security Structure and Strategy," The Judge Advocate General's Corps, U.S. Army, [online], https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/1af4860452f962c085256a490049856f/$FILE/Chapter%2024%20-%20National%20Security%20Structure.htm. As Secretary Rumsfeld himself noted, "I am in the chain of command" ("Secretary Rumsfeld on *ABC*'s Today Show with Diane Sawyer," news transcript, U.S. Department of Defense, May 5, 2004 [online], http://www.defenselink.mil/transcripts/2004/tr20040505-secdef0703.html).

[92] Katharine Q. Seeyle, "A Nation Challenged: The Prisoners; First 'Unlawful Combatants' Seized in Afghanistan Arrive at U.S. Base in Cuba," *The New York Times*, January 12, 2002, p. A7.

[93] "Geneva Convention Doesn't Cover Detainees," Reuters, January 11, 2002.

[94] "Rumsfeld Visits Camp X-Ray," *CNN*, January 27, 2002 [online], http://transcripts.cnn.com/TRANSCRIPTS/0201/27/sun.09.html.

On February 7, 2002, Secretary Rumsfeld questioned the relevance of the Geneva Conventions to current U.S. military operations: "The reality is the set of facts that exist today with the al-Qaeda and the Taliban were not necessarily the set of facts that were considered when the Geneva Convention was fashioned."[95]

Even after the Abu Ghraib scandal broke, Secretary Rumsfeld continued to take a loose view of the applicability of the Geneva Conventions. On May 5, 2004, he told a television interviewer that the Geneva Conventions "did not apply precisely" in Iraq but were "basic rules" for handling prisoners.[96] Visiting Abu Ghraib prison on May 14, Rumsfeld remarked, "Geneva doesn't say what you do when you get up in the morning."

Secretary Rumsfeld's belittling of the Geneva Conventions created a climate in which respect for legal norms by U.S. troops may have been loosened. In May 2004, for instance, a member of the 377th Military Police Company told *The New York Times* that the labeling of prisoners in Afghanistan as "enemy combatants" not subject to the Geneva Conventions contributed to their abuse. "We were pretty much told that they were nobodies, that they were just enemy combatants," he said. "I think that giving them the distinction of soldier would have changed our attitudes toward them."[97]

Similarly, speaking of the decision to apply Geneva Convention rules only where this was "appropriate" and "consistent with military necessity," William H. Taft IV, who until recently served as the State Department's top legal adviser said it:

> unhinged those responsible for the treatment of the detainees in Guantánamo from the legal guidelines for interrogation of detainees reflected in the Conventions and embodied in the Army field manual for decades. Set adrift in uncharted waters and under pressure from their leaders to develop information on the plans and practices of al Qaeda, it was predictable that those managing the interrogation would eventually go too far[98]

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[95] See Jim Garamone, "Geneva Convention Applies to Taliban, Not Al-Qaeda," *DefenseLink News* (US Military), American Forces Press Service, February 7, 2002; "Redefining Torture: Did the U.S. Go Too Far in Changing the Rules, or Did It Apply the New Rules to the Wrong People?" *Time Magazine*, June 21, 2004.

[96] Secretary Rumsfeld, "Today," Interview by Matt Lauer, *NBC*, news transcript, U.S. Department of Defense, May 5, 2004 [online], http://www.dod.gov/transcripts/2004/tr20040505-secdef1425.html.

[97] Douglas Jehl and Andrea Elliott, "The Reach of War: GI Instructors; Cuba Base Sent its Interrogators to Iraqi Prison," *The New York Times*, May 29, 2004, p. A1.

[98] William H. Taft IV, "Keynote Remarks," The Geneva Convention and the Rules of War in the Post 9-11 and Iraq World, conference, Washington College of Law American University, March 24, 2005. On file with Human Rights Watch.

One of the earliest indications of Secretary Rumsfeld's approach to interrogations came with the capture in Afghanistan of John Walker Lindh, the so-called "American Taliban." Photos presented by Lindh's lawyers on April 2, 2002 showed Lindh stripped naked, blindfolded, with plastic cuffs on his wrists, and bound to a stretcher with duct tape.[99] According to a motion filed in federal court by Lindh's attorneys, Lindh was left for days on this gurney in an unheated and unlit metal shipping container, removed from the container only during interrogations. A group of armed American soldiers allegedly "blindfolded Mr. Lindh, and took several pictures of Mr. Lindh and themselves with Mr. Lindh. In one, the soldiers scrawled 'shithead' across Mr. Lindh's blindfold and posed with him. … Another told Mr. Lindh that he was 'going to hang' for his actions and that after he was dead, the soldiers would sell the photographs and give the money to a Christian organization." Mr. Lindh still had a bullet in his thigh, which was said by a U.S. physician to be "seeping and malodorous." He was also said to be suffering from hypothermia, malnourishment, and exposure.[100] According to the motion, "A Navy physician… recounted that the lead military interrogator in charge of Mr. Lindh's initial questioning told the physician 'that sleep deprivation, cold and hunger might be employed' during Mr. Lindh's interrogations." According to documents examined by the *Los Angeles Times*, Rumsfeld's legal counsel instructed military intelligence officers to "take the gloves off" when interrogating Lindh.[101] In the early stages of Lindh's interrogation, his responses were reportedly cabled to Washington hourly.[102]

In addition, as the Schlesinger report found, Secretary Rumsfeld's multiple policy changes regarding acceptable interrogation techniques at Guantánamo "contribut|ed| to uncertainties in the field as to which techniques were authorized."[103]

Secretary Rumsfeld approved interrogation methods that violated the Geneva Conventions and the Convention against Torture

Secretary Rumsfeld was intimately involved in the minutiae of interrogation techniques for detainees at Guantánamo Bay, Cuba, for whom the U.S. government had announced that POW protections would not apply. On December 2, 2002, responding to a request from officers at Guantánamo, Secretary Rumsfeld authorized a list of techniques for interrogation of prisoners in

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[99] See "Setback for 'US Taleban' Defence," *BBC News*, April 1, 2002 [online], http://news.bbc.co.uk/1/hi/world/americas/1905647.stm.

[100] United States of America v. John Philip Walker Lindh, U.S. District Court, E.D. Va., Crim. No. 02-37-A, Proffer of facts in Support of Defendant's Motion to Suppress, June 13, 2002 [online], http://www.lindhdefense.info/20020613_FactsSuppSuppress.pdf.

[101] Richard A. Serrano, "Prison Interrogators' Gloves Came off before Abu Ghraib," *Los Angeles Times*, June 9, 2004.

[102] Ibid. On the eve of a court hearing on his motion to suppress his confession, at which he likely would have testified to his treatment in Aghanistan, Lindh agreed to plead guilty to lesser charges than those for which he was indicted. As part of the arrangement Lindh — reportedly at the request of the Department of Defense — agreed to the following statement: "The defendant agrees that this agreement puts to rest his claims of mistreatment by the United States military, and all claims of mistreatment are withdrawn. The defendant acknowledges that he was not intentionally mistreated by the U.S. military." See Dave Lindorff, "A First Glimpse at Bush's Torture Show," *Counterpunch*, June 5-6, 2004; Dave Lindorff, "Chertoff and Torture," *The Nation*, February 14, 2005.

[103] Schlesinger report, p. 14.

Guantánamo that was an unprecedented expansion of army doctrine.[104] The techniques approved by Rumsfeld included:

- "The use of stress positions (like standing) for a maximum of four hours";
- Isolation up to 30 days;
- "The detainee may also have a hood placed over his head during transportation and questioning";
- "Deprivation of light and auditory stimuli";
- "Removal of all comfort items (including religious items)";
- "Forced grooming (shaving of facial hair, etc)";
- "Removal of clothing"; and
- "Using detainees' individual phobias (such as fear of dogs) to induce stress."[105]

These methods violate the protections afforded to POWs, the presumptive classification of many of the Guantánamo detainees.[106] Depending on how they are used, these methods also likely violate the Geneva Conventions' prohibition on torture or inhuman treatment of prisoners, regardless of whether the prisoners are entitled to POW protections.[107] Their use on prisoners would thus constitute a war crime.

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[104] That doctrine is embodied in Department of the Army *Field Manual 34-52*: Intelligence Interrogation, which stresses cooperation as the basis for successful interrogation. It specifically prohibits torture or coercion. The field manual also lists relevant sections of the Geneva Conventions, including the prohibition against, "subjecting the individual to humiliating or degrading treatment, implying harm to the individual or his property or implying a deprivation of rights guaranteed under international law because of failure to cooperate" (*Field Manual 34-52: Intelligence Interrogation*, U.S. Department of the Army, September 1992). As the working group on interrogation techniques established by Secretary Rumsfeld pointed out, "Army interrogation experts view the use of force as an inferior technique that yields information of questionable quality" ("Working Group Report on Detainee Interrogations on the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," April 4, 2003 [online], http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf, p. 53).

[105] Jerald Phifer to Commander of Joint Task Force 170, memorandum, "Request for Approval of Counter-resistance Techniques," October 11, 2002, which was attached to William J. Haynes II to Secretary of Defense, memorandum, "Counter-resistance Techniques," November 27, 2002, and approved by Secretary Rumsfeld on December 2, 2002 [online], http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf, p. 1 Rumsfeld appended a handwritten note to his authorization of these techniques: "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?"

[106] Article 5 of the Geneva Convention relative to the Treatment of Prisoners of War (1949) states:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

[107] Article 31 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV, 1949) prohibits, "physical or moral coercion" against protected persons (i.e. non-POW prisoners), while Article 27 states that such civilian prisoners must "at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." Article 17 of the Geneva Convention relative to the

Additionally, Army *Field Manual 34-52* cites "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" as an example of torture. Mental torture includes "abnormal sleep deprivation," which may or may not have resulted from the authorization of light control and loud music. The field manual also prohibits forms of coercion including threats. Perhaps most importantly, the field manual instructs soldiers, when in doubt, to ask themselves: "If your contemplated actions were perpetrated by the enemy against U.S. POWs, you would believe such actions violate international or U.S. law."[108]

As the U.N.'s Special Rapporteur on Torture made clear in his 2004 report to the U.N. General Assembly, the techniques also violate the prohibitions of the Convention against Torture[109]:

> The Special Rapporteur has recently received information on certain methods that have been condoned and used to secure information from suspected terrorists. They notably include holding detainees in painful and/or stressful positions, depriving them of sleep and light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, depriving them of clothing, stripping detainees naked and threatening them with dogs. The jurisprudence of both international and regional human rights mechanisms is unanimous in stating that such methods violate the prohibition of torture and ill-treatment.[110]

Indeed, the United States has denounced as torture these same methods when practiced by other countries, including Burma (being forced to squat or remain in uncomfortable periods for long periods of time), Egypt (stripping and blindfolding of prisoners), Eritrea (tying of hands and feet for extended periods of time), Iran (sleep deprivation and "suspension for long periods in

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Treatment of Prisoners of War (Geneva Convention III, 1949) states, "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."

[108] *Field Manual 34-52: Intelligence Interrogation*, U.S. Department of the Army, September 1992, pp. 1-9.

[109] The U.N. Committee against Torture, in its consideration of the report of Israel, for example, noted that methods allegedly included: "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill, and are, in the Committee's view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case" (U.N. Committee against Torture (CAT), "Concluding Observations concerning Israel" (United Nations, Geneva, 1997), A/52/44, para. 257, emphasis added). See also CAT, "Concluding Observations concerning Republic of Korea" (United Nations, Geneva, 1996), A/52/44, para. 56 (severe sleep deprivation constitutes torture); CAT, "Concluding Observations concerning New Zealand" (United Nations, Geneva, 1993), A/48/44, para. 148 (threat of torture constitutes torture). The U.N. Special Rapporteur on Torture has condemned many of these practices, pointing out that while cruel, inhuman or degrading treatment may be subject to different rules than torture under the Convention against Torture and Other Cruel, Human or Degrading Treatment or Punishment (CAT), its prohibition is nonetheless "non-derogable" (absolute at all times) under Article 4 of the ICCPR. See "Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," (United Nations, Geneva, 2004), A/59/324.

[110] "Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," (United Nations, Geneva, 2004), A/59/324, para 17.

contorted positions"), Iraq (food and water deprivation), Jordan (sleep deprivation and solitary confinement), Pakistan (prolonged isolation and denial of food or sleep), Saudi Arabia (sleep deprivation), Tunisia (food and sleep deprivation), and Turkey (prolonged standing, isolation).[111] In the most recent report covering the use of torture in 2004, the State Department criticized: Egypt for stripping and blindfolding detainees and pouring cold water on them; Tunisia, Iran, and Libya for using sleep deprivation; Libya for threatening chained detainees with dogs; and North Korea for forcing detainees to stand up and sit down to the point of collapse.[112]

Of Secretary Rumsfeld's methods, "fear of dogs…to induce stress" deserves special attention. Threatening a prisoner with torture to make him talk is considered to be a form of torture or cruel, inhuman or degrading treatment.[113] Threatening a prisoner with a ferocious guard dog is no different as a matter of law from pointing a gun at a prisoner's head. And, of course, many of the pictures from Abu Ghraib show unmuzzled dogs being used to intimidate detainees, sometimes while they are cowering, naked. As General Fay noted, "When dogs are used to threaten and terrify detainees, there is a clear violation of applicable laws and regulations."[114]

After objections from the Navy's general counsel, Secretary Rumsfeld rescinded his blanket approval of the harsh techniques listed above on January 15, 2003.

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[111] See Human Rights Watch, "U.S. State Department Criticism of 'Stress and Duress' Interrogation Around the World," A Human Rights Watch Backgrounder, April 2003 [online], http://www.hrw.org/press/2003/04/stressnduress.htm.

[112] *Country Reports on Human Rights Practices: 2004*, U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, February 28, 2005.

[113] See *Field Manual 34-52*, Department of Army, 1992, Chapter 1 ("The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government"). Under 18 U.S.C. § 2340(1), torture is defined to include an act specifically intended to inflict severe mental pain or suffering. Section 2340 (2) defines "severe mental pain or suffering" to mean: "the prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; or… (C) the threat of imminent death." According the U.N. Special Rapporteur on Torture,

> A number of decisions by human rights monitoring mechanisms have referred to the notion of mental pain or suffering, including suffering through intimidation and threats, as a violation of the prohibition of torture and other forms of ill-treatment. Similarly, international humanitarian law prohibits at any time and any place whatsoever any threats to commit violence to the life, health and physical or mental well-being of persons. It is my opinion that serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even torture, especially when the victim remains in the hands of law enforcement officials.

("Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62," (United Nations, Geneva, 2001), E/CN.4/2002/76, Annex III.) See also Commission on Human Rights resolution 2003/38, "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," which states, "intimidation and coercion, as described in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, including serious and credible threats, as well as death threats, to the physical integrity of the victim or of a third person, can amount to cruel, inhuman or degrading treatment or to torture" (United Nations, Geneva, 2002), E/CN/4/RES/2002/38, emphasis added; In Brazil, for example, the U.N. Special Rapporteur on Torture stated that: "the most common forms of torture were electric shocks, beatings, and threats."

[114] Fay report, p. 68.

Direct responsibility for abuses at Guantánamo?

An investigation could reveal whether any of the illegal tactics Secretary Rumsfeld authorized on December 2, 2002 were then used in the interrogation of prisoners at Guantánamo before his authorization to use them without requesting his permission was rescinded. There is some evidence suggesting that they may have been. In that case, Secretary Rumsfeld could potentially bear direct criminal responsibility, as opposed to command responsibility.

According to the classified sections of the Church report as described by U.S. Senator Carl Levin, Dr. Michael Gelles, the chief psychologist of the Navy Criminal Investigative Service, completed a study of Guantánamo interrogations in December 2002 (when the harsh Rumsfeld-approved techniques were in effect) that included extracts of interrogation logs. Gelles reported to the service director, David Brant, that interrogators were using "abusive techniques and coercive psychological procedures." According to Levin, Gelles' report prompted Brant to argue that if those aggressive practices continued, the Navy would have to "consider whether to remain" at Guantánamo. At the same time, Alberto J. Mora, the Navy's general counsel, said that the techniques were "unlawful and unworthy of the military services," according to Levin's account.[115]

Since most public accounts of abuse at Guantánamo come from released detainees and since the nature of their confinement renders detainees generally unable to specify dates,[116] it is difficult to say with precision whether the abusive techniques approved by Secretary Rumsfeld were employed before blanket approval was rescinded.

According to the Department of Defense, some of the more severe techniques — including "inducing stress (use of female interrogator)," and "up to 20 hour interrogations," but not the use of dogs — were used on Guantánamo detainees in the interim.[117] The Church report summary states that:

"[D]uring the course of interrogation operations at GTMO, the Secretary of Defense approved specific interrogation plans for two "high-value" detainees who had resisted interrogation for many months, and who were believed to possess actionable intelligence that could be used to prevent attacks against the United States. Both plans employed several of the counter resistance techniques found in the December 2, 2002 GTMO policy, and both successfully neutralized the two detainees' resistance training and yielded valuable intelligence. We note, however, that these interrogations were sufficiently aggressive that they highlighted the difficult question of precisely defining the boundaries of humane treatment of detainees."[118]

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[115] "U.S. Senate Armed Services Committee Holds a Hearing on Military Strategy and Operational Requirements for Combatant Commanders in Review of the Fiscal Year 2006 Defense Authorization Request," March 15, 2005; Charlie Savage, "Abuse Led Navy to Consider Pulling Cuba Interrogators," *The Boston Globe*, March 16, 2005 [online], http://www.boston.com/news/nation/washington/articles/2005/03/16/abuse_led_navy_to_consider_pulling_cuba_interrogators/.

[116] In addition, there are now e-mail accounts from FBI agents released as a result of FOIA litigation. These accounts do also not specify the dates of the observations contained.

[117] "GTMO Interrogation Techniques," (a one-page summary issued to reporters by Bush aides, listing which specific techniques were approved and/or used), June 22,2004, as published in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), Appendix A. See also Josh White, "Methods Used on 2 at Guantánamo," *The Washington Post*, June 4, 2004.

[118] Church report, p. 10.

Rather than discard the techniques entirely, however, Secretary Rumsfeld ordered that any use of the harsher categories of techniques be approved by him personally, thus suggesting that he continued to consider them legitimate:

> Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me. Such a request should include a thorough justification for the use of such techniques.[119]

Also on January 15, 2003, Secretary Rumsfeld ordered the establishment of a working group to consider the legal permissibility of interrogation techniques in the "war on terror." The working group played a significant role in relaxing the definition of torture.[120] Based on the recommendations of this group, Secretary Rumsfeld issued a final interrogation policy for Guantánamo on April 16, 2003. These guidelines, while more restrictive than the December 2002 rules, still allowed techniques that go beyond what the Geneva Conventions permitted for POWs.[121] Indeed, the Secretary's memo itself states in relation to several techniques — including isolation and removing privileges from detainees — that "those nations that believe detainees are subject to POW protections" may find that technique to violate those protections.

The Schlesinger report found that "the augmented techniques [approved by Secretary Rumsfeld] for Guantánamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded."

Contrary to the attention given to interrogation techniques at Guantánamo, there was no prescribed interrogation regime for prisoners held in Afghanistan. According to the Church report, the U.S. military command in Afghanistan in January 2003 submitted, as requested, a list of interrogation techniques to the military's Joint Staff and Central Command. The list included

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[119] Donald Rumsfeld to Commander USSOUTHCOM, "Counter-Resistance Techniques," memorandum, January 15, 2003 [online], www.washingtonpost.com/wp-srv/nation/documents/011503rumsfeld.pdf.

[120] Its recommendations echoed arguments put forth by then-Assistant Attorney General Jay S. Bybee detailing ways in which interrogation techniques could be made more severe without exposing U.S. soldiers or officials to legal liability. The findings of the working group acknowledge and then ignore the Army's opinion that cooperation is the most effective way to obtain intelligence from interrogations. Like the Bybee memo, the working group sought to exploit the distinction between "torture" and "cruel, inhuman or degrading treatment" in the language of the U.N. Convention against Torture and Other Cruel, Human or Degrading Treatment or Punishment. The working group also explored the possibility of defenses (such as necessity and self-defense) that could excuse the use of torture during interrogation. ("Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," Department of Defense, April 4, 2003. A copy of the report can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), pp. 286-359.)

[121] Donald Rumsfeld, Secretary of Defense, to James T. Hill, Commander, U.S. Southern Command, "Counter-Resistance Techniques in the War on Terrorism," memorandum, April 16, 2003. The memorandum can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), p. 360.

techniques "very similar" to those approved by Secretary Rumsfeld for Guantánamo, but were said by Church to have been arrived at locally. When the command in Afghanistan never heard any complaints, it "interpreted this silence to mean that the techniques …were unobjectionable to higher headquarters, and therefore could be considered approved policy."[122] According to the Church report, in Iraq as well, the Pentagon offered no help to Central Command in Baghdad in developing its interrogation procedures. The report noted that by September 2003, Baghdad headquarters "was left to struggle with these issues on its own in the midst of fighting an insurgency."[123]

In both theaters, illegal interrogation methods first approved by Secretary Rumsfeld were, in fact, used. The Schlesinger report found that in Afghanistan, "techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation. Interrogators in Iraq, already familiar with some of these ideas, implemented them even prior to any policy guidance from CJTF-7 [the command in Iraq]."[124] At Abu Ghraib, of course, the techniques put into play by Secretary Rumsfeld, such as the use of dogs, figured prominently in the war crimes committed against detainees.

A secret access program?

Citing "several past and present American intelligence officials," journalist Seymour Hersh alleged that Secretary Rumsfeld "authorized the establishment of a highly secret program that was given blanket advance approval to kill or capture and, if possible, interrogate "high value" targets" in the war on terror. This "secret access program," or SAP, "carried out instant interrogations — using force if necessary — at secret CIA detention centers scattered around the world." Frustrated by a failure to stem the Insurgency in Iraq, Secretary Rumsfeld reportedly decided to "get tough with those Iraqis in the Army prison system who were suspected of being insurgents" and expanded the SAP to Abu Ghraib. "The commandos were to operate in Iraq as they had in Afghanistan. The male prisoners could be treated roughly, and exposed to sexual humiliation."[125]

If Secretary Rumsfeld did in fact approve such a program, he would bear direct liability, as opposed to command responsibility, for war crimes and torture committed by the SAP.

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[122] Church report, p.7

[123] Eric Schmitt, "Prison Abuse Inquiry Says Officials Had Little Oversight," *The New York Times*, December 4, 2004.

[124] Schlesinger report, p. 68.

[125] Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004).

Secretary Rumsfeld approved hiding detainees from the ICRC

Secretary Rumsfeld has publicly admitted that, acting upon a request by George Tenet, then-director of the CIA, he ordered an Iraqi national held in Camp Cropper, a high security detention center in Iraq, to be kept off the prison's rolls and not presented to the International Committee of the Red Cross.[126] The prisoner, referred to as "Triple X" and later identified as Hiwa Abdul Rahman Rashul, was reportedly a senior member of Ansar al-Islam, an al-Qaeda-linked organization apparently responsible for several attacks in Iraq.[127] Rumsfeld also admitted that there have been other cases in which detainees have been held secretly.[128]

The Third Geneva Convention in article 126 (concerning prisoners of war) and the Fourth Geneva Convention in article 143 (concerning detained civilians) requires the ICRC to have access to all detainees and places of detention. Visits may only be prohibited for "reasons of imperative military necessity" and then only as "an exceptional and temporary measure."[129]

Secretary Rumsfeld reportedly initiated pressure on troops at Abu Ghraib to obtain "actionable intelligence"

The severest abuses at Abu Ghraib occurred after U.S forces there were placed under pressure to produce "actionable intelligence" among Iraqi prisoners. Secretary Rumsfeld's role in that pressure remains to be elucidated.

The Schlesinger panel found that "pressure for additional intelligence and the more aggressive methods sanctioned by the Secretary of Defense memorandum resulted in stronger interrogation techniques. They did contribute to a belief that stronger interrogation methods were needed and appropriate in their treatment of detainees."[130]

In August 2003, with American troops facing a growing insurgency in Iraq, and frustration rising over the failure to uncover "weapons of mass destruction" or to capture deposed Iraqi President Saddam Hussein, Maj. Gen. Geoffrey D. Miller, who oversaw the interrogation efforts at the

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[126] "Defense Department Regular Briefing," U.S. Department of Defense, news transcript, June 17, 2004 [online], http://www.defenselink.mil/transcripts/2004/tr20040617-secdef0881.html.

[127] Secretary Rumsfeld's order led to a detention of seven months, during which the detainee was interrogated only once. See Eric Schmitt and Thom Shanker, "Rumsfeld Issued an Order to Hide Detainee in Iraq," *The New York Times*, June 17, 2004. See also Thom Shanker, "Rumsfeld Admits He Told Jailers to Keep Detainee in Iraq out of Red Cross View," *The New York Times*, June 17, 2004.

[128] "There are instances where that occurs," Rumsfeld said. "And a request was made to do that and we did" (Josh White, "Rumsfeld Authorized Secret Detention of Prisoner," *The Washington Post*, June 18, 2004).

[129] Flowing from the Geneva Convention obligations, DoD regulations carry the duty to disclose details of any person in custody. The protection is limited not only to those who have been recognized as prisoners of war but applies to any detainee. Along with the duty of disclosure is the duty to report to Joint Chief of Staffs, Congress of the United States, the International Committee of Red Cross and other Governmental Agencies.

[130] Schlesinger, p. 36.

U.S. military base at Guantánamo Bay, Cuba, was sent to Iraq. In the words of Maj. Gen. Taguba, Gen. Miller's task was to "review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence."[131] As the Schlesinger report noted, Gen Miller brought with him the secretary of defense's April 16th memo (the final of three memos) outlining Guantánamo interrogation techniques and presented it as a possible model for interrogations in Iraq.[132] As Gen. Taguba highlighted and criticized in his report, Gen. Miller recommended that "the guard force be actively engaged in setting the conditions for successful exploitation of the internees."[133]

Secretary Rumsfeld's exact role in Gen. Miller's mission has not been fully explored, and there is broad speculation that his role has in fact been deliberately obscured. According to one critic, Scott Horton, chair of the Committee on International Law of the Association of the Bar of the City of New York, citing a "senior uniformed officer present at the briefing"[134]:

> At an intelligence briefing conducted in the summer of 2003 in the Pentagon for the benefit of Rumsfeld, and with the attendance of Cambone, Boykin and other senior officers, Rumsfeld complained loudly about the quality of the intelligence which was being gathered from detainees in Iraq. He contrasted it with the intelligence which was being produced from detainees at Guantánamo following the institution there of new "extreme" interrogation practices. Expressing anger and frustration over the application of Geneva Convention rules in Iraq, *Rumsfeld gave an oral order to dispatch MG Miller to Iraq to "Gitmoize" the intelligence gathering operations there*. Cambone and Boykin were directed to oversee this process.[135]

Newsweek also reported that it was Secretary Rumsfeld who instigated the trip by Gen. Miller:

> While the interrogators at Gitmo were refining their techniques, by the summer of 2003 the "postwar" insurgency in Iraq was raging. And Rumsfeld was getting

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[131] Taguba later decried Miller's idea of transporting interrogation techniques from Guantánamo to Iraq, noting that there were major differences between the status of the detainees in the two locations.

[132] Schlesinger report, p. 8.

[133] Taguba took issue with this proposal, and noted that it would be "in conflict with" the recommendations of the Ryder report, a previous review Iraqi prisons that stated that the engagement of military police in military interrogations to "actively set the favorable conditions for subsequent interviews runs counter to the smooth operation of a detention facility" ("Abu Ghurayb Prison Investigations: The Taguba report," *GlobalSecurity.org*, March 23, 2005 [online], http://www.globalsecurity.org/intell/world/iraq/abu-ghurayb-prison-investigation.htm).

[134] E-mail from Scott Horton to Human Rights Watch, April 5, 2005.

[135] Scott Horton report, p. 5. Emphasis added. None of this information appears in the official investigations listed above. According to Horton, this was part of a conscious effort to shield Rumsfeld. "[T]his simple fact [Rumsfeld's oral order], well known to many senior officers involved in the process, is consciously suppressed in all accounts. Instead the Fay/Jones account states that the visit of MG Miller was requested by CJTF-7, a statement which is technically correct and consciously misleading" (Ibid).

> impatient about the poor quality of the intelligence coming out of there. He wanted to know: Where was Saddam? Where were the WMD? Most immediately: Why weren't U.S. troops catching or forestalling the gangs planting improvised explosive devices by the roads? Rumsfeld pointed out that Gitmo was producing good intel. So he directed Steve Cambone, his under secretary for intelligence, to send Gitmo commandant Miller to Iraq to improve what they were doing out there. Cambone in turn dispatched his deputy, Lt. Gen. William (Jerry) Boykin — later to gain notoriety for his harsh comments about Islam — down to Gitmo to talk with Miller and organize the trip.[136]

The record of what orders, if any, Secretary Rumsfeld gave to Gen. Miller is confused. Undersecretary of Defense for Intelligence Stephen A. Cambone, Secretary Rumsfeld's top intelligence aide, testified that Gen. Miller went to Iraq "with my encouragement,"[137] but Gen. Miller testified that he had no conversations with Undersecretary Cambone either before or after his Iraq visit.[138] Col. Thomas Pappas, who commanded the 205th Military Intelligence Brigade at Abu Ghraib, said that Gen. Miller sent a draft report of his findings during his visit to Secretary Rumsfeld,[139] but both Rumsfeld and Cambone denied having seen any instruction that MP's be used for "enabling interrogation."[140]

The interplay between Secretary Rumsfeld and Gen. Miller is critical to determining Secretary Rumsfeld's causal link with the Abu Ghraib abuses (although it does not determine any command responsibility). The questions posed at a congressional hearing by Senator Hillary Clinton to Gen. Taguba remain largely unanswered:

> If, indeed, General Miller was sent from Guantánamo to Iraq for the purpose of acquiring more actionable intelligence from detainees, then it is fair to conclude that the actions that are at point here in your report are in some way connected to General Miller's arrival and his specific orders, however they were interpreted, by those MPs and the military intelligence that were involved. … Therefore, I for one don't believe I yet have adequate information from Mr. Cambone and

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[136] John Barry, Michael Hirsh & Michael Isikoff, "The Roots of Torture," *Newsweek* (international edition), May 24, 2004 [online], http://msnbc.msn.com/id/4989481/.

[137] Dr. Steve Cambone, "Testimony of Dr. Steve Cambone," Senate Armed Services Committee, Hearing on Treatment of Iraqi Prisoners, May 7, 2004, p. 24.

[138] Major General Geoffrey Miller, "Testimony of Major General Geoffrey Miller," Senate Armed Services Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004, p. 25.

[139] Sworn Statement of Colonel Thomas M. Pappas, Victory Base, Iraq, February 11, 2004.

[140] Senate Armed Services Committee, Hearing on Treatment of Iraqi Prisoners, May 7, 2004. On page 24 of the hearing transcript, Rumsfeld responds to the question "Did you ever see, approve or encourage this policy of enabling for interrogation?" by saying, "I don't recall that that policy came to me for approval." On page 25, Cambone responds to the question "...[W]ere you aware that a specific recommendation was to use military police to enable in the interrogation process?" by saying, "In that precise language, no."

> the Defense Department as to exactly what General Miller's orders were, what kind of reports came back up the chain of command as to how he carried out those orders, and the connection between his arrival in the fall of '03 and the intensity of the abuses that occurred afterward. [141]

On September 14, 2003, the top U.S. commander in Iraq, Lt. Gen. Ricardo Sanchez, implemented Gen. Miller's proposals by adopting a policy that brought back into play the techniques which Secretary Rumsfeld had approved in December 2002 for use at Guantánamo. Gen. Sanchez's memo authorized 29 interrogation techniques, including the "presence of military working dog: Exploits Arab fear of dogs while maintaining security during interrogations," and sleep deprivation,[142] both approved by Secretary Rumsfeld for Guantánamo. The memo also authorized techniques to alter the environment of prisoners, such as adjusting temperatures or introducing unpleasant smells, while recognizing that "some nations may view application of this technique in certain circumstances to be inhumane." Yelling, loud music, and light control were also approved "to create fear, disorientate [the] detainee and prolong capture shock."[143]

Between three and five interrogation teams were sent in October from Guantánamo to the American command in Iraq "for use in the interrogation effort" at Abu Ghraib.[144]

Beyond this, the Schlesinger report noted that "senior leaders expressed, forcibly at times, their needs for better intelligence." It also concluded that a number of high-level visits to Abu Ghraib contributed to this pressure, including those by Gen. Miller and "a senior member of the National Security Council Staff."[145] This second visit, focused primarily on intelligence collection,[146] led "some personnel at the facility to conclude, perhaps incorrectly, that even the White House was interested in the intelligence gleaned from their interrogation reports."[147] Lieutenant Colonel Stephen L. Jordan, who served as Chief of the Joint Interrogation Debriefing

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[141] Senator Hillary Clinton, question to General Taguba, Senate Armed Services Committee Testimony, Hearing on Allegations of Mistreatment of Iraqi Prisoners, May 11, 2004 [online], http://www.washingtonpost.com/wp-dyn/articles/A17812-2004May11.html.

[142] Ricardo S. Sanchez, Lieutenant General, to Combined Joint Staff Force Seven, Baghdad, Iraq, and Commander, 205th Military Intelligence Brigade, Baghdad, Iraq, "CJTF-7 Interrogation and Counter-Resistance Policy," memorandum, September 14, 2003 [online], http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17851&c=206.

[143] Ibid.

[144] Douglas Jehl and Andrea Elliott, "Cuba Base Sent Its Interrogators to Iraqi Prison," *The New York Times*, May 29, 2004.

[145] This was a reference to a visit by Ms. Frances Fragos Townsend, deputy assistant to the president and deputy national security advisor for combating terrorism. See Blake Morrison and John Diamond, "Pressure at Iraqi Prison Detailed," *USA Today*, June 18, 2004.

[146] James Schlesinger, "Testimony of James Schlesinger," Senate Armed Services Committee, Hearing on DoD Detention Operations, September 9, 2004, p. 34.

[147] Schlesinger report, pp. 65-66.

Center at Abu Ghraib, told Gen. Taguba that he "spent more time running around, being an aide-de-camp … [for] general officers and folks from the White House … than I can shake a stick at."[148] He added, "Sir, I was just told a couple times by Colonel Pappas that some of the reporting was getting read by Rumsfeld, folks out at Langley, some very senior folks…So, I would say it is a true statement sir, that Colonel Pappas was under a lot of pressure to produce, sir, and to produce quality reporting."[149]

Thus, at a time when (as will be shown below) reports of detainee abuse by U.S. troops were mounting, these troops were placed under added pressure to extract intelligence from detainees, and illegal interrogation methods were re-introduced.

Secretary Rumsfeld knew or should have known that soldiers in Afghanistan and Iraq were committing torture and war crimes

Secretary Rumsfeld was personally warned about the abuse of detainees

Throughout the period in question, Secretary Rumsfeld was personally notified about the mistreatment of detainees:

- Journalists raised questions about abuse allegations in Afghanistan during press conferences with Secretary Rumsfeld in January and February of 2002.[150]
- Officials in Afghan President Hamid Karzai's government reportedly raised concerns about detainee abuse allegations with Secretary Rumsfeld during his visits to Afghanistan in 2002.[151]
- Secretary of State Colin Powell reportedly raised the issue of detainee abuse frequently in meetings with Rumsfeld and others.[152]
- According to *The Washington Post*, citing U.S. officials familiar with the discussions, as of August 2003, U.S. Administrator in Iraq L. Paul Bremer "pressed the military to improve

[148] Lieutenant Colonel Stephen L. Jordan, *AR 15-6 Investigation Interview*, February 24, 2004, [online] http://www.aclu.org/torturefoia/released/a53.pdf, p. 96.

[149] Ibid., p. 111.

[150] See e.g., Press Conference with Secretary of Defense Donald Rumsfeld, the Pentagon, January 22, 2002 (dismissing claims about mistreatment of detainees captured in Afghanistan as "utter nonsense"); Press Conference with Secretary of Defense Donald Rumsfeld, the Pentagon, February 12, 2002.

[151] Human Rights Watch interviews with Afghan officials, Kabul, September 2002.

[152] Peter Slevin and Robin Wright, "Pentagon Was Warned of Abuse Months Ago," *The Washington Post*, May 8, 2004, p. A12; Mark Matthews, "Powell: Bush Told of Red Cross Reports," *The Baltimore Sun*, May 12, 2004.

> conditions and later made the issue a regular talking point in discussions with Rumsfeld, Vice President Cheney and national security adviser Condoleezza Rice."[153]

The Defense Department was warned about the abuse of detainees

The ICRC delivered repeated warnings during the same period. The organization paid 29 visits to 14 detention centers in Iraq, delivering oral and written reports to U.S. officials in Iraq after each visit.[154]

According to the ICRC:

> In May 2003, the ICRC sent to the CF [Coalition Forces] a memorandum based on over 200 allegations of ill-treatment of prisoners of war during capture and interrogation at collecting points, battle group stations and temporary holding areas. The allegations were consistent with marks on bodies observed by the medical delegate. The memorandum was handed over to [redacted portion] US Central Command in Doha, State of Qatar.
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> In early July [2003] the ICRC sent the CF a working paper detailing approximately 50 allegations of ill-treatment in the military intelligence section of Camp Cropper, at Baghdad International Airport. They included a combination of petty and deliberate acts of violence aimed at securing the cooperation of the persons deprived of their liberty with their interrogators; threats (to intern individuals indefinitely, to arrest other family members, to transfer individuals to Guantánamo) against persons deprived of their liberty or against members of their families (in particular wives and daughters); hooding; handcuffing; use of stress positions (kneeling, squatting, standing with arms raised over the head) for three or four hours; taking aim at individuals with rifles, striking them with rifle butts, slaps, punches, prolonged exposure to the sun, and isolation in dark cells. ICRC delegates witnessed marks on the bodies of several persons deprived of their liberty consistent with their allegations …[155]

ICRC President Jakob Kellenberger has confirmed that ICRC officials made "repeated requests" to the U.S.-led occupation authority to correct abuses. He said officials presented "serious

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[153] Peter Slevin and Robin Wright, "Pentagon Was Warned of Abuse Months Ago," *The Washington Post*, May 8, 2004, p. A12.

[154] Ibid., p. A12.

[155] ICRC, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004, paras. 33-34.

concerns" to occupation authorities, reminding them of obligations under the Geneva Conventions and international treaties.[156]

When, in the midst of the worst abuses at Abu Ghraib, the ICRC complained to Coalition forces, Army officials apparently responded by trying to curtail the ICRC's access.[157]

The Army provost marshal, Maj. Gen. Donald Ryder, investigated U.S.-run prisons in Iraq. His report on the treatment of Iraqi detainees, delivered to Gen. Sanchez, on Nov. 6, 2003, found "potential human rights training and manpower issues system-wide that needed immediate attention."[158]

In December 2003, retired Col. Stuart A. Herrington presented a confidential report that warned of detainee abuse throughout Iraq. Herrington's findings were reportedly passed on by Gen. Sanchez to officials at U.S. Central Command.[159]

Iraq's former human rights minister Abdel Bassat Turki told the British *Guardian* that he had "informed Mr. Bremer last November and again in December of the rampant abuse in US military prisons." Turki said that he had asked Bremer for permission to visit Abu Ghraib to investigate abuse allegations but was turned down.[160]

There was substantial public information about abuses against detainees

Well before the Abu Ghraib investigation began, Secretary Rumsfeld had access to abundant public information and reports from NGOs that U.S. officials in Afghanistan and Iraq were committing torture and war crimes:

- In **April 2002**, images were released of American John Walker Lindh being held naked and bound by duct tape to a stretcher in Afghanistan.

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[156] Peter Slevin and Robin Wright, "Pentagon Was Warned of Abuse Months Ago," *The Washington Post*, May 8, 2004, p. A12.

[157] Douglas Jehl and Eric Schmitt, "Army Tried to Limit Abu Ghraib Access," *The New York Times*, May 20, 2004. This pattern continued even after the Abu Ghraib disclosures. In June 2004, DIA Director, Vice Adm. Lowell Jacoby, complained in a letter to Undersecretary for Intelligence Stephen Cambone, that two DIA agents had witnessed special forces in Baghdad beating a prisoner in the face severely enough to require medical attention. When they protested, Jacoby told Cambone, the DIA officers were threatened and their photos of the injuries confiscated.

[158] "Report on Detention and Corrections Operations in Iraq," Office of the Provost Marshal General of the Army, November 5, 2003 [online], http://www.aclu.org/torturefoia/released/18TF.pdf; "Chronology: Early Warnings Missed; A Prison-Abuse Timeline," *Los Angeles Times*, May 16, 2004.

[159] Josh White, "U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds," *The Washington Post*, December 1, 2004.

[160] Luke Harding, "Bremer Knew, Minister Claims," *The Guardian*, May 10, 2004.

- On **April 15, 2002**, Amnesty International sent a letter and 61-page "Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay" to President Bush, with a copy to Secretary Rumsfeld, expressing concerns over the conditions of transfer to Guantánamo, the killing and ill-treatment of detainees in Afghanistan and inadequate investigations into these abuses, interrogations without access to counsel, and transfers to third countries for possible torture.[161] Secretary Rumsfeld was asked about the Amnesty report at a press conference, and said that he had not read it.[162]
- On **December 26, 2002**, *The Washington Post* reported that detainees at Bagram Airbase, "are sometimes kept standing or kneeling for hours in black hoods or spray-painted goggles.... At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights — subject to what are known as 'stress and duress' techniques...."
- On **December 27, 2002**, Human Rights Watch wrote to President Bush (and U.K. Prime Minister Tony Blair) about allegations of torture reported in *The Washington Post*, asking that the allegations be investigated immediately.
- Executive directors of leading human rights groups wrote on **January 14, 2003** to Deputy Secretary of Defense Paul Wolfowitz urging, without referring to actual cases, that the administration publicly state that torture in any form or matter would not be tolerated and that the U.S. would not seek intelligence obtained through torture in a third country. The letter also urged the administration to give clear guidelines to U.S. forces. On January 31, the directors wrote to President Bush demanding "unequivocal statements by [Bush] and [his] Cabinet officers that torture in any form or matter will not be tolerated...[and] that any U.S. official found to have used or condoned torture will be held accountable." The directors also called for "clear written guidance applicable to everyone engaged in the interrogation and rendition of prisoners." On **February 5, 2003,** the groups met with Department of Defense General Counsel Haynes to urge the administration to develop clear standards to prevent the mistreatment of detainees.
- *The New York Times* reported on **March 4, 2003** that "The United States military has begun a criminal investigation into the death of an Afghan man in American custody in December, a death described as a 'homicide' by an American pathologist....Two former prisoners...said the conditions to which they themselves were subjected at the time

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[161] Amnesty International to the U.S. Government, "Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantánamo Bay," memorandum, April 15, 2002 [online], http://web.amnesty.org/library/Index/ENGAMR510532002.

[162] "DoD News Briefing - Secretary Rumsfeld and Gen. Myers," news transcript, U.S. Department of Defense, April 15, 2002 [online], http://www.defenselink.mil/transcripts/2002/t04152002_t0415sd.html. Military justice authority A.P.V. Rogers, writing about Command Responsibility, has noted that if a commander "is told that a report deals with, say, the massacre of civilians by troops under his command, he is put under a duty to do something about it. He cannot simply turn a blind eye to it" (Major General (Retired) A. P. V. Rogers, "Command Responsibility under the Law of War," [online], http://lcil.law.cam.ac.uk/lectures/lecture_papers.php).

included standing naked, hooded and shackled, being kept immobile for long periods and being deprived of sleep for days on end."[163]

- On **March 15, 2003,** Amnesty International held a news conference in Baghdad to call attention to cases of detainee mistreatment.[164]
- On **June 26, 2003**, Amnesty International wrote Bremer after interviewing former detainees to criticize methods that "appear to facilitate cruel, inhuman or degrading treatment."[165]
- On **July 26, 2003**, Amnesty International released "Iraq: Memorandum on Concerns Relating to Law and Order," which details cases of ill-treatment of detainees in Iraq, including Abu Ghraib.[166] According to Amnesty, a high-level Amnesty mission to Baghdad (date unclear) met with Coalition Provisional Authority (CPA) officials including: Ambassador John Sawers (UK); Ambassador Macmanway; Lieutenant Colonel Warner, CJTF 7; and Colonel Michael Kelly, Office of Legal Counsel CPA.[167]
- On **October 19, 2003**, the Associated Press reported that "[e]ight marine reservists face charges ranging from negligent homicide to making false statements in connection with the mistreatment of prisoners of war in Iraq."[168]
- On **December 17, 2003**, the Associated Press reported "Marine reservists running a detention facility in Iraq ordered prisoners of war to remain standing for hours until interrogators could question them, according to testimony at a military court hearing."[169]
- On **January 6, 2004**, the Associated Press reported "The U.S. Army discharged three reservists and ordered them to forfeit two months' salary for abusing prisoners at a detention center in Iraq."[170]
- On **January 12, 2004**, Human Rights Watch wrote to Secretary Rumsfeld to express concern about incidents in which U.S. forces stationed in Iraq detained relatives of wanted suspects in order to compel the suspects to surrender, which amounts to hostage-taking, classified as a war crime under the Geneva Conventions.

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[163] Carlotta Gall, "U.S. Military Investigating Death of Afghan in Custody," *The New York Times*, March 4, 2003.

[164] Amnesty International, "USA — Chronology of Correspondence and Action," [online], http://news.amnesty.org/pages/USchronology3.

[165] Peter Slevin and Robin Wright, "Pentagon Was Warned of Abuse Months Ago," *The Washington Post*, May 8, 2004.

[166] Amnesty International, "Iraq: Memorandum on Concerns Relating to Law and Order," July 23, 2003 [online], http://web.amnesty.org/library/Index/ENGMDE141572003.

[167] See Amnesty International, "USA — Chronology of Correspondence and Action," [online], http://news.amnesty.org/pages/USchronology3.

[168] Greg Risling, "Eight California Marine Reservists under Investigation for Death of Iraqi Prisoner-of-War," Associated Press, October 19, 2003.

[169] "Top Story," *Ventura County Star*, December 18, 2003.

[170] Diana Elias, "3 Reservists Discharged from Army after Abuse," Associated Press, January 6, 2004.

- On **January 13, 2004, t**he press reported that a suspect detained by U.S. forces in Iraq claimed that "he was ordered to stand upright until he collapsed after 13 hours," and that interrogators "burned his arm with a cigarette."[171]

Given the widespread nature of crimes against detainees, Secretary Rumsfeld should have known of them

The Schlesinger report counted about 300 allegations of prisoner mistreatment in Iraq, Afghanistan, and Guantánamo, beginning almost immediately after the invasion of Afghanistan in 2001.[172]

The widespread nature of the abuses across three countries suggests that the Secretary of Defense should have been aware, through internal channels, that his subordinates were committing crimes.

Secretary Rumsfeld failed to intervene to prevent the commission of war crimes and torture by soldiers and officers under his command in Afghanistan and Iraq

During the entire period listed above Secretary Rumsfeld failed to intervene to prevent further commission of crimes. Even as he was being personally warned about abuses, even as the press and human rights groups were publicly denouncing abuses, even as the ICRC was complaining, Secretary Rumsfeld apparently never issued specific orders or guidelines to forbid coercive methods of interrogation, other than withdrawing his blanket approval for certain methods at Guantánamo in January 2003. Indeed, as described above, in mid-2003 pressure on interrogators in Iraq to use more aggressive methods of questioning detainees was actually increased.

The documents that were released by the Department of Defense in June 2004, as well as those released more recently in response to a lawsuit by the Center for Constitutional Rights and the American Civil Liberties Union are as telling for what is missing as for the indignities they narrate: to date, there is no evidence that Secretary Rumsfeld (or any other senior leader) exerted his authority as the civilian official in charge of the armed forces and warned that the mistreatment of prisoners must stop. Had he done so, many of the crimes committed by U.S. forces could have been avoided.[173]

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[171] "Iraqi Detainee Details Mistreatment by US Forces," *The Bulletin's Frontrunner*, January 13, 2004.

[172] In addition, there may be as many as 100 "ghost detainees" kept hidden from the ICRC ("Rumsfeld Defends Pentagon in Abuse Scandal," Associated Press, September 10, 2004).

[173] The Department of Defense has reported that abuses against detainees fell sharply after the Abu Ghraib revelations (Josh White, "Reported Abuse Cases Fell after Abu Ghraib," *The Washington Post*, March 17, 2005, p. A17). This suggests that attention to proper treatment of detainees can have a salutory effect.

Former CIA Director George Tenet

Under George Tenet's direction, and reportedly with his specific authorization, the Central Intelligence Agency (CIA) is said to have tortured detainees through waterboarding and withholding medicine. Other tactics reportedly used by the CIA include feigning suffocation, "stress positions," light and noise bombardment, sleep deprivation, and making detainees believe they were in the hands of governments that routinely torture. Under Director Tenet, the CIA "rendered" detainees to other governments which tortured the detainees. Under Director Tenet's direction, the CIA also put detainees beyond the protection of the law, in secret locations in which they were rendered completely defenseless, with no resource or remedy whatsoever, with no contact with the outside world, and completely at the mercy of their captors. These detainees, in long-term incommunicado *detention, have effectively been "disappeared."*

George Tenet was the director of central intelligence (DCI) until his resignation in June 2004. As such, he served as head of the Central Intelligence Agency.[174]

Because the CIA has refused to cooperate with any of the probes listed above[175] or to provide information pursuant to a Freedom of Information Act (FOIA) request,[176] the record is less developed with regard to the CIA's and Director Tenet's potential involvement in criminal activity. No findings of the internal CIA probes that have been conducted have been released.

According to the Schlesinger panel, "the CIA was allowed to operate under different rules."[177] The Fay/Jones report into intelligence activities at Abu Ghraib found that "the perception that non-DoD agencies [i.e., the CIA] had different rules regarding interrogation and detention operations was evident."[178] The investigators complained that "The lack of OGA [here, a way of referring to the CIA without mentioning it by name] adherence to the practices and procedures established for accounting for detainees eroded the necessity in the minds of soldiers and civilians for them to follow Army rules."[179] They concluded that "CIA detention and interrogation practices led to a loss of accountability, abuse, reduced interagency cooperation and an unhealthy mystique that further poisoned the atmosphere at Abu Ghraib."

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[174] 50 U.S.C. § 403 (a) (3).

[175] The Fay/Jones and Schlesinger investigations requested documentation from the CIA in vain. See Senate Armed Services Committee Hearing, September 9, 2004, pp. 11, 13, 14; see also Schlesinger report, pp. 6, 70, 87. ("The Panel did not have full access to information involving the role of the Central Intelligence Agency in detention operations…" and could not make any determinations about ghost detainees). The CIA provided information to the Church inquiry about Iraq only.

[176] In October 2003, the Center for Constitutional Rights, the American Civil Liberties Union and other organizations filed a FOIA request seeking documents pertaining to the torture or abuse of detainees held by the United States. The organizations then went to court to enforce their request. In response to a judge's order, the FBI, Justice Department, and State Department have produced more than 23,000 pages of documents, but the CIA refused to search its files. On February 2, 2005, a federal judge ordered the CIA to process and release those documents.

[177] Schlesinger report, p. 70.

[178] Jones report, p. 6.

[179] Fay report, pp. 44-45.

The CIA's "different rules" in the "global war on terror" can be traced in part to a secret but now-infamous August 1, 2002 Justice Department memorandum to Alberto Gonzales, then White House Counsel, in response to a CIA request for guidance.[180] The memo said that torturing al-Qaeda detainees in captivity abroad "may be justified" and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in the war on terrorism. The memo added that the doctrines of "necessity and self-defense could provide justifications that would eliminate any criminal liability" on the part of officials who tortured al-Qaeda detainees. The memo also took an extremely narrow view of which acts might constitute torture.

The August 2002 memo was reportedly prepared after a debate within the government about the methods used to interrogate alleged al-Qaeda leader Abu Zubaydah after his capture in April 2002.[181] Reports suggest that CIA interrogation methods were authorized by a still-secret set of rules that were endorsed in August 2002 by the U.S. Justice Department and the White House. These were said to include waterboarding and refusal of pain medication for injuries.[182] Indeed, according to *The New York Times*:

> The methods employed by the CIA are so severe that senior officials of the Federal Bureau of Investigation have directed its agents to stay out of many of the interviews of the high-level detainees, counterterrorism officials said. The F.B.I. officials have advised the bureau's director, Robert S. Mueller III that the interrogation techniques, which would be prohibited in criminal cases, could compromise their agents in future criminal cases, the counterterrorism officials said.[183]

Under Director Tenet, the CIA also developed the widespread practice of using "ghost detainees."

The CIA kept a number of detainees off the books at Abu Ghraib, hiding them from the ICRC. The Fay/Jones report spoke of eight such "ghost" detainees at Abu Ghraib, kept off the prison's

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[180] Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, memorandum, "Standards for Conduct of Interrogation under 18 U.S.C. Sections 2340-2340A," August 1, 2002 [online], http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf. (This memorandum has since been repudiated by the administration.)

[181] David Johnston and James Risen, "Aides Say Memo Backed Coercion for Qaeda Cases," *The New York Times*, June 27, 2004.

[182] See Toni Locy and John Diamond, "Memo Lists Acceptable 'Aggressive' Interrogation Methods: Justice Dept. Gave Guidance to CIA," *USA Today*, June 28, 2004; Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004.

[183] James Risen, David Johnston and Neil A. Lewis, "Harsh C.I.A. Methods Cited In Top Qaeda Interrogations," *The New York Times*, May 13, 2004.

roster at the CIA's request. In one of those cases, in November 2003, a detainee brought to the prison by CIA employees but never formally registered with military guards died at the site, and his body was removed after being wrapped in plastic and packed in ice.[184]

In later congressional testimony, General Paul Kern, the senior officer who oversaw the Fay/Jones inquiry, told the Senate Armed Services Committee, "The number [of ghost detainees] is in the dozens, perhaps up to 100." Gen. Fay put the figure at "two dozen or so." Both officers said they could not give a precise number because no records were kept and because the CIA refused to provide information to the investigators.[185] The Church report put the number at 30.[186] Logbooks showed that there were consistently three to ten ghost detainees at Abu Ghraib from mid-October 2003 to January 2004.[187] Some "ghost detainees" at Abu Ghraib were put in disruptive sleep programs and interrogated in shower rooms and stairwells.[188]

In the case of Hiwa Abdul Rahman Rashul, Barry Whitman, Pentagon spokesperson, confirmed that Tenet had specifically asked for the detainee to be hidden "without notification."[189]

Earlier, Maj. Gen. Antonio Taguba sharply criticized this practice of keeping "ghost detainees," correctly saying that "This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law."[190]

The CIA also reportedly transported as many as a dozen non-Iraqi detainees out of Iraq between April 2003 and March 2004. The transfers were apparently authorized by a draft Department of Justice memo dated March 19, 2004. The CIA has not released the detainees' names or nationalities, and it is unclear whether the detainees were handed over to "friendly" governments or kept in secret American-run sites.[191]

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[184] MG George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, 2004 [online], http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf, pp. 53-54.

[185] Senate Armed Services Committee, *Investigation of the 205th Military Intelligence Brigade at Abu Ghraib Prison, Iraq*, September 9, 2004. According to General Kern, "A ghost detainee, by our definition, is a person who has been detained in a U.S. facility and has not been recorded."

[186] Church report, p. 18.

[187] Josh White, "Abu Ghraib Guards Kept a Log of Prison Conditions, Practices," *The Washington Post*, October 25, 2004.

[188] Ibid.

[189] Charles Aldinger, "Military Hid Prisoner from Red Cross," *CommonDreams News Center*, July 17, 2004 [online], http://www.commondreams.org/headlines04/0617-04.htm.

[190] Maj. Gen. Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, (an investigative report, on alleged abuses at U.S. military prisons in Abu Ghraib and Camp Bucca, Iraq), para. 33, emphasis added.

[191] Douglas Jehl, "Prisoners: U.S. Action Bars Right of Some Captured in Iraq," *The New York Times*, October 26, 2004; Dana Priest, "Memo Lets CIA Take Detainees out of Iraq," *The Washington Post*, October 24, 2004.

Under Director Tenet, the CIA "disappeared" detainees

Under Director Tenet, prisoners have "disappeared" in CIA custody in that they have been detained in undisclosed locations with no access to the ICRC, no oversight of their treatment, no notification to their families, and in many cases, no acknowledgement that they are even being held.[192] Human Rights Watch has pieced together information on eleven such detainees who have "disappeared" in U.S. custody, though there may be more. They are:

1. Ibn al-Shaikh al-Libi (Libya)
2. Abu Zubayda, a.k.a. Zubeida, Zain al-`Abidin Muhammad Husain, `Abd al-Hadi al-Wahab (Palestinian)
3. Omar al-Faruq (Kuwait)
4. Abu Zubair al-Haili, a.k.a. Fawzi Saad al-`Obaydi (Saudi Arabia)
5. Ramzi bin al-Shibh (Yemen)
6. Abd al-Rahim al-Nashiri, a.k.a. Abu Bilal al-Makki, Abdul Rahman Husain al-Nashari, formerly Muhammad Omar al-Harazi (Born in Mecca, Saudi Arabia)
7. Mustafa al-Hawsawi (Saudi Arabia)
8. Khalid Shaikh Muhammad, a.k.a. Shaikh Muhammad, Ashraf Ref`at Nabith Henin, Khalid `Abd al-Wadud, Salem `Ali, Fahd bin Abdullah bin Khalid (Kuwait)
9. Waleed Muhammad bin Attash, a.k.a. Tawfiq ibn Attash, Tawfiq Attash Khallad (Yemen)
10. Adil al-Jazeeri (Algeria)
11. Hambali, a.k.a. Riduan Isamuddin (Indonesia)[193]

The CIA has consistently refused to provide information on the fate or the whereabouts of these detainees. For instance, Human Rights Watch has made repeated requests for information on Hambali's location, legal status, and conditions of detention — none of which has been answered.[194] The news media has had no more success, as evidenced by a report on *ABC*'s

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[192] "Enforced disappearance," the systematic practice of which can be a crime against humanity, is defined by the Article 7 (2) (1) of the Rome Statute of the International Criminal Court as the

> arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

[193] See Human Rights Watch, "The United States' 'Disappeared': The CIA's Long-Term 'Ghost Detainees,'" *A Human Rights Watch Briefing Paper*, October 2004 [online], http://www.hrw.org/backgrounder/usa/us1004/.

[194] Human Rights Watch, "In the Name of Security: Counterterrorism and Human Rights Abuses under Malaysia's Internal Security Act," *A Human Rights Watch Report*, May 2004 [online], http://www.hrw.org/reports/2004/malaysia0504/.

"Nightline": "As for the details of where they are being held, exactly how they are being treated, and what the US plans to do with them, that is all a secret. When asked why, an official from the CIA explained, that's a secret, too."[195]

The International Committee of the Red Cross has also repeatedly sought information on the detainees. In a March 2004 public statement, it noted:

> Beyond Bagram and Guantánamo Bay, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations. For the ICRC, obtaining information on these detainees and access to them is an important humanitarian priority and a logical continuation of its current detention work in Bagram and Guantánamo Bay.[196]

In June, Erof Bosisio of the ICRC complained:

> We are more and more concerned about the lot of the unknown number of people captured in the context of what we would call "the war against terror" and detained in secret places…We have asked for information on these people and access to them. Until now we have received no response from the Americans.[197]

According to *The New York Times*, "the agency has refused to grant any independent observer or human rights group access to the high-level detainees, who have been held in strict secrecy. Their whereabouts are such closely guarded secrets that one official said he had been told that Mr. Bush had informed the CIA that he did not want to know where they were."[198]

It is not clear what the authority is under U.S. law for holding these suspects under these conditions of clandestinity. In June 2004, the U.S. Supreme Court ruled that the Authorization for Use of Military Force Act, which Congress passed after September 11, 2001, authorizing the president to pursue al-Qaeda and its supporters, gave him the power to detain enemy forces captured in battle. Speaking for the plurality of the court, however, Justice Sandra Day

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[195] John McWethy, "Nightline," *ABC News*, May 13, 2004.

[196] International Committee of the Red Cross, "United States: ICRC President Urges Progress on Detention-Related Issues," March 4, 2004 [online], http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/774F1B35A7E20CC9C1256E1D007741C1.

[197] "Rights Groups Raise Concerns over Secret U.S.-run Prisons in Afghanistan," Agence France Presse, June 19, 2004.

[198] James Risen, David Johnston, and Neil A. Lewis, "Harsh C.I.A. Methods Cited In Top Qaeda Interrogations," *The New York Times*, May 13, 2004.

O'Connor said, "Certainly, we agree that indefinite detention for the purposes of interrogation is not authorized."[199] U.S. law considers both "prolonged detention without charges and trial," and "causing the disappearance of persons by the abduction and clandestine detention of those persons" to constitute "gross violations of internationally recognized human rights."[200]

Although "disappearances" as such are not defined and punished under U.S. law, prolonged *incommunicado* detention itself is inhuman treatment in contravention of both CAT and the Geneva Conventions, and therefore subject to prosecution under the War Crimes Act and the Anti-Torture Statute. The U.N. Commission on Human Rights has noted that "prolonged incommunicado detention … can *in itself* constitute a form of cruel, inhuman or degrading treatment."[201] Likewise, the U.N. Human Rights Committee found "prolonged incommunicado detention in an unknown location" to be "torture and cruel, inhuman treatment."[202]

Under Director Tenet, and reportedly with his authorization, the CIA has allegedly tortured detainees

Some of the detainees listed above have reportedly been tortured by the CIA. According to *The New York Times*:

> In the case of Khalid Shaikh Mohammed, a high-level detainee who is believed to have helped plan the attacks of Sept. 11, 2001, CIA interrogators used graduated levels of force, including a technique known as "water boarding," in

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[199] Hamdi et al. v. Rumsfeld, Secretary of Defense, et al., No. 03-6696, (2004), 2004 U.S. LEXIS 4761, p. 13.

[200] 22 U.S.C. § 2304 (d) (1).

[201] Commission on Human Rights, (United Nations: Geneva, 2004), Resolution 2004/41, emphasis added. See also "ICCPR General Comment 20 (Forty-fourth Session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment," A/47/40 (1992) 193, para 6 ("prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7").

[202] El-Megreisi v. Libyan Arab Jamahiriya, Communication No. 440/1990, (United Nations: 1994), CCPR/C/50/D/440/1990. The Inter-American Court on Human Rights has also held that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment." Inter-Am. Ct. H. R., Velasquez-Rodriguez case, Judgment of 29 July 1988, Series C, No. 4, para. 156. ("prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the [American] Convention on Human Rights [prohibition against torture etc.].") As noted above, the Third Geneva Convention in article 126 (concerning prisoners of war) and the Fourth Geneva Convention in article 143 (concerning detained civilians) requires the ICRC to have access to all detainees and places of detention. Visits may only be prohibited for "reasons of imperative military necessity" and then only as "an exceptional and temporary measure." These provisions also require that prisoners be documented, and that their whereabouts be made available to their family and governments.

> which a prisoner is strapped down, forcibly pushed under water and made to believe he might drown.[203]

Waterboarding is a technique reportedly approved by the Department of Justice.[204] The current director of U.S. central intelligence, Porter Goss, seemed to suggest that the CIA was indeed using waterboarding when he defined it in Senate testimony as "an area of what I will call professional interrogation techniques."[205] Waterboarding, however, is a notorious form of torture that was practiced by the military dictatorships in Latin America in the 1970s and 1980s, where it became known as the "*submarino*."[206] It has been denounced as a torture method by the U.S. State Department[207] and the U.N. Special Rapporteur on Torture.[208]

It is also reported that U.S. officials initially withheld painkillers from Abu Zubaydah, who was shot during his capture, as an interrogation device.[209] To the extent that this action brought about unnecessary but deliberate additional severe pain or suffering, it would constitute torture.[210] Other tactics used by the CIA, according to *The Washington Post*, include "feigning

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[203] James Risen, David Johnston, and Neil A. Lewis, "Harsh C.I.A. Methods Cited In Top Qaeda Interrogations," *The New York Times*, May 13, 2004; Waterboarding may also include "pouring water on a detainee's toweled face to induce the misperception of suffocation" (Church report, p. 5).

[204] See Toni Locy and John Diamond, "Memo Lists Acceptable 'Aggressive' Interrogation Methods: Justice Dept. Gave Guidance to CIA," *USA Today*, June 28, 2004; Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004.

[205] Testimony of Porter Goss, Senate Armed Services Committee, Hearing on Threats to U.S. National Security, March 17, 2005, p. 16.

[206] *The Instanbul Protocol: The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, a prominent set of international guidelines for documentation of torture and its consequences, states:

> Near asphyxiation by suffocation is an increasingly common method of torture. It usually leaves no marks and recuperation is rapid. This method of torture was so widely used in Latin America, that its Spanish name "submarino" became part of the human rights vocabulary. Normal respiration might be prevented through methods such as covering the head with plastic bag, closure of the mouth and the nose, pressure or ligature around the neck, or forced aspiration of dusts, cement, hot peppers, etc. This is also known as "dry submarino." Various complications might develop such as petechiae of the skin, nosebleeds, bleeding from the ears, congestion of the face, infections in the mouth and acute and chronic respiratory problems. ....Forcible *immersion of the head into water, often contaminated with urine, feces, vomit, or other impurities, may result in near drowning or drowning. Aspiration of the water into the lungs may lead to pneumonia. This form of torture is also called "wet submarino."*

(United Nations: Geneva, 1999), E.01.XIV.1.

[207] U.S Department of State Country Reports on Human Rights Practices; Tunisia, 2004 [online], http://www.state.gov/g/drl/rls/hrrpt/2004/41733.htm. ("The forms of torture included: electric shock; confinement to tiny, unlit cells; submersion of the head in water.")

[208] "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment," Report of the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, 19 Feb. 1986, at para. 119 (describing "suffocation by near-drowning in water (sous-marin) and/or excrement").

[209] Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004.

[210] See Physicians for Human Rights, Letter to President Bush, March 21, 2003 [online], http://www.phrusa.org/waronterror/letter_032103.html. "As health professionals we are keenly aware that withholding necessary medical care for severe injuries also constitutes torture because it brings about unnecessary but deliberate additional suffering from those injuries." This will, of course, depend on whether there is the intentional infliction of "severe

suffocation, 'stress positions,' light and noise bombardment, sleep deprivation, and making captives think they are being interrogated by another government."[211] These techniques can easily amount to torture, particularly when used in a combined manner.[212]

According to *The Washington Post*:

> The interrogation methods were approved by Justice Department and National Security Council lawyers in 2002, briefed to key congressional leaders *and required the authorization of CIA Director George J. Tenet for use*, according to intelligence officials and other government officials with knowledge of the secret decision-making process.[213]

The CIA has reportedly used torture and other prohibited mistreatment in other detention centers as well. As early as December 2002, *The Washington Post* reported that in the "forbidden zone" at the U.S.-occupied Bagram Airbase in Afghanistan:

> Those who refuse to cooperate inside this secret CIA interrogation center are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights — subject to what are known as "stress and duress" techniques.[214]

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pain or suffering" as required by the Convention against Torture. In Hurtado v. Switzerland, the European Commission on Human Rights unanimously found a violation of the prohibition against inhuman or degrading treatment "because [the detainee] was not given immediate medical treatment" for injuries suffered when he was apprehended (Eur. Ct. H.R., App. No. 17549/90 (January 28, 1994), at para. 12 (noting the Commission's findings)). See also Case of Cantoral-Benavides v. Peru, Judgment of August 18, 2000, Inter-Am. Ct. H.R. (Ser C) No. 69 (2000), See Jama v. U.S. Immigration and Naturalization Service, 22 F. Supp.2d 353, 363 (D.N.J. 1998) (noting inadequate medical treatment as part of the conduct which constituted CID treatment). The Special Rapporteur on Torture has recommended that "Governments and professional medical associations should take strict measures against medical personnel that play a role, direct or indirect, in torture… [T]he withholding of appropriate medical treatment by medical personnel should be subject to sanction." Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, E/CN.4/2003/68, 17 December 2002, Annex 1.

[211] Dana Priest, "CIA Puts Harsh Tactics on Hold: Memo on Methods of Interrogation Had Wide Review," *The Washington Post*, June 27, 2004.

[212] The U.N. Committee Against Torture, in its consideration of the report of Israel, for example, noted that methods allegedly included: "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill, and are, in the Committee's view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case" (U.N. Committee against Torture (CAT), "Concluding Observations concerning Israel" (United Nations, Geneva, 1997), A/52/44, para. 257, emphasis added).

[213] Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004.

[214] Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *The Washington Post*, December 26, 2002.

Newsweek reported a clash between the FBI and the CIA during the interrogation in Afghanistan of terror suspect Ibn al-Shaikh al-Libi:

> FBI officials brought their plea to retain control over al-Libi's interrogation up to FBI Director Robert Mueller. The CIA station chief in Afghanistan, meanwhile, appealed to the agency's hawkish counterterrorism chief, Cofer Black. *He in turn called CIA Director George Tenet*, who went to the White House. Al-Libi was handed over to the CIA. "They duct-taped his mouth, cinched him up and sent him to Cairo" for more-fearsome Egyptian interrogations, says the ex-FBI official. "At the airport the CIA case officer goes up to him and says, 'You're going to Cairo, you know. Before you get there I'm going to find your mother and I'm going to f--- her.' So we lost that fight." (A CIA official said he had no comment.)[215]

The Washington Post likewise reported that the capture of al-Libi generated the first real fight over interrogations of the secret detainees: the CIA wanted to threaten his life and family; the FBI objected.[216]

Under Director Tenet, and reportedly with his authorization, the CIA has sent detainees to countries in which they were tortured

Even prior to September 11, the CIA was involved in the "extraordinary rendition" of terror suspects to third countries. In a written statement to the 9-11 Commission, Director Tenet stated that:

> CIA's policy and objectives statement for the FY 1998 budget submission prepared in early 1997 evidenced a strong determination to go on the offensive against terrorists. The submission outlined our Counterterrorist Center's offensive operations and noted the goal to "render the masterminds, disrupt terrorist infrastructure, infiltrate terrorist groups, and work with foreign partners."[217]

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[215] Michael Hirsh, John Barry, and Daniel Klaidman, "A Tortured Debate," *Newsweek*, June 21, 2004, emphasis added.

[216] Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004.

[217] Statement by George Tenet, "Counterterrorism Policy: Hearing before the National Commission on Terrorist Attacks upon the United States," March 24, 2004 [online], http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm

Director Tenet said that the CIA took part in over eighty renditions before September 11, 2001.[218]

Shortly after the September 11 attacks, President Bush reportedly signed a still-classified directive giving the CIA broad authority to transfer terrorist suspects to third countries.[219] Since then, largely under Secretary Tenet, the CIA has reportedly flown 100 to 150 suspects to foreign countries, including many countries in the Middle East known to practice torture routinely.[220] In several cases, detainees rendered into third country custody are known or believed to have been tortured:

- Maher Arar, a Syrian-born Canadian in transit from a family vacation through John F. Kennedy airport in New York, was detained by U.S. authorities. After holding him for nearly two weeks, U.S. authorities flew him to Jordan, where he was driven across the border and handed over to Syrian authorities, despite his statements to U.S. officials that he would be tortured in Syria and his repeated requests to be sent home to Canada. Mr. Arar was released without charge from Syrian custody ten months later and has described repeated torture, often with cables and electrical cords, during his confinement in a Syrian prison. The United States has refused to cooperate with an official Canadian inquiry into the Arar rendition.[221]
- In early October 2001, Australian citizen Mamdouh Habib was arrested in Pakistan. Pakistan's interior minister later said that Habib was sent to Egypt on U.S. orders and in U.S. custody.[222] Habib says that while imprisoned in Egypt for six months, he was suspended from hooks on the wall, rammed with an electric cattle prod, forced to stand tip-toe in a water-filled room, and threatened by a German Shepard dog.[223] In 2002, Habib was transferred from Egypt to Bagram Air Force Base, and then to Guantánamo

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[218] Ibid. (It is not clear which transfers were included in this number, but it would appear that this number encompasses both transfers to the United States and those to other states.)

[219] Douglas Jehl and David Johnston, "Rule Change Lets CIA Freely Send Suspects Abroad to Jails," *The New York Times*, March 6, 2005.

[220] Ibid.

[221] This case and ten others are compiled from news reports in Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law, 2004).

[222] "The Trials of Mamdouh Habib," *Dateline SBS*, July 7, 2004.

[223] See Declaration of Joseph Margulies, attached to Plaintiff's Application for Temporary Restraining Order, Habib v. Bush, filed November 24, 2004. (D.C. Dist.) (No. 02-CV-1130) According to The New Yorker, "Hossam el Hamalawy said that Egyptian security forces train German shepherds for police work, and that other prisoners have also been threatened with rape by trained dogs, although he knows of no one who has been assaulted this way" (Jane Mayer, "Outsourcing Torture," *The New Yorker*, February 14, 2005, p. 118). Dr. Hajib Al-Naumi, Qatar's former justice minister, told the Australian television program "Dateline" that according to reports from contacts of his in Egypt, Habib "was in fact tortured. He was interrogated in a way which a human cannot stand up...We were told that he -- they rang the bell that he will die and somebody had to help him" ("The Trials of Mamdouh Habib," Dateline SBS, July 7, 2004).

Bay. On January 28, 2005, Habib was sent home from Guantánamo to Sydney, Australia.[224]

- Two Egyptians, Ahmed Agiza and Mohammed al-Zari, were handed by the Swedish authorities to U.S. operatives at Bromma Airport in Stockholm in December 2001. The operatives hooded, shackled, and drugged them, placed them aboard a U.S. government-leased plane, and transported them to Egypt. There the two men were reportedly tortured, including in Cairo's notorious Tora prison.[225]
- Italian police are investigating whether American agents illegally seized Milan resident Osama Moustafa Nasr and flew him to Egpyt. Nasr disappeared from Milan on November 16, 2003. Sometime in 2004, he called his wife and friends in Milan and reportedly described being stopped in the street "by western people," forced into a car, and taken to an air force base. From the airbase, Nasr was allegedly flown to Cairo and turned over to secret police. The *London Times* reported that Nasr "claimed he had been tortured so badly by secret police in Cairo that he had lost hearing in one ear. Italian officers who intercepted the call believe he has since been rearrested."[226]
- Muhammad Haydar Zammar, a German citizen of Syrian descent[227] was arrested in Morocco in November 2001 and flown to Syria.[228] Moroccan government sources have told reporters that the CIA asked them to arrest Zammar and send him to Syria,[229] and that CIA agents took part in his interrogation sessions in Morocco.[230] Zammar was taken to the same Syrian prison where Maher Arar was held.[231] On July 1, 2002, *Time* magazine reported:

> U.S. officials tell *Time* that no Americans are in the room with the Syrian who interrogate Zammar. U.S. officials in Damascus submit written questions to the Syrians, who relay Zammar's answers back. State Department officials like the arrangement because it insulates the U.S.

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[224] Raymond Bonner, "Australian's Long Path in U.S. Antiterrorism Maze," *The New York Times*, January 29, 2005.

[225] "The Broken Promise," *Kalla Fakta*, Swedish TV4 Program, May 17, 2004 [online], http://hrw.org/english/docs/2004/05/17/sweden8620.htm; Craig Whitlock, "A Secret Deportation of Terror Suspects; 2 Men Reportedly Tortured in Egypt," *The Washington Post*, July 25, 2004.

[226] Stephen Grey, "U.S. Agents "Kidnapped Militant" for Torture in Egypt," *The Sunday Times*, February 6, 2005.

[227] As in Arar's case, Zammar was technically a dual citizen because Damascus does not allow those born in Syria to renounce their citizenship.

[228] Peter Finn, "Al Qaeda Recruiter Reportedly Tortured; Ex-Inmate in Syria Cites Others' Accounts," *The Washington Post*, January 31, 2003.

[229] Douglas Frantz, "War of Secrets: Sharing Information; Learning to Spy with Allies," *The New York Times*, September 8, 2002; John Crewsdon, "Bid for New Witness Could Slow Plot Trial; Defense Sets Sights on Radical in Syria," *The Chicago Tribune*, January 29, 2003.

[230] Peter Finn, "Al Qaeda Recruiter Reportedly Tortured; Ex-Inmate in Syria Cites Others' Accounts," *The Washington Post*, January 31, 2003.

[231] See Amnesty International, "Syria: Syrian German Held Three Years Without Charge in Rat-Infested Syrian 'Tomb,'" October 8, 2004 [online], http://web.amnesty.org/library/Index/ENGMDE240662004

government from any torture the Syrians may be applying to Zammar. And some State Department officials suspect that Zammar is being tortured.[232]

- Muhammad Saad Iqbal Madni, a Pakistani national, was arrested in Jakarta, Indonesia on January 9, 2002. Indonesian officials and diplomats told *The Washington Post* that this was done at the CIA's request. Several days later, Egypt made a formal request that Indonesia extradite Madni for unspecified, terrorism-related crimes. However, according to "a senior Indonesian government official," "[t]his was a U.S. deal all along…Egypt just provided the formalities." On January 11, the Indonesian officials said, Madni was taken onto a U.S. registered Gulfstream V jet at a military airport, and flown to Egypt.[233] On September 11, 2004, the *Times* of London reported that despite repeated inquiries by Madni's relatives, "nothing has been seen or heard from" him since he was taken from Jakarta.[234]

The post 9/11 rendition of terror suspects was first reported in *The Washington Post* in December 2002, which described transfers to countries including Syria, Uzbekistan, Pakistan, Egypt, Jordan, Saudi Arabia, and Morocco, where they were tortured or otherwise mistreated. One official was quoted as saying, "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."[235] Since then, the *New Yorker*, the *BBC* and *CBS*'s "60 Minutes" have described an organized U.S. program of renditions to Egypt of suspects captured in places such as Afghanistan, Albania, Croatia, and Sweden, resulting in many cases of torture and "disappearance."[236]

Director Tenet was certainly aware of the torture involved in these renditions. The Middle Eastern countries to which detainees have been rendered — Egypt, Syria, Pakistan, Jordan, Saudi Arabia, and Morocco — are notorious for their use of torture.[237] The U.S. State Department had

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[232] Mitch Frank, "Help From an Unlikely Ally," *Time Magazine*, July 1, 2002. *The Daily Telegraph* and *The Washington Post* have also reported that U.S. agents were telling Syrian interrogators what questions to ask Zammar; David Rennie & Toby Helm, "War on Terrorism: Syrians Reveal Secret Help in al-Qa'eda Hunt," June 20, 2002 ("American agents had been allowed to submit written questions to Zammar and had received a steady flow of information in return"); Glenn Kessler, "U.S.-Syria Relations Not Quite as Cold," *The Washington Post*, June 20, 2002. ("While U.S. officials have not been able to question Zammar, Americans have submitted questions to the Syrians"); Howard Schneider, "Syria Evolves as Anti-Terror Ally," *The Washington Post*, July 25, 2002 ("it is unclear whether U.S. officials are being allowed to question [Zammar] in person or merely pose questions through Syrian interrogators").

[233] Rajiv Chandrasekaran and Peter Finn, "U.S. Behind Secret Transfer of Terror Suspects," *The Washington Post*, March 11, 2002.

[234] Daniel McGory, "Ghost Prisoners Haunt Terrorism Hunt," *The London Times*, September 11, 2004.

[235] Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *The Washington Post*, December 25, 2002.

[236] Jane Mayer, "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program," *The New Yorker*, February 8, 2005; "Transcript of 'File on 4' Rendition," BBC Current Affairs Group, February 8, 2005; "CIA Flying Suspects to Torture?" "A 60 Minutes Special Report," March 6, 2005.

[237] See Human Rights Watch, "State Department Criticism of Torture in Countries to Which Detainees Have Allegedly Been Rendered," *A Human Rights Watch Press Release*, April 2003 [online], http://hrw.org/press/2003/04/torture.htm.

the following to say in its 2003 reports about torture in Egypt and Syria, two of the major "extraordinary rendition" destinations:

> [Egypt:] [T]here were numerous, credible reports that security forces tortured and mistreated detainees. .... Principal methods of torture reportedly employed ... included victims being: stripped and blindfolded; suspended from a ceiling or doorframe with feet just touching the floor; beaten with fists, whips, metal rods, or other objects; subjected to electrical shocks; and doused with cold water.[238]

> [Syria:] [T]here was credible evidence that security forces continued to use torture. ...[Syrian groups and ex-detainees] reported that torture methods included administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyper extending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine.[239]

Newsweek reported that at a classified briefing for senators not long after September 11, 2001, Tenet was asked whether the United States was planning to seek the transfer of suspected al-Qaeda detainees from governments known for their brutality. Citing Congressional sources, *Newsweek* reported "that Tenet suggested it might be better sometimes for such suspects to remain in the hands of foreign authorities, who might be able to use more aggressive interrogation methods."[240]

Michael Sheuer, head of the CIA's bin Laden desk, who ran the detainee rendition program, provides evidence that Tenet was very aware of what was happening to detainees, yet nevertheless personally signed off on renditions. Sheuer said he "never a saw a set of operations that was more closely scrutinized by the director of central intelligence, the National Security Council and the Congressional intelligence committees" and that "we told them — again and again and again" that the detainees might be mistreated.[241] According to Sheuer, each individual operation, "I think, ...went to either the Director of Central Intelligence or to the Assistant

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[238] U.S. Department of State Country Reports on Human Rights Practices: Egypt, February 2004 [online], http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm.

[239] U.S. Department of State Country Reports on Human Rights Practices: Syria, February 2004 [online], http://www.state.gov/g/drl/rls/hrrpt/2003/27938.htm. In November 2003, just days after Maher Arar was released from Syrian custody, President Bush declared that the government of Syria had left "a legacy of torture, oppression, misery, and ruin." Remarks by the President George W. Bush on the Occasion of the 20th Anniversary of the National Endowment for Democracy, November 6, 2003 [online], http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html

[240] John Barry, Michael Hirsh & Michael Isikoff, "The Roots of Torture," *Newsweek*, May 24, 2004,

[241] Michael Scheuer, "A Fine Rendition," *The New York Times*, March 11, 2005.

Director of Central Intelligence. So basically the number one and two men in the intelligence community are the ones who signed off."[242]

As noted above, Director Tenet was reportedly involved in wresting from the FBI the terror suspect Ibn al-Shaikh al-Libi so he could be sent to Egypt.

U.S. law, in addition to criminalizing direct acts of torture, provides that "a person who *conspires* to commit [torture] shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy."[243] Similarly, U.S. law provides for so-called "aiding and abetting" liability:

1. Whoever commits an offense against the United States or aids, counsels, commands, induces or procures its commission, is punishable as a principal.
2. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.[244]

As a general principle of U.S. criminal law, the liability of an accomplice or a conspirator depends upon giving encouragement or assistance with the knowledge that it will promote or facilitate a crime.[245]

In the light of these legal provisions, Director Tenet' role in these renditions should be investigated to determine if it amounted to conspiracy to commit torture and/or to aiding and abetting in the commission of torture.[246]

Director Tenet might argue that the United States obtained "diplomatic assurances" from receiving states such as Syria and Egypt that the detainees would not be tortured. In a recent study of the use of "diplomatic assurances," however, Human Rights Watch concluded:

> In contexts where torture is a serious and persistent problem, or there is otherwise reason to believe that particular individuals will be targeted for torture and ill-treatment, diplomatic assurances do not and cannot prevent torture. Sending countries that rely on such assurances are either engaging in wishful

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[242] "Transcript of 'File on 4' Rendition," BBC Current Affairs Group, February 8, 2005.

[243] 18 U.S.C. § 2340A(c), emphasis added.

[244] 18 U.S.C. §2.

[245] Wayne R. Lafave, Criminal Law (3d ed. 2000), § 6.7.

[246] See Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law, 2004), Section VIII.

> thinking or using the assurances as a fig leaf to cover their complicity in torture and their role in the erosion of the international norm against torture.[247]

From the point of view of criminal law, liability would turn on Director Tenet's mental state — his intent that the detainee be tortured or his knowledge or reckless indifference to whether or not torture would result. [248]

In this respect, Human Rights Watch wrote in the study described above:

> It defies common sense to presume that a government that routinely flouts its obligations under international law can be trusted to respect those obligations in an isolated case. And indeed, in an increasing number of cases, allegations of torture are emerging after individuals are returned based on such assurances.

As former CIA counterterrorism official Vincent Cannistraro has remarked: "You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they were making claims to the contrary."[249]

Lieutenant General Ricardo Sanchez

> "As senior commander in Iraq, I accept responsibility for what happened at Abu Ghraib"
>
> - Ricardo Sanchez[250]

Lt. Gen. Sanchez should be investigated for war crimes and torture either as a principal or under the doctrine of "command responsibility." Gen. Sanchez authorized interrogation methods that violate the Geneva Conventions

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[247] See Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard against Torture," *A Human Rights Watch Report*, April 2005 [online], http://hrw.org/reports/2005/eca0405/.

[248] See Wayne R. Lafave, Criminal Law (3d ed. 2000), §6.7 (d). U.S. courts differ on whether liability rests on whether mere "knowing assistance" suffices for criminal liability or whether the defendant must desire the result (that the detainee be tortured).

[249] Shannon McCaffrey, "Canadian Sent to Syria Prison Disputes U.S. Claims against Torture," *Knight Ridder*, July 28, 2004 [online] http://www.realcities.com/mld/krwashington/9264400.htm. See also Dana Priest, "Man was Deported after Syrian Assurances," *The Washington Post*, November 20, 2003: "Spokesmen at the Justice Department and the CIA declined to comment on why they believed the Syrian assurances to be credible." *The Washington Post* quoted an "Arab diplomat, whose country is actively engaged in counterterrorism operations and shares intelligence with the CIA," as saying that it was unrealistic to believe the CIA really wanted to follow up on the assurances. "It would be stupid to keep track of them because then you would know what's going on," he said. "It's really more like 'Don't ask, don't tell" (Dana Priest, "CIA's Assurances on Transferred Suspects Doubted," *The Washington Post*, March 17, 2005).

[250] Testimony of Lt. Gen Ricardo Sanchez, Senate Armed Services Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004.

and the Convention against Torture. He knew, or should have known, that torture and war crimes were committed by troops under his direct command, but failed to take effective measures to stop these acts.

Gen. Sanchez promulgated interrogation rules and techniques that violated the Geneva Conventions and the Convention against Torture

Lt. Gen. Sanchez took command of V Corps in Baghdad in April 2003 and went on to become Commander of the Combined and Joint Task Force 7 (CJTF-7). Over the spring and summer of 2003, CJTF-7 was responsible for the detention of combatant and civilian prisoners in Iraq.[251]

Although Gen. Sanchez testified before Congress that compliance with the Geneva Conventions in Iraq "was always the standard,"[252] it has since been revealed that Gen. Sanchez, "despite lacking specific authorization to operate beyond the confines of the Geneva Conventions" (in the words of the Schlesinger report), took it upon himself to declare some prisoners "unlawful combatants."[253]

As noted by the Schlesinger panel, during the early and mid-2003, General Sanchez's troops interrogated detainees at Abu Ghraib and elsewhere relying "on Field Manual 34-52 and on unauthorized techniques that migrated from Afghanistan."[254] Members of the 519th MI Battalion, which had previously been accused in a Criminal Investigation Command homicide investigation of abusive interrogation practices in Afghanistan, were left to devise interrogation rules on their own.[255] In so doing, they were said to have copied rules "almost verbatim" from the "Battlefield Interrogation Team and Facility Policy" of Special Operations Forces/Central Intelligence Agency Joint Task Force 121, a secretive Special Operations Forces/CIA mission seeking former government members in Iraq.[256] That policy reportedly endorsed the use of stress positions during harsh interrogation procedures, the use of dogs, yelling, loud music, light control, isolation, and other procedures used previously in Afghanistan and Iraq.[257]

In mid-August 2003, according to journalist Mark Danner, a captain in military intelligence at Abu Ghraib sent his colleagues an e-mail in which, responding to an earlier request from interrogators, he sought to define "unlawful combatants," distinguishing them from "lawful combatants [who] receive protections of the Geneva Convention and gain combat immunity for

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[251] Jones report, pp. 9-10.

[252] Testimony of Lt. Gen Ricardo Sanchez, Senate Armed Services Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004, p. 26.

[253] Schlesinger report, p. 83.

[254] Ibid, p. 14.

[255] Fay report, p. 29.

[256] Douglas Jehl and Eric Schmitt, "Army's Report Faults General in Prison Abuse," *The New York Times*, August 27, 2004.

[257] Ibid.

their warlike acts." After promising to provide rules of engagement — "that addresses the treatment of enemy combatants, specifically, unprivileged belligerents," the captain asked the interrogators for "input...concerning what their special interrogation knowledge base is and more importantly, what techniques would they feel would be effective techniques." Then, reminding the intelligence people to "provide Interrogation techniques 'wish list' by 17 AUG 03," the captain signed off saying: "The gloves are coming off gentlemen regarding these detainees, Col Boltz[258] has made it clear that we want these individuals broken. Casualties are mounting and we need to start gathering info to help protect our fellow soldiers from any further attacks."[259]

Gen. Miller, who ran the detention operations at Guantánamo Bay, visited Iraq from August to September 2003, and met with Gen. Sanchez and others. Gen. Sanchez recalls that Gen. Miller "left behind a whole series of SOPs that could be used as a start point for CJTF-7 interrogation operations."[260] Gen. Sanchez took into consideration Gen. Miller's "call for strong, command-wide interrogation policies," when he finally formalized the interrogation rules for Iraq in a memorandum dated September 14.[261]

Sanchez's September 14 memo[262] — released only in March 2005 in response to a FDIA lawsuit — approved the use of a number of harsh interrogation techniques, including:

- "Presence of Military Working Dog: Exploits Arab fear of dogs while maintaining security during interrogations. Dogs will be muzzled and under control of …handler at all times to prevent contact with detainee";
- "Sleep Management: Detainee provided minimum 4 hours of sleep per 24 hour period, not to exceed 72 continuous hours";
- "Yelling, Loud Music and Light Control: Used to create fear, disorient detainee and prolong capture shock. Volume controlled to prevent injury";
- "Stress Positions: Use of physical postures (sitting, standing, kneeling, prode, etc.) for no more than 1 hour per use. Use of technique(s) will not exceed 4 hours and adequate rest between use of each position will be provided"; and
- "False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him."

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[258] Col. Steven Boltz, the second-ranking military intelligence officer in Iraq.

[259] Mark Danner, *Torture and Truth; America, Abu Ghraib and the War on Terrorism* (New York: The New York Review of Books, 2004), p. 33.

[260] Fay report, p. 58.

[261] Schlesinger report, pp. 9-10.

[262] From Lt. Ricardo Sanchez to Commander U.S. Central Command, memorandum, Interrogation and Counter-Resistance Policy, September 14, 2003 [online], http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17851&c=206.

Among the goals Gen. Sanchez thought these techniques would accomplish were "to create fear, disorient detainees and capture shock."

The Schlesinger report found that Gen. Sanchez's September 14 memorandum included "a dozen interrogation techniques beyond [Army] Field Manual 34-52 — five beyond those approved for Guantánamo."[263] As described above in the section on Donald Rumsfeld, these techniques also violate the Geneva Conventions and, depending on their use, can constitute war crimes.

Unreleased portions of the report by Maj. Gen. George R. Fay state that with Gen. Sanchez's September 14 order, national policies and those of Gen. Sanchez "collided, introducing ambiguities and inconsistencies in policy and practice," and that "Policies and practices developed and approved for use on al-Qaeda and Taliban detainees who were not afforded the protection of the Geneva Conventions now applied to detainees who did fall under the Geneva Conventions' protections."[264] The report adds that the memo "established a requirement to obtain LTG Sanchez's approval prior to using certain techniques on EPWs [enemy prisoners of war]." The policy failed to address what, if any, approval authority had to be obtained for using any of the interrogation techniques on civilian internees, who were the bulk of the detainees at that time."[265] In other words, Gen. Sanchez apparently gave Abu Ghraib interrogators the blanket authority to use dogs to threaten detainees — an act that may easily amount to torture or cross the threshold into torture.

Gen. Sanchez appears to have misled Congress in his sworn testimony on this issue. Asked in May 2004, months before the release of his actual memoranda, if he had "ordered or approved the use of sleep deprivation, intimidation by guard dogs, excessive noise and inducing fear," Gen. Sanchez replied: "I never approved any of those measures to be used within the CJTF-7 at any time in the last year." In response to a follow-up question, he repeated, "I have never approved the use of any of those methods within CJTF-7 in the 12-and-a-half months that I've been in Iraq."[266]

At the same time, Gen. Sanchez was apparently relaying the pressure from above for "actionable intelligence." According to one soldier whose testimony is in a declassified attachment to the Fay report:

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[263] Schlesinger report, p. 9.

[264] Fay report, pp. 25-26. See Mark Danner, *Torture and Truth; America, Abu Ghraib and the War on Terrorism* (New York: The New York Review of Books, 2004), p. 461, which includes sections of the Fay report not released to the public.

[265] Fay report, p. 26; Mark Danner, *Torture and Truth; America, Abu Ghraib and the War on Terrorism* (New York: The New York Review of Books, 2004), p. 462.

[266] Senate Armed Services Committee, Hearing on Allegations of Mistreatment of Iraqi Prisoners, May 19, 2004.

> COL Pappas and (REDACTED) were under intense pressure from LTG Sanchez to provide intelligence reporting...On occasion (REDACTED) and (REDACTED) conducted interrogations themselves. One interrogation occurred at the request of LTG Sanchez in the middle of the night.[267]

These guidelines were used by personnel at Abu Ghraib until October 2003.[268] Gen. Sanchez's September 14 guidelines were criticized by CENTCOM, however, which viewed them as "unacceptably aggressive," resulting in Gen. Sanchez drafting new guidelines on October 12, 2003.[269]

While the September 14 memo did not qualify its approval of dogs for interrogation, the October 12 memo confusingly contained two seemingly contradictory sheets of paper. One sheet, a list of approved techniques, did not include dogs. The second sheet, a list of safeguards, now said, "should military working dogs be present during interrogations, they will be muzzled and under control of handler at all times to ensure safety."[270] This memo, Gen. Fay noted, "confused doctrine and policy even further."[271]

As Gen. Fay pointed out:

> Another confusing change involved removing the use of dogs from the list of approaches. The October 12, 2003 policy did not specifically preclude it. In fact, the safeguards section of the policy established the conditions for the use of dogs, should they be present during interrogations: They had to be muzzled and they had to be under the control of a trained handler. Even though it was not listed in the approved techniques section, which meant that it required the LTG Sanchez's approval, its inclusion in the safeguards section is confusing. In fact, the Commander, 205 MI BDE, COL Pappas, believed that he could approve the use of dogs. Dogs as an interrogation tool should have been specifically excluded because the practice was never doctrine. In approving the concept, LTG Sanchez did not adequately consider the distinction between using dogs at the facility to patrol for security and using them as an interrogation tool, and the implications for interrogation policy. Interrogators at Abu Ghraib used both

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[267] Sworn Statement of E5, A Company, 519th Military Intelligence Battalion, 525th Military Intelligence Brigade, Fort Bragg, June 4, 2004.

[268] Colonel Thomas M. Pappas, "AR 15-6 Investigation Interview," February 9, 2004, p. 34.

[269] CJTF-7 Interrogation and Counter-Resistance Policy, memorandum, October 12, 2003 [online], http://www.aclu.org/torturefoia/released/a94.pdf.

[270] Ibid.

[271] Fay report, p. 27.

> dogs and isolation as interrogation practices. *The manner in which they were used on some occasions clearly violated the Geneva Conventions.* [272]

Gen. Jones added that "policy memoranda promulgated by the CJTF-7 Commander [Sanchez] led indirectly to some of the non-violent and non-sexual abuses at Abu Ghraib." [273] Jones added that some of these abuses "may have violated international law."

Lt. Gen. Sanchez knew or should have known about torture and war crimes committed by troops under his command

In his Congressional testimony, Gen. Miller was asked to explain how abuse at Abu Ghraib had taken place without the top leadership knowing about it. He replied, "I think there are failures in people doing their duty, there are failures in systems. *And we should have known and we should have uncovered it and taken action before it got to the point that it got to.* I think there's no doubt about that."[274]

U.S. military personnel under the command of Gen. Sanchez committed numerous war crimes. The Schlesinger report noted 55 substantiated cases of detainee abuse in Iraq, plus 20 instances of detainee deaths still under investigation.[275] The earlier Taguba report had found "numerous incidents of sadistic, blatant, and wanton criminal abuses" that constituted "systematic and illegal abuse of detainees" at Abu Ghraib.[276] The Fay report documents 44 allegations of acts that may amount to war crimes.[277] An ICRC report concluded that in military intelligence sections of Abu Ghraib, "methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information."[278] The ICRC also found that "the use of ill-treatment against persons deprived of their liberty went beyond exceptional cases and might be considered as a practice tolerated by the CF [Coalition Forces]."[279]

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[272] Fay report, p. 28, emphasis added. The Schlesinger report noted that "The Taguba and Jones/Fay investigations identified a number of abuses related to using muzzled and unmuzzled dogs during interrogations." Schlesinger report, p. 77. See also Douglas Jehl and Eric Schmitt, "Army's Report Faults General in Prison Abuse," *The New York Times*, August 27, 2004.

[273] Jones report, p. 4.

[274] Testimony of Gen. Miller, Senate Armed Services Committee, Hearing on Allegations of Mistreatment of Iraqi Prisoners, May 19, 2004, emphasis added.

[275] Schlesinger report, pp. 12-13.

[276] Taguba report, p. 16.

[277] Fay report, p. 7.

[278] International Committee of the Red Cross, *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004 [online], http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/E4EC091842422511C1256EB500636F70 .

[279] Ibid.

Gen. Jones concluded that:

> [I]n retrospect, indications and warnings had surfaced at the CJTF-7 level that additional oversight and corrective actions were needed in the handling of detainees…Examples of these indications and warnings include: the investigation of an incident at Camp Cropper,[280] the International Committee of the Red Cross (ICRC) reports on handling of detainees in subordinate units, ICRC reports on Abu Ghraib detainee conditions and treatment, CID investigations and disciplinary actions being taken by commanders, the death of an OGA detainee at Abu Ghraib.[281]

Indeed, Brigadier General Janis Karpinski has said that when CJTF-7 was alerted to prisoner abuse by the ICRC in November 2003, lawyers who answered directly to Sanchez responded by restricting the access of the ICRC.[282] In May 2003, the ICRC sent a memorandum documenting over 200 allegations of ill-treatment. Though Gen. Sanchez has denied seeing it, the memorandum was forwarded to U.S. Central Command in Qatar.[283] Gen. Sanchez also concedes that he spoke numerous times with U.S. Ambassador Paul Bremer during the summer and fall of 2003 about, among other things, issues of "quality of life of prisoners and the conditions that existed."[284]

A confidential report in December 2003 by retired Col. Stuart A. Herrington, which was commissioned by Maj. Gen. Barbara Fast, the top intelligence officer in Iraq, warned of detainee abuse throughout Iraq.[285] The report, which was reportedly seen by Gen. Sanchez, found that members of Task Force 121 — the joint Special Operations and CIA mission searching for weapons of mass destruction and high-value targets — had been abusing detainees throughout Iraq and had been using a secret interrogation facility to hide their activities.

According to the Schlesinger report, "[b]oth the CJTF-7 commander [Gen. Sanchez] and his intelligence officer, CJTF-7 C2 [Major General Walter Wojdakowski], visited the prison [Abu Ghraib] on several occasions."[286] These visits were among those that the report concluded

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[280] In early July 2003, the ICRC presented a paper detailing approximately 50 allegations of ill-treatment in the military intelligence section of Camp Cropper, at Baghdad International Airport.

[281] Jones report, p. 12.

[282] Douglas Jehl and Eric Schmitt, "Army Tried to Limit Abu Ghraib Access," *The New York Times*, May 20, 2004.

[283] International Committee of the Red Cross, *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004 [online], http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/E4EC091842422511C1256EB500636F70.

[284] Testimony of Lt. Gen. Ricardo Sanchez, Senate Armed Services Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004.

[285] Josh White, "U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds," *The Washington Post*, December 1, 2004.

[286] Schlesinger report, p. 65.

"undoubtedly" contributed to the fact that "pressure was placed on the interrogators to produce 'actionable' intelligence."[287] One soldier in the 800th MP Brigade stated that he believed Brig. Gen. Karpinski spoke to Lt. Gen. Sanchez "every 3 days or so."[288] According to another soldier serving at Abu Ghraib, whose allegation has not been corroborated, Gen. Sanchez was present during some interrogations and was aware of the abuse.[289]

A letter from Col. Pappas to Gen. Sanchez dated November 30, 2003 requested permission to throw tables and chairs while continuously yelling at a detainee, drive the detainee around hooded while interrogating him, threaten him with barking dogs, conduct a strip search while the detainee was hooded, place him in isolation on an adjusted sleep schedule while also using techniques such as loud music and stress positions "in accordance with CJTF-7 IROE."[290] Gen. Sanchez told Congress that he had never seen the letter.[291]

Despite these warnings, Gen. Sanchez seems to have taken no steps to curtail the rampant abuses that were ongoing during his command.

Gen. Jones concluded that "LTG Sanchez…failed to ensure proper staff oversight of detention and interrogation operations"[292] and that "CJTF-7 staff elements reacted inadequately to earlier indications and warnings that problems existed at Abu Ghraib."[293] The Schlesinger report stated that "[w]e believe LTG Sanchez should have taken strong action in November when he realized the extent of the leadership problems at Abu Ghraib. We concur with the Jones findings that LTG Sanchez and MG Wojdakowski failed to ensure proper staff oversight of detention and interrogation operations."[294]

In addition, the Schlesinger panel noted that "the unclear chain of command established by CJTF-7, combined with the poor leadership and lack of supervision, contributed to the atmosphere at Abu Ghraib that allowed the abuses to take place."[295]

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[287] Ibid.

[288] First Lieutenant Elvis L. Mabry, "AR 15-6 Investigation Interview," February 15, 2004, p. 3.

[289] Joe Stephens and Josh White, "Prison Visits by General Reported in Hearing; Alleged Presence of Sanchez Cited by Lawyer," *The Washington Post*, May 23, 2004.

[290] Col. Thomas M. Pappas to Commander CJTF-7 LTG Sanchez, "Request for Exception to CJTF-7 Interrogation and Counter Resistance Policy," memorandum, November 30, 2003.

[291] Testimony of Lt. Gen. Ricardo Sanchez, Senate Armed Services Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004, pp. 31-32.

[292] Jones report, p. 24.

[293] Ibid., p. 4.

[294] Schlesinger report, p. 15.

[295] Ibid., p. 45.

Major General Geoffrey Miller

Major General Geoffrey Miller, as commander at the tightly-controlled prison camp at Guantánamo Bay, Cuba, should be investigated for his potential responsibility in the war crimes and acts of torture committed against detainees there.

Gen. Miller was commander of Joint Task Force-Guantánamo (JTF-GTMO) from November 2002 until April 2004, when he became deputy commanding general of detention operations in Iraq, the position he currently holds.

Gen. Miller knew or should have known that troops under his command were committing war crimes and acts of torture against detainees at Guantánamo

As commander of JTF-Guantánamo, Gen. Miller oversaw both military intelligence and military police functions. His mission was "to integrate both the detention and intelligence function to produce actionable intelligence for the nation… operational and strategic intelligence to help the [United States] win the global war on terror."[296] Before Gen. Miller was brought to Guantánamo, his predecessor in charge of detention, Brigadier General Rick Baccus, was reportedly accused by Pentagon officials of interfering with interrogation by "coddling" detainees for addressing them with words such as "peace be with you," and "may God be with you," promising them that they would be "treated humanely," and authorizing placement in the camp of ICRC posters specifying certain rights that prisoners have under the Geneva Conventions.[297] Under Gen. Miller, detention and interrogation functions were brought together for the first time. The Schlesinger panel described the use of interrogation techniques at Guantánamo as "carefully controlled."[298] Church described the "strict command oversight" and "controlled conditions."[299]

Because no independent monitors with the ability to publicly report on conditions have been able to visit Guantánamo, it is difficult to get a complete picture of practices under Gen. Miller. However based on the testimony of people released from Guantánamo, as well as evidence that has been released as a result of litigation, it appears that under Gen. Miller's command, detainees at Guantánamo were frequently subject to torture or other cruel, inhuman or degrading treatment. The ICRC has reportedly described the psychological and sometimes physical

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[296] Testimony of General Miller, Senate Armed Forces Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004.

[297] See Bill Gertz and Rowan Scarborough, "Inside the Ring," *The Washington Times*, October 4, 2002; David Rose, *Guantánamo* (New York, The New Press, 2004), p. 85; "GITMO Camp Commander Relieved," *The Washington Post*, October 14, 2002.

[298] Schlesinger report, p. 9.

[299] Church report, p. 9.

coercion on prisoners at Guantánamo as "tantamount to torture."[300] Among tactics that appear to have regularly been in use are prolonged sleep deprivation and shackling prisoners in uncomfortable "stress positions" for many hours.[301]

Released detainees also describe: threats with unmuzzled dogs; forced stripping; being photographed naked; being intentionally subjected to extremes of heat and cold for the purpose of causing suffering; being kept around the clock in filthy cages with no exercise or sanitation; denial of access to necessary medical care; deprivation of adequate food, sleep, communication with family and friends, and of information about their status; and violent beatings.[302]

In one case, military intelligence officials and interrogators told *The New York Times* that Mohammed al-Kahtani, a Saudi detainee, was put on a plane, blindfolded, and made to believe that he was being flown to the Middle East. After several hours in the air, the plane returned to Guantánamo and al-Kahtani was allegedly put in an isolation cell for several months, hidden from the ICRC, and subjected to harsh interrogations conducted by people he was encouraged to believe were Egyptian security agents. Al-Kahtani was reportedly forcibly given an enema because it was uncomfortable and degrading. [303]

The *Times* also reported that:

> [I]nterviews with former intelligence officers and interrogators provided new details and confirmed earlier accounts of inmates being shackled for hours and left to soil themselves while exposed to blaring music or the insistent meowing of a cat-food commercial. In addition, some may have been forcibly given enemas as punishment.

While all the detainees were threatened with harsh tactics if they did not cooperate, about one in six were eventually subjected to those procedures, one former interrogator estimated. The interrogator said that when new interrogators arrived they were told they had great flexibility in extracting information from detainees because the Geneva Conventions did not apply at the base.[304]

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[300] Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo," *The New York Times*, November 30, 2004.

[301] See Human Rights Watch, "Guantánamo: Detainee Accounts," *A Human Rights Watch Backgrounder*, October 2004 [online], http://www.hrw.org/backgrounder/usa/gitmo1004/; Center for Constitutional Rights, "Report of Former Guantánamo Detainees," August 4, 2004 [online], http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf.

[302] Ibid.

[303] Neil A. Lewis, "Fresh details emerge on harsh methods at Guantánamo," *The New York Times*, January 1, 2005.

[304] Ibid.

Documents released to the American Civil Liberties Union and the Center for Constitutional Rights following a Freedom of Information Act (FOIA) lawsuit paint a bleak picture of the treatment of Guantánamo detainees under Gen. Miller. In particular, agents of the Federal Bureau of Investigation express their shock at techniques used on detainees. In one e-mail, an FBI agent wrote:

> Here is a brief summary of what I observed at GTMO. On a couple of occassions (sic), I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defacated (sic) on themselves and had been left there for 18, 24 hours or more. On one occassion (sic), the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the [military police] what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion (sic), the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion (sic), not only was the temperature unbearably hot, but 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. [305]

Another FBI agent reported seeing a detainee "sitting on the floor of the interview room with an Israeli flag draped around him, loud music being played and a strobe light flashing." In another recently-declassified FBI e-mail, the author writes:

> from what cnn reports, gen karpinsky at abu gharib (sic) said that gen miller came to the prison several months ago and told her they wanted to "gitmotize" abu ghraib. i am not sure what this means. however, if this refers to intell gathering as i suspect, it suggests he has continued to support interrogation strategies we not only advised against, but questioned in terms of effectiveness.
>
> yesterday, however, we were surprised to read an article in stars and stripes, in which gen. miller is quoted as saying that he believes in the rapport-building approach. this is not what was saying at gitmo when i was there. [redacted] and i

[305] American Civil Liberties Union, E-mail from [redacted] to [redacted], August 2, 2004 [online], www.aclu.org/torturefoia/released/FBI_5053_5054.pdf (though this was written in 2004, it was recalling earlier events).

> did cart wheels. the battles fought in gitmo while gen. miller he was there are on the record.

Recently-revealed videotapes of so-called "Immediate Reaction Forces" (or "Extreme Reaction Force" (ERF)) reportedly show guards punching some detainees, a guard kneeing a detainee in the head, tying one to a gurney for questioning and forcing a dozen to strip from the waist down. One guard squad was all-female, traumatizing some Muslim prisoners.[306]

Between 2002 and 2004, Gen. Miller met on several occasions with the ICRC, which made him aware of their evolving concerns over the treatment of detainees. In October 2003, the ICRC conducted more than 500 interviews at Guantánamo before meeting with Miller and his top aides. According to defense department documents,[307] the ICRC told Miller of its concern over the lack of a legal system for the detainees, the continued use of steel cages, the "excessive use of isolation" and the lack of repatriation for the detainees. The ICRC felt that the interrogators had "too much control over the basic needs of detainees… the interrogators have total control over the level of isolation in which detainees were kept; the level of comfort items detainees can receive; and the access to basic needs of the detainees." According to the documents, Gen. Miller responded that interrogation techniques were not the ICRC's concern. The ICRC countered that those methods and the lengths of interrogations were coercive and having a "cumulative effect" on the mental health of the detainees.[308]

One of the detainees whom Gen. Miller refused to show to the ICRC as recently as February 2, 2004, was Abdallah Tabarak, a Moroccan citizen and allegedly Osama bin Laden's personal bodyguard. According to a Department of Defense memo, Gen. Miller told the ICRC that "Because of military necessity, the ICRC may not have private talks with him." Tabarak was transferred to Morocco in August 2004. In December 2004, he reportedly said that in Guantánamo, he had been beaten, given forcible injections, and held in a dark cell which left him with eyesight problems.[309]

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[306] Paisley Dodds, "Guantánamo Tapes Show Teams Punching, Stripping Prisoners," Associated Press, February 1, 2005. In November 2002, just before Miller arrived, U.S. National Guardsman Spc. Sean Baker was allegedly abused by an ERF while posing undercover as a detainee. Baker was told to put on an orange jumpsuit and crawl under a bunk in a cell. According to Baker, the ERF members "grabbed my arms, my legs, twisted me up and unfortunately one of the individuals got up on my back from behind and put pressure down on me while I was facedown. Then he — the same individual — reached around and began to choke me and press my head down against the steel floor. After several seconds, twenty to thirty seconds, it seemed like an eternity because I couldn't breathe, I began to panic…" Baker was evacuated to a hospital in Virginia, and was later sent to an Army hospital for treatment of traumatic brain injury and he has been plagued by seizures ever since. See David Rose, *Guantánamo* (New York, The New Press, 2004), pp. 72-74.

[307] These documents are collected at "Conditions at Guantánamo Bay: DoD Documents Detail Red Cross Comments on Detainee Treatment and Actions Taken in Response," *The Washington Post*, June 18, 2004 [online], http://www.washingtonpost.com/wp-srv/nation/documents/gitmomemos.html.

[308] See also Scott Higham, "A Look Behind the 'Wire' at Guantánamo: Defense Memos Raise Questions about Detainee Treatment as Red Cross Sought Changes," *The Washington Post*, June 13, 2004.

[309] See Amnesty International, "United States of America: Guantánamo — An Icon of Lawlessness," January 6, 2005.

In June 2004, shortly after Gen. Miller left Guantánamo, the ICRC conducted a full visit and concluded (in the words of *The New York Times*, which obtained a memorandum based on the ICRC report that quotes from it in detail and lists its major findings):

> [I]nvestigators had found a system devised to break the will of the prisoners at Guantánamo… and make them dependent on their interrogators through "humiliating acts, solitary confinement, temperature extremes, use of forced positions." …[T]he methods used were increasingly "more refined and repressive" than what the Red Cross learned about on previous visits. "The construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture." It said that in addition to the exposure to loud and persistent noise and music and to prolonged cold, detainees were subjected to "some beatings."[310]

Thus, there is a mounting body of evidence that acts of torture and war crimes were committed at Guantánamo, and that Gen. Miller, as the commander of the tightly-controlled camp, knew or should have known about these crimes.

Gen. Miller may have proposed interrogation methods for Iraq which were the proximate cause of the torture and war crimes committed at Abu Ghraib

As discussed above, the most severe abuses at Abu Ghraib occurred just after Gen. Miller went to Iraq to advise Gen. Sanchez on the hunt for "actionable intelligence" among Iraqi prisoners.

Gen Janis Karpinski, commander of the 800th Military Police Brigade with authority over the U.S. prison facilities in Iraq, said that Miller "came up there and told me he was going to 'Gitmoize' the detention operation."[311] Miller has denied using this word.[312]

As Gen. Taguba highlighted in his report, Miller recommended that "the guard force be actively engaged in setting the conditions for successful exploitation of the internees." As the Fay report makes clear, Gen. Sanchez "relied heavily on the series of SOPs [standard operating procedures] which MG G. Miller provided to develop not only the structure, but also the interrogation policies for detainee operations."

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[310] Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo," *The New York Times*, November 30, 2004.

[311] Scott Wilson and Sewell Chan, "As Insurgency Grew, So Did Prison Abuse," *The Washington Post*, May 9, 2004.

[312] Testimony of Gen. Miller, Senate Armed Services Committee, Hearing on Iraq Prison Abuse, May 19, 2004 ("Senator, I did not tell General Karpinski I was going to Gitmo-ize Abu Ghraib. I don't believe I've ever used that term — ever").

There is controversy over Gen. Miller's alleged recommendation regarding the use of dogs. According to Col. Thomas Pappas, the top U.S. intelligence officer at Abu Ghraib, Gen. Miller, "said that they used military working dogs at Gitmo [Guantánamo], and that they were effective in setting the atmosphere for which, you know, you could get information" from the prisoners.[313] Pappas said that Gen. Miller said the use of the dogs "with or without a muzzle" was "okay." Gen. Miller is said to deny this.[314] Gen. Fay found that:

> Abusing detainees with dogs started almost immediately after the dogs arrived at Abu Ghraib on 20 November 2003. By that date, abuses of detainees was already occurring and the addition of dogs was just one more abuse device. Dog Teams were brought to Abu Ghraib as a result of recommendations from MG G. Miller's assessment team from JTF-GTMO. MG G. Miller recommended dogs as beneficial for detainee custody and control issues, especially in instances where there were large numbers of detainees and few guards to help reduce the risk of detainee demonstrations or acts of violence, as at Abu Ghraib.[315]

Gen Karpinski said that Gen. Miller told her that prisoners "are like dogs, and if you allow them to believe at any point that they are more than a dog then you've lost control of them."[316] Gen. Miller denies this.

Other Generals in Iraq

Because all of the published probes have focused on the event at Abu Ghraib, the public record is more developed than for the other theatres of abuse. Other generals identified in the Pentagon reports who may bear liability for the crimes committed at Abu Ghraib are:

Major General Barbara Fast: Described in the Jones report as the "senior intelligence officer" on Gen. Sanchez's staff (the "C2" of CJTF-7), Gen. Fast was responsible for "[p]riorities for intelligence collection, analysis and fusion."[317] The Jones report states that Fast was responsible for designing the new intelligence-gathering "architecture" put in place at Abu Ghraib in late 2003 and was centrally involved in defining intelligence gathering needs at Abu Ghraib.[318] The Fay report states that directions as to interrogation needs from Col. Pappas, who played a central

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[313] Jeffrey R. Smith, "General Is Said to Have Urged Use of Dogs," *The Washington Post*, May 26, 2004.

[314] Ibid. ("Miller never had a conversation with Colonel Pappas regarding the use of military dogs for interrogation purposes in Iraq. Further, military dogs were never used in interrogations at Guantánamo," said Brig. Gen. Mark Kimmitt, spokesman for U.S. forces in Iraq.)

[315] Fay report, p. 83.

[316] "Iraq Abuse 'Ordered from the Top,'" *BBC*, June 15, 2004 [online], http://news.bbc.co.uk/1/hi/world/americas/3806713.stm.

[317] Jones report, p. 14.

[318] Ibid., pp. 11, 13.

role in the abuse (as discussed in more detail below) were "coming from LTG Sanchez directly as well as from MG Fast, the C2."[319]

Major General Walter Wojdakowski: deputy commanding general of Combined Joint Task Force Seven (CJTF-7), (i.e. Sanchez's Deputy). According to the Schlesinger report, Gen. Sanchez "delegated responsibility for detention operations to his Deputy, MG Wojdakowski."[320] Pappas told Taguba that interrogation plans involving the use of dogs, shackling, "making detainees strip down," or similar aggressive measures followed Sanchez's policy, but were often approved by Gen. Wojdakowski.[321] Gen. Wojdakowski was also reportedly aware from meetings with the ICRC in November 2003 of allegations of crimes at Abu Gharib and failed to take action.[322] The Schlesinger report found, among other criticisms, that "Wojdakowski failed to ensure proper staff oversight of detention and interrogation operations."[323]

Brigadier General Janis Karpinski: commander of the 800th Military Police Brigade with authority over the U.S. prison facilities in Iraq. Gen. Taguba noted that "following the abuse of several detainees at Camp Bucca in May 2003, I could find no evidence that BG Karpinski ever directed corrective training for her soldiers or ensured that MP Soldiers throughout Iraq clearly understood the requirements of the Geneva Conventions relating to the treatment of detainees."[324] The Fay report noted that throughout 2003, Gen. Karpinski received ICRC reports regarding abuses at Abu Ghraib.[325] Nevertheless, as noted by the Schlesinger panel, Gen. Karpinski "failed to ensure that soldiers had appropriate SOPs [standard operating procedures] for dealing with detainees."[326] Taguba wrote that "LTG Sanchez also cited the recent detainee abuse at Abu Ghraib (BCCF) as the most recent example of a poor leadership climate that 'permeates the Brigade.' I totally concur with LTG Sanchez' opinion regarding the performance of BG Karpinski and the 800th MP Brigade." The Schlesinger report agreed and found:

> that the weak and ineffectual leadership of the Commanding General of the 800th MP Brigade [Karpinski] and the Commanding Officer of the 205th MI Brigade [Pappas] allowed the abuses at Abu Ghraib. There were serious lapses of leadership in both units from junior non-commissioned officers to battalion and

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[319] Fay report, p. 109.

[320] Schlesinger report, p. 45.

[321] Jeffrey R. Smith, "General Is Said to Have Urged Use of Dogs," *The Washington Post*, May 26, 2004.

[322] Douglas Jehl, "U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to G.I.'s," *The New York Times*, June 24, 2004. ("[S]everal senior Army officers knew by last November that the Red Cross had complained about problems at the prison, including forced nudity and physical and verbal abuse of prisoners. Among those aware of the concerns were General Sanchez's top deputy, Maj. Gen. Walter Wojdakowski.")

[323] Schlesinger report, p. 25.

[324] Taguba report, p. 24.

[325] Fay report, pp. 65-67.

[326] Schlesinger report, p. 67.

> brigade levels. *The commanders of both brigades either knew, or should have known, abuses were taking place and taken measures to prevent them*…The independent panel finds that BG Karpinski's leadership failure helped set the conditions at the prison which led to the abuses, including her failure to establish appropriate standard operating procedures (SOPs) and to ensure the relevant Geneva Conventions protections were afforded prisoners, as well as her failure to take appropriate actions regarding ineffective commanders and staff officers.[327]

Abu Ghraib-based Officers

Gen. Taguba wrote:

> I suspect that COL **Thomas M. Pappas**, LTC. **Steve L. Jordan**, Mr. **Steven Stephanowicz**, and Mr. **John Israel** were either directly or indirectly responsible for the abuses at Abu Ghraib (BCCF) and strongly recommend immediate disciplinary action as described in the preceding paragraphs as well as the initiation of a Procedure 15 Inquiry to determine the full extent of their culpability.[328]

The Fay report found that Col. **Pappas**, Col. **Jordan**, Maj. **David Price**, Maj. **Michael Thompson**, and Capt. **Carolyn Wood**, among others, bore individual responsibility for detainee abuse at Abu Ghraib and that their cases should be forwarded to their chains of command for appropriate action.

The Jones report states that Sanchez used Colonel **Marc Warren**, the staff judge advocate for CJTF-7 and Gen. Sanchez's senior legal advisor, "to advise him on the limits of authority for interrogation and compliance with the Geneva Conventions for the memos published."[329] Colonel **Stephen Boltz**, the second-ranking military intelligence officer in Iraq under General Barbara Fast, was centrally involved in administering intelligence gathering efforts in Iraq, including at Abu Ghraib. The journalist Mark Danner obtained an e-mail sent by an intelligence captain at Abu Ghraib in August 2003 that reads: "The gloves are coming off gentlemen regarding these detainees, Col. Boltz has made it clear that we want these individuals broken."[330]

Some of the individuals named above are looked at here in more detail:

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[327] Ibid., p. 43, emphasis added.

[328] Taguba report, p. 42.

[329] Jones report, p. 14.

[330] Mark Danner, *Torture and Truth; America, Abu Ghraib and the War on Terrorism* (New York: The New York Review of Books, 2004), p. 33.

Colonel Thomas Pappas: commander of the 205th Military Intelligence Brigade with "tactical control" of Abu Ghraib from November 19, 2003 to February 6, 2004. Col. Pappas visited Abu Ghraib regularly, even occasionally staying overnight. As of November 16, 2003, he took up residence at Abu Ghraib.[331] Col. Pappas saw the ICRC report on abuse at Abu Ghraib, and twice refused to allow the ICRC teams access to specified detainees, including one detainee who was "abused by the use of dogs."[332] According to the testimony of Capt. Donald J. Reese, commander of the 372nd Military Police Company, on November 4, 2003, he witnessed a group of intelligence personnel standing around the body of a bloody detainee discussing what to do. Reese said that Pappas, one of those present, said "I'm not going down for this alone." Reese said no medics were called, the detainee's identification was never logged, and the death was covered up.[333] Fay reported that after a female soldier stripped a male detainee as punishment for uncooperative behavior and forced the detainee to walk semi-naked across the camp, Pappas left the issue for Jordan to handle, and his failure to take sterner action sent the wrong message to the troops.[334] The Fay report found that Col. Pappas, *inter alia*:

> Improperly authorized the use of dogs during interrogations. Failed to properly supervise the use of dogs to make sure they were muzzled after he improperly permitted their use. Failed to take appropriate action regarding the ICRC reports of abuse. Failed to take aggressive action against Soldiers who violated the ICRP, the CJTF-7 interrogation and Counter-Resistance Policy and the Geneva Conventions.

Taguba, Jones, and Schlesinger were similarly critical of Pappas.[335]

Lieutenant Colonel Stephen L. Jordan: director of the Joint Intelligence and Debriefing Center (JIDC) in Iraq, which included all of the interrogators at Abu Ghraib. According to Capt. Donald J. Reese, commander of the 372nd Military Police Company, "Jordan was very involved in the interrogation process and the day to day activity that occurred."[336] Reese also implicated Col. Jordan in the covering up of the death of a detainee (see above).[337] Col. Jordan also

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[331] Fay report, p. 55.

[332] Ibid., pp. 66-67.

[333] See Fay report, p. 53; Jackie Spinner, "MP Captain Tells of Efforts to Hide Details of Detainee's Death," *The Washington Post*, June 25, 2004.

[334] Fay report, p. 91.

[335] Taguba report, p. 45. See also Jones report pp. 5, 17 and Schlesinger report, p. 15.

[336] Captain Donald J. Reese's sworn statement and interview on January 18, 2004. (Appendix to Taguba report, [online], http://usnews.com/usnews/news/articles/040709/Pappas.pdf.)

[337] See Fay report, p. 53; Jackie Spinner, "MP Captain Tells of Efforts to Hide Details of Detainee's Death," *The Washington Post*, June 25, 2004.

supervised "the first documented incident of abuse with dogs" which became a "chaotic" situation.[338] Fay concluded that:

> Jordan is responsible for allowing the chaotic situation, the unauthorized nakedness and resultant humiliation, and the military dog abuses that occurred that night. … The tone and the environment that occurred that night, with the tacit approval of Ltc. Jordan, can be pointed as the causative factor that set the stage for the abuses that followed for days afterward related.[339]

Col. Jordan reportedly told Col. Phillabaum that "it was common practice for some of the detainees to be kept naked in their cells."[340] According to Gen. Fay, Col. Jordan's failure to adequately punish soldiers who walked a semi-nude detainee across the camp "did not send a strong enough message to the rest of the JIDC that abuse would not be tolerated."[341] Col. Jordan also reversed earlier policy to allow the CIA to conduct interrogations without the presence of Army personnel which "eroded the necessity in the minds of Soldiers and civilians for them to follow Army rules."[342] General Fay also concluded that Col. Jordan: "Failed to prevent the unauthorized use of dogs and the humiliation of detainees who were kept naked for no acceptable purpose while he was the senior officer in charge; Failed to accurately and timely relay critical information to his superior officer about the International Committee of the Red Cross report."[343] The Schlesinger report found that leadership problems by Col. Jordan allowed the abuses to occur at Abu Ghraib.[344]

To Human Rights Watch's knowledge, however, no criminal investigations are underway regarding any of the officers or contactors listed above.

V. Non-Governmental Attempts at Accountability

Because the United States has failed to date to allow for an independent criminal investigation into the role and responsibility of high-ranking civilian and military officials for widespread crimes against detainees, victims and human rights activists have sought alternative routes to justice.

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[338] Fay report, pp. 56, 84.
[339] Ibid., p. 56.
[340] Ibid., p. 65.
[341] Ibid., p. 91.
[342] Ibid., pp. 44-45.
[343] Ibid., p. 121.
[344] Schlesinger report, p. 15.

The attempted prosecution of Secretary Rumsfeld and others in Germany

Four Iraqis allegedly abused at Abu Ghraib filed a criminal complaint in November 2004 with the German Federal Prosecutor's Office in Karlsruhe, Germany, under the doctrine of "universal jurisdiction."[345] Officials named as defendants include Secretary Rumsfeld, current Attorney General and former White House Counsel Alberto Gonzales, Director Tenet, Undersecretary of Defense Stephen Cambone, Gen. Miller, Gen. Sanchez, Gen. Wojdakowski, Gen. Karpinski, Lt. Col. Jerry L. Phillabaum, Col. Pappas, and Lt. Col. Stephen L. Jordan. [346]

The complainants were assisted by the Center for Constitutional Rights (CCR) which argued that Germany was "a court of last resort," as it was "clear that the U.S. government is not willing to open an investigation into these allegations against these officials."

The case apparently became hostage to political events, however, when the German prosecutor dismissed the complaint on the eve of a visit to Germany by Secretary Rumsfeld. When questioned about the case at a Pentagon press conference on February 3, 2005, Secretary Rumsfeld hinted that that he might refuse to attend the annual Munich Conference on Security Policy because of the lawsuit, stating, "[W]hether I end up there, we'll soon know. It will be a week, and we'll find out."[347]

On February 10, 2005, a few days before the Munich conference, German prosecutor Kay Nehm dismissed the complaint on the ground that the United States, which has primary jurisdiction for prosecuting the alleged crimes, would investigate the matter. Nehm maintained that "there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards the violations described in the complaint. Thus several proceedings have already been conducted against participants, even against members of the 800th Military Police Brigade." The next day, Secretary Rumsfeld announced that he would attend the Munich conference.

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[345] See e.g., Human Rights Watch, "The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad," last modified March 2000 [online], http://www.hrw.org/campaigns/chile-98/brochfln.htm. (The doctrine of "universal jurisdiction" holds that every state has an interest in bringing to justice the perpetrators of particular crimes of international concern, no matter where the crime was committed, and regardless of the nationality of the perpetrators or their victims.)

[346] See all the relevant documents at "Center for Constitutional Rights Seeks Criminal Investigation in Germany into Culpability of U.S. Officials in Abu Ghraib Torture," [online], http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472. The German Code of Crimes against International Law in Article 1, Part 1, Section 1 states: "This Act shall apply to all criminal offenses against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany." In addition, three of the defendants are present in Germany: Lt. General Sanchez and Major General Wojdakowski are stationed in Heidelberg, and Colonel Pappas is in Wiesbaden.

[347] DoD News Briefing, February 3, 2005 [online], http://www.defenselink.mil/transcripts/2005/tr20050203-secdef2082.html. The exchange continued as follows: "Reporter: Are you concerned at all about the universal jurisdiction that Germany has, and the fact that ... Rumsfeld: It's certainly an issue, as it was in Belgium [where suits against U.S. officials led Secretary Rumsfeld to threaten to move NATO headquarters]. It's something that we have to take into consideration."

The plaintiffs are currently filing a petition for re-consideration with the prosecutor's office, before they file a formal appeal to a German superior court.

The German prosecutor's decision flies in the face of the evidence, presented in this report, that the United States is not pursuing accountability for those most responsible for the pattern of crimes against detainees in U.S. custody.

Civil suits in the United States against Secretary Rumsfeld and others

On March 1, 2005, Iraqi and Afghan civilians who were allegedly tortured and abused while in U.S. custody, filed lawsuits in U.S. federal courts against Secretary Rumsfeld, Gen. Sanchez, Gen. Karpinski, and Col. Pappas, assisted by the ACLU and Human Rights First. The lawsuit against Secretary Rumsfeld alleges that he and the others ordered the torture and abuse of detainees in Iraq and Afghanistan and that he failed to stop the torture and cruel, inhuman, and degrading treatment even after credible reports of such treatment began to emerge in the media and in military documents. The victims seek a court order that their treatment was unlawful and violated international law, the U.S. Constitution, and U.S. military law. They also seek monetary compensation for the harms they suffered.[348]

VI. The Need for a Special Prosecutor

This report has set forth the publicly-available evidence against two senior civilian leaders and two top military generals in connection with the widespread abuse of detainees in U.S. detention. Human Rights Watch expresses no opinion about the ultimate guilt or innocence of these men, particularly because so much evidence has been withheld and so many questions remain unanswered, but does believe that a criminal investigation is called for with respect to each of them. There may be other senior officials whose conduct also justifies an investigation.

Because there is no realistic possibility that the U.S. Attorney General or the U.S. military will investigate these senior leaders for the crimes described above, the appointment of a special prosecutor is warranted.

Under the Convention against Torture and the Geneva Conventions, the United States is required to prosecute acts of torture and war crimes.

Article 12 of the torture convention provides that:

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[348] The legal papers are collected at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17572&c=206.

> Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Similarly, the Geneva Conventions require the United States to investigate allegations of "grave breaches" of the Geneva Conventions,[349] including "willful killing, torture or inhuman treatment" of POWs and civilians qualified as "protected persons," and to prosecute, or extradite to another state that will prosecute, perpetrators of "grave breaches."[350]

Under U.S. law, as described above, there are two avenues to prosecution for the alleged crimes described in this report — the civilian and the military justice systems.

Under the civilian justice system, criminal enforcement is committed to the U.S. Department of Justice and, in particular, to the Attorney General — Alberto Gonzales.

Under the military justice system, criminal investigations may be undertaken by command authority, with the Secretary of Defense — Donald Rumsfeld — as the ultimate authority.

Given that the two people who can trigger investigations and prosecutions for the alleged war crimes and acts of torture discussed in this report have been deeply involved in the policies leading to these alleged crimes, if not in the crimes themselves, it is extremely unlikely that any such investigations will be undertaken.

Human Rights Watch, together with the American Bar Association, the American Civil Liberties Union, the Center for Constitutional Rights, Human Rights First, and other groups, has called for the appointment of a special prosecutor to pursue these crimes.

Under the former Independent Counsel Act (28 U.S.C. § 591, expired 1999), it might have been possible to compel the appointment of an independent counsel by a special panel. That act expired in 1999, however.

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[349] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I, 1949), Article 51; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II, 1949), Article 52; Convention Relative to the Treatment of Prisoners of War, (Geneva Convention III, 1949), Article 131; Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva Convention IV, 1949), Article 148.

[350] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I, 1949), Article 50; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II, 1949), Article 51; Convention Relative to the Treatment of Prisoners of War, (Geneva Convention III, 1949), Article 130; Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva Convention IV, 1949), Article 147.

Nevertheless, U.S. Department of Justice regulations call for the appointment of an outside special counsel when a three-prong test is met:

> First, a "criminal investigation of a person or matter [must be] warranted."[351] Second, the "investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department."[352] Third, "under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter."[353] If the regulation's three-prong test is met, then the Attorney General is to select a special counsel from outside the government.[354]

In this case, it is easy to see how those three prongs are met. A criminal investigation is warranted, as outlined above. Attorney General Gonzales' conflict of interest is plain. The public interest in uncovering the truth about these alleged crimes that have shocked the nation's conscience and damaged the reputation and the interests of the United States is also self-evident.[355]

The Bush administration has already appointed one special prosecutor. When an unidentified government official retaliated against a critic of the Bush administration by revealing his wife to be a CIA agent — a serious crime because it could endanger her — the administration agreed, under pressure, to appoint a special prosecutor who, while not from outside the Department of Justice, has been promised independence from administration direction.[356] Yet the administration has refused to appoint a special prosecutor to determine whether senior officials authorized torture and other forms of coercive interrogation, which are far more serious and systematic offenses.

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[351] 28 C.F.R. 600.1

[352] Ibid.

[353] Ibid.

[354] Ibid., at 600.3.

[355] See American Civil Liberties Union, "Letter to Senate Urging Alberto Gonzales to Appoint Outside Special Counsel," January 28, 2005, http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17374&c=206.

[356] U.S. Attorney Patrick J. Fitzgerald of Chicago was appointed to lead the investigation. Although Fitzgerald is a career prosecutor, the choice of someone from within the Department of Justice was criticized as outside the regulations. Deputy Attorney General James Comey, in making the announcement, explained that he wanted to "avoid the delay that would come from selecting, clearing and staffing an outside special counsel operation" and promised that Fitzgerald would have the authority to make all prosecutorial decisions — including issuing subpoenas, granting immunity to witnesses, or bringing charges — without first getting approval from the Justice Department. (Deputy Attorney General James Comey and Assistant Attorney General Christopher Ray, "Department of Justice Press Conference, Washington, D.C., Appointment Of Special Prosecutor to Oversee Investigation into Alleged Leak of CIA Agent Identity and Recusal of Attorney General Ashcroft from the Investigation," December 30, 2003 [online], http://news.findlaw.com/hdocs/docs/doj/comey123003doj-pconf.html.)

As a result, no criminal inquiry that the administration itself does not control is being conducted into the U.S. government's abusive interrogation methods. The flurry of self-investigations cannot obscure the lack of any genuinely independent one.

Under the Department of Justice regulations,

> [a]n individual named as Special Counsel shall be a lawyer with a reputation for integrity and impartial decision making, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies. The Special Counsel shall be selected from outside the United States Government. Special Counsels shall agree that their responsibilities as Special Counsel shall take first precedence in their professional lives, and that it may be necessary to devote their full time to the investigation, depending on its complexity and the stage of the investigation.

The special counsel has "full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney."

Such a prosecutor, however, would not have authority to investigate or prosecute officers within the military, such as General Sanchez and General Miller, for their violations of the UCMJ,[357] although as noted above, a prosecutor would be able to investigate those officers' violations of federal law. A prosecutor outside the military would also be unable to investigate and subpoena lower-level officers and soldiers for UCMJ violations (such as "dereliction of duty") and thus obtain their cooperation in the prosecution of more senior officers — a standard prosecutorial tool. Without such powers, it would be difficult for a prosecutor to compel such persons to cooperate with investigations.

A solution to this problem would be for the secretary of defense to appoint a consolidated convening authority within the military to cooperate with a civilian prosecutor and serve to prosecute UCMJ violations in connection with the prosecutor's investigations.

The appointment of a special prosecutor could answer the many questions which remain about the officials listed in this report, as well as about detainee policy generally.

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[357] Only military investigators can investigate UCMJ violations, and only an officer in the military chain of command can act as a convening authority to appoint a court martial to try UCMJ violations.

With respect to Secretary Rumsfeld, the probe could examine whether any of the illegal coercive interrogation methods approved by Secretary Rumsfeld for use on detainees at Guantánamo between December 2, 2002 and January 15, 2003 were actually used on Guantánamo detainees during that period. It could determine whether Secretary Rumsfeld was actually aware that troops were committing torture and war crimes in Afghanistan, Iraq, and Guantánamo. It could determine, once and for all, what orders, if any, did Secretary Rumsfeld give to Gen. Miller before his mission to Iraq. It could examine the allegations by Seymour Hersh that Secretary Rumsfeld authorized a "secret access program" to treat prisoners roughly and expose them to sexual humiliation.

With respect to the CIA and Director Tenet, an independent investigation could examine whether the CIA, as reported, subjected Khalid Shaikh Mohammed to waterboarding or withheld painkillers from Abu Zubaydah, or subjected them or other detainees to other forms of torture, and whether that treatment was approved by Director Tenet or other senior officials. It could also examine the policy of "extraordinary renditions" and determine Director Tenet's role, if any, in the rendition of suspects to countries such as Syria and Egypt where they were tortured.

With respect to Gen. Sanchez, the inquiry should establish if and when he became personally aware of the abuses committed under his command and whether, as alleged, he personally witnessed detainee abuse yet did not act to end the abuse.

With respect to Guantánamo and Gen. Miller, a probe should investigate the treatment of prisoners at the base, and whether Gen. Miller was aware of the tactics alleged in this report and whether he approved them. An investigation could also establish whether Gen. Miller proposed the use in Iraq of guard dogs during the interrogation of detainees, and whether his recommendations were a proximate cause of the crimes committed at Abu Ghraib.

VII. An Independent Commission

In addition, Congress should create a special commission, along the lines of the National Commission on Terrorist Attacks upon the United States (also known as the 9-11 Commission),[358] to investigate the issue of prisoner abuse, including all the issues described above. Such a commission would hold hearings, have full subpoena power, and be empowered

[358] The National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission) was an independent, bipartisan commission created by congressional legislation and the signature of President George W. Bush in late 2002, to prepare an account of the circumstances surrounding the September 11, 2001 terrorist attacks, including preparedness for and the immediate response to the attacks. Its report is available at http://www.9-11commission.gov/.

to recommend the creation of a special prosecutor to investigate possible criminal offenses, if the Attorney General had not yet named one.

An independent commission could compel evidence that the government has continued to conceal, including directives reportedly signed by President Bush in late 2001 which have not been public and which are said to authorize the CIA to establish secret detention facilities and to transfer detainees to the custody of foreign nations,[359] and the still-secret August 2002 Justice Department guidance to the CIA on permissible interrogation techniques which reportedly authorized the use of waterboarding.[360]

The commission could also examine Secretary Rumsfeld's role in the chain of events leading to the worst period of abuses at Abu Ghraib.

Unless a special counsel or an independent commission are named, and those who designed or authorized the illegal policies are held to account, all the protestations of "disgust" at the Abu Ghraib photos by President George W. Bush and others will be meaningless. If there is no real accountability for these crimes, for years to come, the perpetrators of atrocities around the world will point to the U.S.'s treatment of prisoners to deflect criticism of their own conduct. Indeed, when a government as dominant and influential as the United States openly defies laws against torture, it virtually invites others to do the same. Washington's much-needed credibility as a proponent of human rights, damaged by the torture revelations, will be further damaged if the torture is followed by the substantial impunity that has prevailed until now.

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[359] Douglas Jehl and David Johnston, "Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails," *The New York Times*, March 6, 2005; John Barry, Michael Hirsh & Michael Isikoff, "The Roots of Torture," *Newsweek*, May 24, 2004 [online], http://msnbc.msn.com/id/4989422/site/newsweek/.

[360] See Toni Locy and John Diamond, "Memo Lists Acceptable 'Aggressive' Interrogation Methods: Justice Dept. Gave Guidance to CIA," *USA Today*, June 28, 2004; Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004.

Annex — A Note on Command Responsibility

The first and most significant U.S. case involving "command responsibility" was that of General Tomoyuki Yamashita, commander of the Japanese forces in the Philippines in World War II, whose troops committed brutal atrocities against the civilian population and prisoners of war. Gen. Yamashita, who had lost almost all command, control, and communications over his troops, was nevertheless convicted by the International Military Tribunal in Tokyo based on the doctrine of command responsibility. The U.S. Supreme Court affirmed the decision, holding that General Yamashita was, by virtue of his position as commander of the Japanese forces in the Philippines, under an "affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[361] General Yamashita was executed by hanging.

International and U.S. authorities have since set forth three elements to establishing liability for criminal acts pursuant to the doctrine of command responsibility:

1. There must be a superior-subordinate relationship.
2. The superior must have known or had reason to know that the subordinate was about to commit a crime or had committed a crime.
3. The superior failed to take necessary and reasonable measures to prevent the crime or to punish the perpetrator.[362]

U.S Army *Field Manual 27-10*, Section 501 states:

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts

[361] In Re Yamashita 327, U.S. 1, 16 (1946).

[362] In Re Yamashita; The Prosecutor v. Delalic et al. (Celebici Case), Case No. IT-96-21-T, ICTY TC, November 16, 1998 [online], http://www.un.org/icty/celebici/trialc2/jugement/main.htm. More recently, several decisions under the Torture Victim Protection Act of 1991 (28 U.S.C.S. § 1350) have applied the doctrine of command responsibility. See Hilao v. Estate of Ferdinand Marcos, 103.F.3d 767, 777-78 (9th Cir.1996); Kadic v Karadzic, 70 F.3d 232, 239, 242 (2d Cir. 1995); Paul v Avril, 901 F.Supp. 330,335 (S.D.Fla. 1994); Xuncax v. Gramajo, 886 F.Supp. 162, 171-172 (D.Mass. 1995). In Ford v. Garcia, 289 F.3d 1283 (11th Cir. Fla. 2002), for example, family members of victims of atrocities committed by members of the Salvadorian National Guard, filed a case in a Florida federal court against a general and the former minister of defense. The judge directed that the two generals could be held responsible for the crimes of their subordinates if the defendants were in "effective command" and if they "knew or should have known" that persons under their effective command were committing such crimes.

> in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

Similarly, the U.S. Department of Defense draft instructions for guidance to military commissions states: "A person is criminally liable for a completed substantive offense if that person commits the offense, aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility," and provides the following elements:

1. The accused had command and control, or effective authority and control, over one or more subordinates;
2. One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;
3. The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding and abetting such offense or offenses; [and]
4. The accused failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the offense or offenses.[363]

The rule under customary international law is the same. According to an authoritative study by the ICRC, that rule is:

> Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.[364]

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[363] Department of Defense, "Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission," April 30, 2003 [online], http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf.

[364] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 2005.

Superior-subordinate relationship

A superior-subordinate relationship is clearest when there are formal rules, for example when legislation or a military chain of command specify the existence of a relationship. However, even in the absence of formal rules, a superior can have actual and effective control.[365] Thus, civilian and political superiors, as well as those in military command, may be held liable under this doctrine.[366] In establishing whether a superior-subordinate relationship exists, case law has found the following questions useful: What are the powers of influence of the alleged superior?[367] What capacity does the superior have to issue orders?[368] Does analysis of the distribution of tasks within any relationship demonstrate a superior-subordinate relationship?[369]

The superior's knowledge

A superior may be held liable under the command responsibility doctrine where he or she either knew, had reason to know, or should have known that crimes were being committed by his/her subordinates.[370]

According to A. P. V. Rogers, one of the foremost authorities on the laws of war, there are three ways of proving knowledge:

1. that he actually knew (admission or documentary or witness evidence), or
2. that he must have known (evidence of notoriety), or
3. that he ought to have known (serious nature of offence plus evidence of a dereliction of duty on the part of the commander or of his being put on notice).[371]

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[365] Sadaiche case, cited in 15 Law Reports, at 175. Which held that "superior means superior in capacity and powers to force a certain act. It does not mean superiority only in rank."

[366] The Prosecutor v. Delalic et al. (Celebici Case), Case No. IT-96-21-T, ICTY TC, November 16, 1998. See also Article 28 of Statute of the International Criminal Court:

> With respect to superior and subordinate relationships not described in paragraph (a) [military chain of command], a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[367] United States v. von Weizsaecker, 14 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1952).

[368] Celebici judgment.

[369] Prosecutor v. Nikolic, Case No. IT-94-2-R61, ICTY TC,Oct. 20, 1995.

[370] In Re Yamashita 327 U.S. 1 .See also Article 86 of Geneva Conventions Protocol I.

Rogers thus notes that "If knowledge cannot be proved by direct evidence, it may be inferred from the surrounding circumstances, for example, the widespread nature, severity or notoriety of offences." Similarly, if "he is told that a report deals with, say, the massacre of civilians by troops under his command, he is put under a duty to do something about it. He cannot simply turn a blind eye to it. He must give appropriate orders to his staff."

Rogers concludes that:

> Actual knowledge may be difficult to prove, but can be inferred from the surrounding circumstances, especially if war crimes by those under command are so widespread as to be notorious, for example, when soldiers under command carry out sustained and frequent unlawful attacks, …. Liability may also attach to a commander even if he did not actually know about the acts of subordinates but ought to have known about them and his failure in this respect constituted a dereliction of duty on his part, for example, if he is put on notice but fails to do anything about it.

Superior duty to take necessary and reasonable measures to prevent the crime or to punish the perpetrator

Superiors have both a duty to prevent and a duty to punish the crimes of subordinate persons. These constitute distinct and independent legal obligations.[372]

The duty to prevent renders superiors responsible where they failed to consider elements that point to the likelihood that such crimes would be committed.[373] Superiors successfully discharge their duty to prevent subordinate crimes when they employ every means in their power to do so.[374]

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[371] A.P.V. Rogers, "Command Responsibility under the Law of War," [online], http://lcil.law.cam.ac.uk/lectures/lecture_papers.php. The UN Commission of Experts in the former Yugoslavia established in 1992, pursuant to Security Council Resolution 780, also recognized three forms of knowledge:

> (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein.

Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992), UN SCOR, Annex, UN Doc. S/1994/674, para. 58 (May 27, 1994).

[372] Ilias Bantekas, "The Contemporary Law of Superior Responsibility," 93 A.J.I.L. 573, 591 (1999).

[373] *Final Report of the Kahan Commission* (authorized English translation), 22 ILM 473 (1983).

[374] See United States v. von Weizsaecker, 14 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952).

"A superior's 'duty to punish' arises after the commission of an offense. It is predicated upon offenses by others which have already occurred, not future offenses. Punishment is, therefore, intended to deter the commission of future offenses."

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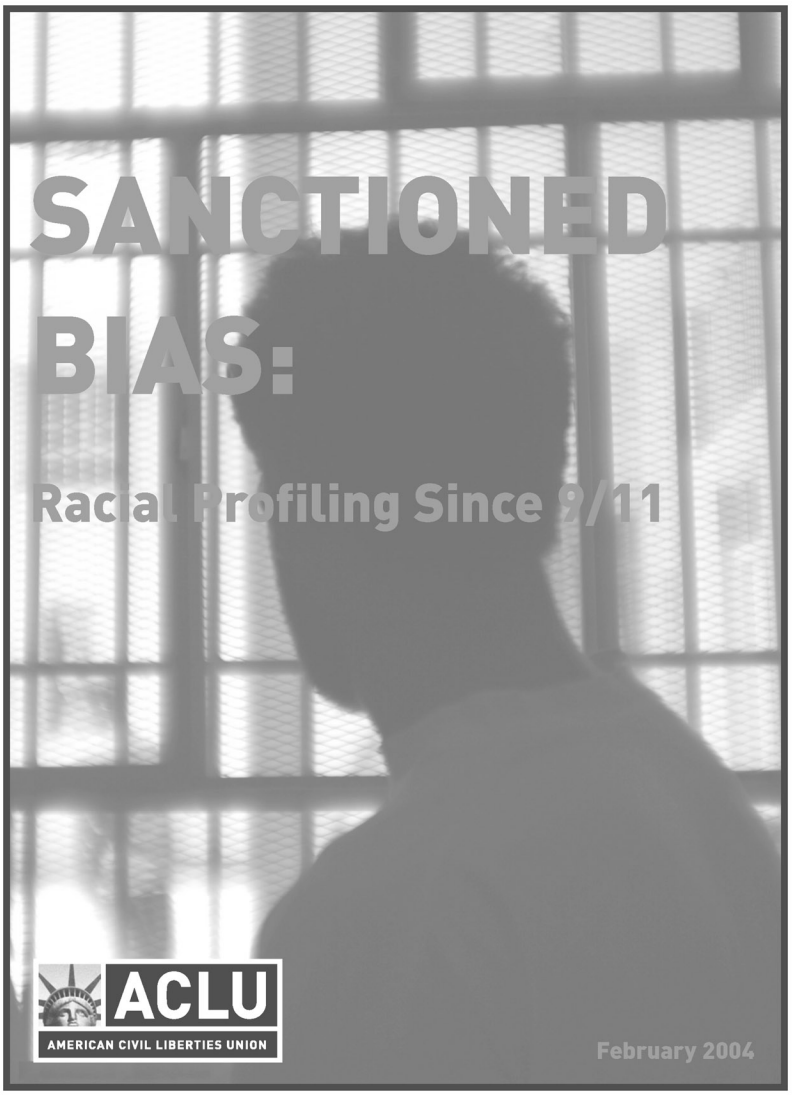
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Foreword

The fight to keep bias from influencing law enforcement actions is as old as the Constitution itself. And, tragically, for much of our history, biased policing – based on fear instead of fact – has been widespread and ineffective.

The ACLU was founded in 1920, in response to the broad suppression of dissent in World War I and a series of huge mass detentions and deportations, largely of recent immigrants from eastern Europe, initiated by Attorney General A. Mitchell Palmer in 1919. The Palmer Raids, as they are now known, came in response to a series of terrorist acts, including the bombing of Palmer's house, that were attributed to left-wing anarchists and socialists.

In response, Palmer ordered federal agents to round up thousands of immigrants based not on evidence of any conspiracy, but on their ethnicity, and in the case of the many Jews who were detained and deported, their religion. It was racial profiling before the term was coined.

Eighty years later, history is repeating itself. Since the tragedy of 9/11, we have seen an increase in the nation's willingness to condone law enforcement and security actions based primarily on skin color or other immutable characteristics, and a clear willingness on the part of the Bush administration to implement such programs.

The nation's Arab, Muslim and South Asian populations are most affected by these new initiatives. Policies primarily designed to impact certain groups often result in the destruction of civil liberties for us all. Moreover, racial profiling makes us less safe as a country, since we are diverting limited law enforcement resources and singling out individuals who ought not fall under government scrutiny.

This report details how the trauma of 9/11 has made general anti-immigrant sentiment acceptable in the guise of law enforcement and how national security initiatives incorporate discrimination into their application.

Just as troubling is Congress' inability to pass legislation to address the problem of bias-based policing both in the contexts of post-9/11 security measures and the traditional "driving while black or brown" turnpike racial profiling. A bill called the End Racial Profiling Act (ERPA) is pending in Congress today – and it deserves our support.

Among other things, the ERPA is a good first step toward addressing traditional racial profiling, driving while black or brown and some post-9/11 selective enforcement. It provides victims a legal recourse, implements and funds key data collection programs to identify and track discriminatory policing and gives the attorney general the ability to deny funds to police departments that refuse to comply. Please visit www.aclu.org/action to find out how you can encourage your members of Congress to sign on to this necessary legislation.

We can, and must, be both safe *and* free. To accomplish this, we must replenish security policies that depend on old fashioned policing, based on evidence and fact, and respect the tradition of minority and individual rights in America. By allowing base prejudice to decide who gets pulled over on our highways or who gets detained and strip searched in our airports, we betray that fundamental promise.

And, most tragically, we do so unnecessarily.

ANTHONY D. ROMERO
Executive Director
American Civil Liberties Union

SANCTIONED BIAS:

RACIAL PROFILING SINCE 9/11

Introduction

On June 17, 2003 President Bush publicly released a set of guidelines promulgated by the Civil Rights Division of the Department of Justice entitled, *Regarding the Use of Race by Federal Law Enforcement Agencies.* The introduction to the guidelines alluded to the president's February 2001 address to Congress in which he declared that racial profiling is "wrong and we will end it in America." The accompanying Fact Sheet on Racial Profiling issued by the Department of Justice contains phrases like:

- "racial profiling is wrong and will not be tolerated;"
- "America has a moral obligation to prohibit racial profiling;" and
- "stereotyping certain races as having a greater propensity to commit crimes is absolutely prohibited."

But the guidelines themselves fall far short of the Bush administration's rhetorical posturing. Since they are only a set of guidelines, rather than a law or an executive order, they have no teeth. They acknowledge racial profiling as a national concern, but they provide no enforcement mechanisms or methods for tracking whether or not federal law enforcement agencies are in compliance.

The guidelines' most serious flaw, however, is that they carve out a huge national security loophole. The guidelines specify:

> "The above standards do not affect current Federal policy with respect to law enforcement activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation's borders..."

Since the 9/11 terrorist attacks, it has been the official policy of the United States government to stop, interrogate and detain individuals without criminal charge – often for long periods of time on the basis of their national origin, ethnicity and religion. In fact, the very inclusion of a national security exception in the guidelines is an admission by the Department of Justice that it relies upon racial and ethnic profiling in its domestic counterterrorism efforts.

In response to the severe shortcomings in the president's guidelines, a bipartisan group of lawmakers in both the House of Representatives and the Senate has introduced the "End Racial Profiling Act," a comprehensive package designed to track and provide steps toward eliminating racial, ethnic, religious and national origin profiling. As this report went to print, nearly 100 members of Congress had co-sponsored the measure and a large coalition of public advocates from many points on the political spectrum, including several law enforcement organizations, were actively working to ensure it receives its due consideration in Washington.

Specifically, the bill would define racial, ethnic, religious and national origin profiling, ban their use and provide a cause of action for individuals

harmed by these forms of profiling. It would permit the attorney general to withhold funds from non-compliant police departments and government agencies and would provide grants to aid compliance. And, crucially, it would require data collection to ensure police accountability and provide police executives with a needed management tool.

Congress should act expediently to make this legislation law. Only through federal legislation can the problem of racial profiling be comprehensively identified and ended.

This report is the latest in a series issued by the ACLU on government actions since 9/11 that threaten fundamental rights and freedoms and fail to make us safer. The ACLU opposes all racial, religious and ethnic profiling, whether in the context of routine law enforcement, or domestic counterterrorism. As we have argued repeatedly in our litigation, legislative advocacy and public statements over the years, racial profiling is in every instance inconsistent with this country's core constitutional principles of equality and fairness.

We have also argued that law enforcement based on general characteristics such as race, religion and national origin, rather than on the observation of an individual's behavior, is an inefficient and ineffective strategy for ensuring public safety. The strength of this argument has been borne out over and over again by data that has been collected by individual police departments throughout the country in response to ACLU lawsuits and the public's demands for answers and police accountability.

We now have incontrovertible proof that racial profiling does not, in fact, give the police a "leg up" in fighting crime. The premise upon which it is based – that certain ethnic minorities are more likely than whites to be in violation of the law – is simply wrong. Studies consistently show that "hit rates" – the discovery of contraband or evidence of other illegal conduct – among minorities stopped and searched by the police are lower than "hit rates" for whites who are stopped and searched. Indeed, the findings of numerous studies throughout the country have been so consistent that police officials are starting to recognize that racial profiling, while still practiced broadly, is ineffective and should be rejected. The International Association of Chiefs of Police, the world's oldest and largest nonprofit membership organization of police executives, has adopted a resolution condemning racial profiling:

> "We must ensure that racial and ethnic profiling is not substituted for reasonable suspicion in traffic stops and other law enforcement activities. The best way to ensure the trust of citizens and the courts, and to protect our officers from unfair criticism, is to develop an anti-profiling policy that delineates approved techniques for professional traffic stops, and makes a clear statement that profiling is not one of those techniques." [1]

There is no reason to believe that a counterterrorism strategy based on ethnic profiling will be any more effective. The overwhelming majority of Muslims, Middle Easterners and South Asians are hardworking, law-abiding people. Singling them out for special law enforcement scrutiny will produce the same low "hit rates" as has racial profiling in the context of drug law enforcement.

[1] IACP Resolutions: Condemning Racial and Ethnic Profiling in Traffic Stops (1999); Condemnation of Bias-Based Policing (2001).

Not long after the 9/11 attacks, a group of senior U.S. intelligence specialists combating terrorism circulated a memo to American law enforcement agents worldwide cautioning against relying on ethnic profiling as a counterterrorism tool. As reported in the Oct. 12 issue of *The Boston Globe*, "the four-page memo warns that looking for a type of person who fits a profile of a terrorist is not as useful as looking for behavior that might precede another attack." One of the authors of the memo, all of whom spoke on condition of anonymity, said,

> "There are at least a million people of Middle Eastern descent in the U.S. Do we consider them all potential terrorists?"

Another explained,

> "…Fundamentally, believing that you can achieve safety by looking at characteristics instead of behaviors is silly. If your goal is preventing attacks…you want your eyes and ears looking for pre-attack behaviors, not characteristics." [2]

Another expert, Vincent Cannistano, the former head of counterterrorism at the CIA, told *Newsweek,* "It's a false lead. It may be intuitive to stereotype people, but

[2] Bill Dedham, "Fighting Terror/Words of Caution on Airport Security: Memo warns against use of profiling as a defense," *The Boston Globe,* Oct. 12, 2001.

THE END RACIAL PROFILING ACT OF 2004

The End Racial Profiling Act (ERPA) has several key provisions, each one of which would work in tandem with the others to procedurally root out, discourage and end bias-informed police stops. Sponsored by Reps. John Conyers, D-MI, and Christopher Shays, R-CT, this bipartisan bill has, at the time of writing, garnered nearly 100 co-sponsors.

Highlights in the current legislation include sections that would:

- Define racial profiling as the practice of relying on race, ethnicity, religion or national origin to select which individuals to subject to a law enforcement encounter.
- Make such conduct illegal.
- Provide victims of such profiling with the right to sue.
- Introduce a nationally uniform data collection that would – like the Uniform Crime Reports – track and monitor bias-based policing. Providing a baseline of information through which the public can identify bias-based policing, it would increase police accountability and ensure the legitimacy of challenges to bias-based policing. This system is also being heralded by some police executives as a necessary management tool.
- Allow the attorney general to withhold funds from police departments that refuse to comply with the law, an enforcement mechanism notably lacking from the president's racial profiling guidelines.
- Provide grants to help police departments comply with the law.

profiling is too crude to be effective. I can't think of any examples where profiling has caught a terrorist." [3]

But in spite of the overwhelming evidence that racial profiling is counterproductive, and in spite of the counsel of intelligence experts that the better method for identifying potential terrorists is through observation of "pre-attack" behaviors, Attorney General John Ashcroft immediately launched a counterterrorism strategy that centers on profiling based on national origin. Moreover, even as it became obvious that the strategy was not producing results, the attorney general continued to conceive and implement increasingly grandiose schemes based on ethnic profiling. These are the "activities and other efforts" President Bush has exempted from his guidelines. The purpose of this report is to demonstrate that the exemption is both unnecessary and unwise.

ETHNIC PROFILING HAS BECOME OFFICIAL GOVERNMENT POLICY

The Secret Roundup

In the hours and days immediately following 9/11, the Department of Justice launched what amounted to an extensive program of preventive detention. It was the first large-scale detention of a group of people based on country of origin or ancestry since the internment of Japanese-Americans during World War II. Within hours of the terrorist attacks, federal agents swept through Arab, Muslim and South Asian neighborhoods throughout the country, snatching men from sidewalks, as well as their homes, workplaces and mosques.

The roundup and incarceration of thousands of men were carried out under an unprecedented veil of secrecy, leaving wives, children, classmates and employers wondering where these people had been taken, and who would be next. The Federal Bureau of Prisons imposed a communications blackout that prevented the detainees from contacting family, friends, the press and even attorneys. And in another act of almost unprecedented secrecy, the attorney general ordered that the deportation hearings of immigrants deemed of "special interest" to the government be closed to the public and the press, effectively concealing all immigration hearings of Arabs and Muslims. In a scenario eerily reminiscent of the "disappearances" of labor and student activists in Argentina during the 1980s, Arab, Muslim and South Asian men were plucked off the streets of American cities. America now had its own "disappeared."

Once it became clear that scores of individuals in New York City and elsewhere were being arrested and detained, the ACLU and other immigrant rights organizations immediately took steps to learn the identities and locations of the detainees, and the charges upon which they were being held. We wanted this information, which is routinely accessible in immigration cases, in order to determine whether or not the roundup was within constitutional bounds. But we were met with a wall of silence.

On Oct. 17, 2001 the ACLU wrote to the attorney general asking him for information about the detainees. He did not respond. We posed the same questions to FBI Director Robert Mueller at two meetings on Sept. 25 and Oct. 25, but were once again rebuffed. On Oct. 29, 2003 the ACLU and several other organizations filed a Freedom of Information Act (FOIA) request for the names and locations of the detainees. But Attorney General Ashcroft, in a radical departure from past practice and basic democratic principles of

[3] Fareed Zakaria, "Freedom vs. Security," *Newsweek*, July 8, 2002, p.30.

open government, issued a directive discouraging federal agencies from releasing the information requested.

On Dec. 5, 2001 the ACLU and several other organizations filed a lawsuit in federal court under the FOIA demanding that the government disclose the names and whereabouts of the detainees. Judge Gladys Kessler ordered the government to release the information on the grounds that "secret arrests are 'a concept odious to a democratic society,' and profoundly antithetical to the bedrock values that characterize a free and open one such as ours." But soon after her ruling, the government appealed and Judge Kessler issued a stay of her order. [4]

As the days turned into weeks and then months, information began to trickle out as some of the detainees were released or deported, and immigration lawyers fought for, and sometimes won, access to the detention centers. It soon became clear that most, if not all, of the several thousand detainees picked up by federal agents in the immediate aftermath of 9/11 were guilty of little more than being Arab, Muslim or South Asian, and in the wrong place at the wrong time.[5] The "tips" leading to their arrests were often tainted with ethnic bias. The vast majority of the men were detained on pretexts: They may have been guilty of minor immigration law offenses for which they would not have been detained, much less deported, under normal circumstances. The men were held for months on end under extraordinarily restrictive and, in some cases, abusive conditions. **Of the thousands of men who were detained and questioned, not one has been publicly charged with terrorism.**

FBI Questioning of Arab, Muslim and South Asian Men

On Nov. 9, 2001 Attorney General Ashcroft directed the FBI and other law enforcement officials to search out and interview at least 5,000 men between the ages of 18 and 33 who had legally entered the U.S. on non-immigrant visas in the past two years, and who came from specific countries linked by the government to terrorism. The list of individuals was compiled solely on the basis of national origin, and even the Justice Department acknowledged that it had no basis for believing that any of these men had any knowledge relevant to a terrorism investigation. Unannounced, the FBI descended upon thousands of Arabs, Muslims and South Asians at their workplaces, homes, universities and mosques. Although called "voluntary," the interviews were inherently coercive and few felt free to refuse. The FBI agents, sometimes accompanied by immigration officials, asked questions about sensitive activities protected by the First Amendment such as religious practice, mosque attendance and feelings towards the United States.

In March 2002, the Department of Justice announced another round of interviews of an additional 3,000 Arab, Muslim and South Asian men legally in the U.S. as visitors or students. The federal government requested that local police departments assist in this dragnet. While many police departments enthusiastically participated in the biased targeting of innocent individuals, some police officials publicly declined to take on the task of immigration enforcement. In

[4] On Jan. 12, 2004, the United States Supreme Court refused to consider whether the government properly withheld names and other details about the hundreds detained.

[5] We cannot be sure of the numbers because our government refuses to release them. On Nov. 5, 2001, Attorney General Ashcroft announced that in the two months since Sept. 11, law enforcement had in custody 1,200 detainees. After that he refused to disclose what appeared to be the growing number of men in custody. Hundreds more Arab and Muslim men continued to disappear into detention. Immigration advocacy groups estimate the number of detainees to be around 3,000.

addition to concerns that racial, religious and ethnic profiling are bad law enforcement techniques, some police officials expressed concern that this would destroy the trust, cooperation and faith that it takes years to build. A sampling follows:

> "We've been trying to get the immigrants in our town to believe that we're not like many of the governments in their old countries, governments that were corrupt and wanted to railroad them, not serve them." (Sgt. Robert Francaviglia, Hillsdale, New Jersey Police Department)[6]

> "Because of our immigrant population here and our diverse communities, we don't want to alienate anybody, or give anybody fear...That's just not our policy. Hasn't been for twenty years." (Sgt. John Pasquariello, Los Angeles Police Department)[7]

> "Communication is big in inner-city neighborhoods and the underpinning of that is trust. If a victim thinks they're going to be a suspect in an immigration violation, they're not going to call us, and that's just going to separate us even further." (Chief Gerry Whitman, Denver Police Department)[8]

In an effort to encourage voluntary cooperation with the FBI, the attorney general promised that he would help non-citizens with their visas in exchange for providing useful information to the government. But this promise bore all the hallmarks of a sting operation, as individuals with even minor visa violations were arrested on the spot and sent to detention facilities. In fact, the attorney general's memorandum governing the conduct of the questioning specifically instructed FBI agents to contact the nearest Immigration and Naturalization Service official if they had any suspicion about someone's immigration status.[9]

Special Registration Program

In June 2002, Attorney General John Ashcroft announced the implementation of NSEERS, the National Security Entry Exit Registration System, which established a series of regulations and registration requirements. One of the most ambitious aspects of this program is Special Registration. In a massive operation reminiscent of the Nazis' requirements for Jews living in Germany and countries under German occupation, all male nationals over the age of 15 from 25 countries were ordered to report to the government to register and be fingerprinted, photographed and questioned. With the exception of North Korea, all targeted countries are Arab and Muslim. Despite the fact that the government gave no individualized notice for this poorly publicized requirement, all those who failed to register were made vulnerable to deportation and criminal penalties. The ACLU denounced the plan as a thinly veiled effort to trigger massive and discriminatory deportations of certain immigrants.

NSEERS is a discriminatory and poorly implemented plan that neither advances national security nor improves the efficiency of the country's immigration system. Not all

[6] "Policing Immigration," *Bergen Record*, April 22, 2002.
[7] "Police Want No Part In Enforcing Immigration," *Los Angeles Times*, April 5, 2002.
[8] "Immigration Bill Has Police Uneasy," *Denver Post*, April 22, 2002.
[9] Nadine Strossen, "Department of Justice Oversight: The Massive, Secretive Detention and Dragnet Questioning of People Based on National Origin in the Wake of September 11," Testimony before the Senate Judiciary Committee, Dec. 4, 2001.

of its requirements have been adequately publicized or translated into all appropriate languages. Many people are not even aware that continuing regulations require registration upon change of address, employment or academic institution and when leaving and entering the country.

In December, 2002 up to 700 men and boys from Iran, Iraq, Libya, Sudan and Syria were arrested in Southern California by federal immigration authorities after they voluntarily complied with the NSEERS "Call-In" program. In many cases, the men were arrested for minor visa problems caused by the INS – a federal agency whose incompetence is legendary. Some were awaiting the approval of their green card applications. Others were students who had allegedly not attended enough classes at the universities where they were enrolled. The summary arrests of so many people spread panic in Arab, Muslim and South Asian communities across the country and discouraged men from other countries from reporting on successive registration dates.[10] In December 2003, the Department of Homeland Security suspended two parts of the registration requirement, but most of the program's discriminatory provisions remain in effect, and there is no relief for the thousands who fell afoul of the program's confusing requirements.[11] In one year, the Special Registration program registered 83,310 foreign nationals, placing 13,740 into deportation proceedings. **Not a single one of these individuals was ever publicly charged with terrorism.**

[10] In addition to Iran, Iraq, Libya, Sudan and Syria, Special Registration countries include Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan and Kuwait.

[11] The Department of Homeland Security subsequently implemented a new immigrant tracking program, US VISIT. It is an addition to, not a substitute for, Special Registration.

TWO YOUNG VICTIMS OF NSEERS

Ahmad and Hassan Amin think of themselves as regular American teenagers. Ahmad, 17, is a star on his Cupertino high school's football team. His brother, Hassan, 19, is studying accounting at De Anza College in Cupertino. They live with their mother, Tahira Manzur, who is a full-time teacher at a children's development center. "We sold our house in Pakistan to come to this country so that my sons could have a better education and a better life," she explains. "Our life is here."

But Ahmad and Hassan may be forced to return to Pakistan – a country they no longer know and where they have no family. "I don't even know if I remember how to write my language," says Hassan.

The boys and their mother believed they were in the U.S. legally and in the process of becoming permanent residents. But unbeknownst to them, their visas had expired because of bad advice from an immigration lawyer. When they reported for Special Registration, Hassan was detained, arrested and sent to Yuba County Jail, where he was held overnight in a criminal cell until he was released on $4,000 bail. Ahmad is now required to miss school every third Wednesday to register with the INS offices. Both brothers will likely soon face deportation.[12]

[12] ACLU of Northern California, www.aclunc.org/aclunews/news0309/backlash.html

"RACIAL PROFILING IS A LAZY METHOD OF LAW ENFORCEMENT."

Veterans of law enforcement who were police officers during the 1980s and 1990s, when the "war on drugs" was in full swing and racial profiling was rampant, are among the country's most knowledgeable experts on the effectiveness of racial profiling in fighting crime. Here are some of their comments:

The Houston Chronicle

Barbara A. Markham

Barbara A. Markham has been a police officer with the Oak Point Police Department in North Texas since 1983. She has been an undercover narcotics investigator since 1986, and is the recipient of awards and letters of commendation from the Department of Treasury-Bureau of Alcohol, Tobacco and Firearms for her investigative work. She has also been an outspoken critic of the Texas police for engaging in racial profiling in the enforcement of narcotics laws – profiling that has focused virtually exclusively on African Americans. In a recent interview, Officer Markham told the ACLU:

> "Racial profiling is utilized when you have no intelligence and you're just casting a wide net and having to use a process of elimination out of that wide net. Racial profiling is a lazy method for law enforcement. You're not using investigative leads; you're not using any investigative skill, all you're doing is casting a wide net against one group, one segment of society, and that's what we call 'going fishing,' and you're going to come up empty-handed. The better way is to simply investigate terrorism by behaviors exhibited by specific individuals. It's not the color of one's skin or their ethnicity that should indict them or bring them under police scrutiny. It should be their behaviors or actions – what they do." [13]

Hiram Monserrate was a patrol officer with the New York Police Department for twelve years. Today, he is a prominent member of the New York City Council, where he sits on the Public Safety Committee. Councilman Monserrate also founded the Latino Officers Association. He is an ardent critic of racial profiling by the police, and, like Barbara Markham, he does not believe ethnic profiling is effective as a law enforcement tool. He told the ACLU:

[13] Telephone interview, Oct. 21, 2003.

Hiram Monserrate

> "It's easy to go to an area like Jackson Heights [Queens, New York] searching out South Asian males under the guise of counterterrorism. It's easy to do that. It's also easy to detain lots of innocent people. I think that is neither a good course of action, nor is it the best use of law enforcement resources. The better way is to do the intelligence work and investigation that needs to be done, and be able to identify individuals where there is reasonable suspicion to believe they are in fact engaged in some type of criminal activity, and then go to those individuals and stop them to question them and ultimately detain them. Good police work is not about cutting corners. It's about using resources and being intelligent. Law enforcement going out and engaging in sweeps and random stops really produces very little in quality arrests." [14]

Jerry Sanders was a member of the San Diego Police Department for 26 years, and for the last six of those years he served as the department's chief of police. Chief Sanders was credited with bringing about a dramatic reduction in crime and for building community-police partnerships. He was also the first chief of police to announce that he would begin collecting traffic stops data on a voluntary basis in order to determine whether or not his department's officers were engaging in racial profiling. He told the ACLU:

> "One of the things I can remember being up on the bulletin boards at work was a sign that said, 'Random patrol produces random results.' If you're doing this randomly, just trying to blanket places, I think you get pretty random results. I don't think you get a high hit rate. Right after 9/11 everybody wanted a quick fix. I was certainly concerned and I wanted things done quickly, too. But it takes time to investigate, to find out who was involved in these things, and good investigative techniques are not always fast. I don't think you get a quick fix by stopping everybody and getting their names, and then trying to figure out what's going on. I think a much more targeted response would be a much better way of doing that without alienating huge parts of the community."[15]

[14] Live interview at councilman's office, Oct. 16, 2003.
[15] Telephone interview, Oct. 15, 2003.

Jerry Sanders

All three police officers also expressed their concern that current counterterrorism practices that rely on ethnic profiling actually compromise public safety. First, such practices lead to the misuse of scarce police resources. Officer Markham explained:

"When you're engaged in racial profiling in counterterrorism you're casting a wide net, and then by process of elimination you have to look at every person in that wide net, and you're going to waste a lot of time, manpower and energy."

This is an accurate description of the Justice Department's post-9/11 investigation. In April 2003 the Office of the Inspector General of the Department of Justice issued a comprehensive 198-page report revealing in detail for the first time the Justice Department's policies, directives, and activities in the wake of the Sept. 11 attacks. Entitled *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (the OIG report), it was based on a year-long investigation that included extensive interviews with federal law enforcement officials and agents, and with some of the detainees. One of the OIG report's findings was that since the attorney general issued a "hold until cleared" policy for all aliens arrested in the 9/11 investigation, law enforcement personnel had to spend time identifying the detainees, investigating their backgrounds and analyzing whatever information came in from the CIA and other agencies. And each of these investigations was so time-consuming that "[t]he FBI cleared less than 3 percent of the September 11 detainees within three weeks of their arrest." (OIG report, p. 51) The report paints a vivid picture of the time and resources wasted clearing individuals who in large part were "suspicious" only because of their national origin:

> "[The FBI's] resources were insufficient to permit the group to analyze the CIA information in a more timely manner for a number of reasons. First, according to one of the SSAs (supervisory special agent) assigned to the project, the volume of cases was simply too great. One of the FBI requests to the CIA for information contained the names of 190 detainees. Second, the SSA pointed to many technical difficulties and 'growing pains' they faced when they first started in late November 2001…Third, many of the people working on this project were not focused exclusively on this task, due to the many demands on the FBI. Finally, some of the cases required contacting FBI offices overseas or other agencies, which took time, especially because the FBI offices in the Middle Eastern countries also were over-burdened at the time." (OIG report, p. 61)

At a time when every investigator could have been following up real leads based on observation of "pre-attack" behaviors, many were tied to their desks, clearing individuals about whom there was no reason to be suspicious. What's more, the futility of this effort became clear early in the process. According to the report, "A variety of INS, FBI and Department officials who worked on these September 11 detainee cases told the OIG that it soon became evident that many of the people arrested during the PENTTBOM[16] investigation might not have a nexus to terrorism." (OIG report, p.45) But because of the "hold until cleared" policy, the

[16] PENTTBOM is an acronym for Pentagon/Twin Towers Bombings.

investigators had to go through this futile and time-consuming process.

As was the case with racial profiling during the "war on drugs," ethnic profiling alienates the communities whose cooperation is essential to the gathering of good intelligence. As Police Chief Sanders explained:

> "Whole communities get very upset when they see that pretty soon everybody that they love has been arrested, and I think that creates far more problems. The issue is one of community trust. If you're relying on the public to assist you in just about any way, and if you're stopping people in communities of color, and your stops are out of sync with the way they are in every other community because you're simply stopping people because you think they may look suspicious, we found that it's awfully difficult for those communities to support and trust the efforts of what the police are doing."

Councilman Monserrate, whose district is comprised of a section of New York City with a large South Asian population, also commented on this problem:

> "I do know that in the South Asian community, there is a lot of concern about people being taken off the street and detained without charge. That leaves an aura of fear and suspicion. And I think that fear and suspicion largely hampers the police mandate to help protect property and lives. The best way is for the communities to be partners with the police and not to be in fear of the police, because that hampers public safety."

THE HUMAN COSTS

The human costs of our government's ethnic profiling policies are incalculable: hard-working, law-abiding men suddenly finding themselves shackled hand and foot, held incommunicado in solitary confinement for months at a time; families separated; homes and businesses lost; and lives turned upside down. For many, the greatest loss of all was the bitter discovery that their adopted country, which promised freedom and opportunity, no longer wanted them.

In November 2002, frustrated by the continuing refusal of the Department of Justice to reveal the identities and happenstances of most of the post-9/11 detainees, the ACLU decided to conduct its own investigation. With the assistance of the Human Rights Commission of Pakistan, we located 21 detainees who had been deported to Pakistan, or who had left the U.S. voluntarily to avoid indefinite detention. We met with these men in Lahore, Karachi and Islamabad.[17] Their accounts, one of which is detailed below, are a powerful indictment of our government's abuse of power. Justice Thurgood Marshall once wrote:

> "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II camp cases, and the Red Scare and McCarthy-era internal subversion cases, are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it."[18]

In the post-9/11 era, the treatment of Arabs, Muslims and South Asians can be added to Justice Marshall's list of "extreme reminders."

[17] "America's Disappeared: Seeking International Justice for Immigrants Detained After September 11," (January 2004)
[18] Skinner v. Rainway Labor Executives' Association, 109 S.CT. 1402 (1989)

OIG REPORT SHOWS THE FUTILITY OF ETHNIC PROFILING

The report by the Office of the Inspector General, released to the public in April 2003, confirmed the ACLU's long-held view that the Department of Justice engaged in deliberate and wholesale civil rights violations in the aftermath of 9/11. According to news reports, the release of the report was delayed for almost a year because of ongoing negotiations with the attorney general's office over who would shoulder blame for the abuses it described. The report reveals a stark pattern of ethnic profiling from the earliest days of the investigation:

- Many of the tips and leads that resulted in detentions were based on little more than ethnic profiling by members of the public and local police. For example, an alien "was arrested, detained on immigration charges *and treated as a September 11 detainee*[19] because a person called the FBI to report that a grocery store in which the alien worked, 'is operated by numerous Middle Eastern men, 24 hrs-7 days a week. Each shift daily has 2 or 3 men...Store was closed day after crash, reopened days and evenings. Then later on opened during midnight hours. Too many people to run a small store.'" (OIG report, p.17) Had the storekeepers been other than Middle Eastern, it is unlikely that their activities would have aroused any suspicion at all.

- Men of Middle Eastern and South Asian ethnicity who happened to be in the vicinity of the subject of a "lead" were also arrested. The OIG report found that, "[i]f Joint Terrorism Task Force agents searching for a particular person on a lead arrived at a location and found a dozen individuals out of immigration status, *each of them were considered to be arrested in connection with the September 11 investigation...* no distinction generally was made between the subjects of the lead and any other individuals encountered at the scene 'incidentally' because the FBI wanted to be certain that no terrorist was inadvertently set free." (OIG report, p.16)

- As a result, the secret detention centers quickly filled up with people who had absolutely no connection to terrorism. The OIG report cites the following examples of fruitless arrests:

  – Several Middle Eastern men were arrested and *treated as connected to the 9/11 investigation* when local law enforcement authorities discovered "suspicious items," such as pictures of the World Trade Center and other famous buildings during traffic stops. (OIG report, p.16)

[19] Italics in this section added for emphasis.

– Another man was arrested on immigration charges and *labeled a 9/11 detainee* when authorities discovered that he had taken a roll of film to be developed and the film had multiple pictures of the World Trade Center on it but no other Manhattan sites. This man's roommates were also arrested when law enforcement authorities found out they were in the United States illegally, *and they too were considered 9/11 detainees.* (OIG report, p. 16)

– On Sept. 15, 2001 New York City police stopped a group of three Middle Eastern men in Manhattan on a traffic violation. The men had the plans to a public school in their car. The next day, their employer confirmed that the men were working on construction at the school and that it was appropriate for them to have the plans. *Nonetheless, they were arrested and became 9/11 detainees.* (OIG report, p. 42)

Of the 762 cases reviewed by the OIG, all the detainees came from countries in the Middle East or from Pakistan. Although the average length of detention was 80 days under extremely restrictive, and in many instances abusive, conditions, *not one of these men was ever charged with participating in, or lending support to terrorist activities.*

SYED WASIM ABBAS

Syed Wasim Abbas came to the United States from Pakistan to attend college. "It was 1992, March 27 when I first landed in New York. I went there as a student on an F-1 visa. I went to Brooklyn College and I worked in between." At the time of his arrest Abbas had a temporary work authorization card and was in the process of applying for a green card. He was running his own business: "I had a gas station, a Sunoco gas station right on Route 30 West. And I had my apartment there and I wanted to settle down there, bring my wife to Pennsylvania. But the circumstances didn't give me a chance to do it."

Syed Wasim Abbas

On June 11, 2002 Abbas was driving home to Pennsylvania when he was pulled over by an INS agent. "When he pulled me over he came

and said to turn the car off. He got the key from me and said, 'I'm from INS.' Then he showed me the paper in his hand and he said, 'Is this you, a-hole?' I said, 'Yeah. That's me.' He used really bad language, so I was scared because this was the first time ever I faced somebody pulling me over like that. He said, 'You have a deportation order.' Then he handcuffed me and he searched my car. He took my passport, my license, my social security card, my wallet and everything. He searched the back of the car, the trunk and then they left my car right there and took me to the INS office in Newark."

Abbas was shackled at the INS office: "They put chains on my legs and real tight handcuffs and stuff. I told them that it's really hurting, you know? Can you just open it up and you can handcuff me in front? But they said, 'We can't do it. This is how we do it.' It was very hard to walk and I wasn't a criminal. I never, you know, was involved in any crime or anything but I was like suddenly I just broke down, I cried. I can't express how I felt at that time."

After 29 days in the Bergen County Jail, Abbas, who had spent his entire adult life in America, was deported to Pakistan. His gas station is gone, and his wife, an American citizen, is living with relatives in New York. He now lives in London in a state of limbo. When we met him in Pakistan, he told us, "I could not and cannot take this out of my mind the fact that I've been to jail, I've been handcuffed and I've been chained. I do get nightmares sometimes and I get scared and when I wake up I'm all sweaty and scared and that stays there. Another thing is financially. Although my dad he's pretty good; I can't ask him for money because I'm 32 years old and those days are gone when I asked money from my parents. Unfortunately there aren't much opportunities here to work."

MUHAMMAD SIDDIQUI

Muhammad Siddiqui is an architect in Houston, husband to a busy physician and father of two young children. When two of his family members called him to say the FBI had questioned them, he was understandably concerned. He contacted Texas ACLU attorney Annette Lamoreaux, who agreed to represent Siddiqui should the authorities contact him. On a Monday evening Siddiqui, who was home with his children, received a visit from two FBI agents.

ACLU attorney Annette Lamoreaux represents Muhammad Siddiqui.

Siddiqui opened the door to the agents and responded to their request to question him by saying, "I'd be happy to talk to you, but I'd like to have my attorney present." One of the agents told Siddiqui that he did not need an attorney and that getting an attorney would only make him look guilty. The FBI agent insisted that Siddiqui submit to the interview "now." Siddiqui repeated the phrase that Lamoreaux had advised him to say: "I'd be happy to talk to you, but I'd like to have my attorney present." When the FBI agent responded angrily, Siddiqui called Lamoreaux from his cell phone. She asked to speak to one of the agents and explained that Siddiqui did not want to speak with the FBI at that time, but if the agent called her office during the day, he might set up an appointment.

"I do this all the time," Lamoreaux said. "As soon as there is a lawyer in the picture, they have to play by a different set of rules." But the

FBI agent on the phone did not seem to be paying attention to the rules. He screamed at Lamoreaux that Siddiqui did not have the right to counsel, to which she replied, "That is absolutely not the law. My client is not going to talk to you without a lawyer present. Call me on Monday morning and we'll set up a time if he is going to talk to you, but he's not going to talk to you right now and you are to leave the house immediately." The agent refused to talk with her any further and gave the phone back to Siddiqui.

Lamoreaux informed Siddiqui of his rights and advised him to insist that the agents leave the house. But he did not feel comfortable telling them to leave. He was standing in front of a very agitated FBI agent and was afraid that if he shut the door, the two of them would break it down. Again and again, Siddiqui repeated that he would only talk to them with his lawyer present. One agent shouted, "Turn off that cell phone!" Siddiqui refused, telling the agent that he wanted his attorney to hear everything that was being said. The agents remained in the doorway of Siddiqui's apartment, one of them pulling his coat back to reveal a gun. Siddiqui, whose children were inside, was afraid. Finally, the agents saw they were getting nowhere and left. As they were walking away, one agent turned back to Siddiqui threatening, "We will talk to you. We are watching you. Don't leave town."

The next morning Lamoreaux received a call from the agent with whom she had spoken. Siddiqui had already decided that it would be better to talk to the FBI agents so they would see that he had nothing to hide. Lamoreaux suggested that they meet on Thursday, when Siddiqui was free from work and childcare responsibilities. The agent insisted on meeting that day and told her that he would stand outside of Siddiqui's house until he came out and talked to him. Later that day, the interview was held in Lamoreaux's office. The meeting lasted 15 minutes, and an FBI agent confirmed that Siddiqui was never a criminal target. Having representation made all the difference, said Siddiqui. "Once there was counsel involved, attitudes changed dramatically. Laws started to mean something. It was like back home [in Pakistan], a guy with a police uniform thinks that he is God. I saw it make a difference." Government officials have not contacted Siddiqui since this interview, but others who do not have legal representation continue to be targeted. As Siddiqui commented, "It is sad that people go back home to Pakistan and find that the system is fairer there than it is here. People never would have said that two years ago."

BANAFSHEH AKHLAGHI

In September of 2001, law school professor Banafsheh Akhlaghi abandoned her position teaching the Constitution to work overtime defending it. As an activist attorney fighting for the civil liberties of Arabs, Muslims and South Asians, Akhlaghi had represented hundreds of men targeted by the government solely because of their ethnicity and religion. She was still swamped with clients over a year later, when the first round of Special Registration began. On Dec. 16, the deadline for the first call-in group, she spent all day at the San Francisco District INS Office, providing free legal counsel for registrants.

By the end of the day, Akhlaghi watched, helpless, as dozens of her newly retained clients found themselves detained. Shackled at the hands and feet, 12 of the men were shoved onto a bus to Oakland, Calif., then flown around the country. Akhlaghi explains, "They are the very faces that our government and the media continue to feed us with as the faces of terror. They are Stanford students, they are business owners, they are shoe salesmen, they

Banafsheh Akhlaghi

are working for high technology firms as engineers, they are in the food industry, they are just normal, normal folks."

Two days passed before one of Akhlaghi's clients was able to contact her. He told her that the men, blindfolded and shackled, had been flown from California to Arizona, to Kentucky, to Chicago, then back to Arizona, then to Bakersfield, Calif., then back to Oakland, before crossing the state again to end up in San Diego – all over the course of 36 hours. Federal officials had been looking for vacant jail cells. The men had not eaten, showered or slept at any point during the 72 hours in which they had been held.

When she learned what had happened, Akhlaghi immediately jumped in her car and drove 10 hours south to San Diego to get in front of the immigration court and secure release dates for her clients who had yet to see an immigration judge. But she was unsuccessful because her clients had not yet been processed into the system that would allow them to have an immigration hearing. To make matters worse, the judges were on vacation and not coming back until after New Year's Day. Despite these setbacks, Akhlaghi was able to convince a district director to issue bonds to her clients, releasing most of them on Dec. 23 and one man on the 24th. Their cases were finally heard on Feb. 17. But for Akhlaghi's extraordinary efforts, these men would have remained in detention until that date. Unfortunately, there were many other men who did not have access to such an advocate. Akhlaghi remains hopeful despite the present crises before her. "After September 11, we all lost our minds here in America, we numbed ourselves out to what is just and what is fair. Hopefully, since time has passed we have started to come back to what is just."

RECOMMENDATIONS

Abbas, Siddiqui and Akhlaghi's stories are not unusual. They are representative of the thousands of people racially, religiously and ethnically profiled. As detailed in the report, not only is racial profiling unnecessary and ineffective, but it destroys countless lives every year. Racial profiling is a misguided technique in the well-intentioned goal of improving security. We must take the important steps toward eradicating this destructive practice. The following are measures the government must adopt to ensure our safety and freedom:

Target terrorists, not immigrants. This administration is using immigration law as its chief instrument in the "war on terror." This is ineffective. There is a huge difference, operationally and legally, between immigration enforcement and counterterrorism. Terrorism must be pursued through legitimate criminal investigation not blatant targeting based on race, religion or ethnicity.

Stop selective enforcement of immigration laws against people of certain national origins or religious background. Immigration violations are found in similar percentages across all immigrant groups.

Eliminate the "national security" loophole in the Bush administration's guidelines, *Regarding the Use of Race by Federal Law Enforcement Agencies,* that allows for blatant and discriminatory targeting of innocent Arabs, Muslims and South Asians. Further, these guidelines must be made stronger through law and executive order.

Pass the End Racial Profiling Act (ERPA). While the racial profiling epidemic has become more pervasive since 9/11, Congress has yet to act to put an end to this unlawful practice. ERPA is a good first step toward addressing traditional racial profiling, driving while black or brown and some post-9/11 selective enforcement. It moves beyond the rhetorical statements included in the unenforceable guidelines issued by the Department of Justice and implements vigorous enforcement mechanisms, including providing legal recourse for victims injured by racial profiling.

End all registration. The continuing requirements, including restricted entry and exit for those who registered, are discriminatory and ineffective. The government must give adequate and fair notice of immigration regulations and leniency where it has failed in that respect.

Reverse the Justice Department's legal opinion in support of state and local enforcement of immigration laws. One of the foremost recommendations to ameliorate the harmful effects of racial, ethnic and religious origin based profiling is the repeal of the Justice Department's Office of Legal Counsel opinion that seeks to permit, and force, local, state and regional police officers to enforce immigration law, a task for which they are not trained, not funded and is contrary to the scope of their purpose. Immigration law is extremely complex and difficult to understand. Poor enforcement carries with it countless damaging consequences, including improper and inconsistent enforcement, destruction of community trust and cooperation and corrosive effects to the ability of police to identify and interdict crime and terrorism in America's cities.

Do not conflate criminal law enforcement with civil immigration law enforcement. Names of people with minor immigration violations should not be entered into National Crime Information Center system. This database is accessed by state and local police millions of times each day, and will subject immigrants to the risk of unlawful arrest by state and local police.

Abandon mandatory detention policies for non-citizens. Today it costs more than a million dollars a day to hold non-citizens in detention.[20] Most of these detainees, however, pose no threat to society and pose little flight risk if released. The mandatory detention laws should be moderated to relieve strain on the system and comport with basic notions of justice and the prevention of arbitrary detention.

Return to open government. The administration has consistently refused to release the names of the detainees. Who are they and what happened to them? We may never know because the Supreme Court declined to hear our claim that the Freedom of Information Act and the First Amendment grants the public the right to obtain access to the names of the people detained. The court's refusal to hear the case means that this could happen again, but it doesn't have to. The blanket closing of immigration hearings of Arab and Muslim men must end, and be replaced by a case-by-case analysis.

[20] Vanessa Waldref, Catholic Legal Immigration Network, Inc. Telephone interviews. Jan. 27, 2004.

CONCLUSION

The practice of profiling by race, ethnicity, religion or national origin runs counter to what is arguably the core principle of American democracy: that humans are created equal, and are entitled to be treated equally by the government, irrespective of immutable characteristics like skin color, faith and ethnic or national origin.

The argument for bias in policing is a self-fulfilling prophecy. If blacks are considered by police to be more likely to commit crimes, they will be stopped and investigated more than whites, and the "crime rate" among blacks will increase. Likewise, if the police concentrated their efforts on white citizens, they would find an increased hit rate among whites as well. If Arabs or Muslims are considered by the Department of Justice more likely to be terrorists, it will investigate, detain, interrogate and deport more Muslims or Arabs, consequently creating a numerical basis for the initial belief.

Numerous law enforcement officials believe that racial, ethnic, religious or national origin profiling actually poses a national security risk. If you are an airport screener and you believe that every terrorist is going to be Middle Eastern, you are not going to look as hard at people of other ethnicities. In addition, bias-based profiling – because of its lack of specificity – wastes resources and ineffectively allocates personnel.

At stake in the fight to end racial profiling are the fundamental principles of democracy upon which our country is based. Those principles deserve our vigorous protection.

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UNPATRIOTIC ACTS

The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You

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UNPATRIOTIC ACTS

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The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You

Published July 2003.

Written by Ann Beeson and Jameel Jaffer.

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FOREWORD

AMERICANS TEND to trust their government. No matter how partisan, no matter how contentious, those of us who studied the Constitution as children expect the federal government and its agents to ultimately do the right thing. Even now, after almost two years of living under the USA PATRIOT Act, most of us take our freedoms for granted – supposing that our homes, our medical records, our email are safe from prying eyes.

Some hear of immigrants jailed for long periods of time without charges or access to lawyers, of reputations sullied and marriages destroyed – and question the accuracy of news reports, wanting to believe there is a line our government will not cross.

But as this report, the eighth in a special series on civil liberties after 9/11, makes clear, the barriers have been lowered and the lines redrawn. The PATRIOT Act that was rushed through Congress after the attacks, under pressure from the Justice Department, greatly expanded the FBI's authority to monitor people living in the United States. One section in particular, giving the FBI unprecedented access to personal records and other belongings in violation of the First and Fourth Amendments, is misunderstood because officials haven't leveled with the press and public. Section 215 targets innocent people, not terrorists; it specifically gives the FBI authority to monitor people not engaged in criminal activity or espionage, and to do so in complete secrecy.

There should be no wiggle room in "inalienable rights." But according to information detailed in this report, the FBI can use the provision to obtain personal belongings directly from your home. It can also get your medical or psychiatric records, and lists of people who have borrowed a particular book, visited a particular Web site, or worshipped at a particular church, mosque, temple or synagogue.

Unpatriotic Acts is fact-filled, explicit and deeply unsettling. Once you've read it, I think you will find it hard to be complacent.

ANTHONY D. ROMERO
Executive Director
American Civil Liberties Union

UNPATRIOTIC ACTS

The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You

IMAGINE THIS SCENARIO: You flee Iraq after being imprisoned and persecuted for your political views. When you arrive in the United States, a local charity helps you find housing and medical care. You start a small business, join a mosque, and become active in a Muslim community association. You use email at a public library to keep in touch with your extended family in Iraq, and to discuss politics with friends. Two years later, you are grateful for the freedoms you enjoy in your new home.

When the U.S. invades Iraq, you are thankful to be rid of Saddam but angry about civilian casualties and the extended U.S. occupation. You write a letter to the editor of your local newspaper encouraging a quick transfer of power to Iraqi civilians.

An FBI agent who is conducting an investigation of other Iraqi-Americans notices your letter and finds it troubling. Based on the letter, the sound of your name, and the outside possibility that you may be connected to the people he's investigating, he decides to investigate you. He goes to a secret court and gets an order that forces the library and its Internet service provider to turn over all your email messages. Then he gets another secret order to obtain records from the charity that helped you when you first arrived in the United States. Those records lead him to the local hospital, where he obtains records of medical treatment you received. He serves another order on the local mosque to find out whether or not you're a member or serve in a leadership position. Though he uncovered nothing suspicious about you in his fishing expedition, he gets another secret order forcing the Muslim community association to turn over its entire membership list. If not you, he thinks, maybe another member has some connection to those people he's investigating ...

As it turns out, you never learn that the FBI is spying on you. The FBI certainly doesn't tell you. And the library, the charity, the hospital, the mosque, and the community association are all prohibited – forever – from telling you or anyone else that the FBI has asked for your records. You simply never learn that the government has been rifling through your life.

Could such a thing happen to you or someone you know? Perhaps it already has. The USA PATRIOT Act vastly expands the FBI's authority to monitor people living in the United States. These powers can be used not only against terrorists and spies but also against ordinary, law-abiding people – immigrants from Iraq or Italy, dentists from Detroit or Denver, truck drivers from Tampa or Tulsa, painters from Peoria or Pittsburgh. Indeed, the FBI can use these powers to spy on *any* United States citizen or resident.

This report examines in detail one PATRIOT Act provision, Section 215, which gives the FBI unprecedented access to sensitive, personal records and any "tangible things." The report explains why Section 215 is misguided, dangerous, and unconstitutional. It reviews the history of unlawful surveillance, and explains why it would be a serious mistake for us to rely on the government to police itself. The report also documents attempts by Congress and the ACLU to challenge the secrecy surrounding the FBI's use of Section 215. It exposes a government disin-

formation campaign apparently intended to mislead the American public about the nature and scope of this new power. And finally the report explains what the ACLU is doing – and what you can do – to get Section 215 off the books.

of speech, because the threat of government surveillance inevitably discourages people from speaking out – and especially from disagreeing with the government.

SECTION 215 VASTLY EXPANDS THE FBI'S SPYING POWERS.

What the Law Says

Section 215 vastly expands the FBI's power to spy on ordinary people living in the United States, including United States citizens and permanent residents. It lets the government obtain personal records or things about *anyone* – from libraries, Internet service providers, hospitals, or any business – merely by asserting that the items are "sought for" an ongoing terrorism investigation. Section 215 threatens individual privacy, because it allows the government free reign to monitor our activities. It also endangers freedom

Section 215 amends an obscure law called the Foreign Intelligence Surveillance Act (FISA), which became law in 1978. FISA set out the procedures that the FBI had to follow when it wanted to conduct surveillance for foreign intelligence purposes. The system is extraordinary – not least because the FISA Court meets in secret, almost never publishes its decisions, and allows only the government to appear before it. But of course it applied only to foreign spies. Thanks to the PATRIOT Act, the FBI can now use FISA even in investigations that don't involve foreign spies. In fact, under Section 215 the FBI can now spy on ordinary, law-abiding Americans.

To obtain your personal records or things under Section 215, the FBI does not need to show

"probable cause" – or any reason – to believe that you have done anything wrong. It does not need to show that you are involved in terrorism, directly or indirectly, or that you work for a country that sponsors terrorism. If you are a United States citizen or permanent resident, the FBI can obtain a Section 215 order against you based in part on your First Amendment activity – based, for example, on the books that you borrowed from the library, the Web sites you visited, the religious services you attended, or the political organizations that you joined. If you are not a citizen or permanent resident, the FBI can obtain a Section 215 order against you based *solely* on your First Amendment activity.

In fact, Section 215 authorizes federal officials to fish through personal records and belongings even if they are not investigating any person in particular. Under Section 215, the FBI could demand a list of every person who has checked out a particular book on Islamic fundamentalism. It could demand a list of people who had visited a particular Web site. It could demand a client list from a charity that offers social services to immigrants.

A gag order in the law prevents anyone served with a Section 215 order from telling anyone else that the FBI demanded information. Because the gag order remains in effect forever, surveillance targets – even wholly innocent ones – are *never* notified that their privacy has been compromised. If the government uses Section 215 to keep track of the books you read, the Web sites you visit, or the political events you attend, you will simply never know.

The Foreign Intelligence Surveillance Court

Congress created the Foreign Intelligence Surveillance Court (FISC) in 1978 to oversee FBI surveillance in foreign-intelligence investigations. The FISC hears FBI applications for foreign-intelligence surveillance orders and warrants, including Section 215 orders. It is comprised of 11 district court judges who are appointed by the Chief Justice of the United States Supreme Court for terms of up to seven years. Since 1978, the FISC has heard approximately 15,000 FBI wiretap and electronic surveillance applications. (This number does not include Section 215 orders, which the FBI is not required to report.) Of these applications, the FISC summarily approved without modification all but five, and it did not reject even one.

While the FISC has traditionally granted FBI surveillance applications, in May 2002 its judges issued an extraordinary, unanimous opinion rejecting the Attorney General's bid for more power to conduct electronic surveillance under the PATRIOT Act. Unfortunately, that historic opinion was overturned by the Foreign Intelligence Surveillance Court of Review (FISCR), an appeals court that had never convened before. (The ACLU filed a friend-of-the-court brief but was not permitted to argue before the Court. More information about the extraordinary litigation before the Foreign Intelligence Surveillance Court of Review is posted at http://www.aclu.org/SafeandFree.) After the FISCR opinion, it is less likely that the FISC will again attempt to serve as a meaningful check on FBI surveillance.

Section 215

Section 215 amended the Foreign Intelligence Surveillance Act so that the relevant provision of that act now reads:

Access to certain business records for foreign intelligence and international terrorism investigations

(a) (1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

(2) An investigation conducted under this section shall

(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and

(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(b) Each application under this section

(1) shall be made to—

(A) a judge of the court established by section 1803(a) of this title; or

Before the PATRIOT Act, the FBI could only obtain records. Now the FBI has the authority to obtain "any tangible thing."

People who are not U.S. citizens or permanent residents can be investigated solely because of their First Amendment activity – e.g., because they wrote a letter to the editor criticizing government policy, or because they participated in a particular political rally. U.S. citizens and permanent residents can be investigated in part on the basis of their First Amendment activity.

Applications for Section 215 orders are ordinarily heard by judges of the Foreign Intelligence Surveillance Court.

(B) a United States Magistrate Judge under chapter 43 of Title 28, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and

(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) of this section to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

(c) (1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.

(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).

(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

Judges of the Foreign Intelligence Surveillance Court have little authority to scrutinize or reject FBI surveillance applications. If the FBI specifies that – in its own opinion – Section 215's requirements are met, the judge must grant the surveillance order.

The FBI need not show "probable cause" or any reason at all to believe that the target of the surveillance order is engaged in criminal or terrorist activity. All the FBI needs to do is "specify" that the records are "sought for" an authorized investigation. The surveillance target may be completely innocent.

Those who are ordered to turn over their records (or "tangible things") are prohibited from mentioning to anyone else that the FBI made the demand.

THE FBI CAN USE SECTION 215 TO DEMAND ANY RECORDS OR "TANGIBLE THINGS."

There is no restriction on the kinds of records or things that the FBI can demand under Section 215. Before the PATRIOT Act, the FBI's authority under this provision was restricted to a discrete category of business records – records from vehicle rental agencies, storage facilities and other similar businesses. Section 215 expands this authority to reach "any tangible things (including books, records, papers, documents, and other items)," held by *any* organization or person. The FBI could use Section 215 to demand:

- personal belongings, such as books, letters, journals, or computers, directly from one's home.
- a list of people who have visited a particular Web site.
- medical records, including psychiatric records.
- a list of people who have borrowed a particular book from a public library.
- a membership list from an advocacy organization like Greenpeace, the Federalist Society, or the ACLU.
- a list of people who worship at a particular church, mosque, temple, or synagogue.
- a list of people who subscribe to a particular periodical.

In fact, the Attorney General himself has acknowledged that the FBI could use the law even more broadly. The following exchange between the Attorney General and Rep. Tammy Baldwin (D-WI) took place before the House Judiciary Committee in June 2003:

Attorney General John Ashcroft.

BALDWIN: Prior to the enactment of the USA PATRIOT Act, a FISA order for business records related only to common carriers, accommodations, storage facilities and vehicle rentals. Is that correct?

ASHCROFT: Yes, it is....

BALDWIN: OK. Now, under section 215 of the USA PATRIOT Act, now the government can obtain any relevant, tangible items. Is that correct?

ASHCROFT: I think they are authorized to ask for relevant, tangible items.

BALDWIN: And so that would include things like book purchase records?

ASHCROFT: ... [I]n the narrow arena in which they are authorized to ask, yes.

BALDWIN: A library book or computer records?

ASHCROFT: I think it could include a library book or computer records....

BALDWIN: Education records?

ASHCROFT: I think there are some education records that would be susceptible to demand under the court supervision of FISA, yes.

BALDWIN: Genetic information?

ASHCROFT: ... I think [we] probably could.

SECTION 215 VIOLATES THE CONSTITUTION.

Section 215 violates the United States Constitution. It violates privacy and due process rights guaranteed by the Fourth Amendment, and free speech rights guaranteed by the First Amendment.

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, ...*
> – United States Constitution, Fourth Amendment

- **Section 215 violates the Fourth Amendment by allowing the government to search and seize your personal records or belongings without a warrant and without showing probable cause.**

The Fourth Amendment ordinarily prohibits the government from searching your home or office, or from seizing your records, unless it first obtains a warrant based on "probable cause" to believe that you are engaged in criminal activity. The Supreme Court has applied this protection not just to physical objects but to personal records and electronic data. Section 215 does not require the government to obtain a warrant or to establish probable cause before it demands your personal records or belongings. In fact, the FBI can use Section 215 against you even if it knows for a fact that you are not engaged in crime or espionage.

- **Section 215 also violates the Fourth Amendment because it does not require the government to provide you with notice – *ever* – that your records or belongings have been seized.**

Ordinarily the Constitution requires that the government notify you before it searches or seizes your records or belongings. Indeed, the Supreme Court has held that this "knock and announce" principle is at the core of the Fourth Amendment's protections; without notice, after all, a person whose privacy rights have been violated will never have an opportunity to challenge the government's conduct. While in some circumstances delayed notice is permitted to protect against the destruction of evidence, the Supreme Court has *never* upheld a government search for which notice is never provided.

> *Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*
> – United States Constitution, First Amendment

- **Section 215 violates the First Amendment because it allows the government to easily obtain information about, for example, the books you read, the Web sites you visit, and the religious institutions you attend.**

Section 215 expressly authorizes the government to obtain books, records, and other items that are protected by the First Amendment. The FBI could use Section 215 to order a library or bookstore to produce records showing that you had borrowed or bought a particular book. It could force an Internet Service Provider to turn over your email messages or records of which Web sites you've visited. It could demand that a political organization confirm that you participated in a political rally. It could even order a mosque to provide a list of all its members.

The Constitution's warrant and probable cause requirements protect First Amendment interests by prohibiting the government from spying on

people based solely on their political views or religious associations. In a 1972 case involving electronic surveillance, the Supreme Court wrote:

> *History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.*

Section 215 is likely to chill lawful dissent. If people think that their conversations, their emails, and their reading habits are being monitored, people will feel less comfortable saying what they think – especially if they disagree with government policies. Indeed, there is a real danger that the FBI will wield its Section 215 power specifically to silence dissenters.

- **Section 215 also violates the First Amendment by preventing those served with Section 215 orders from ever telling anyone that the FBI demanded information, even if the information is not tied to a particular suspect and poses no risk to national security.**

Section 215 prohibits people who receive orders for personal records or belongings from disclosing that fact to others even where there is no real need for secrecy. The gag order is extremely broad. It prevents people from even telling the press and public that the government has sought records, even if the statement is made in the most general terms, without identifying the specific target of the order. For example, it would prevent a library from publicizing statistics about the number of times the FBI had sought patron records in a given time period. To ensure compliance with the gag order, individual employees served with Section 215 orders must strictly limit telling even their fellow staff members that the FBI has demanded information.

Section 215 gag orders are automatic, and do not require the government to explain to the judge why secrecy is necessary. In other contexts, gag orders are imposed only where the government has made a showing that secrecy is necessary in the particular case. Section 215 gag orders are also indefinite, which means that surveillance targets – even wholly innocent ones – will never know their privacy was compromised. In certain investigations, secrecy may sometimes be necessary, and short-term gag orders may sometimes be unavoidable. But Section 215 gag orders require no necessity and are unlimited. If the First Amendment means anything, it means that the government cannot impose an indefinite gag order without reference to the facts of the particular case.

THE FBI CAN USE SECTION 215 TO TARGET IMMIGRANTS AND OTHER INNOCENT PEOPLE.

Section 215 was *specifically intended* to authorize the FBI to obtain information about innocent people – people who are not engaged in criminal activity or in espionage. Of course, not all innocent people are likely to be equally affected. As it has done in the past, the FBI is once again targeting ethnic, political, and religious minority communities disproportionately. In the war on terrorism, the FBI has unfairly targeted minority and immigrant communities with its surveillance and enforcement efforts. The FBI and the Immigration and Naturalization Service (INS) rounded up over a thousand immigrants as "special interest" detainees, holding many of them without charges for months. A "Special Registration" program now requires tens of

thousands of Arab and Muslim immigrants to submit to a call-in interview from which other immigrants are exempted. During the war in Iraq, many Iraqis and Iraqi-Americans were asked to submit to "voluntary" interviews with the FBI. And a Jan. 28, 2003 *New York Times* article by Eric Lichtblau *("F.B.I. Tells Offices to Count Local Muslims and Mosques")* reported that the FBI ordered its field offices to "establish a yardstick for the number of terrorism investigations and intelligence warrants" by counting the number of Muslims and mosques in their districts.

There is little doubt, then, that Section 215 is being used against minorities and immigrants disproportionately. This doesn't make us any safer, of course. (It bears noting, for example, that *none* of the immigrants whom the FBI and INS held as "special interest" detainees was charged with a terrorism-related offense.) Indeed, targeting minorities and immigrants simply because of their ethnicity, religion, or nationality wastes resources that could be dedicated to apprehending real terrorists.

In fact, the FBI does not need the PATRIOT Act to investigate people who are legitimately suspected of engaging in terrorist or criminal activity; it has always had this power. Nor does the FBI need the PATRIOT Act to engage in surveillance of people who are legitimately suspected of spying for foreign governments or terrorist groups; it has had this power since 1978. The government can use these powers – powers that pre-date the PATRIOT Act – to vigorously pursue terrorists and other criminals, consistent with the Constitution.

"OUR CLIENTS have come to the United States seeking refuge from persecution. We help them get the services they need in order to adjust to life here. Of course, we can't get them the help they need if they won't trust us with their personal information. And they won't trust us with their personal information if they think we're going to hand it over to the FBI. Remember, many of our clients are people who came to the United States to escape totalitarianism. The last thing they want to be told when they arrive here is that the government is demanding access to their medical and social service records."

– **MARY LIEBERMAN**, Director, Bridge Refugee and Sponsorship Services (East Tennessee).

CONGRESS AND THE PUBLIC MUST KEEP AN EYE ON THE FBI.

The FBI has a troubled history. Its predecessor organization was responsible for the 1920 Palmer Raids in which thousands of immigrants were arrested and imprisoned solely because of their political beliefs. During the McCarthy era, the FBI supplied Senator McCarthy with information that ruined the careers of many innocent people. In the 1960s, the FBI engaged in a campaign to discredit Martin Luther King. They wiretapped his hotel rooms, tried to block his publications, and even threatened to disclose personal information about him if he did not commit suicide. (The ACLU's soon-to-be-released report, "J. Edgar Hoover Tactics in the 21st Century," discusses this history in more detail.)

Library Awareness Program

The FBI has sent spies into public libraries before. In June of 1987, FBI agents approached Paula Kaufman, the director of Academic Information Services at Columbia University, and demanded that she assist them in identifying possible KGB agents. The FBI told Ms. Kaufman that KGB agents were using libraries to gather technical science data and to recruit library patrons or the librarians themselves as spies. Instead of cooperating with the FBI, Ms. Kaufman exposed the FBI's dubious counterintelligence program in a letter to the library association. The disclosure of the FBI's Library Awareness Program caused a national uproar, particularly after it became known that the FBI had operated such programs in libraries since at least the early 1960s.

Other librarians spoke out – alarmed at the extent of the intrusion into patrons' privacy and academic freedom, and doubtful that they would be able to discern KGB spies from legitimate library patrons. When The New York Times asked an FBI spokeswoman, Susan Schnitzer, to define the type of behavior that librarians were being asked to report, she replied, "It's hard to define; anything not quite right." Statements such as these added to the anxiety that librarians felt about profiling their patrons.

Many public-interest organizations also reacted strongly to the disclosure of the Library Awareness Program. The American Library Association passed a resolution calling on the FBI to end the program. The National Security Archives filed a Freedom of Information Act request in July 1987 demanding that the FBI release all documents related to the program. (The bureau stalled at first but was forced to release the records a year later.) The ACLU sent letters to Congress expressing concern about the legality and efficacy of the program and arguing that the FBI should limit its investigations to people who were reasonably suspected of spying on behalf of foreign governments.

The ACLU of Southern California and the California Library Association created this bookmark to inform library patrons about the threats to their privacy.

In May 1988, the FBI issued a report, The K.G.B. and the Library Target 1962-Present. In it, the FBI admitted asking library directors to provide the circulation records of patrons "with Eastern European or Russian-sounding names," and to look out for people copying large quantities of technical information or placing "microfiches in a briefcase without ...checking them out."

While Congress failed to enact legislation to prevent a recurrence of misguided initiatives such as the Library Awareness Program, congressional and public attention to the program did eventually persuade the FBI to abandon – at least temporarily – its intrusive activities in public libraries. This dark episode was documented by Herbert N. Foerstel in his book *Surveillance in the Stacks: The FBI's Library Awareness Program.* Now Section 215 of the PATRIOT Act has put FBI agents back in the stacks.

In the late 1970s, a Senate report catalogued FBI abuses during the previous decades and concluded that, "...unless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature." In the late 1980s, the FBI's "Library Awareness Program" was exposed – a decades-old initiative to recruit librarians to spy on library patrons for connections to the KGB. In June of 1997, Louis Freeh, who was then FBI director, went before the House Judiciary Subcommittee on Crime to try to persuade the legislators that he and his agency should be given greater power. His candor stood out. "We are potentially the most dangerous agency in the country," he stated.

Especially now, when the FBI has far more surveillance power than it has ever had before, can we really afford to let this agency police itself?

Congress Questions the PATRIOT Act

Almost immediately after the PATRIOT Act became law, some members of Congress began to harbor doubts about the Act's surveillance provisions and about the manner in which the FBI appeared to be implementing them. In June 2002, the House Judiciary Committee sent Attorney General John Ashcroft a letter asking him to respond to 50 questions about the Justice Department's implementation of the PATRIOT Act. Many of the questions related to the Act's surveillance provisions and to Section 215 in particular. Over the subsequent months, other congressional committees began to ask questions of their own.

The Attorney General refused to cooperate fully with these congressional oversight efforts. Of the questions posed by the various congressional committees, many still remain unanswered. Even more problematic, while the Attorney General eventually answered some of Congress's questions, he declared many of the answers classified and insisted that they be withheld from the public. The Attorney General furnished even these classified answers only after the chairman of the House Judiciary Committee threatened to subpoena him in order to obtain the requested information.

A bipartisan report issued in February 2003 by senior members of the Senate Judiciary Committee expressed deep frustration with the Justice Department's refusal to submit to congressional oversight:

> [W]e are disappointed with the non-responsiveness of the DOJ and FBI. Although the FBI and the DOJ have sometimes cooperated with our oversight efforts, often, legitimate requests went unanswered or the DOJ answers were delayed for so long or were so incomplete that they were of minimal use in the oversight efforts of this Committee. The difficulty in obtaining responses from DOJ prompted Senator Specter to ask the Attorney General directly, "how do we communicate with you and are you really too busy to respond?"

The report castigated the Attorney General for his refusal to explain to the public why new surveillance powers were necessary and how those powers are being used. "It is our sincere hope," the report stated, "that the FBI and [Justice Department] will reconsider their approach to congressional oversight in the future." The report concluded: "The Congress and the American people deserve to know what their government is doing."

In May 2003, in response to increasing criticism from Congress and the public, the Justice Department finally released a few shreds of information about its use of new surveillance

powers. The release included information that the Justice Department had – for the previous 18 months – insisted could not be disclosed without jeopardizing national security. Still, the letter was more notable for what it *refused* to disclose. The letter refused to disclose guidelines that govern the FBI's use of foreign-intelligence surveillance powers, including Section 215. It also refused to say whether the FBI had ever used certain sections of the PATRIOT Act, including Sections 215 – let alone in what contexts that section had been invoked. As described below, the ACLU and other public interest organizations have been able to obtain slightly more detailed information through a Freedom of Information Act request.

The Public's Right to Know

In August 2002, the ACLU and other public interest organizations filed a request under the Freedom of Information Act to obtain information about the FBI's reliance on new surveillance powers. The request asked the Attorney General to disclose, among other things:

- the number of times that the FBI had used Section 215;
- the number of times that the FBI had used Section 215 to obtain records from a library, bookstore, or newspaper;
- the number of times that the FBI had used Section 215 to obtain records relating to a specific United States citizen or permanent resident; and
- the number of times that the FBI had used Section 215 against a specific person because of that person's engagement in activity protected by the First Amendment, e.g. her attendance at a political rally, or her membership in a particular political organization.

When the Attorney General failed to respond to the FOIA request, the ACLU and its coalition partners filed suit to force a response. After the suit was filed in October 2002, the Attorney General released approximately 350 pages of responsive material.

The records that the Attorney General was forced to release provide an intriguing – and often chilling – glimpse at the pervasiveness and nature of FBI surveillance under the PATRIOT Act. One released memorandum, apparently produced by the FBI's legal arm, emphasizes to FBI field offices that certain new surveillance powers – including Section 215 – can now be used not only against terrorists but also against ordinary people – including U.S. citizens and permanent residents – who are not suspected of criminal activity or espionage. Another document, a redacted list which is six pages long, suggests that the FBI has also invoked its National Security Letter (NSL) authority dozens – perhaps hundreds – of times since the PATRIOT Act was enacted. The NSL power allows the government to obtain some personal records without any court oversight whatsoever.

Still another released document lists the occasions on which the FBI has invoked Section 215. The list is relatively short – less than a page long – but, because the FBI has blacked out almost all information from the list, it is impossible to know how many times the FBI has invoked Section 215 or – just as important – in what contexts it has done so. The secrecy simply has no justification. No one expects the FBI to disclose the names of its surveillance targets or the details of its intelligence strategy. But there is no good reason why the Attorney General could not disclose, at least in general terms, how often new surveillance powers have been used, and in which contexts.

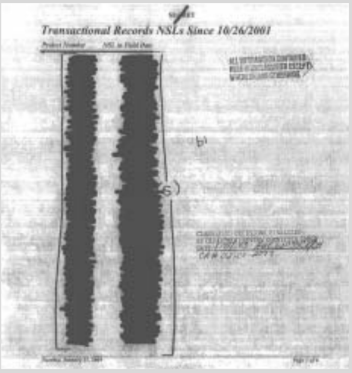
In May 2003, a federal district judge in D.C. held that the Freedom of Information Act does not

National Security Letters

National Security Letters (NSLs) allow the FBI to obtain certain kinds of sensitive personal records without obtaining any kind of court order. Three different statutory provisions provide NSL authority. One authorizes the FBI to order a telephone company or internet service provider to disclose your name, address, length of service, and local and long distance toll billing records. The second authorizes the FBI to order a bank to disclose your financial records. The third authorizes the FBI to order a credit reporting agency to disclose your credit report or to disclose the financial institutions with which you have accounts. Each of the NSL provisions includes "gag" language that prohibits businesses from telling you that the FBI demanded your records.

The principle difference between NSLs and Section 215 orders is that the FBI can issue NSLs unilaterally, without prior judicial approval, whereas Section 215 orders must be obtained in advance from the Foreign Intelligence Surveillance Court. The absence of judicial oversight means that, when it comes to the use of NSLs, the FBI has a free hand. Another difference, of course, is that NSLs are meant to be used only to obtain specific kinds of information, like credit reports. It now seems that the FBI is using NSLs much more broadly. In response to questions from a Congressional oversight committee, Assistant Attorney General Daniel Bryant recently conceded that the FBI might even be using NSLs to obtain records from libraries and bookstores.

The Assistant Attorney General's concession is particularly troubling since


Transactional Records NSLs Since 10/26/2001

NSL power was expanded under the PATRIOT Act. Before the PATRIOT Act became law in October 2001, the FBI could issue an NSL against you only if it had reason to believe that you were a foreign spy. Now, however, the FBI can issue an NSL against you even if it knows you are completely innocent of any such activity. The only requirement is that the NSL be "sought for" an ongoing investigation. And of course, there is no judicial oversight to ensure that even that minimal standard is met. The FBI is expected to police itself.

Records obtained by the ACLU and other public interest organizations under the Freedom of Information Act make clear that the FBI is using its expanded NSL power aggressively. In fact, the list of NSLs issued between Oct. 26, 2001 and Jan. 21, 2003 takes up six full pages. Does it really serve national security to allow the FBI to engage in such aggressive surveillance – including surveillance of ordinary, law-abiding Americans – without any judicial oversight whatsoever?

require the Attorney General to disclose further information about the FBI's use of new surveillance power. The judge found, however, that public advocacy groups had advanced a "compelling argument that the disclosure of this information will help promote democratic values and government accountability." Given the district court's decision, whether the public will be provided additional information about FBI surveillance is now up to the Attorney General and Congress. (For more information about the ACLU's FOIA, go to www.aclu.org/patriot_foia.)

If we want to avoid a repeat of the kinds of abuses that occurred in the past, public oversight is essential. The February 2003 Senate report noted that past FBI abuses have come to light only after "extended periods when the public and the Congress did not diligently monitor the FBI's activities." The report also emphasized that statutory reporting requirements, which are very limited, "are no substitute . . . for the watchful eye of the public." It stated: "Public scrutiny and debate regarding the actions of government agencies as powerful as the DOJ and FBI are critical to explaining actions to the citizens to whom these agencies are ultimately accountable." The Senate report got it absolutely right: Democracies work only if the public has the information it needs in order to hold the government accountable for its policies. Overbroad secrecy about government surveillance is wholly inconsistent with the most basic democratic principles. And as one judge eloquently put it, "An informed public is the most potent of all restraints upon misgovernment."

THE JUSTICE DEPARTMENT IS SPREADING DISINFORMATION ABOUT SECTION 215.

At the same time the Attorney General refuses to disclose even the most basic information about the way new surveillance powers are being used, government spokespeople are engaged in a campaign of disinformation concerning how new surveillance powers – and Section 215 in particular – *could* be used. (A recent ACLU report, "Seeking Truth From Justice: PATRIOT Propaganda - The Justice Department's Campaign to Mislead The Public About the USA PATRIOT Act," at www.aclu.org/SafeandFree, documents this disinformation campaign in detail.)

FBI spokespeople have repeatedly asserted, for example, that Section 215 cannot be used to obtain information about United States citizens. Here's just one of many examples:

> "This is limited only to foreign intelligence," said Mark Corallo, a spokesman with the Department of Justice. "U.S. citizens cannot be investigated under this act."
> – *Florida Today*, Sept. 23, 2002

In fact, Section 215 explicitly states that United States citizens and permanent residents can be targeted under the provision – on condition that they not be targeted solely because of activity that is protected by the First Amendment.

Government spokespeople have also repeatedly asserted that the FBI cannot obtain a person's records under Section 215 without probable cause. Again, here's one example of many:

Spies in the Stacks

There is evidence that the FBI is using its surveillance authority to monitor activity in public libraries. In October 2002, the Library Research Center at the University of Illinois at Urbana-Champaign conducted a survey of 1505 public libraries serving populations of more than 5000 people. The survey found that at least 178 libraries had been visited by the FBI. In addition, responding to a question from the House Judiciary Subcommittee on the Constitution, a senior Justice Department official confirmed that the FBI has asked for or demanded information from public libraries:

> We have made, in light of the recent public information concerning visits to the library, we have conducted an informal survey of the field offices, relating to its visits to library. And I think the results from this informal survey is that libraries have been contacted approximately 50 times, based on articulable suspicion or voluntary calls from librarians regarding suspicious activity.

This response makes clear that the FBI has been monitoring activity at public libraries, but it does not indicate whether the FBI has used Section 215 in particular. The FBI has refused to say, and the gag provision prevents anyone else from talking. A question on the Library Research Center's survey, however, asked libraries whether they had declined to answer any question because they thought that they were prohibited by law from doing so. Disturbingly, fifteen libraries answered "yes."

> The Justice Department spokesman, Mark Corallo, says the assertions about the Act are completely wrong because, for the FBI to check on a citizen's reading habits, it must get a search warrant. And to get a warrant, it must convince a judge "there is probable cause that the person you are seeking the information for is a terrorist or a foreign spy."
> – *Bangor* [ME] *Daily News*, April 9, 2003

In fact, Section 215 does not require the FBI to show probable cause. All the FBI has to do in order to invoke the provision is specify that the records are "sought for" an ongoing investigation. (This standard is sometimes called a "relevance" standard.) The FBI does not have to show any reason at all to believe that the target of the investigation is a criminal or spy, let alone a terrorist. Indeed, the FBI can use Section 215 even against people whom it knows to be wholly innocent of any wrongdoing. The government's assertions to the contrary are simply wrong.

The Justice Department's own documents – obtained through the ACLU's Freedom of Information Act request – acknowledge that Section 215 does not require probable cause. An Oct. 26, 2001 memo to "All Divisions" from the FBI's Office of General Counsel (and approved by FBI Director Robert S. Mueller III) includes a section on "Changes in FISA Business Records Authority." It reads:

> [Field offices] may continue to request business records …through FBIHQ in the established manner. However, such requests may now seek production of any relevant information, and need only contain information establishing such relevance.

In a December 2002 letter to Congress, Deputy Attorney General Larry D. Thompson made essentially the same point:

> Under the old language, the FISA Court would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The USA PATRIOT Act changed the standard to simple relevance.

The government has misrepresented Section 215 in yet another way by asserting that the provision can be used only against terrorists and spies:

> Justice Department spokesman Mark Corallo called [librarians' opposition to the PATRIOT Act] "absurd." The legislation "doesn't apply to the average American," he said. "It's only for people who are spying or members of a terrorist organization."
> – *Journal News* [NY], April 13, 2003

> Before demanding records from a library or bookstore under the PATRIOT Act, he [Corallo] said, "one has to convince a judge that the person for whom you're seeking a warrant is a spy or a member of a terrorist organization."
> – *San Francisco Chronicle*, March 10, 2003

In fact, nothing in Section 215 prevents the FBI from using the provision against ordinary, law-abiding people. As noted above, the FBI cannot invoke Section 215 unless the records it demands are "sought for" an ongoing investigation. It is the FBI itself, however, that determines whether this requirement is met, and in any event the relevance standard certainly does *not* require the FBI to say – let alone convince a judge – that the target of the Section 215 order is a terrorist or spy.

Especially in light of the Attorney General's refusal to disclose information about how new surveillance powers are being used, the government's misleading statements about how those powers *could* be used are exceedingly troubling. The public needs accurate information about the PATRIOT Act.

Misrepresentations about new surveillance powers undermine the public's ability to determine whether the new powers are too broad, whether they are being abused, and whether they should be renewed before they sunset in 2005. The disinformation campaign short-circuits democratic control over government policy.

THE ACLU IS WORKING TO RESTORE CONSTITUTIONAL RIGHTS.

The ACLU is drawing on all of its advocacy tools to fight Section 215.

First, we are filing in late July 2003 a lawsuit to have Section 215 declared unconstitutional and unenforceable. Our legal papers argue that Section 215 violates the Fourth Amendment because it authorizes the FBI to conduct intrusive investigations without probable cause and without notice. We argue that Section 215 also violates the First Amendment because it chills free speech and unjustifiably prevents organizations from disclosing even to innocent people that their privacy has been compromised.
Among the plaintiffs in the suit are:

- **Muslim Community Association of Ann Arbor** (Ann Arbor, Michigan) – a non-profit organization that serves the religious needs of Muslims in and around Ann Arbor. The MCA, which has approximately 1000 regis-

"IN THE BEGINNING, I hesitated to participate in this lawsuit because I feared government retaliation. FBI agents recently singled me out for a visit at home. I am a U.S. citizen, but perhaps they singled me out because of my religion, or because I was active in rallying local communities and civil rights groups to support some of my friends who were imprisoned for minor immigration violations. The visit was not a pleasant experience. The FBI has no right to investigate me or my fellow Arab and Muslim immigrants when we have done nothing wrong. Eventually, I decided to speak out and join this lawsuit because I care about what's happening to the country and to the Constitution."

– **HOMAM ALBAROUDI**, Member, Muslim Community Association of Ann Arbor

tered members, owns and administers a mosque and an Islamic school.

- **American-Arab Anti-Discrimination Committee** (Washington, DC) – a national civil rights organization committed to defending the rights of people of Arab descent. ADC, which was founded in 1980 by former U.S. Senator James Abourezk, is the largest Arab-American grassroots organization in the United States.

- **Arab Community Center for Economic and Social Services** (Dearborn, Michigan) – a human services organization committed to the development of the Arab-American community in all aspects of its economic and cultural life. ACCESS provides a wide range of social, mental health, educational, artistic, employment, legal and medical services.

- **Bridge Refugee and Sponsorship Services** (Knoxville, Tennessee) – an ecumenical, nonprofit organization dedicated to helping refugees navigate the road to United States citizenship. Bridge recruits and trains church sponsors to help refugees create new lives in East Tennessee; and manages refugees' cases until the refugees are eligible to apply for United States citizenship.

- **Council on American-Islamic Relations** (Washington, DC) – a non-profit, grassroots membership organization dedicated to presenting an Islamic perspective on issues of importance to the American public, and to empowering Muslims in the United States through social and political activism. CAIR has chapters nationwide.

Second, the ACLU is actively urging Congress to repeal or amend Section 215. Bills to repeal or at least limit Section 215 have been introduced in both the House and Senate. Other proposed legislation would provide for increased public and Congressional oversight of PATRIOT Act powers. (See www.aclu.org/SafeandFree.)

Finally, as part of a growing grassroots movement, the ACLU is supporting coalitions around the country that are working to pass community resolutions opposing the PATRIOT Act. As this report goes to press, 142 communities in 27 states have passed resolutions opposing the USA PATRIOT Act, and dozens more are preparing to do so. Communities that have adopted resolutions range from the small, such as the North Pole, Alaska and Carrboro, North Carolina, to the very large, such as Philadelphia, Baltimore, Detriot and San Francisco. (For more on community resolutions, see www.aclu.org/resolutions.)

The strength of our democracy depends on our commitment to individual privacy, equality, and freedom of expression. The ACLU is fundamentally committed to protecting those rights. We will not forget the surveillance abuses of the past, or allow a return to the mistakes of that era. We urge you to join us in this important battle for liberty.

OTHER SAFE & FREE REPORTS

Civil Liberties After 9-11: The ACLU Defends Freedom (September 2002)

Insatiable Appetite: The Government's Demand for New and Unnecessary Powers After September 11 (October 2002)

Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society (January 2003)

Freedom Under Fire: Dissent in Post-9/11 America (May 2003)

Independence Day 2003: Main Street America Fights the Federal Government's Insatiable Appetite for New Powers in the Post 9/11 Era (July 2003)

Seeking Truth From Justice: PATRIOT Propaganda – The Justice Department's Campaign to Mislead The Public About the USA PATRIOT Act (July 2003)

J. Edgar Hoover Tactics in the 21st Century: History gives African Americans reason for alarm over new federal police powers (forthcoming September 2003)

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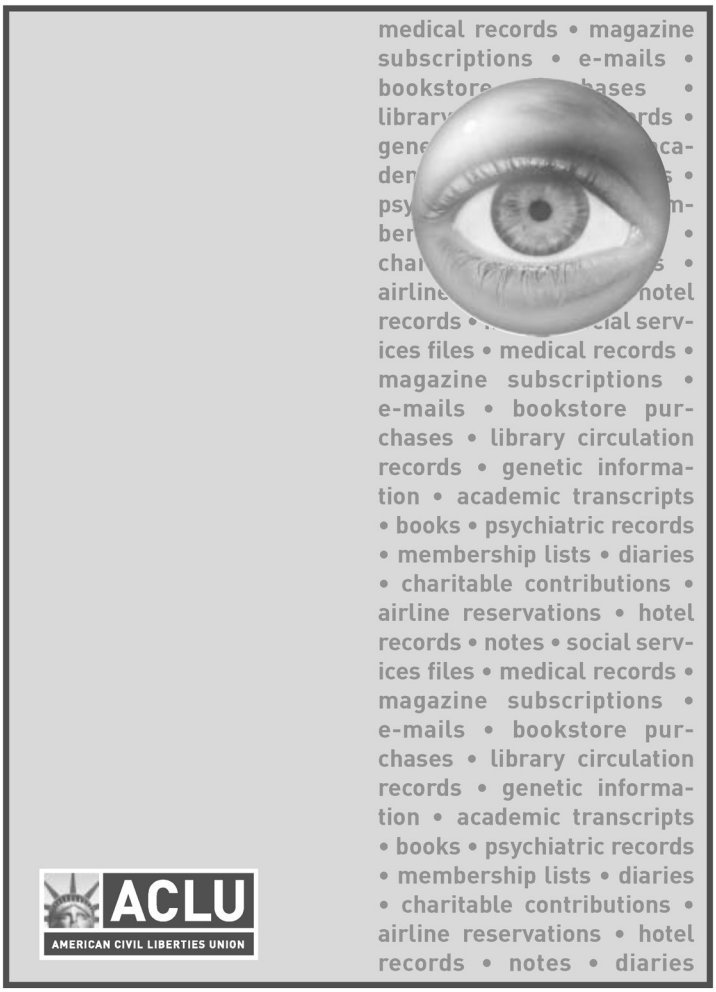
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REPORT, IRENE KAHN, AMNESTY INTERNATIONAL, "DENOUNCE TORTURE, REPORT 2005, FORWARD," MAY 25, 2005

Denounce Torture

AMNESTY INTERNATIONAL

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25 May 2005

Report 2005 - Foreword
By Irene Khan, Secretary General

Last September in a makeshift camp outside El Jeniena in Darfur, Sudan, I listened to a woman describe the attack on her village by government-supported militia. So many men were killed that there were none left to bury the dead, and women had to carry out that sad task. I listened to young girls who had been raped by the militia and then abandoned by their own communities. I listened to men who had lost everything except their sense of dignity. These were ordinary, rural people. They may not have understood the niceties of "human rights", but they knew the meaning of "justice". They could not comprehend why the world was not moved to action by their plight.

It was yet another example of the lethal combination of indifference, erosion and impunity that marks the human rights landscape today. Human rights are not only a promise unfulfilled, they are a promise betrayed.

Take, for instance, the failure to move from rhetoric to reality on economic and social rights. Despite the promises in the Universal Declaration of Human Rights and international human rights treaties that every person shall have the right to an adequate standard of living and access to food, water, shelter, education, work and health care, more than a billion people lack clean water, 121 million children do not go to school, most of the 25 million people suffering from HIV/AIDS in Africa have no access to health care, and half a million women die every year during pregnancy or childbirth. The poor are also more likely to be victims of crime and police brutality.

In September 2000, world leaders adopted the Millennium Declaration, with human rights as a central thread, and a set of Millennium Development Goals, which established some concrete and achievable targets by 2015. They cover issues such as HIV/AIDS, illiteracy, poverty, child and maternal mortality, and development aid. But progress on the Goals has been agonizingly slow and woefully inadequate. They cannot

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be achieved without a firm commitment to equal respect for all human rights -- economic, social and cultural as well as civil and political.

The indifference, apathy and impunity that allow violence against millions of women to persist is shocking. In countries around the world women suffer many forms of violence including genital mutilation, rape, beatings by partners, and killings in the name of honour. Thanks to the efforts of women's groups, there are now international treaties and mechanisms, laws and policies designed to protect women, but they fall still far short of what is required. In addition, there is a real danger of a backlash against women's human rights from conservative and fundamentalist elements.

Women's human rights are not the only casualty of the assault on fundamental values that is shaking the human rights world. Nowhere has this been more damaging than in the efforts by the US administration to weaken the absolute ban on torture.

In 1973 AI published its first report on torture. It found that: "torture thrives on secrecy and impunity. Torture rears its head when the legal barriers against it are barred. Torture feeds on discrimination and fear. Torture gains ground when official condemnation of it is less than absolute." The pictures of detainees in US custody in Abu Ghraib, Iraq, show that what was true 30 years ago remains true today.

Despite the near-universal outrage generated by the photographs coming out of Abu Ghraib, and the evidence suggesting that such practices are being applied to other prisoners held by the USA in Afghanistan, Guantánamo and elsewhere, neither the US administration nor the US Congress has called for a full and independent investigation.

Instead, the US government has gone to great lengths to restrict the application of the Geneva Conventions and to "re-define" torture. It has sought to justify the use of coercive interrogation techniques, the practice of holding "ghost detainees" (people in unacknowledged incommunicado detention) and the "rendering" or handing over of prisoners to third countries known to practise torture. The detention facility at Guantánamo Bay has become the gulag of our times, entrenching the practice of arbitrary and indefinite detention in violation of international law. Trials by military commissions have made a mockery of justice and due process.

The USA, as the unrivalled political, military and economic hyper-power, sets the tone for governmental behaviour worldwide. When the most powerful country in the world thumbs its nose at the rule of law and human rights, it grants a licence to others to commit abuse with impunity and audacity. From Israel to Uzbekistan, Egypt to Nepal, governments have openly defied human rights and international humanitarian law in the name of national security and "counter-terrorism".

Sixty years ago, out of the ashes of the Second World War, a new world order came into being, putting respect for human rights alongside peace, security and development as the primary objectives of the UN. Today, the UN appears unable and unwilling to hold its member states to account.

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In the latest incident of paralysis, the UN Security Council has failed to muster the will to take effective action on Darfur. In this case it was held hostage to China's oil interests and Russia's trade in arms. The outcome is that poorly equipped African Union monitors stand by helplessly and bear witness to war crimes and crimes against humanity. It remains to be seen whether the UN Security Council will act on the recommendation of the International Commission of Inquiry to refer Darfur to the International Criminal Court.

The UN Commission on Human Rights has become a forum for horse-trading on human rights. Last year, the Commission dropped Iraq from scrutiny, could not agree on action on Chechnya, Nepal or Zimbabwe, and was silent on Guantánamo Bay.

At the national level, the ability of the state to protect human rights is in crisis. In some places, armed groups -- warlords, criminal gangs or clan chiefs -- hold sway over people's lives. In many countries, governance has been undermined by corruption, mismanagement, abuse of power and political violence. In a globalized economy, it is increasingly international trade agreements, international financial institutions and big business which are setting the terms. And yet there are few mechanisms for addressing their impact on human rights, and even fewer appropriate systems for accountability.

The time has come for a sober reappraisal of what needs to be done to revive the human rights system and our faith in its abiding values. That is the import of the judgments of the US Supreme Court on Guantánamo detainees and the UK Law Lords on indefinite detention without charge or trial of "terrorist suspects". That is the message of the spontaneous and massive turnout of millions of people in Spain protesting against the Madrid bombings, the popular uprisings in Georgia and Ukraine, and the growing debate on change in the Middle East.

Within the UN too, the appointment of a new High Commissioner for Human Rights in 2004, and the report commissioned by the UN Secretary-General from a High-level Panel on Threats, Challenges and Change, created an environment conducive to reform and renewal of the human rights system. This must be based on shared values and goals, on the rule of law rather than arbitrary power, on global cooperation rather than unilateral adventurism.

The credibility of the international human rights system rests on its ability to reassert the primacy of human rights, and their centrality in tackling the full range of threats to international peace and security. The leadership challenge for the UN and its member states is clear:
Reaffirm and reassert human rights as embodying the common values and universal standards of human decency and dignity, equality and justice. Acknowledge them as the basis for our common security, not a barrier to it.

Resist all efforts to water down the absolute ban on torture and cruel, inhuman or degrading treatment. Torture is unlawful, and morally reprehensible. It dehumanizes the victim and the perpetrator. It is the ultimate corruption of humanity. If the

international community allows this fundamental pillar to be eroded, it cannot hope to salvage the rest.

Condemn unequivocally human rights abuses by those who have taken humanity to new depths of bestiality and brutality by blowing up commuter trains in Madrid, taking school children hostage in Beslan, and beheading humanitarian workers in Iraq, but stand firm on the governments' responsibility to bring them to justice within the rule of law and the framework of human rights. Respect for human rights is the best antidote for "terrorism".

Close the impunity and accountability deficit in human rights. At the national level, a full and independent investigation of the use of torture and other human rights abuses by US officials will go a long way to restoring confidence that true justice has no double standards. At the international level, the International Criminal Court must be supported to become an efficient deterrent for atrocious crimes and an effective lever to advance human rights.

Listen to the voices of the victims, and respond to their cry for justice. UN Security Council members should commit themselves not to use the veto in dealing with genocide, crimes against humanity and war crimes or other large-scale human rights abuses. They should promote an international treaty and other means to control the trade in small arms which kill half a million people every year.

Reform the UN's human rights machinery urgently and radically in order to improve its legitimacy, efficiency and effectiveness. In particular, strengthen the capacity of the UN and regional organizations to protect people at risk of human rights abuse.

Link the achievement of the quantitatively formulated Millennium Development Goals to the qualitative achievement of human rights, particularly economic and social rights, and equality for women. Bring corporate and financial actors into the framework of accountability for human rights.

Protect human rights activists who are increasingly threatened and labelled as subversives. The space for liberal thought is shrinking, and intolerance is on the rise. Be vigilant in protecting civil society, because the pursuit of freedom depends on it as much as on the rule of law, an independent judiciary, free media and elected governments.

Will governments and the UN take up this agenda? Now more than ever human rights activists must play their part, mobilizing public opinion to put pressure on governments and international organizations. In very different ways in the course of 2004, popular mobilization for the victims of the Madrid bombings and the Indian Ocean tsunami showed the power of ordinary people to promote hope over fear, action over inaction and solidarity over indifference. Amnesty International believes in the power of ordinary people to bring about extraordinary change, and with our members and

supporters we will continue in 2005 to campaign for justice and freedom for all. We remain the eternal hope-mongers.

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STATEMENT, ALEXANDRA ARRIAGA, AMNESTY INTERNATIONAL, "STOP OUTSOURCING OF TORTURE," MAY 10, 2005

"War on Terror"

"Stop Outsourcing of Torture"
Press Conference Convened by Congressman Edward Markey
March 10, 2005

Statement by Alexandra Arriaga
Director of Government Relations
Amnesty International USA

Thank you Congressman Markey for your leadership to end the practice of renditions and for your commitment to protecting freedom and human rights.

All governments have a duty to protect the safety of the public, to investigate crime, and to bring those responsible to justice. Amnesty International recognizes that governments must cooperate in their investigations and judicial proceedings where the threats or crimes in question cross national boundaries. But this must take place within the framework of national and international laws and standards, including standards for humane practices.

There is, however, mounting evidence of a wide-ranging US program to transfer detainees to countries outside the rule of law through "extraordinary renditions" that place individuals in direct threat of torture and other forms of cruel, inhuman and degrading treatment. Amnesty International has documented 30 individual cases in a recent report, but estimates in the press suggest the total number of rendered persons may be as high as 150 or more.

Renditions are a form of government cooperation that the US should not be party to. Renditions are immoral, illegal, impractical, and simply wrong. They violate fundamental human rights and international law and they obstruct the search for justice and quest for security. The arrest and detention of suspects should take place in courtrooms, not in clandestine flights: a 'Torture Express' operated by agents of the United States.

It is essential that the United States adopt new safeguards and tighter protections against the transfer of detainees to countries known to engage in torture and other forms of cruel, inhuman and degrading treatment. Diplomatic assurances are sorely insufficient – what country would admit in advance that it intends to break the law and torture its detainees? US officials have already acceded that they are unable to follow up to ensure against electric shock, severe beatings, prolonged sleep deprivation, and

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other forms torture and ill treatment. Independent monitors, such as the International Committee of the Red Cross or organizations such as Amnesty International and others, must be given access to ensure detainees are treated humanely in accordance with US and international law and standards. Violators must be subject to investigation and prosecution by an independent judicial process that meets US and international standards of fairness. And the US government must withdraw the reservations and understanding it placed upon ratifying the Convention Against Torture, and signal to the world its unequivocal support for upholding the treaty obligations.

President Bush, in his inauguration address, stated that "all who live in tyranny and hopelessness can know: the United States will not ignore your oppression, or excuse your oppressors." Sadly, it appears the United States is willing to ignore countries' records of torture when it delivers detainees into their prison cells and when it turns a blind eye to oppressors who torture their captives.

Congressman Markey has called this nefarious practice what it is: "morally repugnant." Many of us believe that the United States must do better and that the country's founders would roll over in their graves to know of such abuse. Congressman Markey, we applaud your initiative, support the principles your bill seeks to address, and look forward to working with you to find effective ways to end renditions and restore American leadership in international human rights.

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AMNESTY INTERNATIONAL, "UNITED STATES OF AMERICA, GUANTANAMO—AN ICON OF LAWLESSNESS," JANUARY 6, 2005

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UNITED STATES OF AMERICA

Guantánamo – an icon of lawlessness[1]

6 January 2005 **AI Index: AMR 51/002/2005**

Imagine this.

Hundreds of US nationals are picked up around the world by a foreign government fighting a "war for national security". The government in question is reacting to evidence that a recent bombing on its territory which left thousands of civilians dead was instigated by a shadowy network based in the United States. The detainees, according to evidence the detaining power says it has but refuses to reveal, are in some way associated with this network. The detainees, a few of them children, are strapped, shackled and blindfolded, into transport planes. Some are forced to urinate and defecate on themselves during the long flights to an island military base. In this offshore prison camp they are held incommunicado in tiny cells, denied access to lawyers, relatives or the courts, and subjected to repeated interrogations and a punitive regime aimed at encouraging their "cooperation". A presidential order announces plans to try some of the detainees in front of executive bodies with the power to hand down death sentences against which there would be no right of appeal to any court.

The months turn into years. Allegations of torture and ill-treatment of the US detainees emerge from the island base, as do reports of psychological deterioration and suicide attempts among the detainees. Interrogation teams are said to have access to the medical files of the detainees in order to help them locate individual weaknesses. The detaining power admits to having authorized interrogation techniques including sleep deprivation, stress positions, isolation, hooding, sensory deprivation and the use of dogs to induce fear. Evidence mounts that these and other techniques have been more widely used than the authorities are willing to admit. It becomes known that the detaining power earlier discussed how its agents could avoid prosecution for torture and war crimes committed during interrogations in the "war for national security".

Some detainees are released back to the USA, appearing to have had no or only very tenuous links to the shadowy network. At every turn, the detaining power continues to resist efforts to have the lawfulness of the hundreds of remaining detentions challenged in court. All the time, it continues to profess its commitment to the rule of law and human rights. Its words are increasingly recognized as empty rhetoric, but some other governments begin to imitate its practices, using the "war for national security" as a pretext for their own repressive conduct.

Would the USA tolerate this treatment of its citizens by another government? Would the international community accept this threat to the rule of law and human rights? Surely not, and yet the USA continues to perpetrate just such abuses in the far from hypothetical Guantánamo Bay prison camp in Cuba, where almost 550 detainees of more than 30 nationalities remain detained without charge or trial. On 11 January 2005, the Guantánamo prison will enter its fourth year. In its more than 1,000 days of executive detentions, Guantánamo has become a symbol of a government's attempt to put itself above the law. The

example it sets is of a world where basic human rights are negotiable rather than universal. Such a world, although built in the name of national security, is dangerous to us all.

The question of lawfulness in relation to Guantánamo can be divided into four categories: the legal limbo of the detainees; their treatment and conditions; secrecy and the suffering of family members; and the planned trials by military commission.

The continuing legal limbo

More than six months after the US Supreme Court ruled that the federal courts can hear appeals from the Guantánamo detainees, it is not because of the slowness of the legal system that hundreds remain held without charge or trial and virtually incommunicado in the naval base. It is the result of a government seeking to drain the Supreme Court ruling of any real meaning and aiming to keep any review of detentions as far from a judicial process as possible.

The US administration responded to the June 2004 decision by establishing the Combatant Status Review Tribunal (CSRT), panels of three military officers whose sole aim is to confirm or reject each detainee's status as a so-called "enemy combatant". This is neither a court of law, nor the "competent tribunal" required by the Third Geneva Convention. Unlike the latter which presumes a detainee to be a prisoner of war until proved otherwise, the CSRT process places the burden on the detainee to disprove his "enemy combatant" status. The detainee does not have access to legal counsel or to secret evidence. Many have boycotted the CSRT process, and to date only two have been released as a result of it, while 230 have been confirmed as "enemy combatants".

Each detainee confirmed as an "enemy combatant" will also have an annual review of his case by an Administrative Review Board (ARB) to assess whether he "continues to pose a threat to the United States or its allies, or whether there are other factors bearing upon the need for continued detention". In December 2004 the Pentagon announced that it had conducted its first ARB. Again, detainees have no access to lawyers or to secret evidence for this administrative review. Evidence extracted under torture or other coercion could be admitted by either body.

Also in December, six months after the US Supreme Court's ruling, the government notified the detainees that they can file *habeas corpus* petitions in federal court. It even gave them the address of a US District Court in which to file them. In this Kafkaesque world of Guantánamo, however, the government has argued to that very same court that the detainees have no basis in constitutional or international law on which to challenge the lawfulness of their detentions. It maintains that review by the Combatant Status Review Tribunal and the Administrative Review Board is more than sufficient due process. Meanwhile, the vast majority of the detainees have still not had access to lawyers.

In Amnesty International's view, international human rights law applies to all the Guantánamo detainees, and as such each and every one of them has the right to full judicial review of his detention and to release if that detention is unlawful – a basic protection against arbitrary arrest, torture and "disappearance". This was always the case for those numerous detainees who were picked up outside the international armed conflict in Afghanistan. However, even those captured in that war – who should have been treated as prisoners of war until a competent tribunal determined otherwise[2] – are now also covered by human rights law because the international conflict in Afghanistan ended more than two years ago and their treatment by the USA remained unchanged by that fact. When the conflict ended, presumed prisoners of war were required to be released or charged and brought to fair trial. Although the administration claims that it is holding the detainees under the laws of war, it has refused to apply those laws as it should have. Previously secret government documents now tell us that the administration refused to apply the Geneva Conventions in order to free up US

interrogators and make their prosecution for war crimes less likely. There is little sign of an apologetic mood within the administration. Indeed, one of the architects of this policy, White House Counsel Alberto Gonzales, has been nominated by President Bush to the post of Attorney General. In his draft statement to the Senate Judiciary Committee for the nomination hearing on 6 January 2005, Alberto Gonzales says that he has a "deep and abiding commitment to the rule of law". He must be held to that pledge.

Treatment of the detainees

The very conditions in which the detainees are held – harsh, isolating and indefinite – can in themselves amount to torture or cruel, inhuman or degrading treatment. There is much additional evidence that numerous detainees in Guantánamo – as well as in Afghanistan, Iraq and elsewhere – have been subjected to direct torture or other cruel, inhuman or degrading treatment during the interrogation or detention process. This situation could be seen as an inevitable outcome where a government believes there are people "who are not legally entitled" to humane treatment, as President Bush suggested in a previously secret memorandum, dated 7 February 2002, on "war on terror" detention policy. Yet no detainee anywhere, not even "killers" or "bad people", as the President has described those held without charge or trial in Guantánamo, can ever fall outside the prohibition on torture and ill-treatment. To suggest otherwise, as this central policy memorandum does, points to a serious gap in a government's understanding of international law and indicates that it views human rights as privileges that can be granted, and therefore taken away, by the state.[3]

Secretary of Defense Donald Rumsfeld, echoing President Bush, has described Guantánamo detainee Mohammed al-Kahtani as "a very bad person". A harsh interrogation plan was approved for this Saudi national. According to recent revelations, Mohammed al-Kahtani was put on a plane, blindfolded in conditions of sensory deprivation, and made to believe that he was being flown to the Middle East. After several hours in the air, the plane returned to Guantánamo and Mohammed al-Kahtani was allegedly put in an isolation cell and subjected to harsh interrogations conducted by people he was encouraged to believe were Egyptian security agents.[4] This is an interrogation technique known in the USA as "false flag" and was one of several methods authorized by Secretary Rumsfeld in April 2003. Another technique promoted by the Pentagon's April 2003 *Working Group Report on Detainee Interrogations in the Global War on Terrorism* is "threatening to transfer to a 3rd country where subject is likely to fear he would be tortured or killed".

In February 2002, following President Bush's decision to reject the application of the Geneva Conventions to those held in Guantánamo, the White House gave assurances that the International Committee of the Red Cross (ICRC) would be able to visit all detainees in private.[5] The ICRC was denied access to Mohammed al-Kahtani during the period of interrogations described above. The ICRC protested such denial of access to a number of detainees in meetings with the Guantánamo authorities in late 2003. Four months later, in a meeting on 2 February 2004, the ICRC was informed that it could still not see one of the detainees "because of military necessity".[6] The detainee in question, reported to be Moroccan national Abdullah Tabarak, was transferred to Morocco in August 2004. In an interview last month, he alleged that he had been tortured and ill-treated in US custody. In Guantánamo, he said that he had been beaten, given forcible injections, and held in a dark cell which has left him with eyesight problems. He said that he suffers from other physical ailments as a result of his confinement, as well as insomnia and nightmares.[7]

It is more than a year since the ICRC made public its concern about the serious deterioration the detention regime was having on the psychological health of the detainees. In November it emerged that it had also protested more direct torture and ill-treatment, adding yet more weight to the allegations of released detainees and others. In heavily redacted

documents released to the American Civil Liberties Union following a Freedom of Information Act lawsuit filed a year earlier, FBI agents have referred to "torture techniques" and "highly aggressive interrogation techniques" being used in Guantánamo. In one email, an FBI agent sends a colleague "an outline of coercive techniques in the military's interviewing tool kit". Of the military's interrogation plan for one particular detainee, the sender writes: "You won't believe it!" Another FBI agent reported seeing a detainee in Guantánamo "sitting on the floor of the interview room with an Israeli flag draped around him, loud music being played and a strobe light flashing". Another tells of having witnessed the use of a dog to intimidate a Guantánamo detainee, who was also subjected to three months of isolation in a cell with 24-hour illumination. The detainee was later witnessed to be displaying conduct "consistent with extreme psychological trauma". In an email, another FBI agent wrote:

> *"Here is a brief summary of what I observed at GTMO. On a couple of occassions (sic), I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defacated (sic) on themselves and had been left there for 18, 24 hours or more. On one occassion (sic), the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the [military police guards] what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion (sic), the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion (sic), not only was the temperature unbearably hot, but 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."*

Such evidence adds weight to earlier allegations made by released detainees. For example, in July 2004, Swedish national Mehdi Ghezali recalled to Amnesty International how:

> *"One prisoner had removed his ID-strap that the prisoners were forced to wear around their wrist. As punishment, the guards shackled both his hands and feet in his cell for more than 10 hours. During this time, the prisoner was not given any food and was not allowed to go to the toilet, although he had to. He could not hold himself. It was very degrading for him."*

Mehdi Ghezali also described to Amnesty International the pain of "short shackling", temperature manipulation, and the use of loud noise and music during interrogations. He said that he was subjected to sleep deprivation, and that Australian detainee Mamdouh Habib had been subjected to sleep deprivation at the end of which "there was blood coming from both his nose and ears." In an affidavit recently made public, another Australian national David Hicks alleges that he has been "deprived of sleep as a matter of policy" and that he and other detainees have been subjected to other forms of torture and ill-treatment in US custody. UK national Moazzam Begg was held in isolation for 600 days.

The administration has yet to denounce such interrogation techniques or detention conditions. In similar vein, Amnesty International has still not received a substantive response from the US authorities to the allegation that a Chinese delegation visited Guantánamo in September 2002 and participated in interrogations of ethnic Uighurs held there. An inside source told the organization that during this time, the detainees were subjected to intimidation and threats, and other torture or ill-treatment, some of it on the instruction of the Chinese delegation. Other detainees, the source has informed Amnesty International, were subjected to

sexual humiliation during interrogations. A former interrogator recently confirmed that female interrogators had sexually harassed detainees.[8]

The administration has continued with its assurances that all detainees in US custody are treated humanely and all allegations of abuse investigated. The evidence is mounting that this is simply false. "They don't use dogs in Guantánamo Bay during the interrogation process and never did", the Senate Armed Services Committee was told in September 2004.[9] The former commander of Guantánamo, Major General Geoffrey Miller, testified on oath that dogs were never used to intimidate detainees at the base. Yet, now FBI agents have added to the allegations of detainees that dogs have been used. For example, FBI agents have reported witnessing sleep deprivation and "the utilization of loud music/bright lights/growling dogs" in interrogations at Guantánamo.

According to a leaked military document, the ICRC raised allegations in a meeting with the Guantánamo authorities in October 2003 that interrogators at the base had had access to the medical files of detainees, that the files were "being used by interrogators to gain information in developing an interrogation plan", and "that there is a link between the interrogation team and the medical team". Major General Miller rejected the allegations.[10] However, in a new article published in The New England Medical Journal of Medicine, two medical doctors write that their own research into "medical involvement in military intelligence gathering in Iraq and Guantánamo Bay has revealed a more troublesome picture":

> *"Not only did caregivers pass health information to military intelligence personnel; physicians assisted in the design of interrogation strategies, including sleep deprivation and other coercive methods tailored to detainees' medical conditions. Medical personnel also coached interrogators on questioning technique...*
>
> *The conclusion that doctors participated in torture is premature, but there is probable cause for suspecting it. Follow-up investigation is essential...".*[11]

On 5 January 2005, US Southern Command announced that it would carry out an internal investigation into the FBI allegations of abuses.[12] In Amnesty International's view, more is needed. There is a need for a full independent commission of inquiry into the USA's detentions in Guantánamo and elsewhere. Such a commission, called for by Amnesty International since May 2004, must have the power to investigate the role of officials in the highest echelons of government, including in the White House and the Office of the Secretary of Defense, and must cover all aspects of the USA's "war on terror" detention and interrogation policy and practices, in all locations.

Secrecy and imprecision as avenues for abuse and suffering

The Pentagon refuses to give precise numbers of detainees held in Guantánamo. The concern is that this could allow secret detainee transfers to take place. In early 2004, for example, approximately seven detainees remained unaccounted for in the official announcements about transfers to and from Guantánamo.[13] In the light of revelations about so-called "ghost detainees" in US custody in Iraq and the continued allegations of secret transfers between the USA and countries with records of torture, there is reason for deep concern in this regard.

A legal motion filed in federal court in November 2004 and declassified on 5 January 2005, renews concern on the case of Australian detainee Mamdouh Habib. The motion begins:

> *"In October, 2001, the Unites States military – in cooperation with the Pakistani and Egyptian Governments – rendered Mamdouh Habib to Egypt, knowing and intending he would be tortured Mr. Habib spent six months in Egyptian custody, where he was subjected to unspeakable brutality. Afterwards, Mr. Habib was returned to United States custody, travelling first to Bagram Air Force Base, then to the U.S. military*

facility at Kandahar, then to Guantánamo Bay, Cuba, where he has been held since May, 2002.

Recently, undersigned counsel learned from press reports that the United States Government is negotiating with Egypt to render Mr. Habib back to that country, where he would once again be tortured."

The motion seeks a restraining order to prevent the feared transfer of Mamdouh Habib to Egypt or the Egyptian authorities.[14] The document details the alleged torture to which Mamdouh Habib was previously subjected in Egypt, including electric shocks, water torture, physical assaults, suspension from hooks, and threats with dogs. It gives details about how US agents were present at his interrogations in Pakistan after his arrest, and during his secret transfer to Egypt. The details echo those given by others who claim to have been subjected to such "rendition". For example, Amnesty International is still awaiting a reply to a letter it sent to the US authorities in August 2004 on the case of Khalid El Masri, a German national of Lebanese origin who alleges that he was secretly flown to incommunicado detention in Afghanistan from Macedonia in early 2004, and that US agents were present during interrogations in secret detention in Kabul.[15] His claims that he was taken to a plane by agents dressed in black, that he had his clothes cut from him with scissors, and that he was made to wear a blue track suit, match the allegations raised in federal court about Mamdouh Habib's previous transfer to Egypt with the involvement of US agents.

Amnesty International has spoken to many relatives of Guantánamo detainees who themselves are in deep distress from the lack of transparency and information about their loved ones. In November 2004, for example, the sister and brother of Kuwaiti detainee Abdullah Al Kandari told the organization of how their parents "are not the same people they were three years ago" because of losing their son to the black hole of Guantánamo. Earlier in the year, the brother of Yemeni detainee Jamal Mar'i related how his mother has developed high blood pressure and sinks into bouts of depression from the strain of not knowing what is happening to the son she has not seen for more than three years. In other contexts, the suffering of the relatives of the "disappeared" has been found by the UN Human Rights Committee to amount to torture or cruel, inhuman or degrading treatment. Similar cruelty is inflicted upon the relatives of people held in indefinite virtual incommunicado detention without charge or trial. It is notable that numerous relatives of the Guantánamo detainees have referred to their loved one as having disappeared.

Military commissions

The fourth category of unlawfulness in relation to the Guantánamo concerns the US administration's continuing efforts to bring selected detainees to trial by military commission. These bodies entirely lack independence from the executive. Set up to obtain convictions on lesser standards of evidence, they can admit secret or coerced testimony. Their verdicts cannot be appealed to any court. Only non-US nationals can be so tried, in violation of the prohibition on the discriminatory application of fair trial rights.

Amnesty International had an observer at the recent pre-trial hearings for the first four detainees charged in preparation for trial by commission. Her observations confirmed the organization's worst fears that this is a system unable to deliver a fair trial. The commission panel's ignorance of the law and the disparity of resources allocated to prosecution and defence team in a process controlled by the executive, were particularly obvious. So too was the low quality of interpreting and translation standards – on several occasions the defence had to request that proceedings be halted because the quality of interpreting was so bad. The commission rejected the defence counsel's attempt to bring in six expert witnesses to explain various aspects of international law and military law. The prosecution asserted that the only law that binds the panel is "commission law", a set of rules and orders developed in the US

Department of Defense. It is shocking that people could face execution after such trials, which clearly fail to meet basic international standards.

Commission proceedings were suspended in November 2004 after a federal judge concluded that those captured in Afghanistan should have been presumed to be prisoners of war, which precluded their trial by military commission. Even if they were found not to be POWs by a competent tribunal, the judge said, the commission rules allowing the use of secret evidence would still violate due process. The administration has appealed to a higher court arguing that the judge's ruling "constitutes an extraordinary intrusion into the Executive's power to conduct military operations". The outgoing Attorney General, presumably referring not only to this judge's ruling, but also that of the Supreme Court in June, condemned what he characterized as a "profoundly disturbing trend" of "intrusive judicial oversight and second-guessing of presidential determinations".

With the US administration showing disdain for its own courts, the international community faces an uphill task to persuade it to change course. The USA should be reminded not only of the various aspects of unlawfulness raised by the Guantánamo detentions, but that this regime also contravenes the USA's National Security Strategy which proclaims that respect for human dignity and the rule of law is the route to security, as well as its National Strategy for Combating Terrorism, which asserts that a world in which such standards are embraced as the norm will be "the best antidote to the spread of terrorism". "This", the latter strategy concludes "is the world we must build today". Instead, the USA built a prison camp which has become an affront to human rights and the rule of law. The international community must redouble its efforts to bring this intolerable situation to an end.

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[1] Amnesty International delivered a shorter version of this text at a hearing on the *Lawfulness of Detentions by the United Sates in Guantánamo Bay* held by the Council of Europe's Committee on Legal Affairs and Human Rights in Paris, France, on 17 December 2004.

[2] Even the US Army's interrogation Field Manual FM 34-52 of 1992 states that "Captured insurgents and other detained personnel whose status is not clear, such as suspected terrorists, are entitled to [Prisoner of War] protection until their precise status has been determined by competent authority".

[3] See *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, AI Index: AMR 51/145/2004, October 2004, http://web.amnesty.org/library/Index/ENGAMR511452004.

[4] *Fresh details emerge on harsh methods at Guantánamo*. New York Times, 1 January 2005.

[5] *Fact Sheet. Status of detainees at Guantánamo*. The White House, 7 February 2002.

[6] *ICRC meeting*, 2 February 2004. http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo02-02-04.pdf.

[7] *Released Moroccan Guantánamo detainee tells Islamist paper of his 'ordeal'*. BBC, 30 December 2004.

[8] *Fresh details emerge on harsh methods at Guantánamo*. New York Times, 1 January 2005.

[9] Major General George Fay. Testimony to Senate Armed Services Committee, 9 September 2004.

[10] See page 94 of *Human dignity denied: Torture and accountability in the 'war on terror'*.

[11] *When doctors go to war*. By M. Gregg Bloche and Jonathan H. Marks. The New England Medical Journal of Medicine, Volume 352:3-6, 6 January 2005, Number 1.

[12] *Southcom investigates abuse allegations at Guantánamo*. United States Southern Command News Release, 5 January 2004.

[13] See page 101-102 of *Human dignity denied: Torture and accountability in the 'war on terror'*.

[14] *Habib v Bush*. Petitioner's memorandum of points and authorities in support of his application for injunctive relief. Civil Action No. O2-CV-1130 (CKK), in the United States District Court for the District of Columbia.

[15] See page 186 of *Human dignity denied: Torture and accountability in the 'war on terror'*.

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UNITED STATES OF AMERICA
Human dignity denied
Torture and accountability in the 'war on terror'

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A report based on Amnesty International's 12-point Program for the Prevention of Torture by Agents of the State

Summary

Then [the guard] brought a box of food and he made me stand on it, and he started punishing me. Then a tall black soldier came and put electrical wires on my fingers and toes and on my penis, and I had a bag over my head. Then he was saying 'which switch is on for electricity?'
Iraqi detainee, Abu Ghraib prison, 16 January 2004[1]

The image of New York's Twin Towers struck by hijacked airliners on 11 September 2001 has become an icon of a crime against humanity. It is tragic that the response to the atrocities of that day has resulted in its own iconography of torture, cruelty and degradation. A photograph of a naked young man captured in Afghanistan, blindfolded, handcuffed and shackled, and bound with duct tape to a stretcher. Pictures of hooded detainees strapped to the floor of military aircraft for transfer from Afghanistan to the other side of the world. Photographs of caged detainees in the United States (US) Naval Base in Cuba, kneeling before soldiers, shackled, handcuffed, masked and blindfolded. Television images of orange-clad shackled detainees shuffling to interrogations, or being wheeled there on mobile stretchers. A hooded Iraqi detainee sitting on the sand, surrounded by barbed wire, clutching his four-year-old son.[2] And the photos from Abu Ghraib – a detainee, hooded, balanced on a box, arms outstretched, wires dangling from his hands with electric torture threatened; a naked man cowering in terror against the bars of a cell as soldiers threaten him with snarling dogs; and soldiers smiling, apparently confident of their impunity, over detainees forced into sexually humiliating poses. The United States of America (USA), and the world, will be haunted by these and other images for years to come, icons of a government's failure to put human rights at its heart.

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[1] Abdou, 16 January 2004. Statement given to US military investigators. Obtained by The Washington Post. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/18170.pdf. This technique is said to be "a standard torture. It's called the 'Vietnam'. But it's not common knowledge. Ordinary American soldiers did this, but someone taught them." Darius Rejali, quoted in *The Roots of Torture*, Newsweek, 24 May 2004.

[2] World Press Photo of 2003. Jean-Marc Bouju, AP. http://www.worldpressphoto.nl/contest/winner.jsp

The struggle against torture and ill-treatment by agents of the state requires absolute commitment and constant vigilance. It requires stringent adherence to safeguards. It demands a policy of zero tolerance. The US government has manifestly failed in this regard. At best, it set the conditions for torture and cruel, inhuman or degrading treatment by lowering safeguards and failing to respond adequately to allegations of abuse raised by Amnesty International and others from early in the "war on terror". At worst, it has authorized interrogation techniques which flouted the country's international obligation to reject torture and ill-treatment under any circumstances and at all times.

The US administration has said that it is "strongly committed" to working with non-governmental organizations "to improve compliance with international human rights standards."[3] President George W. Bush has recently said that the USA "support[s] the work of non-governmental organizations to end torture and assist the victims".[4] With this in mind, Amnesty International seeks to provide a framework in this report by which there can be a full accounting for any torture or cruel, inhuman or degrading treatment by US agents, and to prevent future violations of international law and standards.

Part One gives an overview, describing how the US administration has fallen into an historically familiar pattern of abuse to respond to the "new paradigm" it says has been set by the atrocities of 11 September 2001. The war mentality the government has adopted has not been matched with a commitment to the laws of war, and it has discarded fundamental human rights principles along the way. While there are undoubtedly complex challenges and threats in the current situation, the simple fact is that the USA has stepped onto a well-trodden path of violating basic rights in the name of national security or "military necessity".

Throughout history, torture has often occurred against those considered as "the other", and a second section of Part One traces the thread of dehumanization of detainees in US custody from Afghanistan to Abu Ghraib. A third section in Part One outlines the unequivocal and non-derogable international legal prohibition on torture and cruel, inhuman and degrading treatment. The final section stresses that respect for human rights is the route to security, as the US government itself claims, not the obstacle to security, as appears to be the administration's true belief if its detention and interrogation policies are the yardstick.

Part Two is entitled Agenda for Action, and begins with a reiteration of Amnesty International's call for a full commission of inquiry into all US "war on terror" detention and interrogation practices and policies. While the organization welcomes the recent official investigations that have taken place, it believes that a more comprehensive and genuinely independent inquiry is needed to ensure full accountability and non-repetition of abuse. This commission of experts must have all the necessary powers to carry out such an investigation.

The remainder of Part Two is structured around Amnesty International's *12-point Program for the Prevention of Torture by Agents of the State*. The organization has been

[3] Remarks at Briefing on the State Department's 2002 Country Reports on Human Rights Practices. Secretary of State Colin Powell, Washington, DC, 31 March 2003.
[4] President's statement on the UN International Day in Support of Victims of Torture. White House, 26 June 2004. http://www.whitehouse.gov/news/releases/2004/06/20040626-19.html.

working against torture for more than three decades. In addition to its daily efforts against this most tenacious and pervasive of human rights violations, it has conducted three worldwide campaigns for the abolition of torture, launched in 1972, 1984 and 2000. The 12-Point Program that forms the basis of this report was adopted for the most recent of these campaigns and reflects Amnesty International's key findings on how best to prevent torture.

Under each of the 12 Points, Amnesty International illustrates how the USA has failed to meet basic human rights safeguards, thus opening the door to torture and ill-treatment. Detailed recommendations are given under each Point, with the compilation of more than 60 recommendations provided at the end of the report.

Point 1 of the 12-Point Program is "Condemn Torture". In other words, the highest authorities of every country should demonstrate their total opposition to torture and other cruel, inhuman or degrading treatment or punishment. They should condemn torture and ill-treatment unreservedly whenever they occur. They should make clear to all members of the police, military and other security forces that torture and ill-treatment will never be tolerated.

The report recalls the US administration's repeated claims that it is committed to what it calls the "non-negotiable demands of human dignity", and that it is leading the global struggle against torture. A government's condemnation of torture and other ill-treatment must mean what it says, however. The US administration's condemnation has been paper thin, as shown by the series of government memorandums that have come into the public domain since the Abu Ghraib scandal broke. These documents suggest that far from ensuring that the "war on terror" would be conducted without resort to human rights violations, the administration was discussing ways in which its agents might avoid the international prohibition on torture and cruel, inhuman or degrading treatment. During this time, the government's voice was notable by its absence in the public debate in the USA since 11 September 2001 about whether torture is ever an acceptable response to "terrorism". Such silence may also betray a less than absolute opposition to torture and ill-treatment.

In June 2004, in one of several statements by senior United Nations (UN) officials responding to the US "torture memos", Secretary General Kofi Annan emphasized the absolute prohibition on torture and other cruel, inhuman or degrading treatment. He stressed that the prohibition is binding on all states, "in all territories under their jurisdiction or control", and in times of war as well as peace. He added: "Nor is torture permissible when it is called something else. Euphemisms cannot be used to bypass legal obligations."[5]

There is a tendency, not least amongst the US military, to euphemize aspects of war and violence. Killed and maimed civilians become "collateral damage"; torture and cruel, inhuman or degrading treatment become "stress and duress" techniques; and "disappeared" prisoners become "ghost detainees". Euphemizing human rights violations threatens to promote tolerance of them. In similar vein, there has been a noticeable reluctance among senior members of the US administration to call what happened in Abu Ghraib torture, preferring the term "abuse". Members of an administration that has discussed how to push the

[5] United Nations Press Release SG/SM/9373 OBV/428. 17 June 2004.

boundaries of acceptable interrogation techniques and of how agents could avoid criminal liability for torture might display a particular reticence to call torture by its name.

This reticence, however, is also symptomatic of a tendency by the USA – notwithstanding its pivotal role in the adoption of the Universal Declaration of Human Rights and subsequent international human rights instruments – to reject for itself the standards it so often says it expects of others. The human rights violations which the US government has been so reluctant to call torture when committed by its own agents are annually described as such by the State Department when they occur in other countries. While the State Department reports are positive contributions to the global struggle for human rights, double standards have greatly undermined the credibility of the USA's global discourse on human rights.

The USA's "war on terror" policies show that the prohibition against torture and ill-treatment is not "non-negotiable" as far as the administration is concerned. This is what must change. If a government genuinely opposes torture and ill-treatment, it must act accordingly. From this simple proposition, all 11 other points of the *12-point Program for the Prevention of Torture by Agents of the State* follow.

Impunity allows torture and ill-treatment to thrive. All allegations must be thoroughly investigated, including all deaths in custody (Point 6). Perpetrators of such human rights violations must be brought to justice, preferably in ordinary civilian courts rather than military tribunals as an emerging international consensus now recognizes (Point 7). At the same time, the necessary safeguards must be put and kept in place to prevent any recurrence of torture and ill-treatment. Secret detention must end immediately (Point 3). So too must the use of incommunicado detention, with lawyers, doctors, relatives, and independent monitors granted immediate and continuing access to and information about detainees, and with detainees brought before a judicial authority as soon as possible after arrest (Point 2). There must be a clear delineation between powers of interrogation and detention, with detention conditions fully meeting international standards. Vulnerable detainees, including children and women, should receive particular protections demanded by international law (Point 4). Coerced statements must not be admitted in any trials. Military commissions set up to try "war on terror" detainees, with the power to admit such statements, must be abandoned (Point 8).

Any victims of torture or ill-treatment are entitled to reparations, including compensation for the families of anyone who died as a result of such treatment in custody (Point 10). Training of anyone who comes into contact with detainees is essential, and must include relevant cultural awareness education as well as training in the international prohibition of torture and ill-treatment (Point 9). The numerous conditions the USA attached to its ratifications of international treaties prohibiting torture and other cruel, inhuman or degrading treatment should be withdrawn. It should ratify those treaties and protocols it has not yet ratified (Point 11). In accordance with international human rights law, international security cooperation must rule out the transfer of detainees in conditions or to places where they are at risk of torture or other cruel, inhuman or degrading treatment or punishment (Point 12). US laws must be amended, or reinterpreted, to reflect fully the absolute prohibition on torture and ill-treatment in international law and allow no loopholes, in peacetime, in war, and in the "war on terror," or for anyone, from the foot soldier to the President (Point 5).

On 11 September 2001, President Bush said that "America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world. And no one will keep that light from shining."[6] Three years later, the catalogue of human rights violations alleged or known to have been committed by US agents in the "war on terror" tells a different story. Amnesty International urges the US government to adopt a fundamental change in direction and to ensure that all its policies and practices fully comply with international law. The core message of this report is that the prevention of torture and cruel, inhuman or degrading treatment is primarily a matter of political will.

A brief chronology

11 September 2001 – four US commercial airliners are hijacked. Two are crashed into the World Trade Center in New York, one into the Pentagon and one into a field in Pennsylvania. Almost 3,000 people are killed in this crime against humanity.

7 October 2001 – the USA leads military action against the Taleban government and members of the *al-Qa'ida* network in Afghanistan.

10/11 January 2002 – the first detainees are transferred from Afghanistan to the US Naval Base in Guantánamo Bay, Cuba, in conditions that amount to cruel, inhuman or degrading treatment.

7 February 2002 – the White House announces its decision that the Geneva Conventions do not apply to *al-Qa'ida* suspects captured in Afghanistan, and that neither they nor Taleban members would be eligible for prisoner of war status.

June 2002 – Hamid Karzai appointed as President of interim Afghanistan administration. US forces continue to carry out military operations and detentions in Afghanistan to this day.

20 March 2003 – US-led Coalition forces attack Iraq. On 1 May 2003, President Bush announces that the main combat operations in Iraq are over. A major insurgency against the occupation develops.

28 April 2004 – photographs of torture and ill-treatment of Iraqi detainees by US soldiers in Abu Ghraib prison outside Baghdad are broadcast by CBS News and subsequently around the world.

22 June 2004 – the US administration releases several previously secret memorandums discussing "war on terror" detention and interrogation options "to set the record straight" following leaks.

28 June 2004 – the US Supreme Court rules that the US courts have jurisdiction over the Guantánamo detainees, hundreds of whom have already been held for more than two years without any judicial review, charge, trial or access to legal counsel or relatives.

2001-2004 – The US military has taken more than 50,000 people into custody during its military operations in Afghanistan and Iraq. In Afghanistan, the US has operated some 25 detention facilities, and in Iraq another 17. More than 750 people have been held in Guantánamo. The Pentagon states that 202 have been released or transferred, leaving "approximately 549" in the base by 22 September 2004. An unknown number of detainees have been held in undisclosed locations by the USA or transferred to the custody of other countries.

[6] Statement by the President in his address to the Nation, 11 September 2001.

Part One: Overview

I. A familiar path to torture

Apologists for torture generally concentrate on the classical argument of expediency: the authorities are obliged to defeat terrorists or insurgents who have put innocent lives at risk and who endanger both civil society and the state itself... The accumulated evidence also gives a clear picture of the 'preconditions' for torture... Incommunicado detention, secret detention and 'disappearance' increase the latitude of security agents over the lives and well-being of people in custody.

Amnesty International, *Torture in the Eighties*, 1984

The torture and ill-treatment of Iraqi detainees by US agents in Abu Ghraib prison was – due to a failure of human rights leadership at the highest levels of government – sadly predictable.

"It is a recurring theme in history", said a senior United Kingdom (UK) judge in a criticism of US "war on terror" detentions, "that in times of war, armed conflict, or perceived national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis".[7] Certainly, a glimpse at the history of torture in the 20th century was enough to ring alarm bells following the crime against humanity that was committed in the USA on 11 September 2001. The situation contained some classic ingredients that would demand principled leadership if human rights were not to suffer in the wake of such an atrocity. In the mix was an elusive, ill-defined and demonized enemy; shortcomings in intelligence-gathering; an official interpretation of the situation as new, unique and requiring special measures; and an apocalyptic picture painted by government of a stark moral choice between "good and evil" faced by society and wider "civilization".

Amnesty International wrote to President Bush on 25 September 2001 reiterating its condemnation of the appalling crime of two weeks earlier and its support for efforts to bring the perpetrators to justice in accordance with international human rights standards. The organization urged the President to lead his government "to take every necessary human rights precaution in the pursuit of justice, rather than revenge, for the victims of this terrible crime."[8] The organization regrets that part of the USA's response to the atrocities has been to allow another chapter in the history of torture and cruel, inhuman and degrading treatment to open. Earlier chapters in this history would have been instructive.[9]

In the late 1960s, for example, the Brazilian state faced social unrest as well as violence from small urban guerrilla groups. In the government's view, both economic development and national security were under threat. The authorities took a number of

[7] Guantánamo Bay: The legal black hole. Johan Steyn, 27th F.A. Mann Lecture, 25 November 2003.
[8] Letter to President George W. Bush from Amnesty International Secretary General Irene Khan, 25 September 2001. http://web.amnesty.org/library/Index/ENGAMR511442001.
[9] Examples taken from *Torture in the Eighties*, Amnesty International, 1984, and *Combating torture: a manual for action*, Amnesty International, 2003.

draconian measures, none of which was open to judicial review. The one that had the most direct bearing on the practice of torture was the suspension of the right of *habeas corpus* for anyone charged with crimes against national security.[10] From 1968 to 1973, widespread torture became a feature of the government's campaign against "permanent subversion". On the other side of the continent, the coup in Chile on 11 September 1973 was followed by gross human rights violations. The *Centrál Nacional de Informaciones* (CNI) was the agency most frequently cited as responsible for torture. People detained by, or handed over to, the CNI for interrogation were usually taken to secret detention centres where they could be held incommunicado for up to 20 days. It was during this period that torture was used to obtain information, "confessions", or collaboration. Torture thrives on secrecy.

Also in 1973, faced with a security problem in Northern Ireland, the British government passed emergency legislation. Not only did this relax the rules of evidence for the admissibility of confessions, it also allowed the police to hold those suspected of politically motivated crimes incommunicado for up to three days, raised to seven the following year. In 1976 and 1977 there was a marked increase in allegations of torture and ill-treatment, just as the government was pressing the police for confessions to use in court. A significant factor in the rapid decline in police standards was the failure of government ministers and senior police officers to intervene with interrogators, directly and forcefully, to make it clear that assault and illegal coercion would not be tolerated. The security forces may also have taken the extension of powers granted to them at the expense of the rights of detainees as a signal that the government authorities would tolerate violence towards and coercion of detainees. Torture rears its head when the legal barriers against it are lowered.

From 1987, torture in Israel was effectively legalized. This was made possible because the government and the judiciary, along with much of Israeli society, accepted that the methods of physical and psychological pressure used by the security services were a legitimate means to combat "terrorism". Palestinians, Lebanese and other non-Israeli nationals were seen as "acceptable" victims of torture – and the methods were seen as "acceptable". Torture feeds on discrimination and fear.

Thus the US administration can be seen to have fallen into a familiar pattern since 11 September 2001. Although President Bush said that "this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war," whatever "new thinking" has been done within the administration, the result has been old abuses.[11] They include the denial of *habeas corpus;* the use of incommunicado and secret detention; a pattern of official commentary on the presumed guilt of detainees; the sanctioning of harsh interrogation techniques in the pursuit of "intelligence"; the blurring of the lines between powers of

[10] A writ of *habeas corpus* is a judicial order to a prison official that an inmate be brought to court so that it can be determined if the detention is lawful or release from custody should be ordered.

[11] Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, the Chief of Staff to the President, the Director of Central Intelligence, the Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff. Subject: *Humane treatment of al Qaeda and Taliban detainees.* The White House, 7 February 2002. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf.

detention and interrogation; the setting up of military commissions which could admit coerced evidence; and a selective approach to international human rights and humanitarian law obligations. All contributed to conditions ripe for torture and ill-treatment.

The photographs of torture and ill-treatment of detainees in Abu Ghraib prison did not come out of the blue, but followed numerous allegations of abuse in Afghanistan and Guantánamo Bay raised with the US authorities over the previous two years by the International Committee of the Red Cross (ICRC), Amnesty International and others. When it suited the US government's aims in its build up to the invasion of Iraq, the administration cited Amnesty International's reports on torture in that country.[12] When the alleged abuse involved US agents, its response was denial and disregard for the organization's concerns.

In April 2002, Amnesty International wrote to the administration about allegations of ill-treatment of people in US custody in Afghanistan. It never received a reply to its questions and concerns.[13] Ten months before the Abu Ghraib revelations, the organization raised cases of alleged abuses in Iraq by US forces, including the case of Khreisan Khalis Aballey. This 39-year-old man was arrested by the US military at his home in Iraq on 30 April 2003 with his elderly father. According to the allegations, during his interrogation he was made to stand or kneel facing a wall for a week, hooded, and handcuffed tightly with plastic strips. At the same time a bright light was placed next to his hood and distorted music was playing the whole time. During all this period he was deprived of sleep, though he may have been unconscious for some periods. He reported that at one time a US soldier stamped on his foot and as a result one of his toenails was torn off. When, after seven days he was told he was to be released and told he could sit, he said that his leg was the size of a football. He continued to be held for two more days, apparently to allow his health to improve, and was released on 9 May 2003. His father, who was released at the same time, was held in the cell beside his son, where he could hear his son's voice and his screams. Amnesty International did not receive a response to its concerns on this and other cases.[14]

According to the Fay report, one of the military investigations into Abu Ghraib, when the ICRC made allegations of torture or cruel, inhuman or degrading treatment by US forces in 2003 and 2004, "their allegations were not believed, nor were they adequately investigated".[15] Impunity is the friend of torture.

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[12] *A Decade of Deception and Defiance. Saddam Hussein's Defiance of the United Nations.* The White House, 12 September 2002. http://www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf

[13] *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AMR 51/053/2002, April 2002 (with accompanying letter sent on 10 April 2002 to the President, Vice-President, Secretary of Defense, Secretary of State, Attorney General, and National Security Adviser). http://web.amnesty.org/library/Index/ENGAMR510532002

[14] *Iraq: Memorandum on concerns relating to law and order.* AI Index: MDE 14/157/2003, 23 July 2003. http://web.amnesty.org/library/Index/ENGMDE141572003

[15] Page 64, AR 15-6 Investigation of Intelligence Activities at Abu Ghraib. Conducted by Major General George R. Fay and Lieutenant General Anthony R. Jones. Hereinafter known as the Fay report, with "Jones" page number if from Maj. Gen. Jones's section of the report. http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf

A war mentality without commitment to the laws of war

Prior to 11 September 2001, the USA had "dealt with [terrorist] attacks as primarily a law enforcement matter".[16] This approach changed after the atrocities of that day. President Bush has said he decided that "we were going to war" the moment he heard that airliners had been crashed into the World Trade Center,[17] and early that afternoon he opened a video teleconference meeting with his principal advisers with the words "we're at war".[18] He has characterized the ensuing "war on terror" as a "monumental struggle of good versus evil".[19] The President has maintained this tone, including in speeches to military audiences in his role as Commander-in-Chief.[20]

A war mentality is dangerous for human rights when a government extends the war framework to cover areas that should appropriately be addressed by law enforcement measures, and even then claims that existing laws of war do not cover this "new paradigm". Amnesty International does not believe that the so-called "war on terror" mandates a new legal framework. The territories and the circumstances in which the confrontation with *al-Qa'ida* or others actually takes place determine the applicable legal regime, within the existing framework of international human rights and humanitarian law. The US administration's refusal to recognize this has fed its willingness to countenance the ill-treatment of detainees in the "war on terror".[21]

The global "war on terror" is described by US officials as a conflict of indeterminate but great length.[22] It is a "war" the end of which will presumably be determined, as has the

[16] White House Counsel. Press briefing by White House Counsel Judge Alberto Gonzales, DOD [Department of Defense] General Counsel William Haynes, DOD Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander. 22 June 2004. http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html.

[17] "They had declared war on us, and I made up my mind at that moment that we were going to war". President Bush quoted in *Bush at War*, by Bob Woodward. Simon & Schuster UK Ltd. 2002.

[18] Chapter 10 of the Final Report of the National Commission on Terrorist Attacks Upon the United States (the 9-11 Commission Report). August 2004. http://www.9-11commission.gov/report/index.htm.

[19] Remarks by the President in Photo Opportunity with the National Security Team, 12 September 2001.

[20] For example, in an address to troops in Alaska on 16 February 2002, President Bush described the "war on terror" as "this incredibly important crusade to defend freedom". To applause at the West Point Military Academy in New York on 1 June 2002, he said that: "We are in a conflict between good and evil, and America will call evil by its name". In an address at the US Army War College in Pennsylvania on 24 May 2004, he said: "We did not seek this war on terror, but this is the world as we find it…Our terrorist enemies…seek control of every person, and mind, and soul…We will persevere and defeat this enemy... May God bless our country."

[21] According to an ICRC Legal Adviser, the USA's view that a global international armed conflict is underway "wreaks havoc with a finely tuned and time-honoured balance between the law of armed conflict, human rights and criminal laws, and thus poses grave risks and consequences for human rights and security". Gabor Rona, *'War' doesn't justify Guantánamo*. Financial Times, 1 March 2004.

[22] On 18 September 2001, President Bush said that "this crusade, this war on terrorism, is going to take a while". On 28 June 2004, the US Supreme Court noted that "the national security underpinnings of the 'war on terror'… are broad and malleable" and that "[i]f the Government does not consider this unconventional war won for two generations", then the detention of a person determined by the

fate of so many detainees, by executive decision. There will be no single event to signal its conclusion. President Bush declared one victory achieved on 1 May 2003 when, on the deck of an aircraft carrier off the coast of California, he announced that major combat operations in Iraq were over.[23] However, as the military itself has since pointed out, the US forces on the ground in Iraq "rapidly realized that the war had not ended. They were in a counter-insurgency operation with a complex, adaptive enemy that opposed the rule of law and ignored the Geneva Conventions".[24]

It is tragic that in the "war on terror", the USA has itself undermined the rule of law. Its selective disregard for the Geneva Conventions and international human rights law has contributed to torture and ill-treatment. The presidential decision that none of the detainees captured in the international armed conflict in Afghanistan would be eligible for prisoner of war status, and not to bring any such detainee before a "competent tribunal" to determine status as required by Article 5 of the Third Geneva Convention, contradicted the US Army's own doctrine.[25] The ICRC – the most authoritative body on the provisions of the Geneva Conventions – disagreed with the presidential decision.[26]

The decision to reject the applicability of the Geneva Conventions was in line with the many public messages sent by the administration that the "war on terror" would be waged according to new rules and that those captured during this global "war" could be treated differently. Detainees have even been categorized differently, only adding to the risk that they would be perceived by their guards or interrogators as deserving less than basic protections. Those taken into US custody have been variously classified, beyond previous US military doctrine, as "Enemy Combatant", "Under-privileged Enemy Combatant", "Security Internee", "Criminal Detainee", "Person Under US Forces Control", and "Low Level Enemy Combatant".[27] As the UN Special Rapporteur on torture recently pointed out, however, "although the status of detainees may remain unclear, there is no uncertainty as to the

executive to be an 'enemy combatant' "could last for the rest of his life". (*Hamdi v. Rumsfeld*). Deputy Secretary of Defense Wolfowitz has said that the "war on terrorism" is "not something we will win in three years, or eight years, or perhaps even decades". American Forces Information Service, News Article, 8 September 2004.

[23] Under a banner reading "mission accomplished", President Bush proclaimed the invasion and occupation of Iraq as a victory in the "war on terror": "The battle of Iraq is one victory in a war on terror that began on September 11, 2001"; "The liberation of Iraq is a crucial advance in the campaign against terror." *President Bush Announces Major Combat Operations in Iraq Have Ended.* 1 May 2003.

[24] Fay report (Jones, page 8), *supra.* note 15.

[25] The US Army's interrogation Field Manual, FM 34-52, (1992) states: "Captured insurgents and other detained personnel whose status is not clear, such as suspected terrorists, are entitled to [Prisoner of War] protection until their precise status has been determined by competent authority".

[26] "[There are] divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status… The ICRC remains firmly convinced that compliance with international humanitarian law in no manner constitutes an obstacle to the struggle against terror and crime". ICRC press release, 9 February 2002.

[27] *Detainee Operations Inspection.* Department of the Army Inspector General, 21 July 2004. http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf

international obligations, standards and protections that apply to them, the prohibition of torture being applicable to all individuals without exception and discrimination, regardless of their legal status."[28] The ICRC stated in September 2004 that, based on its "decades of experience in visiting places of detention in vastly different, rapidly changing environments", the organization's consistent finding is that "only by determining and adhering to a clearly established legal framework does one prevent arbitrariness and abuse".[29]

The panel appointed in May 2004 by Secretary of Defense Donald Rumsfeld to review the Pentagon's detention operations (the Schlesinger Panel) pointed out that there was "a failure to plan for a major insurgency" in Iraq and "improvisation was the order of the day".[30] The Schlesinger and military inquiries have stressed that there was a serious under-resourcing of detention operations in Iraq which contributed to abuses. According to Schlesinger, in October 2003 Abu Ghraib, the largest of the US detention facilities in Iraq, had a detainee population of up to 7,000 and a guard force of about 90 personnel. A Schlesinger Panel member has said that the "extreme lack of resources [and] the policy failure at all levels to assure a clear and stable set of rules for treatment and interrogation further opened the door to abuse", adding that this situation was "compounded by inadequate training."[31] Clear policy and effective training become especially crucial at moments of high emotion and high pressure, which can be predicted to be part of any war – as soldiers react to their fellow colleagues being killed or wounded, and interrogators are put under pressure to gain intelligence about the enemy. There is surely responsibility at the highest levels of government – where the decision to go to war is taken – when there is a failure to plan for detention operations, or to ensure an appropriate response to evidence of torture by its troops.

The immediate response of President Bush and other officials to the torture photographs was to claim that the problem was restricted to Abu Ghraib and a few wayward soldiers. On 22 June 2004, after the leaking of earlier government memorandums relating to "war on terror" detention and interrogation options suggesting that torture and ill-treatment had been anticipated, the administration took the step of declassifying selected documents to "set the record straight". At a press briefing, the White House Counsel explained how after 11 September 2001, the US administration had had to ask questions such as "What is the legal status of individuals caught in this battle? How will they be treated? To what extent can those detained be questioned to attain information concerning possible future terrorist attacks? What are the rules?" He continued: "As we debated these questions, the President made clear that he was prepared to protect and defend the United States and its citizens, and he would do so vigorously, but as the documents we are releasing today show, that he would do so in a manner consistent with our nation's values and applicable law, including our treaty obligations..."[32] It was the same White House Counsel who two and a half years earlier had

[28] UN Doc. A/59/324, para. 22. 23 August 2004.
[29] *ICRC reactions to the Schlesinger Panel Report*, 8 September 2004.
[30] Final Report of the Independent Panel to Review DoD Detention Operations. August 2004, [hereinafter, Schlesinger report]. http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf
[31] Dr Harold Brown, written testimony to the Senate Armed Services Committee, 9 September 2004.
[32] Press briefing by White House Counsel et al., 22 June 2004, *supra*, note 16.

drafted a memorandum to President Bush suggesting that determining that the Geneva Conventions did not apply to those captured in Afghanistan would free up US interrogators and make their prosecution for war crimes less likely.[33] That memorandum was not one released by the administration. Indeed, at the 22 June press conference, the White House Counsel made clear that the administration's release of its documents "should not be viewed as setting any kind of precedent". It has kept to this line. Of 23 additional documents requested by the Senate Judiciary Committee, only four had been provided by the administration by 13 October 2004.[34]

If one were to single out one sentence from one of the declassified memorandums that calls into question the administration's stated commitment to its international legal obligations, it might be the following: "Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, *including those who are not legally entitled to such treatment*" (emphasis added).

No detainee can fall outside the prohibition on torture or cruel, inhuman or degrading treatment. To suggest otherwise, as this line does, points to a serious gap in a government's understanding of international law and indicates that it views fundamental human rights as privileges that can be granted, and therefore taken away, by the state. The sentence in question – repeated aloud by the White House Counsel at the June 2004 press briefing with no apparent recognition of the disturbing message contained in it – was in a memorandum signed by President Bush on 7 February 2002, classified as secret for 10 years, and distributed to the main office-holders in his administration.[35] According to the White House Counsel, this document is the "most important" of those released by the administration.

The White House, which maintains that the USA is "steadfastly committed to upholding the Geneva Conventions",[36] has "categorically reject[ed] any connection" between the decision to reject the application of the Geneva Conventions to detainees in Afghanistan and Guantánamo and the torture committed in Abu Ghraib prison in Iraq.[37] Yet its selective disregard for the Geneva Conventions has been part of a policy which has at best sown confusion about interrogation rules among its armed forces, and at worst given a green light to torture or other cruel, inhuman or degrading treatment. Official investigations have concluded that versions of interrogation techniques developed for use against detainees in Afghanistan and Guantánamo, unprotected by the Geneva Conventions, later emerged in Iraq, where the Conventions were held by the US Government to apply.

It is clear that the decision to reject the protections of the Geneva Conventions in the "war on terror" outside Iraq has infected official thinking in the USA. Following the

[33] Memorandum for the President from Alberto R. Gonzales. *Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban.* Draft 25 January 2002. http://msnbc.msn.com/id/4999148/site/newsweek/. In this report, Amnesty International uses the spellings *al-Qa'ida* and Taleban. Different spellings reflect US government's or others' usage.
[34] For a list of the documents requested, see http://leahy.senate.gov/press/200406/062204c.html.
[35] Presidential memorandum, 7 February 2002. *supra*, note 11.
[36] President's statement, 26 June 2004, *supra*, note 4.
[37] White House Counsel, in press briefing, 22 June 2004. *supra*, note 16.

publication of the Schlesinger report, for example, the ICRC pointed out that it contained "a number of inaccurate assertions, conclusions and recommendations" on the role of the ICRC and about the laws of armed conflict.[38] For example, the Schlesinger Panel suggests that the Fourth Geneva Convention is "not sufficiently robust and adequate" for the detention of "terrorist" suspects, reminiscent of the memorandum drafted by the White House Counsel for President Bush in January 2002 which characterized provisions of the Geneva Conventions as "quaint", "undefined" and "obsolete".[39] Secretary of Defense Rumsfeld echoed this more recently when he said "Some will say, well… in my view it is mental torture to do something that is inconvenient in a certain way for a detainee. Like standing up for a long period or some other thing that someone else might say is not in any way abusive or harmful. And there's no way to get everybody to agree to all that because when Geneva was prepared and agreed upon, it didn't go to that level of detail."[40]

In response to the findings of Secretary Rumsfeld's appointees on the Schlesinger Panel, the ICRC pointed out that the Fourth Geneva Convention allows internment for imperative security reasons, as well as prosecution, and does not prohibit interrogation. What it does prohibit – a prohibition apparently seen as an obstacle by the US administration – is inhumane treatment. The ICRC added that "the Panel's suggestion that because Geneva Convention IV would not be 'sufficiently robust' it could be waived by decision of individual State parties is a dangerous premise. To accept this argument would mean creating an exception that risks undermining all the humanitarian protections of the law."

Echoing President Bush's central premise in the "war on terror" – that this is a "new paradigm" that "requires new thinking in the law of war" – the Schlesinger Panel recommended that:

> "*The United States needs to redefine its approach to customary and treaty international humanitarian law, which must be adapted to the realities of the nature of conflict in the 21st Century. In doing so, the United States should emphasize the standard of reciprocity… The Panel believes the International Committee of the Red Cross, no less than the Defense Department, needs to adapt itself to the new realities of conflict…*"

The ICRC responded that the organization indeed "continues to initiate or participate in debates about how the Geneva Conventions can best be applied in contemporary situations of armed conflict". It continued:

> "*Nevertheless, a decision to deviate unilaterally from these universally established standards should not be taken lightly. To date, there has been little evidence presented that faithful application of existing law is an impediment in the pursuit of those who violate the same law. Moreover, the standard of reciprocity cannot apply to fundamental safeguards such as prohibition on torture without accepting the risk*

[38] ICRC reactions to the Schlesinger Panel Report. 8 September 2004.
[39] Memorandum for the President from Alberto R. Gonzales. 25 January 2002, *supra*, note 33.
[40] *Secretary Rumsfeld media availability en route to Baghdad.* Department of Defense, 13 May 2004.

of destroying not only the principle of law, but also the very values on which it is built".[41]

In similar vein, the most recent version (1992) of the US Army Intelligence Interrogation Field Manual (FM 34-52) states:

> "[The Geneva Conventions] *and US policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the US Army. Acts in violation of these prohibitions are criminal acts punishable under the* [Uniform Code of Military Justice]...
>
> "*Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It also may place US and allied personnel in enemy hands at a greater risk of abuse by their captors. Conversely, knowing the enemy has abused US and allied* [prisoners of war] *does not justify using methods of interrogation specifically prohibited by the* [Geneva Conventions] *and US policy*."

The Schlesinger Panel noted that the Legal Advisor to the Chairman of the Joint Chiefs of Staff and "many service lawyers" had been among those who, in late 2001 and early 2002, had been concerned that rejecting the Geneva Conventions would "undermine the United States military culture which is based on a strict adherence to the law of war".[42] Their fears, it seems, have been realized.

Old arguments to justify torture: the concept of 'necessity'

In its first major report on torture three decades ago, Amnesty International wrote: "Those who consciously justify torture…rely essentially on the philosophic argument of a lesser evil for a greater good. They reinforce this with an appeal to the doctrine of necessity – the existential situation forces them to make a choice between two evils… The usual justification posits a situation where the 'good' people and the 'good' values are being threatened by persons who do not respect 'the rules of the game', but use ruthless, barbaric, and illegal means to achieve their 'evil' ends."[43]

The concept of "necessity" in relation to torture or ill-treatment has been raised in different ways by the US administration in the context of the "war on terror". Having taken the decision not to apply the Geneva Conventions to those held in Afghanistan and Guantánamo Bay – people whom he has described as "bad people" who "don't share the same values we share"[44] – President Bush sought to dispel concern about the treatment of detainees

[41] ICRC reactions to the Schlesinger Panel Report. 8 September 2004.
[42] Schlesinger report, page 34, *supra*, note 30.
[43] Page 23, *Report on Torture*. Amnesty International, 1973. Second edition 1975.
[44] Remarks by the President to the travel pool. 20 March 2002, and Press Conference of President Bush and Prime Minister Tony Blair. White House, 17 July 2003.

by saying that they would be treated "in a manner consistent with the principles of Geneva".[45] This has always been qualified, however, with a loophole for torture, namely the phrase "to the extent appropriate and consistent with military necessity".[46]

The legal concept of military necessity cannot lawfully be used to override the prohibition on torture. What happens, however, if a government willing to violate this principle perceives "military necessity" to require the torture or ill-treatment of a detainee, especially if it believes that there can be some detainees who "are not legally entitled to [humane] treatment"? One such detainee would appear to be Saudi national Mohammed al-Kahtani, held without charge or trial in Guantánamo on suspicion of being involved in the 11 September 2001 conspiracy and considered to be resistant to standard interrogation methods. An interrogation plan was approved for Mohammed al-Kahtani – described by Secretary Rumsfeld as "a very bad person"[47] – which "outlines the military necessity for doing this [harsh interrogation]".[48] This followed a request made on 11 October 2002 by military intelligence at Guantánamo for approval of techniques that went beyond normal army doctrine. Techniques including stress positions, sensory deprivation, hooding, stripping, and the use of dogs to inspire fear, were requested and were approved by Secretary Rumsfeld in December 2002 "as a matter of policy". Blanket approval was not given for other requested techniques such as death threats, exposure to cold weather or water, and inducing the perception of suffocation, but the Pentagon's General Counsel suggested that these were "legally available" and, according to a 15 January 2003 memorandum from Secretary Rumsfeld could be requested on a case-by-case basis, presumably if "military necessity" was considered to demand such techniques.[49] A 16 April 2003 memorandum signed by Secretary Rumsfeld, which is believed to remain in force, appears to allow for the possibility of these and any "additional interrogation techniques" to be requested on a case-by-case basis.[50]

The authorities have invoked "military necessity" to prevent the ICRC from meeting with certain detainees held in Guantánamo. In February 2002, following President Bush's decision to reject the application of the Geneva Conventions to those held in Guantánamo, the White House gave assurances that the ICRC would be able to visit all detainees in private.[51] According to leaked military documents, however, at a meeting with the Guantánamo authorities in October 2003, the ICRC raised the cases of four detainees who it had been unable to visit. It was informed by the camp commander that three of them were "off limits…

[45] A policy which the Schlesinger Panel found "vague and lacking". Schlesinger report, page 81.
[46] Presidential memorandum, *supra*, note 11. See also Rumsfeld memorandum to Joint Chiefs of Staff, 19 January 2002, http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf.
[47] Interview with David Frost (BBC). Department of Defense news transcript, 27 June 2004.
[48] Department of Defense Deputy General Counsel. Press briefing, 22 June 2004, supra, note 16.
[49] Action memo. For Secretary of Defense, from William J. Haynes, General Counsel. *Counter-Resistance Techniques*. 27 November 2002. Approved 2 December 2002. http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf.
[50] Memorandum for the Commander, US Southern Command, 16 April 2003. *Counter-Resistance Techniques in the War on Terrorism*. http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf
[51] *Fact Sheet. Status of detainees at Guantanamo*. The White House, 7 February 2002.

due to military necessity".[52] Four months later, in a meeting on 2 February 2004, the ICRC was informed that it could still not see one of the detainees "because of military necessity".[53]

Under Article 143 of the Fourth Geneva Convention, ICRC visits to civilian internees may be denied "for reasons of imperative military necessity", but "only as an exceptional and temporary measure". In Iraq in January 2004, the US authorities invoked "military necessity" when they refused to grant the ICRC access to eight detainees held in Abu Ghraib. According to the Fay report, one of the eight detainees, a Syrian national, was at that time held in a tiny dark cell without windows, toilet or bedding. The use of "extended solitary confinement in dark and extremely small" cells was one of the torture techniques used under the government of Saddam Hussein that the USA cited in its build up to the invasion of Iraq.[54]

The inhumane treatment of this Syrian detainee, facilitated by the invocation of "military necessity", was not limited to solitary confinement in appalling conditions. Around 18 December 2003, he was abused and threatened with dogs. According to the military, there is a photograph of him kneeling on the floor with his hands tied behind his back, while an unmuzzled dog is snarling a few feet from his face. During an ICRC visit in mid-March 2004, the organization's delegates were again denied access to him, and eight other detainees, on the grounds of "military necessity". In January and March 2004, the ICRC questioned the "exceptional and temporary" nature of the denial of access. By the time of its March visit, the Syrian detainee had been under incommunicado interrogation for four months.[55]

Another variation on the concept of "necessity" in relation to torture arose in the now declassified government communications – including in an August 2002 Justice Department memorandum to the White House, and again in an April 2003 Pentagon report *on* "war on terror" interrogations.[56] Both contend that US agents accused of torture might evade criminal liability by arguing the defence of "necessity". For example, they state that "any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing [a terrorist] attack". This crude "lesser evil" approach echoes the moral argument behind the "torture warrant" system proposed by Harvard law professor Alan Dershowitz – the idea that judges could approve torture for use against detainees believed to have information about future terrorist attacks, part of a public debate that the administration has failed to challenge (see Point 1.4).

The administration's previously secret memorandums discussed ways that US agents might escape criminal liability if accused of torture and explicitly argued that the President, as

[52] Department of Defense Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03*. http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf.
[53] *ICRC meeting*, 2 February 2004. http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo02-02-04.pdf. The detainee in question is reported to be Moroccan national Abdallah Tabarak. A *look behind the 'wire' at Guantánamo*. Washington Post, 14 June 2004.
[54] *A Decade of Deception and Defiance*, *supra*, note 12.
[55] Fay report (pages 66 and 86), *supra*, note 15.
[56] *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 4 April 2003 (hereinafter Pentagon Working Group report). http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf

Commander-in-Chief of the armed forces, could authorize torture. In suggesting very narrow definitions of torture and that US agents could also get away with employing cruel, inhuman and degrading interrogation techniques, the memorandums took a deeply regressive approach to international standards, even as the administration continued to portray itself in public as leading the global struggle against torture. Its approach represents an attack on fundamental values enshrined in international law developed over the past half century or more. It directly contravenes the position of the international community of nations that:

> "*No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.*"[57]

The administration claimed that the declassified documents "were circulated among lawyers and some Washington policymakers only", as if that makes their contents acceptable, and that they "never made it to the hands of soldiers in the field, nor to the President". [58] However, the administration's lack of a clear and consistent message that the *international* prohibition on torture and cruel, inhuman or degrading treatment would be strictly respected at all times and under all circumstances, opened the door to abuse.

Moreover, General Paul Kern, who oversaw the Fay investigation, has said that the debate on interrogation policies within official circles "found its way into the hard drives of the computers that we found in [Abu Ghraib] prison". He pointed out that "those policies were being debated while we were asking soldiers to conduct interrogations. And so they were seeking to find the limits of their authority." At the same time, the same soldiers were under pressure to produce intelligence. "We need to be crisp and clear in our delivery of orders to these people", the General concluded, "so that they know what the rules are".[59]

The White House Counsel said that President Bush "has given no order or directive that would immunize from prosecution anyone engaged in conduct that constitutes torture. All interrogation techniques actually authorized have been carefully vetted, are lawful, and do not constitute torture".[60] Yet the administration has sanctioned interrogation techniques that, even if each of them did not amount to torture in themselves, have done so in combination, and in any event constituted cruel, inhuman or degrading treatment equally prohibited under

[57] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 3452, 9 December 1975. Article 5 of the Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly in 1979, similarly states: "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification for torture or other cruel, inhuman or degrading treatment or punishment."
[58] White House Counsel, in press briefing, 22 June 2004, *supra*, note 16.
[59] Oral testimony to the Senate Armed Services Committee, 9 September 2004.
[60] White House Counsel, in press briefing, 22 June 2004, *supra*, note 16.

international human rights and humanitarian law. By their action as well as inaction, the government set a climate in which torture was more likely to occur. Even today's limited knowledge of the role of the administration suggests, at the very least, a significant degree of executive "acquiescence" – to use the language of Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture) – in the torture and ill-treatment that has been alleged.

The memorandums have caused deep international concern, with senior UN officials seeing the need to reiterate the absolute prohibition on torture and ill-treatment. Referring to the US administration's documents, the UN High Commissioner for Human Rights has stressed: "There can be no doubt that the prohibition against torture and cruel, inhuman or degrading treatment or punishment is non-derogable under international law…Yet we find, remarkably, that questions continue to be raised about this clear dictate of international law, including at high levels of government".[61] The UN Special Rapporteur on torture has written:

> "*Legal arguments of necessity and self-defence, invoking domestic law have recently been put forward, aimed at providing a justification to exempt officials suspected of having committed or instigated acts of torture against suspected terrorists from criminal liability. The condoning of torture is per se a violation of the prohibition on torture… A head of State, also in his or her capacity as commander-in-chief, should therefore not authorize his or her subordinates to use torture, nor to guarantee immunity to the authors, co-authors and accomplices to torture. The argument that public officials have used torture having been advised by lawyers and experts that their actions were permissible is not acceptable either. No special circumstance may be invoked to justify a violation of the prohibition on torture for any reason, including an order from a superior officer or a public authority.*
>
> "*The Special Rapporteur has recently received information on certain methods that have been condoned and used to secure information from suspected terrorists. They notably include holding detainees in painful and/or stressful positions, depriving them of sleep or light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, depriving them of clothing, stripping detainees naked and threatening them with dogs. The jurisprudence of both international and regional human rights mechanisms is unanimous in stating that such methods violate the prohibition on torture and ill-treatment.*"[62]

Not just a few 'bad apples'

By September 2004, four months after the Abu Ghraib photographs came to light, the administration's theory that the problem was restricted to Abu Ghraib and a few aberrant soldiers had been debunked. Indeed, on 8 September 2004, eight retired US generals and

[61] *Security under the rule of law.* Address of Louise Arbour, UN High Commissioner for Human Rights to the Biennial Conference of the International Commission of Jurists (Berlin). 27 August 2004.
[62] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Forty-ninth session of the General Assembly. UN Doc A/59/324, 23 August 2004.

admirals wrote to President Bush noting that "no fewer than a hundred criminal, military, and administrative inquiries have been launched into apparently improper or unlawful US practices related on detention and interrogation. Given the range of individuals and locations involved in these reports, it is simply no longer possible to view these allegations as a few instances of an isolated problem".[63] A day after this letter, the Senate Armed Services Committee was told that there might have been as many as 100 "disappearances" in US custody in Iraq, prisoners hidden from the ICRC at the behest of the Central Intelligence Agency (CIA).[64] At least one of these detainees died in custody, one of numerous deaths in US detention facilities in Iraq and Afghanistan since the "war on terror" began. The death in US custody in Gardez in Afghanistan in March 2003 of a young Afghan soldier, 18-year-old Jamal Naseer, allegedly after he and seven other detainees were tortured over a two-week period, has only come to light in recent weeks and raises further questions about the real extent of the abuses and the adequacy of official investigations into them (see Point 6.2).

On 25 August 2004, the Fay report revealed that 54 military intelligence, military police, medical personnel and civilian contractors had "some degree of responsibility or complicity in the abuses that occurred at Abu Ghraib", including seven soldiers already charged.[65] It found "failures of leadership…, failures to follow our own policy, doctrine and regulations", as well as confusion over which interrogation techniques were allowed in which theatre of operation.[66] On 24 August, the Chairman of the Schlesinger Panel, former Secretary of Defense James Schlesinger, had revealed that there had been approximately 300 recorded cases of alleged abuse in Afghanistan, Guantánamo and Iraq, "many of them beyond Abu Ghraib. So the abuses were not limited to a few individuals".[67] Another of the Schlesinger Panel members, former Secretary of Defense Harold Brown, has suggested that a degree of responsibility for "failure to provide adequate resources to support the custodial and intelligence requirements throughout the theater, and for the confusion about permissible interrogation techniques extend[s] all the way up the chain of command to include the Joint Chiefs of Staff and the Office of the Secretary of Defense".[68]

The Schlesinger Panel, however, was not critical of the interrogation techniques *per se*, just of the failure to prevent their transfer from Afghanistan and Guantánamo to Iraq. Chairman Schlesinger claimed: "In the conditions of today, aggressive interrogation would seem essential", and "what constitutes 'humane treatment' lies in the eye of the beholder".[69] Any tolerance for abusive techniques on the part of the investigative body with the widest

[63] General David M. Brahms, General James Cullen, General John L. Fugh, General Robert Gard, Admiral Lee F. Gunn, General Joseph Hoar, Admiral John D. Hutson, General Richard Omeara. See www.humanrightsfirst.org/us_law/PDF/detainees/Military_Leaders_Letter_President_Bush_final.pdf
[64] General Paul Kern, oral testimony to the Senate Armed Services Committee, 9 September 2004.
[65] Fay report, page 8-9, *supra*, note 15.
[66] General Paul Kern, oral testimony to the Senate Armed Services Committee, 9 September 2004.
[67] Press conference with members of the Independent Panel to Review Department of Defense Detention Operations (Schlesinger Panel). Department of Defense News Transcript, 24 August 2004.
[68] Dr Harold Brown, written testimony to Senate Armed Services Committee, 9 September 2004.
[69] Written statement of James Schlesinger to the Senate Armed Services Committee, 9 September 2004.

remit of the reviews conducted since the Abu Ghraib scandal, and the one promoted by the government as the most independent of these investigations, is cause for serious concern.

It was also clear that on the question of accountability the Schlesinger Panel took a limited view. Former Secretary of Defense Harold Brown has suggested that in the case of high-level administration officials, punishment was not an option and that the matter of their accountability rests with the electorate at election time.[70] James Schlesinger suggested that the resignation of the Secretary of Defense "would be a boon to all of America's enemies" and that "his conduct with regard to [the issue of interrogation policy] has been exemplary".[71] The other panel members, retired General Charles Horner and former member of Congress, Tillie Fowler, agreed. This was consistent with the position Tillie Fowler had taken in an interview before the panel had begun its work, in which she had made it clear that Secretary Rumsfeld was not to be the focus of their review. Referring to the Abu Ghraib revelations, she was quoted as saying: "The Secretary is an honest, decent, honourable man, who'd never condone this type of activity. This was not a tone set by the Secretary."[72] Yet in December 2002 Secretary Rumsfeld authorized stripping, isolation, hooding, stress positions, sensory deprivation, and the use of dogs in interrogations. In November 2003, he in effect authorized a "disappearance" by ordering military officials in Iraq to keep a detainee off any prison register (see Point 3.1). In international human rights terms, his conduct, and that of the administration as a whole, has been far from exemplary. Indeed, he and the administration have authorized human rights violations.

II. Human dignity denied: torture or ill-treatment of the 'other'

Make no mistake: every regime that tortures does so in the name of salvation, some superior goal, some promise of paradise. Call it communism, call it the free market, call it the free world, call it the national interest, call it fascism, call it the leader, call it civilisation, call it the service of God, call it the need for information; call it what you will, the cost of paradise, the promise of some sort of paradise… will always be hell for at least one person somewhere, sometime.

Ariel Dorfman, Chilean writer, May 2004[73]

Moazzam Begg, a dual UK/Pakistan national, was abducted in January 2002 from Pakistan by US agents and taken to the US air force base in Bagram in Afghanistan where he claims to

[70] "To take the highest level, take the level of the Secretary of Defense, I don't think that you can punish somebody, demand resignation, on the basis of some action, an individual action, by somebody far down the chain. I think at that level, the decision has to be made on the basis of broad performance. And indeed at the very highest level, it's made at election time… The Secretary of Defense has to decide whether he's lost confidence in his under-secretaries or his assistant secretaries on the basis of their performance. And the electorate has to decide on the basis of its confidence at election time". Oral testimony to the Senate Armed Services Committee, 9 September 2004.

[71] Press conference with members of the Schlesinger Panel, supra, note 67.

[72] Wide gaps seen in US inquiries on prison abuse, New York Times, 6 June 2004.

[73] *Are there times when we have to accept torture?* Ariel Dorfman, The Guardian (UK), 8 May 2004.

have been subjected to "pernicious threats of torture, actual vindictive torture and death threats – amongst other coercively employed interrogation techniques". He has alleged that he was interrogated "in an environment of generated fear, resonant with terrifying screams of fellow detainees facing similar methods. In this atmosphere of severe antipathy towards detainees was the compounded use of racially and religiously prejudicial taunts."[74]

On 7 October 2003, an Iraqi man, Amin Sa'id al-Sheikh, was arrested in Baghdad and taken to Abu Ghraib prison. The sworn statement he gave on 16 January 2004 to military investigators looking into allegations of abuse suggests that anti-Muslim sentiment was still running high among at least some US military personnel:

> *"They stripped me naked, they asked me, 'Do you pray to Allah?' I said, 'Yes'. They said, 'Fuck you' and 'Fuck him'...One of them told me he would rape me. He drew a picture of a woman to my back and makes me stand in shameful position holding my buttocks. Someone else asked me, 'Do you believe in anything?' I said to him, 'I believe in Allah'. So he said, 'But I believe in torture and I will torture you.'... Then they handcuffed me and hung me to the bed. They ordered me to curse Islam and because they started to hit my broken leg, I cursed my religion. They ordered me to thank Jesus that I'm alive. And I did what they ordered me. This is against my belief."*[75]

Throughout history, torture has often occurred against those considered as the "other". The UN Committee against Torture has stated that "discrimination of any kind can create a climate in which torture and ill-treatment of the 'other' group subjected to intolerance and discriminatory treatment can more easily be accepted."[76] Even in regular internment facilities in Iraq, the ICRC noted a "widespread attitude of contempt" on the part of the US guards towards detainees. [77] The UN High Commissioner for Human Rights has reported that detainees in Iraq have even been humiliated upon release: "Among the examples given were that prisoners were released in the middle of the night, handcuffed, with Mickey Mouse drawn on their shirt...".[78]

Torture involves the dehumanization of the victim, the severing of all bonds of human sympathy between the torturer and the tortured. This process of dehumanization is made easier if the victim is from a despised social, political, religious or ethnic group.

[74] Letter from Moazzam Begg, Guantánamo Bay, copied among others to Amnesty International, dated 12 July 2004. http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/01_10_04.pdf.
[75] Translated statement: http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151362.pdf.
[76] World Conference against racism, racial discrimination, xenophobia and related intolerance, contribution of the Committee against Torture to the preparatory process, UN Doc. A/CONF.189/PC.2/17, 26 February 2001.
[77] *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation.* February 2004. [Hereinafter, report of the ICRC, February 2004]. The ICRC *inter alia* called for respect for the "cultural sensitivity" of detainees. http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf
[78] E/CN.4/2005/4, 9 June 2004.

Discrimination paves the way for torture and ill-treatment by allowing the victim to be seen not as human but as an object, who can, therefore, be treated inhumanely.

Anti-Muslim sentiment increased in the USA in the wake of the atrocities of 11 September 2001. Amnesty International welcomed President Bush's early statements calling for citizens to respect Muslim and Middle Eastern members of their communities[79], but is concerned that the same message – that any form of retaliatory injustices would not be tolerated – does not appear to have been forcefully and directly transmitted to US law enforcement and military agencies. In November 2001, Amnesty International wrote to the US government raising allegations that immigration detainees arrested in the USA after 11 September were being subjected to more punitive conditions than before in some facilities, and that people of Muslim or Middle Eastern origin were being treated more harshly than other inmates. Reports included detainees being placed in solitary confinement and denied exercise; being required to wear full restraints, including leg-irons, during visits; being denied contact visits with families; being given an inadequate diet; and being denied personal possessions and copies of books in Arabic, including the Koran.[80] The subsequent Justice Department investigation confirmed such allegations, including of racial abuse of detainees.[81]

In its November 2001 memorandum, Amnesty International urged the US Government to stay fully committed to upholding principles of non-discrimination in the current challenging climate. It urged that "all precautions are taken to ensure that people are not arrested or detained or otherwise treated unfairly on grounds of their ethnic origin, race or religion."[82] The organization believes that the authorities have failed in this regard as they have taken the "war on terror" outside the US mainland. The absence of appropriate cultural training was part of the problem. The Fay report into Abu Ghraib found that "guard and interrogation personnel were not adequately trained or experienced and were certainly not well versed in the cultural understanding of the detainees".[83] Intelligence officers going to Guantánamo apparently had no cultural awareness training until at least a year after the detentions began.[84] One of Major General Antonio Taguba's recommendations following his

[79] Letter to President George W. Bush. http://web.amnesty.org/library/Index/ENGAMR511442001. The organization also welcomed "the strong action taken by the Department of Justice to respond to attacks and acts of discrimination perpetrated against people perceived to be Muslim or of Middle Eastern origin in the wake of 11 September." *USA: Memorandum to the US Attorney General – Amnesty International's concerns relating to the post-11 September investigations*, AI Index: AMR 51/170/2001. http://web.amnesty.org/library/Index/ENGAMR511702001.

[80] *Memorandum to the US Attorney General, supra,* note 79.

[81] *The September 11 detainees: A review of the treatment of aliens held on immigration charges in connection with the investigation of the September 11 attacks.* Office of the Inspector General, June 2003. http://www.usdoj.gov/oig/special/0306/index.htm.

[82] *Memorandum to the US Attorney General, supra,* note 79.

[83] Fay report, page 45, *supra,* note 15.

[84] *New intel course trains Al Qaeda interrogation.* Army News Service, 24 February 2003. An instructor noted that the course would have a component on cultural awareness, adding that "most of these soldiers are Christians and know nothing about the Muslim religion". Without proper safeguards,

investigation of US abuses in Iraq was that there should be an immediate deployment to Iraq of a mobile training team whose expertise should include "Arab cultural awareness".[85]

Colonel Henry Nelson, a US Air Force psychiatrist assigned to assist the Taguba investigation, concluded that among the factors contributing to the abuse was that soldiers sent to Iraq were immersed in Islamic culture for the first time and that "there is an association of Muslims with terrorism".[86] The US administration has played its part in this dangerous perception. The constant refrain of senior administration officials, including President Bush in his role as Commander-in-Chief of the armed forces, labelling detainees who have neither been charged with nor convicted of any offence as "terrorists", "killers", "dangerous", "the worst of a very bad lot", and "bad people", and holding them outside the protection of the law, always risked encouraging abuse.[87]

From Afghanistan to Abu Ghraib, via Guantánamo

Allegations of abuse by US forces in Afghanistan have been persistent. The Fay report confirmed that from December 2002 (there are also allegations of abuse from before then), "[US] interrogators in Afghanistan were removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation."[88] The Schlesinger Panel noted that Special Operations Forces in Afghanistan had been implicated in "a range of abuses… similar in scope and magnitude to those found among conventional forces".[89] Amnesty International and others have raised allegations of abuse in Afghanistan with the US authorities, with little or no response.

Abdullah's arrest along with 33 others took place at 3am in a compound near Kandahar in Afghanistan on 18 March 2002. He told Amnesty International in October 2002 after his release that US forces broke down all the doors and took everybody outside. The detainees had their hands zip-tied behind their backs and were taken to Kandahar air base, where they were forced to lie on the gravel for several hours, their hands cuffed, now with metal handcuffs, behind their backs. Abdullah said that during this time he was kicked in the ribs and that he and all his fellow detainees were hooded and searched by dogs. They were subjected to forced shaving. He said that he was shaved of his entire facial and body hair by a

AI notes that such training – on "how to extract intelligence from Al Qaeda detainees", could be double-edged. Ill-treating through use of cultural sensitivities is prohibited as is any ill-treatment.

[85] Article 15-6 Investigation of the 800th Military Police Brigade (hereinafter the Taguba report). http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html

[86] *Soldiers vented frustration, doctor says*. Washington Post, 24 May 2004.

[87] Journalist Seymour Hersh has reported an interview he had with a former Marine assigned to guard duty at Guantánamo in 2003 in which the soldier said that the guards were encouraged by their squad leaders to "give the prisoners a visit" once or twice a month, when there were no journalists around, to "rough up" the detainees: "We tried to fuck with them as much as we could – inflict a little bit of pain", the Marine is quoted as saying. Hersh reports: "As far as he was concerned, the former Marine added, the prisoners at Guantánamo were all terrorists: 'I thought everybody was a bad guy'." *Chain of Command: The road from 9/11 to Abu Ghraib*. Seymour M. Hersh. Allen Lane, 2004. Pages 12-13.

[88] Fay report, page 29, *supra*, note 15.

[89] Schlesinger report, page 13, see *supra*, note 30.

woman. He was then put in a cage, under a tent, with about 14 others, including a boy of about 15. Some in the cage refused to eat because they did not want to have to use the toilet, a portable pot in the corner. Abdullah said that during interrogation, he was handcuffed, shackled and hooded, and that a female interrogator pulled and pushed him. He said that the cultural violations were the most traumatizing aspects of the treatment.

Two years later, an elderly Afghan man was arrested in his village by US marines in June 2004 and detained for three days. Noor Mohammad Lala alleged:

> *"They told me to take off my shirt. I said 'How can I do that?' Then I told myself 'Take your shirt off.' When I took off my shirt, they told me to undo my belt. I found that very painful. I felt like I was having a nervous breakdown. In my entire life I'd never exposed myself. With respect, I have a bladder problem and I could not stop urinating. After that I was so humiliated I couldn't see for my pain. When they took off my trousers I had my eyes closed. I was totally disoriented, they stood me up in the container. When they stood me up like this, they took off all my clothes. I was completely naked, I'm not telling you a lie. They told me to look straight ahead, not to look around. While I was standing, I'm not lying to you, they kicked my feet apart with their boots and they were touching me. That's how it was I did not know what was going on. That's the sort of treatment I received. That's what they did. When I looked around there was only an interpreter, no one else. He told me to get dressed, my bottom was wet. I would not be a Muslim if I lied to you. When I put on my clothes, I rubbed it off. And this happened when I'm old, white-bearded with no teeth. And this outrage happened to me."*[90]

Amnesty International has been told by the Afghanistan Independent Human Rights Commission of another elderly man who approached them after his release from US custody in 2004. At first he said that he was too ashamed to talk about it, but he later revealed that along with other detainees he had been stripped naked and kept in a container.

One of eight Afghan soldiers arrested by US Special Forces on 1 March 2003 has said that he and his fellow detainees were treated "like animals" when taken to the US base in Gardez. An investigation by the Crimes of War Project has revealed allegations by the detainees that they were subjected to torture and ill-treatment during their 17 days in custody, including repeated beatings, electric shocks and immersion in cold water. They were hooded and shackled during interrogations. One of the detainees, Jamal Naseer, died in custody (see Point 6.2).[91] Another Afghan national, Syed Nabi Siddiqi, has said that he was ill-treated during his 22-day detention in US custody in Gardez, Afghanistan, in July 2003. He says that he was blindfolded, kicked and beaten, and had his clothes removed:

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[90] (Translation). *Taliban Country*. SBS Dateline. 11 August 2004. http://www.sbs.com.au/dateline/#. Noor Mohammad Lala's son, Wali Mohammad, has also described such a strip search on him, during which he says some 20 US soldiers were "laughing and mocking" and taking photographs: "They disrespected us and undermined our dignity. They brought shame on us before the whole world."

[91] *A torture killing by US forces in Afghanistan*. Crimes of War Project. www.crimesofwar.org.

> "*Then they asked me which animals – they made the noise of goats, sheep, dogs, cows – I had had sexual activities with. They laughed at me. I said that such actions were against our Afghan and Islamic tradition, but they again asked me, 'Which kind of animals do you want to have sex with?' Then they...beat me with a stick from the back and kicked me. I still have pains in my back as a result.*"[92]

After Gardez, Syed Nabi Siddiqi said that he was flown to the US air base in Kandahar, where the ill-treatment continued, including when the soldiers "brought dogs close to us, they were biting at us". In a witness statement in 2004, former detainee Tarek Dergoul recalled his detention in Kandahar:

> "*[I]n Kandahar I was hooded whilst being taken to interrogation and some of the time during interrogation. I was interrogated at least three or four times a week for up to seven or eight hours a day. Sometimes I was just left sitting in the interrogation tent with nothing, no food or toilet facilities. The guards in Kandahar regularly tore up the Qur'an and threw it. My body hair was shaved, including my pubic hair... After three months in Kandahar I was flown to Guantanamo Bay, Cuba, on 1 May 2002... I was stripped naked, given a full body search and pictures were taken of me naked.*"[93]

Tarek Dergoul states that he was again stripped and given another full body search on arrival in Guantánamo, despite the fact that since leaving Kandahar he had been handcuffed, shackled and blindfolded the entire time. Swedish national Mehdi Ghezali has told Amnesty International that he and his fellow detainees were stripped, shaved of their facial and head hair and photographed before being transferred to Guantánamo. He says that they were also stripped and photographed on arrival in the naval base. He, like others, has described a punitive regime in Guantánamo that has shown little respect for human dignity. For example:

> "*One prisoner had removed his ID-strap that the prisoners were forced to wear around their wrist. As punishment, the guards shackled both his hands and feet in his cell for more than 10 hours. During this time, the prisoner was not given any food and was not allowed to go to the toilet, although he had to. He could not hold himself. It was very degrading for him.*"[94]

Souvenir T-shirts, available for soldiers to purchase in the Navy Exchange shopping mall in Guantánamo perpetuate a view of "war on terror" detainees as less than human. One depicts a rat in a turban, orange jumpsuit and shackles, with the words *Guantanamo Bay: Taliban Lodge* around it. Another depicts six shackled rats in orange jumpsuits, surrounded

[92] '*They said this is America... if a soldier orders you to take off your clothes, you must obey.*' The Guardian (UK), 23 June 2004.

[93] Witness statement of Tarek Dergoul in the case of *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 69, 21 May 2004.

[94] Interview with Amnesty International, Sweden, 27 July 2004. Mehdi Ghezali said that he was handed over to US custody by authorities in Pakistan in December 2001, and flown with others to Kandahar. He says he was dragged and beaten at Kandahar, and told "Now we are going to take you to a place where they are going to shoot you".

by the caption *Al Qaeda six-pack – Guantanamo Bay, Cuba, Home of the sand rat*. Such "humour" takes on a different meaning when set against the experiences of real detainees. In a poem sent from his cell in Guantánamo to his brother in Kabul, Wazir Mohammed wrote, "I'm in a cage like an animal; No-one's asked me am I human or not".[95] Fellow detainee Sayed Abbasin told Amnesty International after his release in 2003 that the Guantánamo prison camp was "like a zoo". French detainee Nizar Sassi wrote of Guantánamo to his family: "If you want a definition of this place – you don't have the right to have rights".[96] The administration's position that the Guantánamo detainees – all foreign nationals – should be denied any opportunity to challenge the lawfulness of their detention led a US Supreme Court Justice to point out that US law at the Naval Base "even protect[s] the Cuban iguana".[97]

The first detainees to be taken to Guantánamo were not told where they were, and apparently thought they were "being taken to be shot", a situation exacerbated by the reddish colour of their jumpsuits, which "in their culture…is a sign that someone is about to be put to death".[98] The camp authorities considered whether to "continue not to tell them what is going on and keep them scared. ICRC says that they are very scared".[99] The authorities only agreed to consider telling the detainees where they were "after the first round of interrogations", an early sign of a blurring between detention conditions and interrogation techniques (see Point 4.1).[100]

In Iraq, foreign detainees were given wristbands marked "terrorist".[101] An Iraqi detainee has recalled how the US soldiers "used to beat up a prisoner who was from Syria and strip him all night. We heard him screaming all night".[102] It is not known if this was the Syrian national who was kept incommunicado "in a totally darkened cell measuring about 2

[95] *USA: The threat of a bad example: Undermining international standards as 'war on terror' detentions continue*, August 2003, AI Index: AMR 51/114/2003 http://web.amnesty.org/library/Index/ENGAMR511142003

[96] *People the law forgot*. The Guardian, 3 December 2003. The first detainees to be taken to Guantánamo were not told where they were, and detainees thought they were "being taken to be shot", a situation exacerbated by the red/orange colour of their jumpsuits, which "in their culture…is a sign that someone is about to be put to death". The camp authorities debated whether to "continue to not to tell them what is going on and keep them scared. ICRC says that they are very scared". The authorities only agreed to consider telling the detainees where they were "after the first round of interrogations".

[97] *Rasul v. Bush*, oral arguments, 20 April 2004.

[98] *Initial observations from ICRC concerning treatment of detainees*. Department of Defense Memorandum from Staff Judge Advocate to Commander Joint Task Force 170, 21 January 2002. http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo01-21-02.pdf.

[99] *Ibid.*

[100] Department of Defense Memorandum: *Concerns voiced by the International Committee of the Red Cross (ICRC) on Behalf of the Detainees*. From Staff Judge Advocate, 24 January 2002. http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo01-24-02.pdf.

[101] According to the ICRC, this practice ended after it gave a memorandum in July 2003, based on more than 200 alleged cases of ill-treatment, to US Central Command. *Report of the ICRC*. February 2004, *supra*, note 77.

[102] Translation of statement given by Mustafa Jassim Mustafa to military investigators on 17 January 2004. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150542-1.pdf.

meters long and less than a meter across, devoid of any window, latrine or water tap, or bedding." On the door of the cell was the inscription "the Gollum" and a picture of this character from the film *Lord of the Rings*.[103] Other detainees were also reportedly given names of fictional non-human characters. According to a US Army reservist at Abu Ghraib, for example, there was a detainee with a deformed hand whom the US guards called "The Claw" and another with bulging eyes who was called "Froggy".[104] A US military lawyer later raised his concern about the use of nicknames chalked on cell doors by military guards in Abu Ghraib. He said that he was not aware of the torture and ill-treatment going on in the prison at the time he witnessed this nicknaming and so "I didn't recognize [its] significance".[105]

In Iraq, the allegations of abuse have not been restricted to Abu Ghraib. For example, three Iraqi nationals working for *Reuters* news agency have alleged that they were subjected to torture and cruel, inhuman or degrading treatment by US soldiers while held in military detention near Fallujah (see also Point 6.1). The three, Salem Ureibi, Ahmad Muhammad Hussein al-Badrani and Sattar Jabar al-Badrani, say they were held for three days in January 2004 and subjected to humiliation, religious taunts, sleep deprivation, hooding, kicking and beating, stress positions, loud music, forced physical exercises, and threats of transfer to Guantánamo.[106]

> *"He asked me to pick up a shoe, took it and beat me on the face with it. Then he made me take the shoe in my mouth. He made me put my finger in my anus, then he made me smell my hand and put it in my nose, and keep the shoe in my mouth, with my other hand in the air. He told me I looked like an elephant. Every time I mentioned God they would beat me. The interrogators said they had found RPG launchers. I said: "I swear to God, no". Then they beat me".*[107]

The UN High Commissioner for Human Rights has cited reports by Iraqis that during house searches by Coalition forces in Iraq, the conduct of soldiers has been "considered humiliating, for example, when they send women outside the house in their nightgowns, or when they show disrespect for the Koran, throwing it on the floor or tearing it apart."[108] Local civilians have made similar complaints of cultural disrespect by US forces in Afghanistan.

Released detainees have described how, in the first weeks of the Guantánamo detentions from early January 2002, there was little official tolerance for the practice of

[103] Fay report, page 66, *supra*, note 15.
[104] *Behind the walls of Abu Ghraib*, Newsweek, 22 May 2004.
[105] "I had seen that the [military police] had written in chalk on some of the outside of the cell doors, kind of like nicknames for the prisoners inside, so that they would know what to call them, because they never really liked, I guess, using their Arabic names, not that I think they every really knew them". Deposition by Colonel Ralph Sabatino, 10 February 2004. One man had been given the name of a US pornographic film actor, which the Colonel said he realized was significant given what had emerged about the sexual cruelty to the detainees. http://www.publicintegrity.org/docs/AbuGhraib/Abu16.pdf.
[106] *Iraqi journalists report abuse as detainees in US hands*. Reuters, 18 May 2004.
[107] Interview with Sattar Jabar al-Badrani, 8 January 2004. Transcript provided by Reuters.
[108] E/CN.4/2005/4, 9 June 2004.

Islam.[109] This was apparently improved under ICRC intervention.[110] The first commander of the Guantánamo prison camp was Brigadier General Rick Baccus. There was said to be tension between him and intelligence officials because he was seen as "soft" on the detainees by eventually distributing copies of the Koran, adjusting meal times for Ramadan, and allowing the ICRC to put up posters on the Geneva Conventions.[111] He has since been quoted as saying: "I was mislabelled as someone who coddled detainees. In fact, what we were doing was our mission professionally".[112] He was relieved of his post in October 2002, and Secretary Rumsfeld reportedly gave military intelligence control of the Guantánamo detainee operations, including the guards.[113] Major General Geoffrey Miller was appointed as commander of Guantánamo detentions and assumed command on 4 November 2002.[114] According to three released detainees, the regime changed around this time:

> *"[A] point came at which you could notice things changing. That appeared to be after General Miller around the end of 2002. That is when short-shackling started, loud music playing in interrogation, shaving beards and hair, putting people in cells naked, taking away people's 'comfort' items, the introduction of levels, moving people every two hours depriving them of sleep, the use of A/C air. Isolation was always there. 'Intel' blocks came in with General Miller. Before when people were put into isolation they would seem to stay for not more than a month. After he came, people would be kept there for months and months and months."*[115]

Released Swedish detainee Mehdi Ghezali has described to Amnesty International the pain of "short shackling" in interrogations: "There was a ring attached to the floor. They chained your hands and feet to this ring. You had to sit chained with your arms between your legs from underneath. In this way, they could let you sit for hours". He has described harsh interrogations, including the manipulation of air conditioning to make interrogation rooms very cold or very hot. He said that during interrogations rap and heavy metal music was played loud, or sometimes loud un-tuned radio noise, which was "very unpleasant".[116] A recent report in the *New York Times*, based on interviews with people who have worked in Guantánamo, adds weight to such detainee allegations. It describes the debilitating effect on

[109] Mohammed Saghir, a Pakistan national, has alleged: "In the first one-and-a-half months they wouldn't let us speak to anyone, wouldn't let us call for prayers or pray in the room…I tried to pray and four or five commandos came and they beat me up. If someone would try to make a call for prayer they would beat him up and gag him." *People the law forgot*. The Guardian (UK), 3 December 2003.
[110] *Concerns voiced by the ICRC on Behalf of the Detainees*. 24 January 2002, supra. note 100.
[111] See, for example: *'Too nice' Guantanamo chief sacked*, BBC 16 October 2002.
[112] *Former Guantánamo chief clashed with army interrogators*. The Guardian (UK), 19 May 2004.
[113] *The roots of torture*. Newsweek, 24 May 2004.
[114] *Major General Miller takes command Joint Task Force GTMO*. US Southern Command News Release. JTF-GTMO Public Affairs, 4 November 2002.
[115] *Detention in Afghanistan and Guantanamo Bay*. Statement of Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed. July 2004. Available at: http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf.
[116] Interview with Amnesty International, Sweden, 27 July 2004.

detainees of the alleged use of short-shackling, stripping, loud music, strobe lighting and temperature manipulation in prolonged interrogations.[117]

According to the military, the ICRC had "a serious concern with the treatment of the Koran" by military guards in Guantánamo, particularly in August 2003. Twenty detainees had told the ICRC that they had been forcibly shaved as punishment for "disturbances" that followed alleged disrespect towards the Koran. Major General Miller denied that the Koran had been deliberately disrespected or that anyone had been shaved as punishment.[118]

After some nine months of running the detention operation in Guantánamo, Major General Miller visited Iraq from 31 August to 9 September 2003 with a team of current and former Guantánamo personnel. His remit was to make recommendations on how to run the USA's detention operations in Iraq with a view to obtaining intelligence to counter the growing insurgency to the US-led occupation.[119] A central recommendation of his subsequent report was that the US authorities in Iraq should "[d]edicate and train a detention guard force subordinate to [military intelligence] that sets the conditions for the successful interrogation and exploitation of the internees/detainees" (see Point 4.1). The report asserted that "a significant improvement in actionable intelligence will be realized within thirty days".[120]

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[117] "One regular procedure that was described by people who worked at Camp Delta, the main prison facility at the naval base in Cuba, was making uncooperative prisoners strip to their underpants, having them sit in a chair while shackled hand and foot to a bolt in the floor, and forcing them to endure strobe lights and screamingly loud rock and rap music played through two close loudspeakers, while the air conditioning was turned up to maximum levels, said one military official who witnessed the procedure. The official said that was designed to make the detainees uncomfortable as they were accustomed to high temperatures both in their native countries and their cells. Such sessions could last up to 14 hours with breaks, said the official, who described the treatment after being contacted by The Times. 'It fried them,' the official said, explaining that anger over the treatment the prisoners endured was the reason for speaking with a reporter. Another person familiar with the procedure who was contacted by The Times said: 'They were very wobbly. They came back to their cells and were just completely out of it'." *Broad use of harsh tactics is described at Cuba base*. New York Times, 17 October 2004.

[118] Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03, supra*, note 52.

[119] *General promised quick results if Gitmo plan used at Abu Ghraib*. USA Today, 25 June 2004. Major General Miller's mission to Iraq was made at the "encouragement" of Under-Secretary of Defense for Intelligence, Stephen Cambone, and "other senior members of the Department [of Defense]" (Under-Secretary Cambone, Senate Armed Services Committee, 11 May 2004). The Under-Secretary sent his deputy, Lieutenant Geneneral William Boykin, to Guantánamo to talk to Major General Miller and organize his trip to Iraq (*The roots of torture*. Newsweek, 24 May 2004). Lt. Gen. Boykin, nominated to his post by President Bush in June 2003, has caused controversy due to speeches in which he reportedly said that the "war on terror" was being fought against Satan, that God put President Bush in the White House for this purpose, and that he, Lt. Gen. Boykin, had told a Muslim in Somalia that "my God was a real God, and his was an idol". There were calls for his removal from his Pentagon post. Under-Secretary Cambone said he received a briefing on Maj. Gen. Miller's report from Lt. Gen. Boykin (Senate Armed Services Committee, 11 May 2004).

[120] *Assessment of DoD Counterterrorism Interrogation and Detention Operations in Iraq* (Miller report) http://www.publicintegrity.org/docs/AbuGhraib/Abu3.pdf.

Brigadier General Janis Karpinski, who was in charge of Abu Ghraib prison before being suspended from duty after the torture evidence became public, has claimed that Major General Miller told her of his intention to "Gitmo-ize the confinement operation" in Iraq:[121]

> "*He said at Guantánamo Bay we've learned that the prisoners have to earn every single thing they have.... He said they are like dogs, and if you allow them to believe at any point that they're more than a dog, then you've lost control of them. He said every time we remove them from a cell, there's two MPs that accompany them, they have ankle chains on, they have wrist chains on, and they have a belly chain on, and they are never moved outside of their cell unless they are under those conditions.*"[122]

Soon after Major General Miller's mission to Iraq, the ICRC found a regime in Abu Ghraib in which some detainees were being made "to earn" their right to humane treatment. The organization reported that during a visit to the prison in mid-October 2003 it witnessed the US practice of keeping detainees "completely naked in totally empty concrete cells and in total darkness". The organization reported that it was told by a military intelligence officer that this was "part of the process" – a process which the ICRC said "appeared to be a give-and-take policy whereby persons deprived of their liberty were 'drip-fed' with new items (clothing, bedding, hygiene articles, lit cell, etc.) in exchange for their 'co-operation'."[123]

Interrogation techniques with a discriminatory resonance

On 2 December 2002, a month after Major General Miller had begun his posting at Guantánamo Bay, Secretary Rumsfeld approved a number of interrogation techniques for use at the Naval Base, including hooding, sensory deprivation, isolation and stress positions.[124] Some of the techniques – such as forced shaving of facial and head hair, stripping, the use of dogs to inspire fear – although potentially humiliating, painful or frightening for anyone, can have particular resonance for Muslim detainees.[125]

After six weeks, Secretary Rumsfeld rescinded his authorization that such techniques could be used at the discretion of the Guantánamo authorities. In April 2003, he signed another memorandum, authorizing techniques which included isolation, environmental manipulation, and sleep adjustment. However, Secretary Rumsfeld reserved the right to authorize personally any "additional interrogation techniques". Attached to the memorandum were guidelines formulated by the Pentagon Working Group and which included the reference, "it is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee's culture...", a dangerous instruction if any religious intolerance, racism, or xenophobia was present within the military.

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[121] Brigadier General Janis Karpinski, Article 15-6 Investigation Interview with Major General Antonio Taguba, 15 February 2004, page 89, http://www.publicintegrity.org/docs/AbuGhraib/Abu29.pdf. The military refer to Guantánamo as GTMO or Gitmo – "to Gitmo-ize" is to make like Guantánamo.
[122] *On the Ropes*. BBC Radio 4, 15 June 2004.
[123] Report of the ICRC, February 2004, *supra*, note 77.
[124] http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf. See also, GTMO Interrogation Techniques. DOD General Counsel fax, 22 June 2004.
[125] Memorandum for the Commander, US Southern Command, 16 April 2003.

Removal of religious items

Secretary Rumsfeld approved the removal of religious items as an interrogation technique. On this question, the legal advice he received was that if these were US citizens, the removal of such materials would raise questions of constitutionality, but "such is not the case with [these] detainees", all foreign nationals.[126] The USA acknowledges that the use of this interrogation technique, known as "incentive or removal", may cause international tension because of disagreement over the USA's labelling of detainees as "enemy combatants" unprotected by provisions of the Geneva Conventions. The military authorities note of this technique, approved again by Secretary Rumsfeld in April 2003, that: "Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law".[127]

The US government itself criticizes such practices in other countries. For example in its human rights report on Syria in 2004, under the section on torture and other cruel, inhuman or degrading treatment, the US State Department noted: "Some former detainees reported that the Government prohibited reading materials, even the Koran, for political prisoners."[128] The US Army interrogation training manual, FM 34-52, lists various examples of mental torture. It includes: "Threatening or implying that other rights guaranteed by the [Geneva Conventions] will not be provided unless cooperation is forthcoming".

Use of dogs

The Fay report found that "interrogations at Abu Ghraib were also influenced by several documents that spoke of exploiting the Arab fear of dogs".[129] Major General George Fay has referred to a set of photographs from the prison depicting military intelligence personnel "encouraging" military police guards to "use the dogs to soften up a particular detainee who was a high-value detainee".[130]

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[126] Memorandum for commander, Joint Task Force 170. Subject: *Legal brief on proposed counter-resistance strategies.* Signed by Diane E. Beaver, LTC, USA. Staff Judge Advocate. 11 October 2002. http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf. The US has used such tactics against US citizens. Former Guantánamo Muslim Chaplain, James Yee, was arrested in September 2003, blindfolded, manacled, and on the order of Major General Miller was held in maximum security solitary confinement for 76 days in South Carolina. He was shackled and handcuffed whenever he left his cell. The guards refused to provide him with a liturgical calendar or prayer rug and refused to tell him the time of day or the direction of Mecca. Chaplain Yee was accused of espionage and was said by the military to face a possible death sentence, before all charges against him were dropped in 2004.

[127] Memorandum for the Commander, US Southern Command. *Counter-resistance techniques in the war on terrorism*, 16 April 2003. Article 34 of the Third Geneva Convention states: "Prisoners of war shall enjoy complete latitude in the exercise of their religious duties". Article 93 of the Fourth Geneva Convention requires the same for civilian internees.

[128] Entry on Syria. *Country Reports on Human Rights Practices – 2003.* Released by the Bureau of Democracy, Human Rights, and Labor, 25 February 2004.

[129] Fay report, page 10, *supra*, note 15.

[130] Oral testimony to the Senate Armed Services Committee, 9 September 2004.

The use of dogs to "induce stress" was one of the interrogation techniques authorized by Secretary Rumsfeld in December 2002 for use in Guantánamo Bay, and their use has been alleged in Afghanistan, and later in Iraq. The Fay report found that:

> "*Abusing detainees with dogs started almost immediately after the dogs arrived at Abu Ghraib on 20 November 2003. By that date, abuses of detainees was* [sic] *already occurring and the addition of dogs was just one more abuse device. Dog teams were brought to Abu Ghraib as a result of recommendations from MG G Miller's assessment team from JTF-GTMO. MG G Miller recommended dogs as beneficial for detainee custody and control issues.*"

According to Colonel Thomas Pappas, who was in charge of interrogations at Abu Ghraib from 19 November 2003, Major General Miller told him that military working dogs were used at Guantánamo and that they were effective in setting the atmosphere for interrogations.[131] Major General Miller has denied this, claiming that he only said that dogs help to provide a controlled atmosphere in a detention facility.[132] What is beyond doubt is that the use of dogs "to induce stress" during interrogations in Guantánamo has been authorised by Secretary for Defence Rumsfeld. It seems that the technique may still be used if he personally authorizes it in any particular case. It is one of the techniques listed in the final report of the Pentagon Working Group, which recommended its use in "strategic interrogation facilities", including Guantánamo (see Point 1.2).

Interviewed for the Taguba investigation, a soldier from the 229th Military Police Company deployed to Abu Ghraib prison in Iraq recalled an incident involving a military intelligence (MI) officer and a military dog (K-9) handler:

> "*The MI stated to the K-9 handler to allow the dog into the cell as a method of obtaining information. The dog would go into the cell for about a minute and then MI would call them out. I saw the dog during this strike the detainee. The detainee was bound and could not move, and the K-9 handler would allow the K-9 to approach within inches his face, and one time the dog bit the detainee's arm. When I saw the detainee later it appeared the detainee was bitten multiple times… During the time I was in the cell the detainee never resisted. The MI was calling the dog into the cell as a scare tactic to gather information.*"[133]

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[131] "[MG Miller] said that they used military working dogs [in Guantánamo], and that they were effective in setting the atmosphere for which, you know, you could get information". Colonel Pappas, interview for Taguba investigation, 12 February 2004, page 29. http://www.publicintegrity.org/docs/AbuGhraib/Abu14.pdf.

[132] Major General George Fay has suggested that there was "miscommunication" between the two men: "General Miller did have such a conversation with Colonel Pappas, but he was suggesting the use of dogs for security purposes, just as they used them in Guantánamo Bay. They don't use dogs in Guantánamo Bay during the interrogation process and never did." Testimony to Senate Armed Services Committee, 9 September 2004.

[133] Sworn statement of Gregory Andrew Spiker, 20 January 2004. http://www.publicintegrity.org/docs/AbuGhraib/Abu11.pdf.

The Taguba report found that the "intentional abuse of detainees" in Abu Ghraib included "using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee". On 16 January 2004, Amin Sa'id al-Sheikh, an Abu Ghraib detainee told military investigators that sometimes guards "hang me to the door allowing the dogs to bite me".[134] Another detainee, Ballendia, has said that he was taken from his cell during the night and sent into a hallway handcuffed: "They sent the dogs towards me. I was scared… The bite from the first dog caused me to have 12 stitches from the doctor of my left leg as a result I lost a lot of blood."[135] Another Iraqi detainee in Abu Ghraib recalled to military investigators: "I saw also in Room #5 they brought the dogs. [Guard X] brought the dogs and they bit [the detainee] in the right and left leg. He was from Iran and they started beating him up in the main hallway of the prison".[136] The Fay report found allegations of a competition between two military dog-handlers to see if they could make detainees defecate out of fear of the dogs. One of the handlers allegedly revealed that they had already made some detainees urinate, "so they appeared to be raising the competition", according to the Fay report.

Use of female interrogators

Released Swedish detainee Mehdi Ghezali has alleged to Amnesty International that women were used to "degrade us and our faith".[137] Amnesty International has received other allegations that detainees in the Naval Base have been subjected to sexual humiliation targeted at their Muslim sensitivities. For example, a non-detainee source recently told the organization that during Ramadan in 2002, female military personnel attempted to sexually arouse detainees. In one case, it is alleged, the detainee broke down in distress when he was returned to his cell and prayed for forgiveness for having had sexual feelings.[138] In another case, it is alleged, a Yemeni detainee was subjected to sexual insults during interrogation, including repeated and graphic questions about whether his first sexual experience had been with a male relative. According to three UK detainees released from Guantánamo:

> "*We didn't hear anybody talking about being sexually humiliated or subjected to sexual provocation before General Miller came. After that we did. Although sexual provocation, molestation did not happen to us, we are sure that it happened to others... It was clear to us that this was happening to the people who'd been brought up most strictly as Muslims. It seemed to happen most to people in Camps 2 and 3, the 'intel' people, i.e. the people of most interest to the interrogators*".[139]

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[134] Translated statement. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151362.pdf.
[135] *Use of dogs to scare prisoners was authorized*. Washington Post, 11 June 2004.
[136] Translated statement of Mohammed Juma Juma given to military investigators on 18 January 2004. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/152307.pdf
[137] Interview with Amnesty International, Sweden, 27 July 2004.
[138] During Ramadan, a practising Muslim is meant to refrain from food, drinks and sexual activity from dawn to sunset.
[139] *Detention in Afghanistan and Guantanamo Bay*. Statement of Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed. July 2004.

The Pentagon has acknowledged that, at least between December 2002 and January 2003, female interrogators were used in Guantánamo to "induce stress" in the male Muslim detainees.[140] However, according to the authorities, "the only incident of misbehaviour by an interrogator [at Guantánamo] was a female interrogator who went into the room to interrogate a detainee, took off her uniform blouse, had her T-shirt on, sat on the detainee's lap as part of her interrogation technique, and began to run her hands through his hair… She was suspended from duties for 30 days". [141]

In May 2004, in response to a question about the fact that the use of female guards can offend the religious or cultural sensitivities of male Muslim detainees, Porter Goss, then a member of the House of Representatives, reportedly responded: "My basic reaction to that was, 'Gee, you're breaking my heart, and maybe next time you start shooting at Americans, or blowing up Americans, you want to think about that'." Porter Goss also reportedly claimed that there "was no calculated effort" to have female military personnel in Guantánamo, contradicting the Pentagon's admission.[142] In August 2004, President Bush nominated Porter Goss to be the new Director of the CIA (following George Tenet's resignation). The Senate confirmed the nomination, and Porter Goss was sworn in as CIA Director on 24 September 2004.

Forced nudity

Another of the interrogation techniques Secretary Rumsfeld approved in December 2002 for use in Guantánamo was "removal of clothing". The legal advice which he received before this authorization was that stripping was permissible "so long as it is not done to punish or to cause harm, as there is a legitimate governmental objective to obtain information".[143] Forced stripping for the sake of "obtaining information" clearly constitutes at least degrading treatment, which is prohibited in all circumstances under international law. The Fay report into Abu Ghraib noted that "removal of clothing for both [military intelligence] and [military police] objectives was authorized, approved, and employed in Afghanistan and GTMO." [144]

While forced nudity of detainees is far from being a new technique, and can be humiliating to any detainee of any nationality or culture, it can be particularly shaming in Muslim culture. Two men who were in Bagram air base in 2002 before being transferred to Guantánamo alleged that they were forced to strip naked in the presence of female soldiers during medical examinations and showers. One of them, Parkhudin, who has alleged that his

[140] *GTMO Interrogation Techniques*, dated 22 June 2004. DoD General Counsel fax.
[141] Department of Defense Deputy General Counsel, Press Briefing, 22 June 2004, *supra*, note 16.
[142] "We were very concerned that Guantanamo was being set up by the military to get the Good Housekeeping seal of approval because the International Committee of the Red Cross and the human rights people were there en masse, baying in large crowds with cameras, and making sure that these people who were trying to kill us an blow up airplanes… that these nice, friendly people would be receiving all the necessary amenities of Good Housekeeping". *Bush's CIA choice says interrogations are key to war on terror*. Associated Press, 2 September 2004. http://www.navytimes.com/story.php?f=1-292925-335277.php
[143] *Legal brief on proposed counter-resistance strategies*. 11 October 2002, *supra*, note 126.
[144] Fay report, page 88, *supra*, note 15.

hands were chained to the ceiling for eight of the 10 days he spent in isolation in Bagram, said that the other acts of torture or ill-treatment "don't matter, but we are very angry about this (stripping)".[145] Another released prisoner said that female soldiers had watched male prisoners taking showers and undergoing intimate body searches at Bagram air base: "We don't know if it's medical or if they were very proud of themselves. But if it was medical, why were they taking our clothes off in front of the women? We are Afghans, not Americans."[146] Another Afghan man said after his release from US custody in Afghanistan on 19 April 2004 that he was photographed nude in detention: "I'm 50 years old, and no one has ever taken my clothes. It was a very hard moment for me. It was death for me".[147]

The Fay investigation found that in Abu Ghraib, "removal of clothing was employed routinely and with the belief that it was not abuse".[148] It found that "male detainees were naked in the presence of female Soldiers. Many of the Soldiers who witnessed the nakedness were told that this was an accepted practice. Under the circumstances, however, the nakedness was clearly degrading and humiliating." Military intelligence interrogators, the report said, "started directing nakedness at Abu Ghraib as early as 16 September 2003 to humiliate and break down detainees. MPs would also sometimes discipline detainees by taking away clothing and putting detainees in cells naked."

The Taguba report notes that the abuse of prisoners was not just committed by military police guards, but also by members of military intelligence. The report referred to the specific example that "on 24 November 2003, SPC Luciana Spencer, 205th MI Brigade, sought to degrade a detainee by having him strip and returned to cell naked". One of the women soldiers charged in the Abu Ghraib crimes has explained her role: "Because I was a female and in the Muslim culture it's very embarrassing or humiliating to be naked in front of another female, especially if it's an American."[149] Another woman soldier has recalled that she was asked by a plainclothes US official in Abu Ghraib to be present when a male detainee was in the shower because "he'll feel more humiliated if there's a female present".[150]

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[145] *Afghan deaths linked to unit at Iraq prison.* New York Times, 23 May 2004. *New charges raise questions on abuse at Afghan prisons.* New York Times, 16 September 2004.

[146] *Ibid.* The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment has emphasised that: "persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender." CPT, 10th General Report, CPT/Inf (2000).

[147] *Forced nudity of Iraqi prisoners is seen as a pervasive pattern, not isolated incidents.* New York Times, 8 June 2004.

[148] In his interview for the Taguba investigation, the warden of the military intelligence section of Abu Ghraib described his initial surprise at seeing so many detainees naked. Noting that he had "never worked in corrections before", he said that he was told by a senior military intelligence official that nudity was "'an interrogation method that we use', and from that point on, I said, 'okay'… that's an accepted method of interrogation". Donald Reese, 372nd Military Police Company, 10 February 2004. http://www.publicintegrity.org/docs/AbuGhraib/Abu10.pdf.

[149] Private Lynndie England. *Shamed. A Panorama Special.* BBC TV, BBC1 19 May 2004.

[150] *Behind the walls of Abu Ghraib.* Newsweek web exclusive, 22 May 2004.

The Fay report emphasized the link between what happened in Abu Ghraib and the operations in Afghanistan, Guantánamo and the wider "global war on terror" (GWOT):

> *"The use of nudity as an interrogation technique or incentive to maintain the cooperation of detainees was not a technique developed at Abu Ghraib, but rather a technique which was imported and can be traced through Afghanistan and GTMO. As interrogation operations in Iraq began to take form, it was often the same personnel who had operated and deployed in other theaters and in support of GWOT, who were called upon to establish and conduct interrogation operations in Abu Ghraib... They simply carried forward the use of nudity into the Iraqi theater of operations. The use of clothing as an incentive (nudity) is significant in that it likely contributed to an escalating 'de-humanization' of the detainees and set the stage for additional and more severe abuses to occur."*[151]

If the use of nudity contributed to an escalating dehumanization of detainees in Iraq, there is no reason to think that the same has not been the case elsewhere in the "war on terror".

From stripping to sexual assault

Forced nudity used to degrade and humiliate can easily be a prelude to more severe or wider torture or ill-treatment. On 17 January 2004 in Iraq, Mustafa, an Abu Ghraib detainee, told military investigators that he was stripped and kept naked for seven days, during which time the guards "were bringing a group of people to watch me naked." He alleged that another detainee was stripped and "they put wire up his ass and they started taking pictures of him".[152] On 20 January 2004, another Abu Ghraib detainee, Haidar, told investigators that he had been stripped, hooded, ordered to masturbate in front of a female US soldier, and piled up with five other naked detainees. He said that the soldiers were:

> *"laughing, taking pictures, and they were stepping on our hands with their feet. And they started taking one after another and they wrote on our bodies in English. I don't know what they wrote, but they were taking pictures after that. Then, after that they forced us to walk like dogs on our hands and knees. And we had to bark like a dog and if we didn't do that, they start hitting us hard on our face and chest with no mercy. After that, they took us to our cells, took the mattresses out and dropped water on the floor and they made us sleep on our stomachs on the floor with the bags on our head and they took pictures of everything."*[153]

Haidar was released without charge or trial in mid-April 2004. He recalled the torture and humiliation he said he had undergone. He said that when "the interpreter told us to strip. We told him: 'You are Egyptian, and you are a Muslim. You know that as Muslims we can't do that.' When we refused to take off our clothes, they beat us and tore our clothes off with a blade." The Pentagon Working Group report of April 2003 states that removal of clothing as an interrogation technique means: "Potential removal of all clothing; removal to be done by

[151] Fay report, page 10, *supra*, note 15.
[152] Translation. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150542-1.pdf
[153] Translated statement. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/13077.pdf

military police if not agreed to by the subject. Creating a feeling of helplessness and dependence".[154] In May 2004, Haidar said that the shame of what happened to him in custody is so deep that he felt that he could not move back to his old neighbourhood.[155]

The Taguba report found that the "sadistic, blatant and wanton criminal abuse" of detainees in Abu Ghraib included "forcing groups of male detainees to masturbate themselves while being photographed and videotaped; videotaping and photographing naked male and female detainees; writing 'I am a Rapest' (sic) on the leg of a detainee alleged to have forcibly raped a 15-year-old fellow detainee, and then photographing him naked; forcibly arranging detainees in various sexually explicit positions for photographing; forcing naked male detainees to wear women's underwear; a male MP guard having sex with a female detainee; and arranging naked male detainees in a pile and then jumping on them".[156]

The Fay report found, in Abu Ghraib, "an alleged rape committed by a US translator and observed by a female Soldier, and the alleged sexual assault of an unknown female".[157] An Abu Ghraib detainee has alleged that a fellow Iraqi detainee was sodomized with a phosphoric light, and that a child detainee was raped. There is reported to be a videotape, apparently made by US personnel, of Iraqi guards raping young boys.[158]

A male Abu Ghraib detainee made a statement on 21 January 2004 which included the following allegations:

> *"And then the policeman was opening my legs, with a bag over my head, and he sat down between my legs on his knees and I was looking at him from under the bag and they wanted to do me because I saw him and he was opening his pants, so I started screaming loudly and the other police started hitting me with his feet on my neck and he put his feet on my head so I couldn't scream... And one of the police he put a part of his stick that he always carries inside my ass and I felt it going in about 2 centimetres, approximately. And I started screaming..."*[159]

The Schlesinger report concluded that the torture and ill-treatment depicted in the Abu Ghraib photographs were the result of "freelance activities" on the part of a few personnel on the "night shift" at the prison.[160] At the same time, however, both the Schlesinger Panel and the Fay investigation found more widespread abuses not caught on film, and various prisoner statements indicate that the cruelty cut across shifts. For example Abu Ghraib detainee Nori gave a sworn statement to military investigators on 17 January 2004. His (translated) allegations included the following:

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[154] Pentagon Working Group report, page 65, *supra*, note 56.
[155] *Iraqi recounts hours of abuse by US troops*. New York Times, 5 May 2004.
[156] Taguba report. http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html.
[157] Fay report, page 70, *supra*, note 15
[158] *Chain of Command*. The New Yorker, 17 May 2004, quoting an NBC report.
[159] Translation. Name withheld. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/10.pdf.
[160] *Final Report of the Independent Panel to Review DoD Detention Operations*. August 2004; and Press conference with members of the panel, 24 August 2004.

> "*And they treated us like animals, not humans. They kept doing this for a long time. No one showed us mercy. Nothing but cursing and beating. Then they started to write words on our buttocks, which we didn't know what it means. After that they left us for the* ***next two days*** [emphasis added] *naked with no clothes, with no mattresses, as if we were dogs.*"[161]

Similarly, fellow detainee Thaar said that he was held in solitary confinement "for 67 days of suffering and little to eat".[162] On 18 January 2004, Abu Ghraib detainee Kasim gave military investigators a statement in which he recalled that:

> "*They stripped me of all my clothes, even my underwear. They gave me woman's underwear that was rose colour with flowers in it and the put the bag over my face. One of them whispered in my ear, 'today I am going to fuck you', and he said this in Arabic... And they forced me to wear this underwear all the time,* ***for 51 days*** [emphasis added]. *And most of the days I was wearing nothing else.*"[163]

In August 2003, Secretary Rumsfeld allegedly approved the expansion of a secret operation – a "special-access program" (SAP) – originally for use against alleged *al-Qa'ida* detainees detained in the "war on terror", to prisoners incarcerated in Iraq in the growing insurgency there. The secret tactics, it is stated, allowed for sexual humiliation and physical coercion as interrogation tactics.[164] The Department of Defense issued a general denial of the detailed allegations, characterizing the report in which they first appeared as "outlandish, conspiratorial, and filled with error and anonymous conjecture".[165] The CIA also issued a three-sentence denial, saying that the allegations were "fundamentally wrong" and that there "was no DoD/CIA program to abuse and humiliate Iraqi prisoners".[166] Seymour Hersh, who reported the allegations, is standing by them.[167] He has alleged that the SAP is still active.[168]

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[161] http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/7787.pdf.
[162] Statement given 17 January 2004. Translation. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150427.pdf.
[163] Translation. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151108.pdf
[164] *The Gray Zone*, by Seymour Hersh. The New Yorker, 15 May 2004.
[165] Statement from Department of Defense spokesperson Lawrence di Rita, 15 May 2004.
[166] Statement by CIA spokesman Bill Harlow on New Yorker story. CIA press release, 18 May 2004.
[167] "I was initially told of the SAP's existence by members of the intelligence community who were troubled by the program's prima facie violation of the Geneva Conventions; their concern was that such activities, if exposed, would eviscerate the moral standing of the United States and expose American soldiers to retaliation. After my article on SAP was published, in May 2004, a ranking member of Congress confirmed its existence and further told me that President Bush had signed the mandated finding officially notifying Congress of the SAP. The legislator added that he had nonetheless been told very little about the program. Only a few members of the House and Senate leadership were authorized by statute to be informed of the program, and, even then, the legislators were provided with little more than basic budget information. It's not clear that the Senate and House members understood that the United States was poised to enter the business of 'disappearing' people". *Chain of Command: The road from 9/11 to Abu Ghraib*. Seymour M. Hersh. Allen Lane, 2004. Page 47.
[168] "In mid-June [2004], the former [senior intelligence] official said, the Pentagon briefly disbanded the special-access team and, in a few days, reconstituted it, with new code words and new designators.

The Fay report also concluded that "no policy, directive or doctrine directly or indirectly caused violent or sexual abuse." However, it also found that "the existence of confusing and inconsistent interrogation technique policies", including those for use in Afghanistan and Guantánamo, "contributed to the belief that additional interrogation techniques were condoned in order to gain intelligence". It found that "what started as nakedness and humiliation, stress and physical training (exercise)" – stripping and stress positions, for example, were techniques approved by the administration in Afghanistan and Guantánamo – "carried over into sexual and physical assaults by a small group of morally corrupt and unsupervised Soldiers and civilians".[169] Contrary to what it stated, therefore, the Fay report found at least an indirect link between policy and abuse.

Moreover, three months before Seymour Hersh's original allegations were made, the ICRC in Iraq complained to the US authorities. According to its leaked February 2004 report:

> "*In certain cases, such as in Abu Ghraib military intelligence section, methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military personnel to obtain confessions and extract information. Several military intelligence officers confirmed to the ICRC that it was part of the military intelligence process to hold a person deprived of his liberty naked in a completely dark and empty cell for a prolonged period to use inhumane and degrading treatment, including physical and psychological coercion, against persons deprived of their liberty to secure their cooperation.*"

The ICRC wrote that detainees suspected of security offences or deemed to have an intelligence value were at "high risk of being subjected to a variety of harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture". The techniques found by the ICRC included acts of physical force and sexual humiliation.[170] Asked whether he agreed with the ICRC's conclusion that "coercive practices such as holding prisoners naked for extended periods of time" were used "in a systematic way as part of the military intelligence process at Abu Ghraib", Major General Antonio Taguba replied that he did.[171]

In his May 2004 report, Seymour Hersh alleged that "the notion that Arabs are particularly vulnerable to sexual humiliation became a talking point among pro-war Washington conservatives in the months before the March, 2003 invasion of Iraq."[172] It is

The same rules of engagement were to be applied; suspected terrorists were fair game for the American operatives". *Ibid.* page 65.

[169] Fay report, page 10, *supra* note 15.

[170] For example, "being paraded naked outside cells in front of other detainees, guards, sometimes hooded or with women's underwear over the head"; "acts of humiliation such as being made to stand naked, with arms raised or with women's underwear over the head, for prolonged periods, while being laughed at by guards, including female guards, sometimes photographed in this position"; "beatings with hard objects, slapping, punching, kicking". ICRC February 2004 report.

[171] Testimony before the Senate Armed Services Committee, 11 May 2004.

[172] *The Gray Zone*, by Seymour Hersh. The New Yorker, 15 May 2004. Hersh writes: "The Patai book, an academic told me, was 'the bible of the neocon|servative|s on Arab behaviour'."

said that a book frequently cited in support of this notion was *The Arab Mind* by Raphael Patai, which includes a chapter on "The realm of sex".[173] On homosexuality in Arab culture, Patai wrote: "acceptance of the role of the passive homosexual is considered extremely degrading and shameful because it casts the man or youth into a submissive, feminine role", and on masturbation, "whoever masturbates… evinces [proves] his inability to perform the active sex act, and thus exposes himself to contempt".[174] A 2001 edition of the book contains a foreword by the director of Middle East Studies at the US Army John F. Kennedy Special Warfare Center and School at Fort Bragg, North Carolina, who states: "At the institution where I teach military affairs, 'The Arab Mind' forms the basis of my cultural instruction… Over the past 12 years I have also briefed hundreds of military teams being deployed to the Middle East."[175] The JFK Special Warfare Center is responsible for the Army's special operations training and doctrine.

The right to be treated with humanity

Respect for human dignity and freedom from discrimination are at the heart of international human rights and humanitarian law. For example, the "fundamental guarantees" of Article 75 of Additional Protocol 1 to the Geneva Conventions, recognized by the USA as reflecting customary international law, prohibit torture, indecent assault, and humiliating or degrading treatment of any kind, discrimination of any kind, including on the basis of colour, race, nationality and religion.[176] Article 75 expressly applies to military or civilian agents. Article 10.1 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". According to the Human Rights Committee, this requirement is "a fundamental and universally applicable rule" and "a norm of general international law not subject to derogation". According to the Committee:

> "*Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7…, but neither may they be subjected to any hardship or*

[173] *The Arab Mind*, by Raphael Patai. Charles Scribner's Sons, New York. 1973. Chapter VIII.
[174] *Ibid.* pages 134 and 135.
[175] *Misreading 'The Arab Mind'*. The Boston Globe, 30 May 2004.
[176] For instance, in 1977, in a report highlighting "the substantive successes of the Conference [in which Protocol I was finalised] in codifying and developing the law applicable in international armed conflict," the US delegation wrote: "We take satisfaction from the first codification of the customary rule of proportionality (Article 57), from a good definition of mercenaries which should not be open to abuse (Article 47), and from the minimum humanitarian standards (Article 75) that must be accorded to anyone not entitled to better treatment." John A. Boyd, Office of the Legal Adviser, Department of State, *Digest of United States Practice in International Law* 1977 (1979), pp. 918-919. See *Restoring the rule of law: The right of Guantánamo detainees to judicial review of the lawfulness of their detention.* AI Index: AMR 51/093/2004. http://web.amnesty.org/library/Index/ENGAMR510932004.

constraint other than that resulting from the deprivation of their liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."[177]

The USA has repeatedly declared its commitment to human dignity. Indeed, the National Security Strategy mentions this phrase no less than seven times in its 31 pages, and devotes an entire chapter to promising that the USA will "stand firmly for the non-negotiable demands of human dignity". In all three of his State of the Union addresses, as well as in his inaugural speech, President Bush asserted that the USA was founded upon and is dedicated to the cause of human dignity. It was a theme of his speech to the UN General Assembly on 21 September 2004. In a statement three months earlier to mark the UN International Day in Support of Victims of Torture, the President said that the "non-negotiable demands of human dignity must be protected without reference to race, gender, creed, or nationality. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law."[178] The USA's detention and interrogation policies in the "war on terror" have left such words ringing hollow.

III. Coercive interrogations and international law

Executive detention [may not] be justified by the naked interest in using unlawful procedures to extract information... For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.

Four US Supreme Court Justices, 28 June 2004[179]

Do the interrogation techniques suggested by the administration's declassified documents, or those actually approved and practiced by the USA in Guantánamo Bay, Afghanistan, Iraq and elsewhere constitute torture or cruel, inhuman or degrading treatment (ill-treatment) under international law? In fact, it does not matter whether particular practices are described as torture on the one hand or cruel, inhuman or degrading treatment on the other. All forms of torture and ill-treatment are strictly and equally prohibited in all circumstances. For instance, the International Covenant on Civil and Political Rights (ICCPR) prohibits both torture and ill-treatment even "[i]n time of public emergency which threatens the life of the nation."[180]

International humanitarian law, which covers international and non-international armed conflict, similarly prohibits not only torture but also any other ill-treatment. Thus, for instance, according to the Third Geneva Convention,

[177] General Comment 21, para. 3.
[178] President's Statement on the UN International Day in Support of Victims of Torture, *supra*, note 4.
[179] *Rumsfeld v. Padilla*, 28 June 2004 (Justice Stevens, dissenting, joined by Justices Souter, Ginsburg and Breyer).
[180] Article 4 (prohibiting derogation under any circumstances from the obligations under Article 7). Article 7 provides, *inter alia*, that "[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

> "*[N]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.*"[181]

The Fourth Geneva Convention, which regulates the treatment of civilians under occupation or otherwise under the power of a party to a conflict similarly provides that "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."[182]

Similarly stringent provisions apply to non-international armed conflicts. Article 3 common to all four Geneva Conventions and relating to armed conflicts not of an international character provides the following:

> "*Persons taking no active part in the hostilities... shall in all circumstances be treated humanely... the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:...Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture...Outrages upon personal dignity, in particular humiliating and degrading treatment...*"[183]

This prohibition exists "without distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria". In its August 2004 report on the attacks of 11 September 2001, the bi-partisan National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission) recommended that:

> "*The United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.*"[184]

The International Court of Justice has determined that the rules in common Article 3 "constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what

[181] 1949 Geneva Convention III, Art. 17. See also 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977, Arts. 75(2)(a)(ii); 75(2)(b); 75(2)(e).
[182] Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (1949), Art. 31. See also Arts. 5, 27, 32, 37.
[183] Art. 3(1) common to all four Geneva Conventions; 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977, Arts. 4(a), 4(e), 4(h).
[184] 9-11 Commission report, Chapter 12, *supra*, note 18.

the Court in 1949 called 'elementary considerations of humanity'".[185] The International Criminal Tribunal for the former Yugoslavia (ICTY) reiterated that determination, adding that common Article 3 is "applicable to armed conflicts *in general*" (emphasis added).[186]

The duty of a state – *any* state – regarding its treatment of detainees – *any* detainees – under international law may be summed up in one short sentence: "*They shall at all times be humanely treated*".[187] It is here that the international community has created, through treaty and custom, an obligation that states can never renounce, and a line that must never be crossed.[188] The ICTY has emphasized that,

> "*The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is... the very raison d'être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person.*"[189]

Nor is "humane treatment" or its corollary, the prohibition of torture and cruel, inhuman or degrading treatment or punishment, a vague notion open to all kind of interpretations, as the US administration's legal memorandums suggest. Some elements of humane treatment are spelt out in the treaties themselves. These include conditions of detention that "shall in no case be prejudicial to their health," "minimum cubic space," proper "bedding and blankets," "conditions of food and hygiene which will be sufficient to keep them in good health," "respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs," protection "against all acts of violence or threats thereof and against insults and public curiosity", and more.

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[185] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, ICJ Rep., para. 218. The ICJ considered that the minimum rules applicable to international and non-international conflicts were identical and that the obligation to ensure respect for them in all circumstances derived not only from the Geneva Conventions themselves, "but from the general principles of humanitarian law to which the Conventions merely give expression". *Ibid.* Para. 220.

[186] *Prosecutor v. Dusko Tadic*, Trial Chamber II, Opinion and Judgment of 7 May 1997, para. 559. See also paras. 607, 613-615.

[187] See 4th Geneva Convention, Art. 27. See similarly Art. 10(1) of the ICCPR: "All persons deprived of their liberty shall be treated with humanity."

[188] The Human Rights Committee has said that the prohibition on torture and cruel, inhuman or degrading treatment is a peremptory norm of international law, non-derogable and binding on all states. General Comment 29 (States of Emergency, Article 4). UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001. General Comment 20 (Article 7), 1992.

[189] *Prosecutor v. Furundzija*, No. IT-95-17/1-T, Judgment of 10 December 1998, para. 183.

In addition, UN bodies have adopted a series of instruments over the past half century specifying in detail the conditions under which detainees and prisoners must be held. These include the Standard Minimum Rules for the Treatment of Prisoners,[190] the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[191] and the Basic Principles for the Treatment of Prisoners.[192] UN and regional human rights monitoring bodies and courts have further clarified the contents of this legal requirement.

Not a single one of these treaties, instruments, human rights monitoring bodies, regional human rights courts, commissions and other international or regional bodies has ever condoned either acts of torture or any form of cruel, inhuman or degrading treatment or punishment in any circumstances.

Some US officials may contend that some of the interrogation methods outlined in the various government memorandums, or used in practice by US agents, if applied in isolation, for a short period or in mild form, may not cause "severe pain or suffering, whether physical or mental" as provided in most international definitions of torture. However, there is no doubt that interrogation methods such as "Using detainees individual phobias (such as fear of dogs) to induce stress," "Removal of clothing" or "The use of stress positions" constitute, at the very least, cruel, inhuman or degrading treatment and violate the right to be treated with humanity and with respect for the inherent dignity of the human person. Such interrogation methods cannot in any way be construed as "humane treatment" of detainees or as the absence of "any… form of coercion" as strictly and absolutely required by international law.

Curiously, the orders by Secretary for Defense Rumsfeld approving these and similarly humiliating or painful interrogation methods (whether as a matter of policy or "only" in individual cases subject to his approval) included also the instruction to "continue the humane treatment of detainees."[193] This indicates that the administration's non-legal notion of "humane treatment" has little to do with the international legal requirement of humane treatment and, unlike the latter, provides little or no safeguards against physical and mental abuse of detainees. The US administration has explicitly stated that it does not consider itself bound by any international legal requirements regarding its treatment of "terrorist" suspects (see Point 5).

Torture and ill-treatment as international crimes

Both torture and other forms of ill-treatment that are prohibited at all times and in all circumstances, such as "inhuman treatment" "cruel treatment" and "wilfully causing great suffering or serious injury to body or health," are "grave breaches" of the Geneva

[190] Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.
[191] Adopted by General Assembly resolution 43/173 of 9 December 1988.
[192] Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.
[193] See, for instance, Memorandum for the Department of Defense General Counsel Ref: Detainee interrogations Dated: 15 Jan 2003; Memo for Commander, SOUTHCOM: Counter Resistance Technique in the War on Terrorism Dated: 16 Apr 2003.

Conventions, that is, universally punishable crimes.[194] Similarly, they have been deemed war crimes and crimes against humanity under all *ad hoc* international criminal tribunals established so far. None of these tribunals has, to date, accepted any justifications for torture or other ill-treatment in any circumstances or found that torturing or otherwise ill-treating certain persons is not a crime. Torture and other ill-treatment are also war crimes and crimes against humanity under the Rome Statute of the International Criminal Court.[195]

International law not only allows states to bring to justice in their own courts persons suspected of having committed international crimes such as torture and ill-treatment, but in certain, notable instances *requires* them to do so. This is true even where the suspects are neither nationals nor residents of the state concerned, and the crime did not take place in its territory. Thus each of the 192 state parties to the Geneva Conventions, including the USA, is *required* to search for persons suspected of grave breaches and do one of the following: (1) bring such persons before its own courts, (2) extradite such persons to any state party willing to do so or (3) surrender such persons to an international criminal court with jurisdiction to try persons for these crimes. A similar duty exists under the UN Convention against Torture. In addition, states may exercise this principle – universal jurisdiction – as a matter of customary international law.

International crimes apply to those physically committing them, but also to those who order that they be committed, and to the superiors – both military and civilian – of perpetrators who tolerate or fail to act reasonably to prevent or repress the criminal acts. A Trial Chamber of the ICTY held that: "[t]he criminal responsibility of commanders for the unlawful conduct of their subordinates is a very well settled norm of customary and conventional international law."[196] This principle has been equally recognized in various judicial decisions since the Second World War, including cases decided by US judges, for example: in the cases of *Yamashita*,[197] *Von Leeb* (*German High Command Case*)[198] and *List* (*Hostages Case*),[199] as well as by further jurisprudence of the ICTY.

Criminal liability is not limited to soldiers – any "superior" is responsible for international crimes committed during activities that were within his or her "effective responsibility and control."[200] Nor does international law accept any limits as to how high the rank of civilian superiors who may be prosecuted is. The Rome Statute,

> "*...shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member*

[194] See for instance. 3rd Geneva Convention, Art. 130, 4th Geneva Convention, Art. 147.
[195] Rome Statute of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9), entered into force 1 July 2002, Arts. 7(1)(f) (torture) and 7(1)(k) (other inhumane acts – both as crimes against humanity), Art. 8(1)(ii) ("[T]orture or inhuman treatment" as war crimes).
[196] *Prosecutor v. Z.* Delalic *and others*, Case No. IT-96-21-T, Trial Chamber, Judgment of 16 November 1998, para. 734.
[197] *Trial of General* Tomoyuki *Yamashita*, 4 *Law Reports of Trial of War criminals* 35.
[198] *US v. von Leeb et al.* (Case 12, the High Command case), 11 *Trials of War Criminals* 462.
[199] *US v. Willhelm* List *et al*, (Case 11, the Hostages case) *Trials of War Criminals* 1230.
[200] Rome Statute, Art. 28(b)(ii).

of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."[201]

While the USA has rejected the ICC Statute (see Point 11.6), the statutes of both the ICTY and the International Criminal Tribunal for Rwanda, which the USA strongly supported, contain provisions with exactly the same effect.[202]

In the context of the USA's use of civilian interrogators, it is also important to note that international law provides that, in certain circumstances, even a crime committed by a single private individual – when he or she has acted as a *de facto* organ of the state – may generate individual criminal responsibility for the military commanders and those who effectively act as military commanders. The Appeals Chamber of the ICTY stated:

> "*Other cases also prove that private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as de facto State organs. In these cases, it follows that the acts of such individuals are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility.*"[203]

IV. Human rights: the route to security, not the obstacle to it

Allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need.
9/11 Commission report, August 2004[204]

The USA and other countries face serious security threats, including those posed by groups determined to pursue their fight by abusing fundamental human rights without restraint. Governments have a duty to protect people's rights from such threats. In so doing, however, governments must not lose sight of other human rights and of their obligation to respect them. The UN High Commissioner for Human Rights has said:

> "*Let us be clear: there is no doubt that States are obliged to protect their citizens from terrorist attacks. The most important human right is the right to life. States not only have the right, but also the duty to secure this right by putting in place effective measures to prevent and deter the commission of acts of terrorism...But counter-terrorism cannot be taken at any cost... Insisting on a human rights-based approach and a rule of law approach to countering terrorism is imperative... For even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually works to improve human security...Ultimately, respect*

[201] Rome Statute, Art. 27(1).
[202] Art. 27(2) of the ICTY Statute; Art. 6(2) of the ICTR Statute.
[203] *Prosecutor v.* Dusko *Tadic*, Appeals Chamber, 15 July 1999, para. 144.
[204] National Commission on Terrorist Attacks Upon the United States. August 2004, supra, note 18.

for the rule of law lessens the likelihood of social upheaval, creating greater stability both for a given society and its neighbours."[205]

To flout the rule of law, to torture, to humiliate, is to undermine long-term security, even if there are perceived gains along the way. The brother of then Guantánamo detainee Wazir Mohammed told Amnesty International in Kabul in July 2003 that the USA's treatment of the prisoners "makes the reputation of the US bad amongst the people of Afghanistan". One of the alleged victims of the Abu Ghraib torture, asked after his release about the effect of his experience on his view of the occupation of Iraq, responded: "What would you do if I occupied your country, tortured people and violated all the laws of your country? Would you resist?"[206] In similar vein, a woman allegedly subjected to torture and cruel, inhuman and degrading treatment in US custody in Iraq has said that her ordeal has made her "hate [the Americans]".[207] The USA's tactics against the insurgency in Iraq drew the following response from a young Iraqi man in Fallujah: "For Fallujans it is a *shame* to have foreigners break down their doors. It is a *shame* for them to have foreigners stop and search their women. It is a *shame* for the foreigners to put a bag over their heads, to make a man lie on the ground with your shoe on his neck. This is a great *shame*, you understand? …The Americans provoke the people. They don't respect the people."[208]

The US government itself has said that "states which demonstrate a high degree of respect for human rights are likeliest to contribute to international security and well-being".[209] In his address to the UN General Assembly on 21 September 2004, President Bush said that "the security of our world is found in the advancing rights of mankind".[210] The USA's National Strategy for Combating Terrorism stresses that creating a world in which principles based on human dignity, including the rule of law, "are embraced as standards, not exceptions, will be the best antidote to the spread of terrorism".[211]

The USA was one of the prime movers behind the adoption in 1948 of the Universal Declaration of Human Rights (UDHR). This visionary document, from which today's body of international human rights law and standards has developed, emerged in response to a time in which "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind". It recognizes that respect for "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The USA claims to remain committed to the principles of the Universal Declaration:

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[205] *Security under the rule of law*. Address of Louise Arbour, UN High Commissioner for Human Rights to the Biennial Conference of the International Commission of Jurists (Berlin). 27 August 2004.
[206] *Iraqi tells of US abuse, from ridicule to rape threat*. New York Times, 14 May 2004.
[207] *After Abu Ghraib*. The Guardian, 20 September 2004.
[208] *Torture and truth*. By Mark Danner. New York Review of Books, Vol. 51, No. 10, 10 June 2004.
[209] Secretary of State Colin Powell. Remarks at briefing on the State Department's 2002 Country Reports on Human Rights Practices. Washington, DC, 31 March 2003.
[210] *President speaks to the United Nations General Assembly*. New York. 21 September 2004.
[211] Page 30, National Strategy for Combating Terrorism, February 2003.
http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf

> "*The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of US foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.*"[212]

Article 5 of the UDHR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Fifty-four years after that unequivocal statement was adopted by the international community, a memorandum was written in the US Justice Department advising on ways precisely to undermine this prohibition. The April 2003 report of the Pentagon Working Group noted that the UDHR "is not itself binding or enforceable against the United States". A legal memorandum recommending approval of interrogation techniques that the UN Committee against Torture has said violate the prohibition on torture or cruel, inhuman or degrading treatment, noted that this prohibition is contained in the Universal Declaration but added that "although international declarations may provide evidence of customary international law (which is considered binding on all nations even without a treaty), they are not enforceable by themselves".[213]

Yet, in his address to the UN General Assembly on 21 September 2004, President Bush proclaimed his country's commitment to the UDHR, adding that the rights enshrined in it "are advancing across the world" despite the belief of "the enemies of human rights" that the Universal Declaration and "every charter of liberty ever written are lies to be burned and destroyed and forgotten". In the past three years the US administration has itself discarded or eroded central tenets of the Universal Declaration and other international instruments.

For his own address to the UN General Assembly on 21 September 2004, the UN Secretary General chose the rule of law for his subject. Citing examples of gross human rights abuses by state and non-state actors from Uganda to Russia, from Israel to Palestine, and from Sudan to Iraq – including the torture of Iraqi prisoners by US forces – Kofi Annan said:

> "*No cause, no grievance, however legitimate in itself, can begin to justify such acts. They put all of us to shame. Their prevalence reflects our collective failure to uphold the rule of law, and instil respect for it in our fellow men and women. We all have a duty to do whatever we can to restore that respect. To do so, we must start from the principle that no one is above the law, and no one should be denied its protection. Every nation that proclaims the rule of law at home must respect it abroad; and every nation that insists on it abroad must enforce it at home.*"

[212] United States Department of State, http://www.state.gov/g/drl/hr/
[213] Memorandum for commander, Joint Task Force 170, 11 October 2002, *supra*, note 126.

Part Two: Agenda for action – Commission of inquiry and 12-Point Program

An independent commission of inquiry is called for

I really doubt whether the Defense Department can investigate itself, because there's a possibility the Secretary himself authorized certain actions. This cries out for an outside commission to investigate.

Retired US Army General, May 2004[214]

Amnesty International welcomes the official investigations and reviews that the US authorities have initiated and conducted – indeed the findings of such investigations are cited throughout this report. The information that has been made public has provided a wealth of information, insight and analysis.

Nevertheless, the organization believes that more is needed if full accountability is to be achieved and seen to be achieved – not least because none of the investigations has been comprehensive in scope and all have ultimately lacked genuine independence, most consisting of the military reviewing itself. It is clear that none has had the independence or reach necessary to adequately investigate the role of the Secretary of Defense or agencies, departments or individual office-holders outside the Pentagon, for example the Justice Department or the White House. The activities of the CIA and "other government agencies" in the "war on terror" remain shrouded in secrecy, and require a light to be shone on them by an independent inquiry.

In spite of the official reviews that have been initiated, there remain many unanswered questions about policies and practices still in operation. An investigation entirely independent of government, and with a willingness to take full cognizance of international law and standards, is needed. It must have the power to investigate the highest echelons of government. It must adopt more than just a "lessons-learned" approach, namely one that fully rejects impunity and facilitates full accountability.

The UN Special Rapporteur on torture has stated: "Independent entities are essential for investigating and prosecuting crimes committed by those responsible for law enforcement".[215] The Human Rights Committee has regularly criticized states parties to the International Covenant on Civil and Political Rights for inadequate investigations and called on them to set up independent bodies to investigate complaints of torture, ill-treatment and

[214] Wayne A. Dowling, quoted in: *Some seek broad, external inquiry on prisoner abuse*. Washington Post, 27 May 2004. Former Army General Dowling headed a Pentagon task force which investigated the 1996 bombing in Saudi Arabia of a US Air Force barracks.
[215] UN Doc. E/CN.4/2001/66, 25 January 2001, para. 1310.

other abuses committed by agents of the state.[216] The same is true of the Committee against Torture.[217]

The "review" that has particularly been promoted as "independent" by the administration was conducted by the panel of four members appointed on 7 May 2004 by Secretary of Defense Rumsfeld to provide him with advice on the Department's detainee operations.[218] The Schlesinger Panel issued their report on 24 August 2004. The panel said that it had reviewed the following "completed investigations":

- *Joint Staff External Review of Intelligence Operations at Guantanamo Bay, Cuba*. 28 September 2002. This was a report by Brigadier General John Custer, acting commander of the US Army Intelligence Center at Fort Huachuca, following a visit to Guantánamo. One outcome of his visit was a new course at Fort Huachuca to train officers assigned to Guantánamo "on how to extract intelligence from Al Qaeda detainees".[219] The course began in late January 2003, more than a year after the first detainees arrived at Guantánamo. The Custer report was not made public.
- *Army Provost Marshal General assessment of detention and correction operations in Iraq* (Ryder report). This was a report, dated 5 November 2003, conducted by Major General Donald J. Ryder. Not made public, but leaked.
- *Joint Task Force Guantánamo assistance visit to Iraq to assess intelligence operations*. This was the report, dated 5 September 2003, produced by the then commander of Guantánamo Bay detentions, Major General Geoffrey Miller following his visit to Iraq in August and September 2003. Not made public, recently leaked.
- *Administrative Investigation under Army Regulation 15-6 (AR 15-6) regarding Abu Ghraib*. This is the administrative investigation of the 800th Military Police Brigade conducted by Major General Antonio Taguba, completed in late February 2004. This report was not intended for public release, but part of it was leaked to the media. The Taguba investigation did not interview any military personnel above the rank of brigade commander.
- *Army Inspector General assessment of doctrine and training for detention operations*. An "inspection" of US detainee operations in Afghanistan and Iraq, ordered on 10 February 2004, and conducted by Lieutenant General Paul Mikolashek. His report,

[216] See for instance the Human Rights Committee's concluding observations on France, UN Doc. A/52/40 vol. I (1997), para. 403; Armenia, UN Doc. A/54/40 vol. I (1999), para. 108; Kyrgyzstan, UN Doc. A/55/40 vol. I (2000), para. 390; Venezuela, UN Doc. A/56/40 vol. I (2001), para. 77(8).
[217] See for instance the Committee Against Torture's conclusions and recommendations regarding Ecuador, UN Doc. A/49/44 (1994), para. 105; Switzerland, UN Doc. A/53/44 (1998), para. 90; Belarus, UN Doc. A/56/44 (2001), para. 46; Australia, UN Doc. A/56/44 (2001), para. 53.
[218] The four are: former Defense Secretaries James Schlesinger and Harold Brown; retired Air Force General Charles Horner; and former Republican member of US Congress, Tillie Fowler.
[219] *New intel course trains Al Qaeda interrogation*. Army News Service, 24 February 2003.

dated 21 July 2004, described the abuses as "aberrations" committed by "a few individuals". Partially made public.

- *The Fay investigation of activities of military personnel at Abu Ghraib and related LTG Jones investigation under the direction of General Kern.* This review was initiated in April 2004 with Major General George Fay, deputy to the head of military intelligence, as the investigating officer. On 16 June 2004, General Paul Kern, Commanding General, US Army Materiel Command, was named as the "appointing authority" for the review, because Lieutenant General Ricardo Sanchez, head of US forces in Iraq, had excluded himself.[220] At General Kern's request, Lieutenant General Anthony Jones, Deputy Commanding General, US Army Training and Doctrine Command, was assigned responsibility for completing the review, with General Fay remaining on the review team.[221] The Fay report was issued on 25 August 2004. Parts remain classified. It found that abuses went beyond "the few", and implicated intelligence officials. It stressed that the "primary causes" of the "abuse" at Abu Ghraib was "misconduct (ranging from inhumane to sadistic) by a small group of morally corrupt soldiers and civilians, a lack of discipline on the part of the leaders and Soldiers of the 205th Military Intelligence Brigade, and a failure or lack of leadership by multiple echelons within CJTF-7".
- *Naval Inspector General's review of detention procedures at Guantanamo Bay, Cuba, and the Naval Consolidated Brig, Charleston, South Carolina.* Vice Admiral Albert Church was directed in early May 2004 by Secretary Rumsfeld to conduct this review. On 12 May, Vice Admiral Church emphasized that this was a short review and neither an inspection nor an investigation. He described the review as a "snapshot of current existing conditions" which had found "no evidence of current abuse".[222] Not made public.
- *Naval Inspector General's review of Department of Defense worldwide interrogation operations.* Again, conducted by Vice Admiral Albert Church. Not completed by 19 October 2004.
- *Special inspection of detainee operations and facilities in the Combined Forces Command-Afghanistan.* 26 June 2004. Led by Brigadier General Chuck Jacoby, described as "a top-to-bottom review of all of our detention facilities" in Afghanistan "to make sure we're in complete compliance with our own standards".[223] The Schlesinger Panel reported that the Jacoby review of Special Operations Forces detention operations "found a range of abuses and causes similar in scope and

[220] *Army announces appointing authority for intelligence investigation.* US Army News Release, 16 June 2004.
[221] *Army announces an additional Procedure 15 investigating officer.* US Army News Release, 25 June 2004.
[222] Media Availability with Vice Admiral Church. Department of Defense Transcript, 12 May 2004.
[223] Lieutenant General David Barno, Commander, Combined Forces Command, Afghanistan. Central Command briefing, 17 June 2004.

magnitude to those found among conventional forces". It has not yet been made public. On 19 October 2004, the Commander of US forces in Afghanistan said that the report was "in a review process" in Washington, DC, and that when it was released, he would provide a media briefing on "the unclassified aspects of it".[224]

- *Administrative investigation of alleged detainee abuse by the Combined Joint Special Operations Task Force – Arabian Peninsula.* Conducted by Brigadier General Richard Formica into allegations of detainee abuse by Special Operations Forces in Iraq. However, the Schlesinger Panel said that it had not reviewed this "assessment". By 13 October 2004, the report had not been made public, and US Central Command was unable to provide Amnesty International with a date when it would be released.
- *Army Reserve Command Inspector General assessment of training and Reserve units regarding military intelligence and military police.* Beginning in March 2004, conducted by Colonel Beverly Ertman. Due for release in December 2004.

Notably, the CIA is absent from this list. The CIA did not cooperate with either the Schlesinger or Fay investigators, stating that it was carrying out its own investigation of the agency (see Point 3.2).

Some of the Schlesinger Panel's findings have been noted in the first part of this report. However, one of the Schlesinger report's core conclusions was that:

> "*the vast majority of detainees in Guantanamo, Afghanistan and Iraq were treated appropriately, and the great bulk of detention operations were conducted in compliance with US policy and directives... While any abuse is too much, we see signs that the Department of Defense is now on the path to dealing with the personal and professional failures and remedying the underlying causes of these abuses. We expect any potential future incidents of abuse will similarly be discovered and reported out of the same sense of honor and duty that characterized many of those who went out of their way to do so in most of these cases. The damage these incidents have done to US policy, to the image of the US among populations whose support we need in the Global War on Terror and to the morale of our armed forces, must not be repeated.*"

The report did not refer to the suffering of the detainees who were subjected to torture or other cruel, inhuman or degrading treatment, or to the distress of their families.

The UN Principles for the investigation of torture and other cruel, inhuman or degrading treatment, adopted by the General Assembly in 2000, state that where the "established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a commission

[224] Lt. Gen. David Barno, Special DoD News Briefing on Operations and Mission in Afghanistan, 19 October 2004.

shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry…".[225] The UN principles covering the investigation of deaths in custody state the same thing.[226]

Since 19 May 2004, Amnesty International has been calling for an impartial and independent commission of inquiry to be set up by the US Congress to conduct a thorough investigation into the USA's "war on terror" detention policies and practices worldwide.[227] Such a commission, composed of credible experts, could be appointed by Congress, but must be independent of government. It should have the necessary powers to be able to fully investigate all US "war on terror" detention policies, practices and facilities around the world, including in relation to the CIA and other agencies, and including in relation to all secret transfers ("renditions") of detainees between countries in which the USA has been involved (see Point 12). The commission should have subpoena powers, and unrestricted access to all classified information and to all agencies and levels of government. To ensure its effectiveness and the appearance of impartiality in the eyes of the world, the inquiry should seek the advice of international experts such as the UN Special Rapporteur on torture. Its findings should be made public.

As the UN Principles require, there are numerous reasons that call for such an approach. They include:

- A perceived or actual failure of previous investigations (see Point 6);
- Allegations suggesting a pattern of torture or cruel, inhuman or degrading treatment;
- Previously secret documents suggesting that at the highest levels of government there has been an official willingness to countenance torture if "military necessity" required it, as well as to authorize interrogation techniques that violate the prohibition on torture and other cruel, inhuman or degrading treatment. The resistance of the administration to releasing all such documents;
- The highest office-holder in government is also Commander-in-Chief of the Armed Forces, a power which has been used to justify the government's detention policies, the response to the crimes of 11 September 2001 having been framed in terms of "war". A Supreme Court Justice has seen fit to offer a reminder, in the face of the executive's detention policies, that "the President is not Commander-in-Chief of the

[225] UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by General Assembly resolution 55/89 Annex, 4 December 2000, Principle 5(a).
[226] UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, Principle 11.
[227] *USA: Amnesty International calls for a commission of inquiry into 'war on terror' detentions*, AI Index: AMR 51/087/2004, http://web.amnesty.org/library/Index/ENGAMR510872004

country, only of the military".[228] In this context, the commission of inquiry must be independent of the Pentagon and the rest of the "war" administration;

- Government officials, including the President and Secretary of Defense, have been perceived to prejudge the outcome of military investigations already initiated. The same office-holders throughout the "war on terror" have shown a disregard for the rights of detainees, including the presumption of innocence. There is enough reason to believe that they would disregard the right of detainees to have allegations of torture or ill-treatment properly investigated and those responsible brought to justice;
- The investigation must be entirely free from the influence of party politics;[229]
- The military authorities have stated that "there is no agreed-upon definition of abuse among all legal, investigating and oversight agencies" in the USA;[230]
- Any investigation must respect and comply with international standards. As a state party to the UN Convention against Torture the US is *obliged* to conduct "prompt and *impartial* investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction" (Article 12, emphasis added). The US government in general has shown itself to be reluctant to apply international human rights law and standards to its own conduct, and remains ideologically opposed to the International Criminal Court. The members of any commission of inquiry should be prepared to apply the UN principles for the investigation of torture, and other international standards.

When the commission of inquiry concludes that conduct may have amounted to crimes under national or international law, the information gathered should be referred to the appropriate national authorities with a view to possible prosecution.

Any official who ordered, authorized, condoned or committed torture or cruel, inhuman or degrading treatment should be brought to justice as required by international law. As a matter of principle, across all countries, Amnesty International takes the position that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law, such as torture, in independent and impartial civilian courts. There is a growing international consensus on this view (see Point 7).

Full accountability, covering the whole "war on terror", of persons at all levels of the chain of command, including officials in the administration, officers in the armed forces, CIA personnel and private contractors, with no hint of scapegoating of low-level soldiers and reservist officers, is crucial.

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[228] Justice Souter in *Hamdi v. Rumsfeld*, No. 03-6696, decision of 28 June 2004.

[229] In September 2004, there was an attempt in the House Judiciary Committee to kill off the provision in a bill (H.R.10) that would allow US authorities to deport certain foreign nationals even if they would face torture or other human rights violations. At that time, the provision survived with voting split along party lines. *Plan would let US deport suspects to nations that might torture them.* Washington Post, 30 September 2004. For information on H.R.10, see www.amnesty-usa.org.

[230] Fay report (Jones, page 14), *supra*, note 15.

Point 1 – Condemn torture

The highest authorities of every country should demonstrate their total opposition to torture. They should condemn torture unreservedly whenever it occurs. They should make clear to all members of the police, military and other security forces that torture will never be tolerated.

1.1 Words undone by deeds

The United States is committed to the worldwide elimination of torture and we are leading this fight by example.
President George W. Bush, 26 June 2003[231]

The USA ratified the UN Convention against Torture in October 1994. Five years later, in its initial report to the Committee against Torture, the US Government stressed that:

> *"Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offense under the law of the United States. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. US law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a "state of public emergency") or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension."*[232]

In November 2001, Amnesty International reminded the US Government of this statement and warned that "any withdrawal from such a clear affirmation of US policy in this area would send a grave signal to the international community about the USA's commitment to the respect and promotion of human rights. Any acceptance of torture in the United States risks eroding respect for the rule of law elsewhere. Furthermore, were the US Government to sanction even 'moderate physical pressure' on even a few detainees, it would almost inevitably lead to an expanded use, as Amnesty International has found in more than 40 years of documenting the use of torture."[233]

The USA's stated opposition to torture and ill-treatment has continued in public. On 26 June 2003, President Bush called on "all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of

[231] *Statement by the President. United Nations International Day in Support of Victims of Torture.*
[232] Committee against Torture, Initial Report of the United States of America [15 October 1999], UN Doc. CAT/C/28/Add.5, 9 February 2000, para. 6.
[233] *USA: Memorandum to the US Attorney General, supra,* note 79.

torture and in undertaking to prevent other cruel and unusual punishment."[234] On the eve of President Bush's proclamation against torture, the General Counsel of the Department of Defense wrote to a US Senator concerned about allegations of torture and cruel, inhuman or degrading treatment against "war on terror" detainees. The Pentagon letter said that "we can assure you that it is the policy of the United States to comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the Convention against Torture".[235]

Taken at face value, these assurances might appear to meet the first point of Amnesty International's 12-Point program – that the highest officials of a country should make clear their opposition to torture and other cruel, inhuman or degrading treatment. Words alone can never be enough, however. Officials at all levels of government must *demonstrate* their total opposition to torture by what they do as well as what they say. The struggle against torture and ill-treatment by agents of the state requires absolute commitment and constant vigilance. It requires stringent adherence to safeguards. It demands a policy of zero tolerance.

This US administration has manifestly failed in this regard. Indeed the Pentagon's General Counsel gave his assurances just six months after Secretary of Defense Rumsfeld approved, for use at Guantánamo, a number of interrogation techniques which violated the USA's obligations under the UN Convention against Torture, and variations of which emerged not long afterwards in Abu Ghraib prison in occupied Iraq. The techniques included stress positions, sensory deprivation, isolation, hooding, stripping and the use of dogs to inspire fear. Similarly, President Bush's June 2003 proclamation of the USA's commitment to the eradication of torture came a matter of weeks after a Pentagon Working Group had produced a report, classified "secret" by the Secretary Rumsfeld until 2013, contending that as Commander-in-Chief of the armed forces the President was not bound by US and international law prohibiting torture and suggesting legal defences against criminal liability for any officials accused of torture.[236]

In July 2004, Guantánamo detainee Moazzam Begg wrote that he had been held in solitary confinement since 8 February 2003 – by October 2004 he had been in isolation for approximately 600 days.[237] He has been held in a reportedly windowless cell under 24-hour video surveillance. His isolation began almost a year to the day after the White House gave assurances that, despite President Bush's decision not to apply the Geneva Conventions to the Guantánamo detainees, they would "not be subjected to physical or mental abuse or cruel treatment".[238] The US administration's assurances must be treated with some scepticism.

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[234] Statement by the President. 26 June 2003, *supra*, note 231.
[235] Letter to Senator Patrick J. Leahy from William J. Haynes, General Counsel of the Department of Defense, 25 June 2003.
[236] Pentagon Working Group report, 4 April 2003, *supra*, note 56.
[237] Letter from Moazzam Begg, *supra*, note 74.
[238] *Fact Sheet. Status of detainees at Guantanamo*. The White House, 7 February 2002. http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

1.2 The condemnation is paper thin – The 'torture memos'

There can be no doubt that the prohibition against torture and cruel, inhuman or degrading treatment or punishment is non-derogable under international law...Yet we find, remarkably, that questions continue to be raised about this clear dictate of international law, including at high levels of government.

UN High Commissioner for Human Rights, August 2004.[239]

It now seems that the US administration rejected provisions of the Geneva Conventions because it believed that the USA's treaty obligations might tie the hands of its interrogators. As the Geneva Conventions do not prohibit the interrogation of detainees, it would appear that the administration envisaged treatment that would potentially violate the prohibition on torture and ill-treatment. The ICRC itself has taken issue with the Schlesinger Panel's recent assertion that "If we were to follow the ICRC's interpretations, interrogation operations would not be allowed".[240] The organization responded:

> *"The ICRC has never stated, suggested or intimated that interrogation of any detainee is prohibited, regardless of the detainee's status or lack of status under the Geneva Conventions. The ICRC has always recognized the right of States to take measures to address their security concerns. It has never called into question the right of the US to gather intelligence and conduct interrogations in furtherance of its security interests. Neither the Geneva Conventions, nor customary humanitarian law, prohibit intelligence gathering or interrogation. They do, however, require that detainees be treated humanely and their dignity as human beings protected. More specifically, the Geneva Conventions, customary humanitarian law and the Convention against Torture prohibit the use of torture and other forms of cruel, inhuman or degrading treatment. This absolute prohibition is also reflected in other international legal instruments and in most national laws."* [241]

Nevertheless, two and a half years earlier, in a memorandum to President Bush, the White House Counsel advised that adherence to the Geneva Conventions would restrict the interrogation methods used by the USA in this "new kind of war" which "renders obsolete Geneva's strict limitations on questioning of enemy prisoners". The memorandum counselled that this "new type of warfare... requires a new approach to our actions towards captured terrorists".[242] Not applying the Geneva Conventions to certain prisoners, the memorandum said, "substantially reduces the threat of domestic criminal prosecution [of US agents] under the War Crimes Act".[243] He suggested that some of the language of the Geneva Conventions

[239] *Security under the rule of law.* Address of Louise Arbour, UN High Commissioner for Human Rights to the Biennial Conference of the International Commission of Jurists (Berlin), 27 August 2004.
[240] Schlesinger report, August 2004, page 85, *supra*, note 30.
[241] ICRC reactions to the Schlesinger Panel Report, 8 September 2004. http://www.icrc.org/Web/Eng/siteeng0.nsf/html/64MHS7
[242] Memorandum for the President from Alberto R. Gonzales, 25 January 2002, *supra*, note 33.
[243] The War Crimes Act of 1996 (18 U.S.C. § 2441) makes it a criminal offence for US military personnel and US nationals to commit war crimes as specified in the 1949 Geneva Conventions.

is "undefined", giving the example of the prohibition on "outrages upon personal dignity" and "inhuman treatment".[244] Given this, the memorandum continued, "it is difficult to predict with confidence what actions might be deemed to constitute violations".[245]

Although the memorandum stated that the USA would continue to treat detainees in accordance with international standards, it clearly anticipated that harsher treatment would occur. Subsequent official comments support this view. A Pentagon official tellingly said in May 2004, for example, that "it's very different" treating detainees who are not subject to the Geneva Conventions to those who are.[246] Equally telling was Secretary Rumsfeld's (incorrect), assertion that official investigations into Abu Ghraib had not found "any abuse that was related to interrogations". He added that "The Iraq situation was always subject to the Geneva Convention. The President announced that, I announced it… Any abuse that took place was inconsistent with that."[247] His comment would appear to betray a view that interrogations of prisoners not protected by the Geneva Conventions can be abusive. This is somewhat reminiscent of President Bush's position, stated in his previously secret memorandum of 7 February 2002, suggesting that there can be detainees "who are not legally entitled to [humane] treatment".[248]

The White House Counsel's advice to President Bush was echoed by the US Attorney General, John Ashcroft. In a letter to the President, dated 1 February 2002, he wrote: "[A] Presidential determination against treaty applicability would provide the highest assurance that no court could subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States".[249]

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[244] The USA has given a similar reason for only agreeing to be bound by Article 16 of the Convention against Torture to the extent that its prohibition on cruel, inhuman or degrading treatment matched the USA's constitutional ban on cruel and unusual punishments. The USA said that "it was necessary to limit United States' undertakings under this article primarily because the term 'degrading treatment' is at best vague and ambiguous". CAT/C/28/Add. 5, para. 303. In 2000, the Committee against Torture said that the USA's "reservation lodged to article 16 in violation of the Convention, the effect of which is to limit the application of the Convention", should be withdrawn. A/55/44, paras 175-180.

[245] The White House Counsel should have realised that international law is not as vague as he portrays it. For instance, in the *Akayesu* case before the International Criminal Tribunal for Rwanda, the accused was convicted, among other things, of "inhumane acts," "outrages upon personal dignity" and "serious bodily or mental harm" – crimes originally prohibited in Article 3 common to the Geneva Conventions and Additional Protocol II – for ordering the local militia "to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd." These acts are quite similar to those committed by US military personnel in Abu Ghraib. See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-*T*, Judgment of 2 September 1998, paras. 688, 692-7.

[246] Senior Defense Official. Defense Department background briefing, 20 May 2004.

[247] Secretary Rumsfeld press conference in Phoenix, Arizona. Department of Defense News Transcript, 26 August 2004.

[248] Presidential memorandum, 7 February 2002, *supra*, note 11.

[249] http://news.findlaw.com/wp/docs/torture/jash20102ltr.html.

The theory that presidential power can be used to override treaty and national laws is a theme that runs through government communications following the attacks of 11 September 2001. A Justice Department memorandum, dated 22 January 2002 and made public by the government on 22 June 2004, concluded that "customary international law does not bind the President or the US Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners".[250] The memorandum proposed "justified deviations from the Geneva Convention requirements". It pointed out that "some very well may argue that detention conditions [at Guantánamo] currently depart from Geneva III requirements". However, it suggested that "some deviations would not amount to a treaty violation" because, *inter alia*, they could be justified under the self-defence argument and "no treaty can override a nation's inherent right to self-defense".

In fact, international humanitarian law applies exactly when "nations" are exercising their right to self-defence. Its essence is encapsulated in a provision of a 1907 treaty which now reflects customary international law: "The right of belligerents to adopt means of injuring the enemy is not unlimited."[251]

Any rejection of this principle is an invitation to lawless wars. At the very least, Guantánamo detainees have been subjected to violations of their right to be treated with respect for their human dignity – transferred from Afghanistan and elsewhere in conditions of sensory deprivation and excessive restraint and held in some cases in small cells for more than two years without any legal process.

An influential memorandum disowned today

Another memorandum to the White House, dated 1 August 2002, also deserves scrutiny.[252] Written at the Justice Department reportedly in response to a CIA request for legal protections for its agents (see Point 3), the memorandum drew, *inter alia*, the following three erroneous conclusions: (1) that interrogators could cause a great deal of pain before crossing the threshold to torture. Specifically, it suggested that torture would only occur if the pain caused rose to the level "that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions"; (2) that even though US law makes it a criminal offence for anyone in an official position to commit or attempt to commit torture against a detainee outside the USA, and even though the USA has ratified treaties prohibiting torture, the US President's authority as Commander-in-Chief could override these laws – in other words if the President authorized torture, the agent

[250] Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense. Re: *Application of treaties and laws to al Qaeda and Taliban detainees*. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 22 January 2002. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf.
[251] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Art. 22.
[252] Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A., Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002. (Bybee memo, 1 August 2002), http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

who carried it out could not be prosecuted by the Justice Department.[253] Any attempt by Congress to interfere would be unconstitutional;[254] and (3) that, even if interrogators were prosecuted for torture, there were defences available to them by which they could escape criminal liability. "We conclude", the memorandum said, "that, under the current circumstances, necessity or self-defense may justify interrogation methods that might [amount to torture]".[255]

Almost two years after the August 2002 memorandum was produced and soon after it had been leaked to the media in June 2004, the administration attempted to distance itself from its contents, saying that parts of it would be rewritten.[256] Yet the memorandum had reportedly been vetted by numerous officials, including lawyers at the National Security Council, the White House, the Vice-President's office, as well as the Justice Department.[257] In 2003, its author, Jay S. Bybee, had been confirmed by the Senate as a federal judge after being nominated by President Bush to that position.[258] In hearings before the Senate Judiciary Committee in February 2003, nominee Bybee had declined to discuss any legal advice he had given to the administration, citing his obligation to maintain confidentiality.

As well as distancing itself from the August 2002 memorandum, the administration claims that the declassified documents "were circulated among lawyers and some Washington

[253] Page 31: "Even if an interrogation method arguably were to violate Section 2340A [ie constitute torture], the statute would be unconstitutional if it impermissibly encroached upon the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy… Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional." Article 2 of the UN Convention against Torture expresses in unequivocal terms that "no exceptional circumstances whatsoever" or "an order from a superior officer or a public authority" may be invoked as a justification for torture.

[254] Page 39: "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President… Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."

[255] On necessity ("the lesser of two evils"), the memorandum said: "As we have made clear in other opinions involving the war against *al Qaeda*, the nation's right to self-defense has been triggered by the events of September 11. If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A [i.e. amount to torture], he would be doing so in order to prevent further attacks on the United States by the *al Qaeda* terrorist network. In that case, we believe that he could argue that his actions were justified by the executive branch's constitutional authority to protect the nation from attack" (page 46).

[256] *Justice Department rewrites prison advice*. Associated Press, 24 June 2004.

[257] *CIA puts harsh tactics on hold*. Washington Post, 27 June 2004. Indeed it was cited in a second memorandum from the Department of Justice to the White House, also dated 1 August 2002, signed by Deputy Assistant Attorney General John C. Yoo, and made public by the administration in June 2004.

[258] Jay Bybee's lifetime appointment was to the US Court of Appeals for the Ninth Circuit. At the time he authored the memorandum in 2002, he was an Assistant Attorney General in the Department of Justice's Office of Legal Counsel.

policymakers only" and "never made it to the hands of soldiers in the field, nor to the President".[259] This raises several questions. Firstly, given that the US administration has repeatedly justified its detention and interrogation policies as legitimate under the President's powers as Commander-in-Chief of the Armed Forces, the President should be expected to have known about the various memorandums written about his government's "war" policies on these issues. Secondly, the administration's belated distancing from the August 2002 memorandum should be set against the fact that other memorandums which have come into the public domain clearly formed the basis for government policy, for example President Bush's decision to reject the applicability of the Geneva Conventions and the choice of Guantánamo Bay as a location to keep detainees out of the reach of the judiciary.[260]

Thirdly, despite being the subject of official public disdain in June 2004, much of the August 2002 memorandum is repeated in the April 2003 final report of the Pentagon's *Working Group on Detainee Interrogations in the Global War on Terrorism*. For example, the latter states that, "[i]n order to respect the President's inherent constitutional authority to manage a military campaign, [the US law prohibiting torture]…must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority." Echoing the August 2002 memorandum, and its interpretation of the USA's reservation to Article 1.1 of the UN Convention against Torture (see Points 5.2 and 11.2), the report states that:

> "*…even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent* [to be guilty of torture] *even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control.*"[261]

In a recent lecture, Professor Sir Nigel Rodley, formerly the UN Special Rapporteur on torture and currently a member of the Human Rights Committee, commented on this approach:

> "*This cannot be and is not a true reading of the effect of the US reservation on the CAT. For, by this definition, no one could be guilty of the crime of torture…* [the definition of torture in Article 1 of the UN Convention against Torture][262] *requires*

[259] White House Counsel, in press briefing, 22 June 2004. *supra*, note 16.

[260] For example: Memorandum for William J. Haynes II, General Counsel, Department of Defense. From Patrick F. Philbin, Deputy Assistant Attorney General and John C. Yoo, Deputy Assistant Attorney General, US Department of Justice, Office of Legal Counsel. Re: *Possible habeas jurisidiction over aliens held in Guantanamo Bay, Cuba*. 28 December 2001.

[261] Pentagon Working Group report, April 2003, page 9.

[262] Article 1.1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the

that there be a purpose separate from the intention (purposes such as those of obtaining information or confessions). Since these must be the purposes, it can never be the objective simply to inflict severe pain or suffering – the severe pain or suffering can only be a means to the objective. So there can, therefore, never be the requisite specific intent. I do not for a moment believe that any other States Parties to the Convention would have accepted the understanding, had they believed this could be the effect. Indeed, such an interpretation is evidently incompatible with the international law requirement that treaties be interpreted 'in good faith'."[263]

The Pentagon Working Group report has not been disowned, and its recommendations were adopted by Secretary for Defense Rumsfeld, whose memorandum of 16 April 2003 does not rule out any interrogation method, as long as he authorizes it personally on a case-by-case basis.[264]

Fourthly, some of the contents of the August 2002 memorandum reflect what has happened on the ground. Noting that the UN Convention against Torture "reserves criminal penalties and the stigma attached to those penalties for torture alone", the memorandum emphasised that there is a "significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture". Citing past abuses in Northern Ireland and Israel, and taking a highly regressive view of international standards and decisions (see Point 11.4), the memorandum said that these techniques include forced sitting, crouching and standing in painful positions, hooding, excessive tightening of handcuffs, subjection to noise, sleep deprivation and deprivation of food and drink. These techniques have all been alleged in the "war on terror", including in combination.[265]

In its August 2004 report, the Schlesinger Panel noted the Justice Department's memorandum. One of the Panel members left whether the document had influenced events on the ground as an open question. Whether the Department's position had "further contributed to an atmosphere of permissiveness in the field", he said, was "difficult to assess".[266]

The Guantánamo memos

Among the dozen "Category I" and "Category II" techniques Secretary Rumsfeld authorized in December 2002, "as a matter of policy" for discretionary use at Guantánamo were the use

instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

[263] Nigel Rodley, "The Prohibition of Torture: Absolute Means Absolute," William Butler Lecture given at the University of Cincinnati, 23 September 2004. Amnesty International is grateful to Professor Sir Nigel Rodley for providing the organization with the text of his lecture.

[264] "*If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.*" Memo for Commander, SOUTHCOM, 16 April 2003, *supra*, note 50.

[265] It has also been reported that the USA employed Israeli security service experts to assist in the interrogation of detainees in Iraq. Jane's Foreign Report, 7 July 2004.

[266] Dr Harold Brown, written statement to Senate Armed Services Committee, 9 September 2004.

of 20-hour interrogations, stress positions, isolation, sensory deprivation, using detainees' individual phobias (such as fear of dogs), hooding, "dietary adjustment", removal of clothing, forced shaving, removal of all "comfort items", and the use of "mild, non-injurious physical contact".[267] He has said that these techniques "were not torture", while making no mention on whether he thought they constitute cruel, inhuman or degrading treatment and equally prohibited under international law.[268]

In May 2004, a month before Secretary Rumsfeld's December 2002 memorandum was declassified by the administration, two former Guantánamo detainees wrote to the Senate Armed Services Committee:

> "*Our interrogations in Guantánamo, too, were conducted with us chained to the floor for hours on end in circumstances so prolonged that it was practice to have plastic chairs for the interrogators that could be easily hosed off because prisoners would be forced to urinate during the course of them and were not allowed to go to the toilet. One practice that was introduced specifically under the regime of General Miller was "short shackling" where we were forced to squat without a chair with our hands chained between our legs and chained to the floor. If we fell over, the chains would cut into our hands. We would be left in this position for hours before an interrogation, during the interrogations (which could last as long as 12 hours), and sometimes for hours while the interrogators left the room. The air conditioning was turned up so high that within minutes we would be freezing. There was strobe lighting and loud music played that was itself a form of torture. Sometimes dogs were brought in to frighten us*".[269]

Meanwhile, the sort of techniques authorized by Secretary Rumsfeld for use at Guantánamo were being used in Afghanistan where interrogators were "removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation."[270]

Including "mild, non-injurious physical contact", four so-called "Category III" techniques (in italics below) had been requested in October 2002 for use in Guantánamo against "the most uncooperative detainees".[271] The request noted that such techniques were used by "other US government agencies", a phrase usually used by the military to mean the CIA. The legal advice offered on these four Category III techniques struck a tone reminiscent of the August 2002 Justice Department memorandum:

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[267] Action Memo, approved 2 December 2002, *supra*, note 49.

[268] "[T]he procedures were not torture. And so the suggestion to the contrary, it seems to me, would be inaccurate". Secretary Rumsfeld's speech at the National Press Club, 10 September 2004.

[269] Shafiq Rasul and Asif Iqbal, 13 May 2004.

[270] Fay report, page 29, *supra*, note 15. The Fay report says that they were being used from December 2002. Amnesty International understands that such techniques were used before this.

[271] Memorandum for Commander, Joint Task Force 170. Subject: *Request for approval of counter-resistance strategies*. Signed by Jerald Phifer, LTC, USA, Director, J2.

- "*The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent* is not illegal [because] there is a compelling governmental interest and it is not done intentionally to cause prolonged harm. However, caution should be utilized with this technique because the torture statute specifically mentions making death threats as an example of inflicting mental pain and suffering." No advice was offered on how this contradiction was to be resolved.
- "*Exposure to cold weather or water* is permissible with appropriate medical monitoring".
- "*The use of a wet towel to induce the misperception of suffocation* would also be permissible if not done with the specific intent to cause prolonged mental harm, and absent medical evidence that it would. Caution should be exercised with this method, as foreign courts have already advised about the potential mental harm that this method may cause."
- "The use of *mild non-injurious physical contact* with the detainee, such as pushing and poking, will technically constitute an assault under Article 128 [of the Uniform Code of Military Justice]".[272]

Despite making these limited *caveats*, the military lawyer recommended that all four Category III techniques be approved. Major General Michael Dunlavey, commander at Guantánamo (until Major General Miller assumed command on 4 November 2002) then forwarded the request, with his recommendation also that it be approved, to General James T. Hill, Commander, US Southern Command. Commander Hill wrote to the Chairman of the Joint Chiefs of Staff asking for Pentagon and Justice Department lawyers to review the Category III techniques. The Department of Defense's General Counsel wrote that "while all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time".[273] Amnesty International is seriously concerned that the chief lawyer for the Pentagon should consider that these techniques might be legal. This once again suggests an administration either ignorant or contemptuous of international law and standards. In June 2004, the General Counsel suggested that interrogation techniques such as stress positions and prolonged isolation did not violate the USA's international obligations *per se*, it was just a question of proper application: "Certainly, any one technique improperly applied could, you know, produce all sorts of undesirable consequences, including perhaps torture. But we – the United States is not permitted to go near that".[274]

Secretary Rumsfeld himself has apparently been willing to countenance such techniques. On 15 January 2003, he rescinded his 2 December 2002 authorization, saying that any use of the techniques should be approved by him on a case-by-case basis, including any

[272] Memorandum for commander, Joint Task Force 170, 11 October 202, *supra*, note 126.
[273] Action memo, 27 November 2002, *supra*, note 49.
[274] DoD General Counsel William Haynes, Press Briefing, 22 June 2004, *supra*, note 16.

technique in either Category II or III.[275] He set up a working group within the Department of Defense, chaired by the General Counsel of the Department of the Air Force, Mary Walker, "to assess the legal, policy, and operational issues relating to the interrogations of detainees held by the US Armed Forces in the war on terrorism".[276] The working group issued its report on 4 April 2003, and it was classified as secret for 10 years by Secretary Rumsfeld. A March 2003 draft of the report was leaked to the press after the allegations of abuse at Abu Ghraib became public, and subsequently the final version was made public by the administration at its press briefing on 22 June 2004 (see page 11).

The Pentagon Working Group report

The Working Group report lists 35 interrogation techniques. It recommended that the first 26 be "approved for use with unlawful combatants outside the United States". Eighteen of these appear in the most recent (September 1992) edition of the US Army's Field Manual on Intelligence Interrogation (FM 34-52).[277] The remainder thus go beyond standard US army interrogation doctrine. One comes from the May 1987 version of FM 34-52.[278] The remaining seven of the first 26 techniques are:

20) Hooding;

21) Mild physical contact;

22) Dietary manipulation;

23) Environmental manipulation (e.g. adjusting temperature);

[275] "Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me". Memorandum for Commander US SOUTHCOM. Subject: Counter-Resistance Techniques. 15 January 2003. http://www.defenselink.mil/news/Jun2004/d20040622doc7.pdf.

[276] Memorandum for the General Counsel of the Department of Defense. Subject: Detainee Interrogations. 15 January 2003; and Memorandum for the General Counsel of the Department of the Air Force, from William J. Haynes, General Counsel of the Department of Defense, 17 January 2003. http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf.

[277] The 18 are: 1. Direct; 2. Incentive or Removal; 3. Emotional Love; 4. Emotional Hate; 5. Fear Up Harsh; 6. Fear Up Mild; 7. Reduced Fear; 8. Pride and ego up; 9. Pride and Ego down; 10. Futility; 11. We Know All; 12. Establish Your Identity; 13. Repetition Approach; 14. File and Dossier; 15. Rapid Fire; 16. Silence; 17. Change of Scenery Up; 18. Change of Scenery Down. For explanations of these techniques, see Pentagon Working Group report, *supra*, note 56.

[278] 19. "Mutt and Jeff" approach (that is, "friend and foe", or "good cop/bad cop" approach). The Fay report found that a possible contributing factor to abuses in Abu Ghraib was the use of the outdated 1987 training manual. It had been used at "various locations" in Iraq, where it appeared to have been used as a "primary reference" tool. The Fay report pointed to a section in the 1987 version of FM 34-52 "which could appear as a license for the interrogator to go beyond current doctrine". The section in question stated: "The interrogator should appear to be the one who controls all aspects of the interrogation to include the lighting, heating, and configuration of the interrogation room, as well as the food, shelter, and clothing given to the source." Fay report, page 16, *supra*, note 15.

24) Sleep adjustment; [279]

25) False flag (convincing the detainee that interrogators are from country other than the USA – see possible case example, Walid al-Qadasi, page 100);

26) Threaten to transfer to a 3rd country (where subject is likely to fear he would be tortured or killed).[280]

The Working Group recommends that the remaining nine of the 35 techniques it lists in the report "be approved for use with unlawful combatants outside the United States", but with "specific limitations". The restrictions include that the interrogations be conducted at "strategic interrogation facilities", including Guantánamo; that the detainee is believed to have "critical intelligence"; that the detainee has been medically cleared for subjection to such techniques; and that the interrogators are specifically trained to use these methods. The nine techniques are:

27) Isolation;

28) Use of prolonged interrogations (e.g. 20 hours in a single day);

29) Forced grooming;

30) Prolonged standing;[281]

31) Sleep deprivation (not to exceed four days in succession);[282]

32) Physical training;

33) Face or stomach slap;

34) Removal of clothing;

35) Increasing anxiety by use of aversions (e.g. simple presence of dog).

The Pentagon Working Group also recommended that a procedure be established for requesting approval of any interrogation techniques additional to these 35.

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[279] The Fay report found that among the techniques brought to Iraq by the 519th MI unit was "sleep adjustment", a technique of reversing sleep schedules from night to day, which was also used at Guantánamo. "At Abu Ghraib, however, the MPs [military police] were not trained, nor informed as to how they actually should do the sleep adjustment [see Point 9.1]. The MPs were just told to keep a detainee awake for a time specified by the interrogator. The MPs used their own judgment as to how to keep them awake. Those techniques included taking the detainees out of their cells, stripping them and giving them cold showers. [Captain] Wood [see below] stated she did not know this was going on and thought the detainees were being kept awake by the MPs banging on the cell doors, yelling, and playing loud music." Fay report, page 28, *supra*, note 15.

[280] The 1992 version of FM 34-52 lists "threatening or implying physical or mental torture to the subject, his family, or others to whom he owes loyalty" as an example of mental torture.

[281] FM 34-52 (1992) lists "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" as an example of physical torture.

[282] FM 34-52 (1992) version of the US Army interrogation manual lists "abnormal sleep deprivation" as an example of mental torture.

On 16 April 2003, Secretary Rumsfeld authorized 24 of the techniques for use at Guantánamo Bay (1-19; 22-25; and 27 above). Additional techniques were not ruled out, but would have to be requested on a case-by-case basis. There is evidence which suggests that techniques such as stress positions and prolonged interrogations, authorized by Secretary Rumsfeld in December 2002, were continuing beyond the revocation of that authorization, and were being combined with techniques he authorized in April 2003, such as environmental manipulation. If accurate, these allegations would indicate that the Secretary of Defense was indeed approving such additional techniques on a case-by-case basis unless this authorization scheme was being bypassed.

For example, Parkhudin, an Afghan farmer who was detained at Guantánamo from February 2003 to March 2004, said that he had been shackled with a short chain during interrogation and that he had been questioned for up to 20 hours in uncomfortable positions, adding that "they made me stand in front of an air conditioner. The wind was very cold".[283] Released Swedish detainee Mehdi Ghezali told Amnesty International that he was subjected to sleep deprivation in April 2004, three months before he was released:

> "*They kept doing it for about two weeks around 11 April 2004. The Americans took me to an interrogation that lasted 14-16 hours. Then they brought me back to my cell. Shortly thereafter, just as I was going to bed, the guards came and said that I was going to be moved to another cell. One hour later I was moved once more to another cell. I once saw how the guards treated an Australian prisoner in this way, by moving him from cell to cell and thus preventing him from getting any sleep. At the end, there was blood coming from both his nose and his ears. He was so tired.*"[284]

A recent report in the New York Times, based on non-detainee sources, adds further evidence:

> "*The people who worked at the prison also described as common another procedure in which an inmate was awakened, subjected to an interrogation in a facility known as the Gold Building, then returned to a different cell. As soon as the guards determined the inmate had fallen into a deep sleep, he was awakened again for interrogation after which he would be returned to yet a different cell. This could happen five or six times during a night, they said. This procedure was described by those who participated as part of something called 'Operation Sandman'. Much of the harsh treatment described by the sources was said to have occurred as recently as the early months of this year. After the scandal about mistreatment of prisoners at the Abu Ghraib prison in Iraq became public in April, all harsh techniques were abruptly suspended, they said.*"[285]

A technique that is listed by the Pentagon Working Group, but was not authorized by Secretary Rumsfeld in either his December 2002 or April 2003 memorandum, is "threatening to transfer to a 3rd country that subject is likely to fear would subject him to torture and

[283] *US said to overstate value of Guantánamo detainees*. New York Times, 21 June 2004.
[284] Interview with Amnesty International, Sweden, 27 July 2004.
[285] *Broad use of harsh tactics is described at Cuba base*. New York Times, 17 October 2004.

death".[286] Former Guantánamo detainee Tarek Dergoul, for example, has alleged that this happened to him. His testimony also brings to mind the emphasis that the Pentagon Working Group report placed on the importance of interrogators being "provided reasonable latitude to vary techniques depending on the detainee's culture", and its additional note that "techniques are usually used in combination":

> "*Later the American interrogators did things that upset me. They threatened to send me to Morocco and Egypt where I would be tortured. They played US music very loud during interrogations. They brought pictures of naked women and dirty magazines and put them on the floor. One of the interrogators brought a cup holder for four cups with two coffees in the cup holder. He then deliberately placed the Qur'an on top of the coffee. He put his folder on the desk and then grabbed the Qur'an with his feet up on the table and read it like he was reading a magazine. He made jokes about the Qur'an... In later interrogations, I was kept in the interrogation room, chained to a ring in the floor, for at least six and sometimes as long as ten hours with no access to sanitary facilities. The interrogators left the room for hours at a time. I had to go to the toilet on the ground...During interrogation, if you moved from a sitting position or closed your eyes, they would take the chair away and make you bend your legs to sit cross-legged. They would then tighten the chain so there was no slack and you couldn't bend to the left or the right. This happened in very many interrogation sessions. I would get cramp and start screaming. The guards would swear at Muslims and curse Allah and the Prophet Mohammed. In interrogation sessions they used either the air conditioning unit or sometimes extreme heat to make you uncomfortable.*"[287]

The Afghanistan, Iraq and other unreleased memos

There are an unknown number of government documents that have not been released by the authorities, as well as an unknown number of decisions not put on paper.[288] For example, on 24 January 2003, the Commander of Joint Task Force-180 in Afghanistan forwarded to the Pentagon Working Group a list of interrogation techniques being used in Afghanistan.[289] Among the techniques listed was the use of nudity against detainees. The CJTF-180 memorandum "highlighted that deprivation of clothing had not historically been included in battlefield interrogations.[290] However, it went on to recommend clothing removal as an effective technique that could potentially raise objections as being degrading or inhumane, but

[286] For some, this threat is alleged to have become a reality (see Point 12.1).
[287] Witness statement of Tarek Dergoul in the case of *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598•69, 21 May 2004.
[288] In his authoritative account of the administration's response to the atrocities of 11 September 2001, Washington Post journalist Bob Woodward quotes from a National Security Council meeting on the morning of 21 September 2001: CIA Director George Tenet: "The leaks will kill us, and undermine our coalition." ... President Bush: "We'll just have to put some of the most sensitive stuff not on paper". *Bush at War*, page 110, Simon Schuster UK Ltd 2003.
[289] Schlesinger report, page 36, see *supra*, note 30.
[290] CJTF stands for Combined Joint Task Force.

for which no specific written legal prohibition existed."[291] As already noted, the Fay report into Abu Ghraib concluded that interrogators with experience in Afghanistan and Guantánamo, redeployed to Iraq, "simply carried forward the use of nudity into the Iraqi theater of operations" and that this "likely contributed to an escalating 'de-humanization' of the detainees and set the stage for additional and more severe abuses to occur."[292]

The Fay report's finding that interrogation techniques were "imported" (or, in the Schlesinger Panel's words, that they "migrated") to Iraq from Afghanistan and Guantánamo contrast to earlier Pentagon assurances that no interrogation techniques were "exported to Iraq" from the wider "war on terror".[293]

According to the Schlesinger review, the techniques listed in the CJTF-180 document of 24 January 2003 "were included in a Special Operations Forces (SOF) Standard Operating Procedures document published in February 2003". In Iraq, interrogation guidelines were initially drafted that were "a near copy of the Standard Operating Procedure (sic) created by SOF".[294] The officer who drafted these guidelines was Captain Carolyn A. Wood, officer in charge of the 519th Military Intelligence Battalion from Fort Bragg, North Carolina. The 519th military intelligence unit had served in Afghanistan and had "assisted in interrogations in support of SOF and was fully aware of their interrogation techniques".[295] Prior to its deployment to Iraq in August 2003, Captain Wood's unit "allegedly conducted the abusive interrogation practices in Bagram resulting in a Criminal Investigation Command (CID) homicide investigation."[296] Two detainees had died in Bagram in December 2002, showing signs of "blunt force" injuries (see Point 6.2).

In addition to Major General Miller's recommendations following his visit to Iraq from Guantánamo (see page 29), Colonel Marc Warren, the main US military lawyer in Iraq (Staff Judge Advocate), used the final report of the Pentagon Working Group in developing interrogation policy there. The Commander of the US forces in Iraq, Lieutenant General Ricardo Sanchez, signed a memorandum on 14 September 2003 "which contained elements of the approved Guantanamo policy and elements of the SOF policy" from Afghanistan.[297] It included the use of dogs, stress positions, sensory deprivation, yelling, loud music, light control, and sleep management as interrogation techniques.[298] The Schlesinger report pointed out that this meant that detainees in Iraq, where the US had decided to apply the Geneva Conventions, would be subject to interrogation policies developed for use against those not so protected – further evidence that the decision by President Bush to deny Geneva Conventions protection to detainees in Afghanistan and Guantánamo was taken to allow interrogators to adopt harsh techniques, as suggested by the White House Counsel's January 2002

[291] Fay report, page 88, *supra*, note 15.
[292] Fay report, page 10, *supra*, note 15.
[293] Background briefing, Department of Defense news transcript, 20 May 2004.
[294] Schlesinger report, page 37, *supra*, note 30.
[295] Schlesinger report, page 36, *supra*, note 30.
[296] Fay report, page 29, page 8-9, *supra*, note 15.
[297] Schlesinger report, page 37, *supra*, note 30.
[298] Fay report, page 25, *supra*, note 15.

memorandum to President Bush.[299] The 14 September 2003 memorandum has not been made public by the administration.

The 14 September 2003 memorandum was subsequently replaced by a memorandum signed by General Sanchez on 12 October 2003. On 16 October 2003, Captain Wood of the 519th Military Intelligence Battalion posted a list of interrogation techniques – entitled "interrogation rules of engagement" – on the wall of the Joint Interrogation and Debriefing Center at Abu Ghraib prison "as an aid for interrogators" and which "graphically portray[ed] the 12 October 2003 policy".[300] Confronted with this list of interrogation techniques during questioning in May 2004 by a Senate committee, Secretary Rumsfeld indicated that the Pentagon had approved such methods.[301]

The 12 October 2003 policy recently came into the public domain in the form of a Memorandum for Record, dated 27 January 2004.[302] This lists a number of interrogation techniques with blanket approval for use against "all detainees regardless of status".[303] It then lists techniques that could be used with the approval of General Sanchez. The policy stresses that this is "not an all-inclusive list", and adds, somewhat redundantly, that "at no time will detainees be treated inhumanely nor maliciously humiliated" (see also page 44):

- Change of scenery down;
- Dietary manipulation (minimum bread and water, monitored by medics);
- Environmental manipulation (i.e. reducing [air conditioning] in summer, lower heat in winter);
- Sleep adjustment;
- Isolation (for longer than 30 days);
- Presence of working dogs;
- Sleep management (for 72-hour time period maximum; monitored by medics);

[299] To emphasise: "the techniques employed in JTF-GTMO included the use of stress positions, isolation for up to thirty days, removal of clothing, and the use of detainees' phobias (such as the use of dogs)… [I]nterrogators in Afghanistan were removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation." Fay report, page 29, *supra,* note 15.

[300] Fay report, page 28, *supra,* note 15. The poster is available at: http://talkleft.com/Iraqinterrogationrules1.pdf.

[301] Testimony before the Senate Armed Services Committee, 12 May 2004. "Any instructions that have been issued or anything that's been authorized by the Department have been checked by the lawyers" and "deemed to be consistent with the Geneva Conventions".

[302] Memorandum for Record. Subject: CJTF Interrogation Rules of Engagement, 27 January 2004. http://www.publicintegrity.org/docs/AbuGhraib/Abu14.pdf.

[303] Direct, Emotional Love/Hate, Futility, Establish your Identity, Silence, Incentive, Fear Down, We Know All, File & Dossier, Fear up Harsh (yelling authorized), Pride & Ego Up, Repetition, Rapid Fire. Explanations of these can be found in the Pentagon Working Group report, *supra,* note 56.

- Sensory deprivation (for 72-hour time period maximum; monitored by medics);
- Stress positions (no one position for longer than 45 minutes, within a 4-hour time period).

The 12 October 2003 memorandum included text lifted from the Pentagon Working Group report, including: "interrogation approaches are designed to manipulate an internee's emotions and weaknesses…in close cooperation with the detaining units", and: "it is important that interrogators be provided reasonable latitude to vary approaches depending on the security internee's cultural background". Like the Pentagon Working Group report, the memorandum noted that interrogation techniques "are usually used in combination".[304] According to the Fay report, the 12 October memorandum,

> "*…left certain issues for interpretation: namely, the responsibility for clothing detainees, the use of dogs in interrogation, and applicability of techniques to detainees who were not categorized as 'security detainees'. Furthermore, some military intelligence personnel executing their interrogation duties at Abu Ghraib had previously served as interrogators in other theaters of operation, primarily Afghanistan and GTMO. These prior interrogation experiences complicated understanding at the interrogator level. The extent of 'word of mouth' techniques that were passed to the interrogators in Abu Ghraib by assistance teams from Guantanamo, Fort Huachuca, or amongst themselves due to prior assignments is unclear and likely impossible to definitively determine… [T]he existence of confusing and inconsistent interrogation technique policies contributed to the belief that additional interrogation techniques were condoned in order to gain intelligence.*"[305]

On 30 November 2003, Colonel Pappas, commander of the 205th Military Intelligence Battalion which was handling the interrogations of detainees at Abu Ghraib, requested authorization for the harsher methods against a Syrian detainee who was proving resistant to interrogation. The Colonel's memorandum described the interrogation plan, which would begin with "Fear up Harsh", one of the techniques that could be used against any detainee without authorization:

> "*Interrogators will at a maximum throw tables, chairs, invade his personal space and continuously yell at detainee. Interrogators will not physically touch or harm the detainee, will take all necessary precautions that all thrown objects are clear of the detainee and will not coerce the detainee in any way. If the detainee has not broken yet, interrogators will move into the segregation* [isolation] *phase of the approach… For the segregation phase of the approach, the MPs* [military police] *will put an empty sandbag onto the prisoners head before moving him out... During transportation, the Fear up Harsh approach will be continued… Upon arrival at site, MP guards will take him into custody. MP working dogs will be present and barking during this phase. Detainee will be strip searched by guards with the empty sandbag*

[304] Memorandum on CJTF-7 Interrogation and Counter-Resistance Policy, 12 October 2003. http://www.publicintegrity.org/docs/AbuGhraib/Abu4.pdf.
[305] Fay report (Jones, page 15), *supra*, note 15.

over his head... Detainee will be put on the adjusted sleep schedule for 72 hours. Interrogations will be conducted continuously during this 72-hour period. The approaches which will be used during this phase will include, fear up harsh, pride and ego down, silence and loud music. Stress positions will also be used... in order to intensify the approach. The approval for this approach is essential due to the information this detainee possesses... and could potentially save countless lives of American soldiers in the future".[306]

Amnesty International understands that the Syrian detainee in question was the detainee who was kept in prolonged incommunicado in solitary confinement in appalling conditions, without access to the ICRC (see page 16), on grounds of "military necessity" invoked by Colonel Pappas and Colonel Marc Warren.[307]

WORDS	ACTIONS
Interrogation techniques listed by Pentagon Working Group, April 2003 (not exhaustive). Notes "techniques are usually used in combination".	**Interrogation techniques, used "in a systematic way" against security detainees in Iraq, found by International Committee of the Red Cross and listed in report in February 2004 (not exhaustive).**
Hooding Prolonged interrogations Environmental manipulation	Hooding, sometimes used in conjunction with beatings. Hooding could last for periods from a few hours to up to two to four consecutive days; Exposure while hooded to loud noise or music, prolonged exposure while hooded to the sun at the hottest time of day;
Mild physical contact Face slap / Stomach slap	Beatings with hard objects, slapping, punching, kicking;
Fear up harsh Threat of transfer	Threats (of ill-treatment, reprisals against family members, imminent execution or transfer to Guantánamo);
Removal of clothing Isolation Sleep deprivation Dietary manipulation Prolonged standing	Being stripped naked for several days while held in solitary confinement in an empty and completely dark cell; Being held in solitary confinement, combined with threats, insufficient sleep, food or water deprivation, minimal access to showers, denial of access to open air; Being forced to remain for prolonged periods in stress positions; Acts of humiliation such as being made to stand naked, with arms raised or with women's underwear over the head, for prolonged periods...

[306] Memorandum: Request for Exception to CJTF-7 Interrogation and Counter-Resistance Policy, 30 November 2003. http://www.publicintegrity.org/docs/AbuGhraib/Abu7.pdf.
[307] Fay report, page 66, *supra*, note 15.

Major General Miller, who in March 2004 was appointed to the post of Deputy Commander of Detainee Operations in Iraq, has stated that "the basics of the Geneva Convention – shelter, medical care, food – are never used as a manipulative tool."[308] Yet, the 12 October 2003 policy signed by Lieutenant General Sanchez, authorized interrogators to assume control over the "lighting, heating and configuration of the interrogation room, as well as the food, clothing, and shelter given to the security detainee" (as in the now outdated 1987 FM 34-52, see footnote 278). The Fay report noted that abuses such as "exposure to cold and heat or denial of food and water", including "detainees being left naked in their cells during severe cold weather without blankets", occurred at Abu Ghraib. It found that some of these abuses were directed by military intelligence and some were committed solely by military police guards.[309]

The "torture memos" that have come into the public domain show that the government failed in its international obligation to "keep under systematic review interrogation rules, instructions, methods and practices" with a view to preventing any cases of torture or cruel, inhuman or degrading treatment, as Articles 11 and 16 of the UN Convention against Torture require. Instead the administration discussed how to avoid Geneva Convention protections, how to push the legal limits on torture and have its agents avoid criminal liability, and sanctioned the use of interrogation techniques which violated the international prohibition on torture and cruel, inhuman or degrading treatment. This clearly contradicted the government's assurances that it was committed to all its legal obligations prohibiting torture. In so doing, the administration failed to meet Point 1 of Amnesty International's 12-Point program against torture, that the highest authorities of every country should make clear to all members of the police, military and other security forces that torture and cruel, inhuman or degrading treatment will never be tolerated.

1.3 'Un-American' activities?

I think it's appropriate to have as a part of the record at this point that the incidents of abuses in our prisons in the United States appear to be far greater than what we're experiencing over there in Abu Ghraib.

US Senator, 9 September 2004[310]

From early on in the "war on terror", the White House issued assurances that "as Americans, the way we treat people is a reflection of America's values…, based upon the dignity of every individual."[311] This has become a standard response. In 2003, asked to respond to allegations that detainees had been ill-treated in Bagram air base in Afghanistan, the military spokesman there said: "I think you would have to agree, America, and for the most part the other

[308] Coalition Provisional Authority briefing, 4 May 2004.
[309] Fay report, pages 70-71, *supra*, note 15.
[310] Senator James Inhofe, Senate Armed Services Committee hearing, 9 September 2004. At a hearing on 11 May 2004, Senator Inhofe stated that he was "outraged that we have so many humanitarian do-gooders right now crawling all over these prisons [in Iraq] looking for human rights violations...".
[311] Statement by the Press Secretary on the Geneva Convention, 7 February 2002.

countries involved in this coalition, don't have a reputation for treating individuals in an inhumane way. It's not part of our culture."[312] Asked about allegations of ill-treatment of Guantánamo detainees, President Bush responded: "We don't torture people in America. And people who make that claim just don't know anything about our country".[313] Around that time, acts of torture against Iraqi detainees were being filmed by US personnel in Abu Ghraib prison. Once the photographs were made public numerous officials claimed that what they depicted was an affront to "American values".[314] Secretary of Defense Rumsfeld told members of Congress that what happened in Abu Ghraib was "un-American".[315]

At best, such responses suggest a degree of complacency and a misunderstanding of the roots of torture. Torture is a human phenomenon, not an indigenous or cultural one. History shows that it can occur whenever safeguards against it are absent, regardless of the culture or nationality of the interrogators or jailers. In the "war on terror" the US administration has removed or lowered such safeguards, and failed to respond to evidence that torture and ill-treatment were the result.

Familiarity breeds contempt

The common refrain about "un-American" conduct or conduct inconsistent with "American values" should also be set against the USA's domestic human rights record, including its resort to judicial killing; its practice of holding detainees in long-term isolation in super-maximum security facilities; its excessive and cruel use of restraints against detainees; its failure adequately to confront racism in the criminal justice system; and its selective approach to international human rights law. This reluctance towards international standards has manifested itself in numerous ways. For example:

- The UN Committee against Torture has criticized the USA's domestic use of remote-controlled electro-shock stun belts, restraint chairs and "excessively harsh" conditions in super-maximum security prisons. The US government has ignored the Committee's concerns. In the "war on terror", excessive and cruel use of restraints has been routine.[316] In May 2004, the US authorities opened Camp Five at

[312] Colonel Rodney Davis, interviewed for *Inside Guantánamo*. BBC TV, Panorama, 5 October 2003.
[313] Interview of the President by Laurence Oakes, Channel 9 TV, 18 October 2003.
[314] President Bush, for example, has said that "the actions of those folks in Iraq do not represent the values of the United States of America" (White House, 6 May 2004) and described the torture as the "disgraceful conduct by a few American troops who… disregarded our values" (US Army War College, Pennsylvania, 24 May 2004).
[315] Testimony before the Senate and House Armed Services Committees, 7 May 2004.
[316] Former Guantánamo detainee Alif Khan told Amnesty International in July 2003 that he had been held in US custody in Bagram air base for five days in May 2002. He said that he was held in handcuffs, waist chains and leg shackles for the whole time, subjected to sleep deprivation, denied water for ablution and prayer, and repeatedly interrogated. He was transferred to Kandahar for 25 days, and kept in restraints for most of the time, subjected to daily intimate body searches and repeatedly interrogated. In an interview for Amnesty International in Afghanistan in August 2003, released Guantánamo detainee Muhammad Naim Farooq recalled that the tightness of his handcuffs during his transfer to Cuba in mid-2002 had injured his wrists. He said that many of his co-detainees were crying "because of

Guantánamo Bay. This appears to have been modelled on the super-max prisons on the US mainland. Detainees are held in solitary confinement for up to 24 hours a day in concrete cells and are under 24-hour video surveillance.

It is noteworthy, with this in mind, that among the first six soldiers charged in connection with the Abu Ghraib torture were two men who in their civilian life had been prison guards, one with the Virginia Department of Corrections, and one in a notorious maximum security prison housing Pennsylvania's death row.[317] The Taguba report found that the military police guards' lack of training in detentions meant that they "relied heavily on individuals… who had civilian corrections experience, including many who worked as prison guards or corrections officials in their civilian jobs". Two of the soldiers allegedly involved in abuses in June 2003 at Camp Whitehorse, a US detention facility in Iraq, were corrections officers in civilian life.[318] According to prosecutors at a subsequent court-martial, one of them had allegedly told other soldiers that abusive treatment maintains prisoner discipline.[319]

It is also noteworthy, when considering the claims of "un-American" conduct, that early on in the "war on terror" the US Secretary of Defense ascribed a normality to the clearly harsh conditions to which detainees were being subjected. Faced with concern about the conditions of detainee transfers from Afghanistan to Guantánamo and asked whether "hooding…, shaving, chaining, perhaps even tranquillizing some of these people is violating their civil rights", Secretary Rumsfeld responded that "it simply isn't… all one has to do is look at television any day of the week, and you can see that when prisoners are being moved between locations, they're frequently restrained in some way with handcuffs or some sort of restraints".[320]

On other occasions, Secretary Rumsfeld has displayed an attitude of disregard for international standards relating to the treatment of detainees. "To be in an eight-by-eight [feet] cell in beautiful, sunny Guantánamo Bay, Cuba", he suggested in January 2002 "is not inhumane treatment".[321] Three months later, detainees were transferred to smaller cells in which many of them have been held without charge or trial for more than two years. In December 2002, Secretary Rumsfeld approved additional interrogation techniques for use at Guantánamo, including isolation, sensory deprivation, use of 20-hour interrogations, hooding,

pain". Another former Guantánamo detainee, Wazir Mohammad, told Amnesty International in February 2004 that he had been held in handcuffs and shackles for the first week of his 45-day detention in Bagram air base in Afghanistan. He said that when he was moved from Bagram to Kandahar air base by plane, his handcuffs were so tight that it cut the blood flow to his hands. Rule 34 of the UN Standard Minimum Rules for the Treatment of Prisoners states that restraints "must not be applied for any longer time than is necessary". In its February 2004 report on abuses in Iraq, the ICRC found that handcuffs were "used so tight and used for such extended periods that they caused skin lesions and long-term after-effects".

[317] Staff Sergeant Ivan Frederick and Specialist Charles Graner.

[318] Lance Corporal William Roy, a county jail guard, and Reserve Sergeant Gary Pittman, a federal prison guard. *Marine goes on trial in death of Iraqi*. Associated Press, 23 August 2004.

[319] *New York marine convicted of assaulting Iraqi prisoners*. New York Times, 3 September 2004.

[320] Department of Defense news briefing, 11 January 2002.

[321] Department of Defense news briefing, 22 January 2002.

removal of clothing, use of dogs to instil fear, and stress positions for a maximum of four hours. On this latter technique, he handwrote at the bottom of the memorandum, "I stand for 8-10 hours a day. Why is standing limited to 4 hours?"[322] He has repeated this, to his apparent amusement, in at least one media interview.[323] Amnesty International considers that, given his position, Secretary Rumsfeld's public comments on detentions have frequently been inappropriate and inconsistent with international human rights law and standards, the promotion of which is purportedly a central pillar of his country's foreign policy.

"Notwithstanding the isolated pockets of international hyperventilation", stated Secretary Rumsfeld soon after the first transfers to Guantánamo Bay, "we do not treat detainees in any manner other than a manner that is humane."[324] This is not how those at the receiving end of this treatment perceived it. Released detainees have spoken of the degrading conditions of the transfers. One detainee, Sayed Abbasin, has described it as the "worst day of my life": "I arrived tied and gagged; it was the act of an animal to treat a human being like that".[325] Another, Wazir Mohammed, recalled to Amnesty International how he and his fellow detainees were treated "like cargo not people". He refused to go into detail of the indignities that occurred during the 22-hour flight to Guantánamo from Afghanistan. Amnesty International has been told that detainees were forced to defecate and urinate where they sat.

History repeats itself

The history of US practices is also informative when considering this administration's claims that what happened at Abu Ghraib was "un-American". Amnesty International's 1973 *Report on Torture* noted that a large number of the detainees brought in for interrogation in South Vietnamese detention facilities during the war in Vietnam were detained under the USA's Phoenix Program, devised in the late 1960s for "rooting out the Vietcong 'infrastructure'". Several ex-US Army intelligence operators had testified to the extensive use of torture and murder of suspects under the Program. The 1973 Amnesty International report also noted frequent reports that the USA had financed and organized anti-subversive training courses in Panama. Much more has been revealed since then. For example, the US training institution, the School of the Americas (SOA), became notorious for training and educating Latin American military personnel who went on to commit human rights violations in their own countries. In the 1980s and early 1990s, the SOA used manuals that advocated torture, extortion, kidnapping and execution. No one was ever held accountable for the development and use of these manuals.[326]

Amnesty International's 1973 *Report on Torture* also noted allegations that US personnel had been present at torture sessions in Latin American countries. Again, more

[322] Action memo. Approved 2 December 2002, *supra*, note 49.
[323] "Another technique was to have people stand for four hours. You know, on the other hand, people will look at that and say, well, that's not anything terrible [chuckles]." Secretary Rumsfeld interview with Sean Hannity, ABC Radio. Department of Defense transcript, 24 June 2004.
[324] Department of Defense news briefing, 8 February 2002.
[325] BBC TV Newsnight, 5 June 2003 (translation).
[326] See http://www.amnestyusa.org/arms_trade/ustraining/schools.html.

evidence has emerged since. Dr Juan Romagoza was detained in El Salvador in late 1980 and early 1981. He says that he was kicked and beaten, kept naked and blindfolded, hung by his hands, sexually assaulted and subjected to electric shock torture. He claims that during his torture, US advisers were present, "asking questions and laughing".[327] Sister Dianna Ortiz, a nun and US citizen who was abducted and tortured in Guatemala in 1989, has alleged that her torture was only stopped when a man with a North American accent, whom she believes was a US agent, was called in by her torturers and recognized her from media reports.[328]

The USA has also had a long reach in the "war on terror", and not only in relation to secret transfers (see Point 12). For example:

- In Saudi Arabia, agents of the Federal Bureau of Investigation are reported to have either interrogated or been present at the interrogation of Ahmed Abu 'Ali, arrested in June 2003. They are alleged to have threatened him with transfer to Guantánamo Bay or with a trial in Saudi Arabia where he would have no legal assistance, public hearing, or appeal to a higher tribunal.[329]
- In August 2004, UN Independent Expert on Afghanistan, Professor M. Cherif Bassiouni, raised allegations that US pressure was behind the continued illegal detention in Afghan government custody of hundreds of detainees in Pul-e-Charkhi prison in Afghanistan. He described the conditions in which the detainees were held as violating "every standard of human rights".[330]

Declassified CIA interrogation training manuals from the 1960s and 1980s describe "coercive techniques" that mirror the "stress and duress" techniques sanctioned in the "war on

[327] See *America's Amnesia*, by Matthew Rothschild. The Progressive, July 2004.

[328] The Inter-American Commission on Human Rights concluded that Dianna Ortiz was a "credible witness" and that she had been abducted and tortured. The Commission wrote: "There is no evidence in the record that the military and the National Police conducted the basic investigations which would be appropriate in this case… The court with jurisdiction over the case sent out a request to the various branches of the security forces of Guatemala to list any North Americans that had worked with those agencies. But, there is no indication that either the military or the National Police conducted an independent investigation to determine whether a North American matching the description of 'Alejandro' [the alleged US agent] worked with Guatemalan security forces either covertly or overtly." Inter-American Commission on Human Rights, Report no 31/96. *Dianna Ortiz v. Guatemala*, Case 10.526, 16 October 1996, paras. 49, 96, respectively.

[329] *The Gulf and the Arabian Peninsula: Human rights fall victim to the "war on terror"*. AI Index: MDE 04/002/2004, June 2004. http://web.amnesty.org/library/Index/ENGMDE040022004

[330] "Every Government official I have discussed this matter with has agreed that there's no legal basis for their detention, and everyone has said that they should be released… There are allegations that the US authorities ask that they continue to be kept in detention". Professor Bassiouni noted official US denials, but said that "it is quite clear having spoken to almost every senior [Afghan] official other than the President, that all of the indications are that they want them to be released and that there's someone else who's putting the hold on them." He added: "It seems that there's a question of credibility at stake here". *Afghanistan: UN expert denounces abuses in illegal prisons*. UN News Service, 22 August 2004.

terror".[331] For example, the *Human Resource Exploitation* training manual of 1983 states the subject should be "immediately blindfolded and handcuffed" upon arrest and "isolation, both physical and psychological must be maintained from the moment of apprehension". The subject should remain blindfolded and handcuffed, the manual asserts, during "the entire processing" of the detainee after arrival at the detention facility. After this the "subject is completely stripped and told to take a shower. Blindfold remains in place while showering and guard watches throughout". Hooding, stripping, isolation and the cruel and excessive use of handcuffs and shackles have all been used against detainees in US custody during the "war on terror".

The 1983 CIA manual instructs that:

> "*the manner and timing of arrest should be planned to achieve surprise and the maximum amount of mental discomfort. He should therefore be arrested at a moment when he least expects it and when his mental and physical resistance is at its lowest. Ideally in the early hours of the morning* [the 1963 manual states that the "the next best time is in the evening"]. *When arrested at this time, most subjects experience intense feelings of shock, insecurity, and psychological stress and for the most part have great difficulty adjusting to the situation.*"

The practice of shock arrests has emerged in US operations in Afghanistan and Iraq. In its February 2004 report on its concerns about abuses by Coalition forces in Iraq, the ICRC stated that it had found a "consistent pattern" of "brutality" at the time of arrest.

> "*Arresting authorities entered houses usually after dark, waking up residents roughly, yelling orders, forcing family members into one room under military guard while searching the rest of the house and further breaking doors, cabinets and other property. They arrested suspects, tying their hands [behind their] back with flexi-cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in a house, including elderly, handicapped or sick people. Treatment often included pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles. Individuals were often led away in whatever they happened to be wearing at the time of arrest – sometimes in pyjamas or underwear – and were denied the opportunity to gather a few essential belongings, such as clothing, hygiene items, medicine or eyeglasses.*"

Sheik Abdul Sattar, a 71-year-old man, was arrested on 25 April 2004. According to reports, he was watching television in the early hours of the morning when US soldiers entered his house. Sheik Abdul Sattar, a frail man, was pushed to the ground, had a bag put over his head and his hands tightly cuffed behind him, and was dragged along the ground, suffering bruises and a twisted ankle.[332]

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[331] The manuals are available at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm. In its 1973 *Report on Torture*, Amnesty International noted evidence of the torture of prisoners in a South Vietnamese interrogation centre run with the advice and support of the CIA.

[332] *Pervasive abuse alleged by freed detainees, Red Cross*. Los Angeles Times, 18 May 2004.

A US soldier told the Fay investigation into Abu Ghraib that he had been asked by a civilian contract interrogator for ideas to get detainees to talk. The soldier "related several stories about the use of dogs as an inducement, suggesting [the contractor] talk to the [military police guards] about the possibilities." The soldier also suggested that the contractor could photograph detainees being ill-treated so he could use the pictures to frighten other detainees. He added that detainees are most susceptible during the initial hours after capture:

> "*The prisoners are captured by soldiers, taken from their familiar surroundings, blindfolded and put into a truck and brought to this place (Abu Ghraib); and then they are pushed down a hall with guards barking orders and thrown into a cell, naked; and that not knowing what was going to happen or what the guards might do caused them extreme fear.*"[333]

"Control of the source's environment", states the CIA's *Kubark Counterintelligence Interrogation* manual of July 1963, "permits the interrogator to determine his diet, sleep pattern, and other fundamentals. Manipulating these into irregularities, so that the subject becomes disorientated, is very likely to create feelings of fear and helplessness". It concludes that "the principal coercive techniques are arrest, detention, the deprivation of sensory stimuli, threats and fear, debility, pain, heightened suggestibility and hypnosis, and drugs". The 1983 manual, drawing heavily on its 1963 predecessor, discusses "coercive techniques" under the headings of "debility (physical weakness)", "dependency" and "dread (intense fear and anxiety)". [334] The manual offers the interrogator a checklist, including: "Is solitary confinement to be used? Does the place of confinement permit the elimination of sensory stimuli? Are threats to be used? Are coercive techniques to be used?" These CIA manuals are officially no longer policy, but two decades on, similar questions have been answered in the affirmative during the "war on terror".

What has without doubt been authorized are the detention conditions in Guantánamo Bay. Under the heading "cell block planning", the CIA's 1983 training manual instructs that "cells should be about 3 metres long and 2 metres wide". In Camp Delta in Guantánamo Bay, where hundreds of detainees have been kept virtually incommunicado for over two years, the cells are even smaller (approximately 2 metres by 2.45 metres). The manual continues: "window should be set high in the wall with the capability of blocking out light (this allows the 'questioner' to be able to disrupt the subject's sense of time, day and night)"; "heat, air and light should be externally controlled". In Camp Echo, in Guantánamo, where detainees awaiting trial by military commission have been held in solitary confinement for months and months on end, the cells they were put into are reportedly windowless.

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[333] Fay report, page 63, *supra*, note 15.

[334] In turn these categories stem from the 1950s post-Korean War research of Albert Biderman, whose 'chart of coercion' lists various interrogation methods now familiar in the "war on terror". The techniques include: isolation, darkness or bright light, barren environment, restricted movement, monotonous food, exploitation of wounds, sleep deprivation, prolonged constraint, prolonged interrogation, overexertion, threats of death, rewards for partial compliance, insults and taunts, demeaning punishments, and denial of privacy. See *Report on Torture*, Amnesty International, 1973.

In May 2004, Amnesty International raised allegations that a Chinese government delegation had visited Guantánamo in September 2002 and participated in interrogations of Chinese ethnic Uighur detainees held there. It is alleged that during this time, the detainees were subjected to intimidation and threats, and to interrogation techniques such as environmental (temperature) manipulation, forced sitting for many hours, and sleep deprivation, some of which is alleged to have been on the instruction of the Chinese delegation.[335] Asked about these allegations, Army General James T. Hill would only confirm that various government delegations "have come and they have talked to their detainees", but stated that "we don't talk about what countries come" to Guantánamo. He said that foreign government delegations talk to their nationals "following our rules and under our direct supervision".[336]

Given the allegations of released detainees and the contents of government documents now in the public domain, General Hill's response raises the question: what do US officials mean when they refer to "our rules" of interrogation?

Upon declassification, the CIA's 1983 *Human Resource Exploitation* manual was hand-edited to alter passages on "coercive techniques". The apparently hasty hand-editing betrays a recognition by officialdom that torture and cruel, inhuman and degrading treatment are wrong. For example, the sentence "While we do not stress the use of coercive techniques, we do want to make you aware of them and the proper way to use them", was changed to "While we *deplore* the use of coercive techniques, we do want to make you aware of them *so that you may avoid them*." Similarly "coercive techniques always require prior HQs approval" became "coercive techniques *constitute an impropriety and violate policy*."

1.4 Slippery slope: Undermining public morality

Every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms.
Preamble, Universal Declaration of Human Rights, 1948

On 13 May 2004, at a hearing before the US Senate Armed Services Committee, the following exchange took place between Senator Jack Reed and Deputy Secretary of Defense Paul Wolfowitz:

> Senator: *[T]he rules that we were shown by General Alexander and others which would allow, with his permission, to keep someone in a squatting position and presumably naked, with their arms up, for 45 minutes... Mr Secretary, do you think crouching naked for 45 minutes is humane?*
>
> Deputy Secretary: *Not naked, absolutely not.*

[335] Amnesty International Urgent Action. Further information on UA 356/03. AI Index: AMR 51/090/2004, 25 May 2004. http://web.amnesty.org/library/Index/ENGAMR510902004.
[336] Department of Defense briefing, 3 June 2004.

Senator: *So if he's dressed up, that's fine. But this also has other environmental manipulation. Let me put it this way. Seventy-two hours without regular sleep, sensory deprivation, which would be a bag over your head for 72 hours – do you think that's humane, putting a – and that's what it is, a bag over your head for 72 hours – is that humane?*

Deputy Secretary: *Let me come back to what you said the work…*

Senator: *No, no. Answer the question, Mr Secretary. Is that humane?*

Deputy Secretary: *I don't know whether it means a bag over your head for 72 hours, Senator. I don't know.*

Senator: *Mr Secretary, you're dissembling, non-responsive. Anybody would say putting a bag over someone's head for 72 hours, which is…*

Deputy Secretary: *I believe it's not humane.*

Members of an administration that has discussed how to push the boundaries of acceptable interrogation techniques and of how agents could avoid criminal liability for torture might display a reticence to call torture by its name. Official equivocation over the question of torture and ill-treatment may betray a willingness to tolerate unacceptable conduct on the spectrum of torture and other cruel, inhuman or degrading treatment.

As of October 2004, Amnesty International was not aware of President Bush or any official in his cabinet referring to what happened in Abu Ghraib as torture or a war crime, preferring the term "abuse".[337] In his statement on 26 June 2004 reaffirming the USA's "commitment to the worldwide elimination of torture", President Bush referred to "the abuse of detainees at Abu Ghraib".[338] The following day, Secretary Rumsfeld said that "everything we know thus far suggests that what was taking place in the photographs was abuse".[339] At a Pentagon briefing on 4 May 2004, in one of several statements apparently downplaying the allegations, he stated that his "impression is that what has been charged so far is abuse, which I believe technically is different from torture".

The reports of the various reviews and investigations into detention operations have maintained this position. On 24 August 2004, John Schlesinger, Chairperson of the Secretary Rumsfeld-appointed Independent Panel to review Department of Defense detention

[337] Visiting Abu Ghraib, General Richard Myers followed a speech by the Secretary of Defense with his own comments, including: "Well, I think the Secretary covered the abuse situations, so I'm going to let that go. I think that was covered adequately." He then added to the assembled military and press: "I have great confidence that, hopefully, you haven't been *tortured* by any of the testimony [in hearings on the Abu Ghraib scandal before congressional committees] we've been involved in the last several days" (emphasis added). Department of Defence news transcript, 13 May 2004.

[338] President's Statement on the UN International Day in Support of Victims of Torture, 26 June 2004.

[339] Secretary of Defense Rumsfeld interview with David Frost (BBC TV). Department of Defense news transcript, 27 June 2004. A US army interrogator who has reportedly served in Afghanistan and Guantánamo has said that "nothing seen in the pictures constitutes the torture of a detained person." *How Expert Gets Detainees To Talk.* The Capital Times (Wisconsin), 17 August 2004.

operations, said that "there is a problem in defining torture. We did not find cases of torture, however".[340] The following day, Major General George Fay admitted in a press conference what had not been put in writing in his report on Abu Ghraib. Asked whether any of what the investigation had found in Abu Ghraib amounted to torture, he replied:

> *"Torture is a subjective term, but in my use of the word torture, I would consider these things to be abusive in nature. Torture sometimes is used to define something in order to get information. There were very few instances where in fact you could say that was torture. It's a harsh word, and in some instances, unfortunately, I think it was appropriate here. There were a few instances when torture was being used."*[341]

On the question of torture, Secretary Rumsfeld has suggested that "headline writers and people dramatize things".[342] This is apparently standard Pentagon thinking. The final report of the *Working Group on Detainee Interrogations in the Global War on Terrorism*, completed a year before the Abu Ghraib revelations, contains the following conclusion: "Should information regarding the use of more aggressive techniques than have been used traditionally by US forces become public, it is likely to be exaggerated or distorted in the US and international media accounts". The report recommended the preparation of a "press plan" to anticipate and address potential public inquiries and misunderstandings regarding appropriate interrogation techniques."[343]

In June 2004, an ABC News/Washington Post opinion poll reportedly found that 35 per cent of the US population felt torture was acceptable in some circumstances.[344] In an opinion poll conducted in the USA in May, only a third of those polled said that they would define what happened in Abu Ghraib prison as torture.[345] Would they describe such treatment as torture if it was happening closer to home rather than to distant foreign nationals long demonized by US leaders, or indeed if those same leaders would describe it as such? One well-known radio commentator, Rush Limbaugh, who has an audience of over 20 million, characterized the torture at Abu Ghraib as soldiers "having a good time" and needing "to blow some steam off".[346] He has noted that "the closer you get to 9/11 the more everybody was willing to speak out about [the need for torture in the 'war on terror'], but now 9/11 is in the past and we're doing this in Iraq. And look, we all know what war is… and we are in a war for our way of life, and so that's why I say just keep all this in perspective".[347]

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[340] Press Conference with Schlesinger panel, 24 August 2004, *supra*, note 67.
[341] Special Defense Department Briefing on results of investigation of military intelligence activities at Abu Ghraib prison facility. Department of Defense News Transcript. 25 August 2004.
[342] Defense Department regular briefing, 17 June 2004.
[343] Pentagon Working Group Report. Page 69-70, *supra*, note 56.
[344] Cited in: *The hidden history of CIA torture: America's road to Abu Ghraib.* By Alfred W. McCoy. 2004. http://www.tomdispatch.com/index.mhtml?pid=1975.
[345] *Torture and physical abuse: what Americans will allow.* Washington Post, 27 May 2004. The report cites a new Washington Post/ABC News poll.
[346] Rush: MPs just 'blowing off steam'. CBS News.com, 6 May 2004.
[347] Liberals were for torture after 9/11. Radio Transcript, 10 May 2004.

Rush Limbaugh was referring to the public debate that there has been in the USA since 11 September 2001 on whether torture can be acceptable in the "war on terror". A government fully and unswervingly committed to the eradication of torture would have participated directly and continuously in this debate in order to make clear that torture and cruel, inhuman or degrading treatment must never be tolerated and that the country's military and law enforcement agencies would live by that principle at this and any other time.[348] Instead, while making general statements against torture, aimed mainly at an international audience, the administration was secretly discussing and authorizing interrogation techniques that were unacceptable under international standards.

A country steps on to a slippery slope when it begins to chip away at the prohibition on torture and cruel, inhuman or degrading treatment. In its first major report on torture 30 years ago, Amnesty International wrote:

> "*History shows that torture is never limited to 'just once; 'just once' becomes once again – becomes a practice and finally an institution. As soon as its use is permitted once, as for example in one of the extreme circumstances like a bomb, it is logical to use it on people who might plant bombs, or on people who might think of planting bombs, or on people who defend the kind of person who might think of planting bombs...*".[349]

The USA claims to have reserved its harsh interrogation techniques for what it calls a few "high-value" detainees – that is, those detainees considered to be in possession of immediately usable intelligence. For example, the Pentagon has claimed that Secretary Rumsfeld's December 2002 approval for use at Guantánamo of interrogation techniques including stress positions, sensory deprivation, isolation, hooding, stripping and the use of dogs to inspire fear stemmed from the need for "additional techniques… for use against high-value detainees", including Saudi national Mohamed al-Kahtani, suspected of being involved in the 11 September 2001 conspiracy (see page 15).[350] Asked about this in June 2004, Secretary Rumsfeld stated that the techniques "were not used, I'm told, on anyone one other than Kahtani. We may find out that's not correct at some point in the future".[351]

According to what released prisoners have alleged, this discovery has already occurred. Their evidence suggests that torture and ill-treatment by US personnel has not been

[348] Public education is an important part of a government's human rights responsibilities. For example, the Human Rights Committee has said that it "should be informed how States parties disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by Article 7 [of the International Covenant on Civil and Political Rights]". Human Rights Committee, CCPR General Comment No. 20. (General Comments), Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7), 10 March 1992, para. 10.
[349] *Report on Torture*. Amnesty International, 1973.
[350] Department of Defense Deputy General Counsel. Press briefing, 22 June 2004, *supra*, note 16.
[351] Secretary of Defense Rumsfeld interview with David Frost (BBC TV). Department of Defense news transcript, 27 June 2004.

limited to "high value" detainees.[352] In any event, international law prohibits torture or ill-treatment regardless of the "value" it would allegedly produce.

An official version of the 'torture warrant'

The administration's explanation that it was approving techniques in limited circumstances against a small number of detainees is reminiscent of the concept of the judicial "torture warrant" that has been promoted during the "war on terror" by Harvard law professor Alan Dershowitz. According to Professor Dershowitz, torture by US agents happens anyway, so to have it out in the open, it should be authorized by a judge when circumstances call for it: "Thus we would not be winking an eye of quiet approval at torture while publicly condemning it".[353] He has said that "an application for a torture warrant would have to be based on the absolute need to obtain immediate information in order to save lives coupled with probable cause that the suspect had such information and is unwilling to reveal it".[354] Of course, were such a policy adopted by any country, let alone one as influential as the USA, others would surely follow and the international consensus against torture would be broken.[355]

Amnesty International is also troubled by a letter to Congress signed by some 450 US law professors and other academics six weeks *after* publication of the Abu Ghraib photographs, suggesting that "any decision to adopt a coercive interrogation policy… should be made within the strict confines of a democratic process".[356] Yet the same letter states,

[352] Amnesty International, for example, has spoken to two Afghan taxi drivers – Wazir Mohammed and Sayed Abbasin – whom the organization remains convinced were erroneously taken into custody in Afghanistan in 2002 and subjected to cruel, inhuman and degrading treatment before being flown out to detention without charge or trial in Guantánamo Bay. They have since been released without charge. See: USA: *The threat of a bad example: Undermining international standards as 'war on terror' detentions continue*. August 2003, *supra*, note 95.

[353] *Is there a torturous road to justice?* By Alan Dershowitz. Los Angeles Times, 8 November 2001. See also Dershowitz, *Why Terrorism Works: understanding the threat, responding to the challenge*, New Haven, Yale University Press, 2002, Ch. 4.

[354] *Let America take its cues from Israel regarding torture*. Jewish World Review, 30 January 2002.

[355] For some, the proposal for "torture warrants" may bring to mind the issue of death warrants, almost 1,000 of which have been carried out in the USA since 1977. This policy of judicial killing continues despite the absence of evidence that it has offered a constructive solution to violent crime and in the face of overwhelming evidence that the death selection process is marked by arbitrariness, discrimination and error. Amnesty International considers the death penalty to be the ultimate cruel, inhuman and degrading punishment. International law and standards, while being abolitionist in outlook, recognize the possibility that some countries may retain the death penalty. President Bush supports capital punishment in the stated belief that it "ultimately saves lives" (White House press briefing, 7 May 2001). The USA's "war on terror" interrogation and detention policies are driven by a similar stated belief, i.e. to deter or pre-empt future acts of criminal violence. The deterrence value that some attribute to the death penalty has generally been discredited, and there is evidence that it may even have a brutalizing or counter-deterrence effect. Amnesty International believes the USA's "war on terror" detention and interrogation policies are undermining long-term security by eroding respect for fundamental human rights.

[356] In the wake of the Abu Ghraib revelations, the Federal Bureau of Investigation sent a memorandum to all its divisions to remind all personnel deployed in Iraq, Afghanistan, Guantánamo, "or any other

correctly, that the Third and Fourth Geneva Conventions prohibit any "physical or moral coercion" of prisoners of war or civilian detainees to obtain information, in addition to other provisions in international human rights and humanitarian law prohibiting torture and cruel, inhuman or degrading treatment. "Democracy" should surely not be used to justify any measures that strip individuals, however few, of basic rights, or to destroy an international legal consensus, built over centuries, around such rights.

Professor Dershowitz has said of his proposal for torture warrants against security detainees: "If someone asked me to draft the statute, I would say, 'Try buying them off, then use threats, then truth serum, and then if you came to a last recourse, non-lethal pain, a sterilized needle under the nail to produce excruciating pain'. You would need a judge signing off on that. By making it open, we wouldn't be able to hide behind the hypocrisy".[357] Hypocrisy there has been, at the highest levels of government. But rather than a judge signing off on torture, the Secretary of Defense and others have signed off on interrogation techniques that violate the prohibition on torture and other cruel, inhuman or degrading treatment (see, for example, Pappas interrogation plan, page 71).

Rather than confront the Dershowitz proposal with a clear and categorical putdown, the administration has engaged in its own version of it. For example, echoing the proposal, the Pentagon Working Group report states: "If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaida terrorist network."[358]

The slippery slope of brutalization

Amnesty International's 1973 torture report, referring to the conflict in Vietnam, suggested that "an administration defending itself against what it or its major ally construes to be an insurrectionary movement may regrettably find it hard to resist the expedient of torture in its efforts to crush its elusive opponent". It also stated that "the brutalizing effects of the Vietnam War have become so entrenched that some of the time the use of torture during interrogation is no longer even motivated by a desire to gather 'intelligence'." The slippery slope from limited authorization of torture to a wider tolerance of such methods is a part of the landscape of this human rights violation.

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foreign location" of FBI interrogation policy. The memorandum, dated 19 May 2004, reminds its recipients that "it is the policy of the FBI that no interrogation of detainees, regardless of their status, shall be conducted using methods which could be interpreted as inherently coercive". *Treatment of prisoners and detainees*. From General Counsel, Federal Bureau of Investigation, 19 May 2004. It has been reported that the senior officials at the FBI had been so concerned about the severity of interrogation techniques used by the CIA in the "war on terror" (see Point 3.2), that they have warned their operatives to stay out of interrogations of high-level detainees interrogated by the CIA. *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004.

[357] *The psychology of torture*. Washington Post, 11 May 2004.

[358] Pentagon Working Group, page 31, *supra*, note 56.

A former US marine, now a military analyst with the mainstream Fox TV News Channel, has reportedly said that he tortured a Vietcong prisoner during the Vietnam War by attaching electrodes to his genitals and threatening electrocution.[359] Lieutenant Colonel William Cowan claimed that the torture "worked like a charm", making the prisoner talk. Lt. Col. Cowan has also suggested that torture should be used against high-ranking *al-Qa'ida* suspects: "If it's Abu Zubaydah, you start out being tough – physical pain and emotional pain. You're putting him under physical duress outside the bounds of what the United Nations accepts."[360] Government agents are already alleged to have done so (see Point 3.2).

Some of the torture and cruel, inhuman or degrading treatment in Abu Ghraib was apparently carried out as punishment or for the sadistic amusement of guards.[361] As already noted, the Fay report found that authorized techniques such as nudity and physical stress were followed by violent physical and sexual assaults by some personnel. The Schlesinger report noted that one of the soldiers involved in the Abu Ghraib torture and ill-treatment said that it had been committed "just for the fun of it". During the Taguba investigation, a soldier assigned to Abu Ghraib stated:

> "*The MPs [military police] were using the detainees as practise dummies, like they would show each other how to knock someone out by knocking the detainee out. They did this while another detainee would watch, when the other detainee would start to get scared, the MPs would calm him down and then hit him in another way.*"[362]

On 17 January 2004, an Abu Ghraib detainee, Abd Alwhab, gave military investigators a statement in which he alleged that he was subjected to brutal punishment:

> "*One day while in the prison the guard came and found a broken toothbrush, and they said that I was going to attack the American Police. I said the toothbrush wasn't mine. They said we are taking away your clothes and mattress for six days and we are not going to beat you. But the next day the guard came and cuffed me to the cell door for two hours, after that they took me to a closed room and more than five guards poured cold water on me, and forced me to put my head in someone's urine that was already in that room. After that they beat me with a broom and stepped on my head with their feet while it was still in the urine. The pressed my ass with a broom and spit on it. Also a female soldier, whom I don't know the name was standing on my legs. They used a loudspeaker to shout at me for three hours, it was cold.*"[363]

Punitive brutality has also been alleged in Guantánamo:

> "*Soldiers told us personally of going into cells and conducting beatings with metal bars which they did not report. Soldiers told us 'we can do anything we want.' We*

[359] *The dark art of interrogation*. Atlantic Monthly, October 2003.
[360] *The psychology of torture*. Washington Post, 11 May 2004.
[361] *Punishment and amusement: Documents indicate three photos were not staged for interrogation.* Washington Post, 24 May 2004.
[362] Sworn statement of Samuel Provance, 302nd Military Intelligence Battalion, 21 January 2004. http://www.publicintegrity.org/docs/AbuGhraib/Abu11.pdf.
[363] Translation. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150425.pdf

ourselves witnessed a number of brutal assaults upon prisoners. One, in April 2002, was of Jummah Al-Dousari from Bahrain, a man who had become psychiatrically disturbed, who was lying on the floor of his cage immediately near to us when a group of eight or nine guards known as the ERF Team (Extreme Reaction Force) entered his cage. We saw them severely assault him. They stamped on his neck, kicked him in the stomach even though he had metal rods there as a result of an operation, and they picked up his head and smashed his face into the floor. One female officer was ordered to go into the cell and kick him and beat him which she did, in his stomach. This is known as "ERFing". Another detainee, from Yemen, was beaten up so badly that we understand he is still in hospital eighteen months later. It was suggested that he was trying to commit suicide. This was not the case."[364]

Support for such allegations has come from an unusual source. On 24 January 2003, an orange jump-suited individual was reportedly choked and beaten at Guantánamo Bay, and has suffered a brain injury as a result. His name is Sean Baker. He was not a detainee, but a US military guard who had volunteered to pose as an uncooperative detainee in a training exercise. However, the five-man team sent in to extract him from his cell was not told it was an exercise. He says that they slammed him to the floor, put him in a painful chokehold, and pounded his head at least three times against the steel floor. He was treated in a number of military hospitals, and a military evaluation referred to his "service-connected disability" and traumatic brain injury received as a result of his "playing role of detainee…during training exercise".[365]

The pursuit of intelligence at all costs

Despite such evidence of a degree of punitive or sadistic brutality, much of the torture and cruel, inhuman or degrading treatment allegedly carried out by US forces in Afghanistan, Guantánamo and Iraq appears to have been for intelligence-gathering purposes, to "soften up" detainees prior to or during interrogation (see Point 4.1).

The authorities claim that they have obtained substantial intelligence from interrogations. For example, the Schlesinger Panel stated that the interrogation of detainees has "yielded significant amounts of actionable intelligence", adding that much of the information in the 9/11 Commission Report on the attacks of 11 September 2001 "came from interrogation of detainees at Guantanamo and elsewhere".[366] The Schlesinger Panel, however, failed to qualify this in the way in which the 9/11 Commission had. The latter pointed out that the information could be unreliable.[367] Neither the Commission nor the Schlesinger Panel,

[364] Shafiq Rasul and Asif Iqbal, Letter to Senate Armed Services Committee, 13 May 2004.
[365] *Ex-soldier recalls beating he received in Guantánamo drill*. Los Angeles Times, 16 June 2004.
[366] Schlesinger report, page 18, see *supra*, note 30.
[367] "Assessing the truth of statements by these witnesses – sworn enemies of the United States – is challenging. Our access to them has been limited to the review of intelligence reports based on communications received from the locations where the actual interrogations take place. We submitted questions for use in the interrogations, but had no control over whether, when, or how questions of particular interest would be asked. Nor were we allowed to talk to the interrogators so that we could

however, referred to, let alone publicly protested, the fact that some of the information may have been extracted under torture or other cruel, inhuman or degrading treatment of individuals held in secret locations (see Point 3.2).

The most recent version (1992) of the US Army Intelligence Interrogation Field Manual (FM 34-52) is instructive in this regard. It states:

> "*Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.*"

There have also been reports that the "success" of this interrogation policy has been far more limited than the government claims. There is evidence of widespread arbitrary arrests conducted on the basis of poor intelligence. For example, the Afghanistan Independent Human Rights Commission has recently told Amnesty International that the US forces in Afghanistan appear to remain susceptible to manipulation by local tribal affiliations and interests in detaining people on the basis of false or malicious intelligence. US military intelligence officers told the ICRC that "in their estimate between 70 per cent and 90 per cent of the persons deprived of their liberty in Iraq had been arrested by mistake".[368] In similar vein, "dozens of high-level military, intelligence and law-enforcement officials in the United States, Europe and the Middle East said that contrary to the repeated assertions of senior administration officials, none of the detainees at the United States Naval Base at Guantánamo Bay ranked as leaders or senior operatives of Al Qaeda".[369]

Effective intelligence-gathering is a long-term task, not something that should be beaten or coerced out of a selection of people a government broadly defines as the enemy. A former intelligence officer familiar with the Guantánamo intelligence regime has said: "The quality of the screening, the quality of the interrogations and the quality of the analysis were all very poor. Efforts were made to improve things, but after decades of neglect of human intelligence skills, it can't be fixed in a few years."[370]

In the end, however, the absolute prohibition of torture and cruel, inhuman or degrading treatment in international law rests firmly on moral grounds. It is about what sort of society we aim to build. Ariel Dorfman's country, Chile, suffered gross human rights violations on and following 11 September 1973, the day of the coup that brought Augusto Pinochet to power. Dorfman has written:

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better judge the credibility of the detainees and clarify ambiguities in the reporting. We were told that our requests might disrupt the sensitive interrogation process." Chapter 5. 9/11 Commission report.

[368] ICRC report. February 2004. *supra*, note 77.

[369] *US said to overstate value of Guantánamo detainees*. New York Times, 21 June 2004. Similarly, an interrogator has said that "there are a large number of people at Guantánamo who shouldn't be there". *How expert gets detainees to talk*. The Capital Times (Wisconsin), 16 August 2004

[370] Lieutenant Colonel Anthony Christino III, quoted in: *US said to overstate value of Guantánamo detainees*. New York Times, 21 June 2004.

> "[T]*orture is not a crime committed only against a body, but also a crime committed against the imagination. It presupposes, it requires, it craves the abrogation of our capacity to imagine someone else's suffering, to dehumanise him or her so much that their pain is not our pain. It demands this of the torturer, placing the victim outside and beyond any form of compassion or empathy, but also demands of everyone else the same distancing, the same numbness, those who know and close their eyes, those who do not want to know and close their eyes, those who close their eyes and ears and hearts.*"[371]

President Bush has said that "the United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere."[372] Amnesty International believes that the USA has failed to live up to these words in the "war on terror".

A government's condemnation of torture and other cruel, inhuman and degrading treatment must mean what it says. If it genuinely opposes torture and ill-treatment, it must act accordingly. From this simple proposition, all 11 other points of Amnesty International's *12-Point Program for the Prevention of Torture by Agents of the State* follow.

1.5 Recommendations under Point 1

The US authorities should:

- Provide a genuine, unequivocal and continuing public commitment to oppose torture *and* cruel, inhuman or degrading treatment under any circumstances, regardless of where it takes place, and take every possible measure to ensure that all agencies of government and US allies fully comply with this prohibition;
- Review all government policies and procedures relating to detention and interrogation to ensure that they adhere strictly to international human rights and humanitarian law and standards, and publicly disown those which do not;
- Make clear to all members of the military and all other government agencies, as well as US allies, that torture or cruel, inhuman or degrading treatment will not be tolerated under any circumstances;
- Commit to a program of public education on the international prohibition of torture and ill-treatment, including challenging any public discourse that seeks to promote tolerance of torture or cruel, inhuman or degrading treatment.

[371] *Are there times when we have to accept torture?* By Ariel Dorfman. The Guardian, 8 May 2004.
[372] President's statement, 26 June 2004, *supra,* note 4.

Point 2 – Ensure access to prisoners

Torture often takes place while prisoners are held incommunicado – unable to contact people outside who could help them or find out what is happening to them. The practice of incommunicado detention should be ended. Governments should ensure that all prisoners are brought before an independent judicial authority without delay after being taken into custody. Prisoners should have access to relatives, lawyers and doctors without delay and regularly thereafter.

2.1 Incommunicado detention facilitates torture

[P]rolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture.
UN Commission on Human Rights, April 2004[373]

On 28 May 2004, Amnesty International issued an urgent appeal on behalf of Mohammad Jassem 'Abd al-'Issawi, a 43-year-old Iraqi civil engineer believed to be in detention in the High Security section of Abu Ghraib prison. He was reportedly kicked and punched by the US soldiers who arrested him on 17 December 2003. Since then, he had not had access to his family, to legal counsel, or to the ICRC.[374]

The US military has taken more than 50,000 people into custody during its military operations in Afghanistan and Iraq. In Afghanistan, the US has operated approximately 25 detention facilities, and in Iraq another 17.[375] It has held people in Guantánamo and in undisclosed locations. Lawyers, relatives, and human rights organizations have systematically been denied access to detainees. While the ICRC has had access to some detainees, this cannot be considered enough under the circumstances (see Point 4). For example, the ICRC has had access to detainees held in the US air base in Bagram in Afghanistan, but not immediately after their arrest.[376] In Afghanistan, the ICRC has only had access to Bagram and Kandahar and none of the numerous "forward collection points", more remote US temporary holding facilities in other locations. In both Afghanistan and Iraq, detainees have been held at such facilities for far longer than the 12-24 hours allowed under army doctrine. Some detainees have been held for one or two months at "forward collection points".[377] Hundreds of detainees have been held incommunicado without charge or trial between ICRC visits to Guantánamo Bay.

Because of its urgency as a safeguard against torture, Amnesty International and international law and standards hold that relatives, lawyers and independent doctors should have access to detainees without delay and regularly thereafter. Access by others such as

[373] Resolution: 2004/41, para. 8, 19 April 2004.
[374] http://web.amnesty.org/library/Index/ENGMDE140272004. He is no longer held incommunicado.
[375] Schlesinger report, page 11, see *supra*, note 30.
[376] ICRC Operational update, 26 July 2004.
[377] Detainee Operations Inspection, Department of the Army Inspector General, 21 July 2004, page 28.

representatives of human rights organizations and (in armed conflicts and other applicable situations) the ICRC is also of great importance.

The UN Commission on Human Rights has stated that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture".[378] The Human Rights Committee has stated that provisions should be made against the use of incommunicado detention, and the Committee against Torture has called for its elimination.[379] The Special Rapporteur on torture, recognizing that "torture is most frequently practised during incommunicado detention", has also called for such detention to be made illegal.[380]

2.2 Access to legal counsel

Allegations of torture were difficult to verify because the police and security officials frequently denied detainees timely access to lawyers.
US State Department 2004 human rights report, entry on Jordan

One of the first prisoners of the USA in its "war on terror" overseas was John Walker Lindh, a US citizen captured in Afghanistan. His alleged treatment – stripping, blindfolding, threats, cruel use of restraints, use of humiliating photography[381], and denial of access to legal counsel or relatives – echoes what would happen two years later in Iraq. Furthermore, it is alleged that the General Counsel of the Department of Defense authorized John Lindh's interrogator to "take the gloves off" during his interrogation.[382]

John Lindh was taken into US custody on 1 December 2001 in Afghanistan. Interrogated repeatedly in incommunicado detention, he repeatedly asked for a lawyer. [383]

[378] Resolution: 2004/41, para. 8, 19 April 2004.
[379] Human Rights Committee General Comment 20, *supra,* note 188, para. 11. Committee against Torture: UN Doc. A/52/44 (1997), para. 121(d).
[380] UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.
[381] For example, soldiers allegedly "blindfolded Mr Lindh, and took several pictures of Mr Lindh and themselves with Mr Lindh. In one, the soldiers scrawled 'shithead' across Mr Lindh's blindfold and posed with him." James J. Brosnahan (Lindh's lawyer). Affidavit filed in *USA v. Lindh*, quoted in *Chain of Command*, by Seymour M. Hersh. The New Yorker, 17 May 2004.
[382] *Prison interrogators' gloves came off before Abu Ghraib*. New York Times, 9 June 2004.
[383] For the first six days of US custody, his wounds untreated, Lindh was held in a room with the only window blocked, "making it difficult to discern whether it was night or day". Interrogated, he asked for a lawyer but was told he would be provided with one later. On 7 December 2001, he was transferred to the US base at Camp Rhino, south of Kandahar. "During the flight, he was blindfolded and bound with plastic cuffs so tight they cut off the circulation to his hands. Soldiers threatened him with death and torture. Upon arrival at Camp Rhino, Mr Lindh's clothes were cut off him, his hands and feet were again shackled, and he was bound tightly with duct tape to a stretcher. Still blindfolded and completely naked, he was then placed in a metal shipping container. Despite the extreme cold of Afghanistan nights in December, there was no heat source, lighting or insulation in the container. After some time, one blanket was placed over Mr Lindh and another was put under the stretcher." Details of

Finally, he alleged, "to escape the torture of his current circumstances", he agreed to answer the interrogator's questions. From 3 December, a lawyer retained by John Lindh's family following news of his arrest had requested the US authorities to stop any further interrogation, "[e]specially if there is any intent to use it in any subsequent legal proceedings"[384] (see also Point 8.1). Moreover, communications to Lindh from his family informing him that they had retained the lawyer were allegedly not relayed to him.

On 14 December 2001, he was transferred to the *USS Peleliu*, where he received medical treatment. Lindh's parents wrote to him repeatedly following his arrest, including via the ICRC, but he was not allowed to receive any communications until approximately 6 January, more than a month after he had been transferred from Afghan to US custody. Just over seven months after being taken into US custody, John Walker Lindh agreed in US federal court to plead guilty to carrying a weapon while serving with the Taleban, and was sentenced to 20 years in prison. As part of the plea arrangement, he withdrew his allegations of torture and ill-treatment by the US military. If he breaks the terms of his plea agreement, "the United States may prosecute the defendant to the full extent of the law".

The Human Rights Committee has stated that detained persons should have "immediate access to counsel and contact with their families".[385] The Committee against Torture has recommended "unrestricted access to counsel immediately after arrest".[386] The Special Rapporteur on torture has stated: "In exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer".[387]

Even when access to legal counsel is arguably impractical in battlefield situations, military lawyers can still be made available to monitor interrogations as a safeguard against torture or ill-treatment. In the first Gulf War, military lawyers were reportedly present in every US detention facility, and could monitor any interrogation from behind a one-way mirror and intervene if misconduct occurred. Neither the interrogator nor the detainee knew if any particular session was to be monitored in this way.[388] However, according to senior military lawyers, this practice has been curtailed by the current administration.[389]

Lindh's case are taken from documents filed in *USA v. Lindh*, Criminal No. 02-37-A, in the US District Court for the Eastern District of Virginia, unless otherwise stated.

[384] Letter from James J. Brosnahan to Colin Powell, Secretary of State; John Ashcroft, Attorney General; Donald Rumsfeld, Secretary of Defense; George Tenet, Director of the Central Intelligence Agency; Robert McNamara, General Counsel to the Central Intelligence Agency. 3 December 2001.

[385] A/55/40, para. 472.

[386] A/54/44. para. 51.

[387] A/56/156, para. 39(f). Principle 17 of the UN Body of Principles states: "A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it."

[388] *A Prison Beyond the Law*, by Joseph Margulies. Virginia Quarterly Review, July 2004.

[389] "[According to] senior JAG [Judge Advocate General] officers …the prior practice of having JAG officers monitor interrogations in the field for compliance with law and regulations had been curtailed

2.3 Access to doctors

> *The complicity of US military medical personnel during abuses of detainees in Iraq, Afghanistan, and Guantánamo Bay is of great importance to human rights, medical ethics, and military medicine... An inquiry into the behaviour of medical personnel in places such as Abu Ghraib could lead to valuable reforms within military medicine.*
> UK medical journal, 21 August 2004[390]

Amnesty International believes that detainees should have access to independent doctors as soon as possible after arrest. Doctors must in no way participate in any torture or ill-treatment, and must expose any such treatment of which they become aware.

International standards require detainees and prisoners to be given or offered a medical examination as promptly as possible after they have been taken into custody.[391] They also call for medical personnel to advise on basic prison conditions, such as food, light, ventilation and hygiene.[392] The evolution of international standards relating to the medical care of detainees and prisoners has also been paralleled by the elaboration of ethical principles for health professionals in their relations with detainees. In particular, principles adopted by the UN General Assembly in 1982 state:

> "*It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.*"[393]

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at the direction of senior officials." *Human rights standards applicable to the United States' interrogation of detainees. Supplementary report*, 4 June 2004. Association of the Bar of the City of New York. Page 12, n. 22. The Army Inspector General "did not observe a dedicated judge advocate for interrogation operations". *Detainee Operations Inspection*, 21 July 2004, *supra*, note 27, page 15.

[390] *Abu Ghraib: its legacy for military medicine*. Steven H. Miles. The Lancet, Vol. 364, Number 9435.

[391] Rule 24 of the UN Standard Minimum Rules for the Treatment of Prisoners states: "The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary". The UN Human Rights Committee has emphasized the need to have detainees "examined by an independent doctor as soon as they are arrested [and] after each period of questioning". UN Doc. A/52/40 (1998), para. 109, referring to Switzerland. The Special Rapporteur on torture has stated: "At the time of arrest, a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention." UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.

[392] Rule 26, UN Standard Minimum Rules.

[393] Principle 2, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by General Assembly resolution 37/194 of 18 December 1982. The World Medical Association (of which the American Medical Association is a member) provides for similar strictures in its Declaration of Tokyo (1975). Paragraph 1 specifies: "The doctor shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman

The same safeguards also state that it is a contravention of medical ethics for health personnel to apply their knowledge and skills in order to assist in the interrogation of detainees "in a manner that may adversely affect" their physical or mental health. They must not certify or participate in the certification of the fitness of detainees for "any form of treatment or punishment that may adversely affect their physical or mental health". Also they must not participate in any procedure for restraining a detainee except under strictly medical criteria as being necessary for safety reasons and harmless to the detainee's physical or mental health. There "may be no derogation from the foregoing principles on any grounds whatsoever, including public emergency".[394]

- According to a leaked military document, the ICRC raised allegations in a meeting with the Guantánamo authorities in October 2003 that interrogators at the base had had access to the medical files of detainees, that the files were "being used by interrogators to gain information in developing an interrogation plan", and "that there is a link between the interrogation team and the medical team". Major General Miller, the camp commander, rejected the allegations.[395]
- The 12 October 2003 interrogation policy in Iraq listed "dietary manipulation", "sleep management", and "sensory deprivation", as techniques that could be authorized as long as they were "monitored by medics" (see page 70-71);

In the "war on terror", sleep deprivation, stress positions, hooding, stripping, and the cruel use of restraints are among the practices employed against detainees. Hakkim Shah, a 32-year-old Afghan farmer was reportedly subjected to torture and ill-treatment in the US air base in Bagram. He said that he was held naked for 16 days in an upstairs room in the facility, hooded, shackled, and forced to stand by being secured to the ceiling. After 10 days, his legs reportedly became so swollen that the shackles cut off the blood supply and he could no longer stand. According to the allegations, doctors eventually removed the shackles and he was allowed to sit.[396]

The final report of the Pentagon Working Group suggests the potentially institutionalized involvement of medical personnel in interrogation techniques that violate international standards: "The use of exceptional interrogation techniques should be limited to… when the detainee is medically and operationally evaluated as suitable."[397]Drawing on

or degrading procedures, whatever the offence of which the victim of such procedure is suspected, accursed or guilty, and whatever the victim's belief or motives, and in all situations, including armed conflict and civil strife."

[394] Principles 4 (a), 4(b), 5 and 6. Principles of Medical Ethics, *supra,* note 393.

[395] Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03, supra,* note 52. The principle of confidentiality of medical information should not be overturned when a person enters prison. The European Committee for the Prevention of Torture has repeatedly stated in relation to detainees that "the confidentiality of medical data is to be strictly observed". See e.g. Report on initial visit to the Czech Republic (1997), CPT/Inf (99), para. 32; Report to the Government of the Slovak Republic on the visit to Slovakia, CPT/Inf (2001) 29 (2001), para. 35.

[396] *New charges raise questions on abuse in Afghan prisons*. New York Times, 16 September 2004.

[397] Pentagon Working Group Report, 4 April 2003, *supra,* note 56.

this, a 12 October 2003 US interrogation policy in Iraq noted that stress positions, dietary manipulation and sleep management could be used as interrogation techniques if "monitored by medics" (see page 70). The assumption that doctors will participate in torture or cruel, inhuman or degrading treatment, which defies the age-old ethical requirement that doctors act only with their patient's health and well-being in mind, was also apparent in a military memorandum requesting approval for various interrogation techniques at Guantánamo Bay in late 2002. One of the techniques requested was "exposure to cold weather or water (*with appropriate medical monitoring*)" – [emphasis added].[398] The request passed various levels of authority, including the General Counsel to the Secretary of Defense who suggested that it was legally available although not warranted on a blanket basis at that time.[399]

The totality of the conditions at Guantánamo Bay have had a seriously adverse effect on the psychological health of many of the detainees held there, according to the ICRC, the only independent organization to have had access to the detainees. Relevant professional and ethical standards make clear that the mental health professionals at the prison camp should raise the detention conditions and their effects on prisoners with the authorities. Amnesty International is not aware that they have done so, and points out that they are not independent – instead, like the detaining force, they are employed by the military. The Department of Defense has disclosed that there have been over 30 suicide attempts among the detainees. It has been reported that a decrease in the rate of suicide attempts is the result of the military psychiatrists reclassifying such attempts as "manipulative self-injurious behaviour", and that the total of suicide attempts under the old classification is now over 70.[400]

The final report of the Pentagon Working Group on "war on terror" interrogations states that US legislation criminalizing torture committed outside the USA "does not preclude any and all use of drugs". The withholding of health care and the use of forcible injections without the detainee knowing what he is being injected with has been alleged.

- Abu Zubaydah, who had been shot in the groin during his arrest, was allegedly denied painkillers to obtain his cooperation during interrogation (see Point 3.2).
- Alif Khan told Amnesty International in July 2003 that he had been given two injections, one in each arm, for his transfer from Afghanistan to Guantánamo. He said that he did not know what they were, but referred to experiencing "a kind of unconsciousness". Former Guantánamo detainee Mehdi Ghezali told Amnesty International in July 2004 that "even if prisoners didn't want any injections they were forced to receive them. Certain prisoners were beaten before they were injected."

The torture at Abu Ghraib was reported to US army investigators by a soldier, not a doctor. The Fay report found that medical personnel "may have been aware of detainee abuse at Abu Ghraib and failed to report it". The report called for an inquiry into this specific issue. Reported incidents implicating medical personnel include:

[398] Memorandum for Commander, Joint Task Force 170. Subject: Request for approval of Counter-Resistance strategies. 11 October 2002. http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf
[399] Action memo. Signed by Secretary Rumsfeld, 2 December 2002, *supra,* note 49.
[400] David Rose, Vanity Fair, January 2004.

- *"After they brought six people and they beat them up until they dropped to the floor and one of them his nose was cut and the blood was running from his nose and he was screaming but no one was responding and all this beating from [Guard X] and [Guard Y] and another man, whom I don't know the name. The doctor came to stitch the nose and [Guard X] asked the doctor to learn how to stitch and it's true, the guard learned how to stitch. He took the string and needle and he sat down to finish the stitching...."*[401]
- *"One of the prisoners was bleeding from a cut he got over his eye. Then they called the doctor who came and fixed him. After that they started beating him again..."*[402]
- A military guard at Abu Ghraib wrote home about a death in custody in November 2003. He wrote that the day after his death, "the medics came and put his body on a stretcher, placed a fake [intravenous drip] in his arm and took him away".[403]

2.4 Access to relatives

Police continued to hold individuals without granting access to family members or lawyers.
US State Department human rights report entry on China, 2004

Amnesty International issued a worldwide appeal in July 2004 for Sattam Hameed Farhan al-Ga'ood who had been arrested at his home in Baghdad by US soldiers on 19 April 2003.[404] He had not been seen for over a year, and although his family had received a number of messages via the ICRC to indicate that he was in detention, his whereabouts were not specified and remained unknown. His case was simply referred to as HVD, thought to mean "high-value detainee". The US authorities would appear, however, to place a low value on his right and the right of his family to be informed of his whereabouts and the reason for his arrest.

In its February 2004 report, the ICRC described the distress that family members in Iraq have suffered due to the systematic failure of the Coalition forces to provide information on the whereabouts of detainees. The arresting authorities "rarely informed the arrestee or his family where he was being taken and for how long, resulting in the *de facto* 'disappearance' of the arrestee for weeks or even months until contact was finally made". The ICRC continued:

> *"In the absence of a system to notify the families of the whereabouts of their arrested relatives, many were left without news for months, often fearing that their relatives unaccounted for were dead... [H]undreds of families have had to wait anxiously for weeks and sometimes months before learning of the whereabouts of their relatives*

[401] Statement provided by Shalan to military investigators, 17 January 2004. http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/150422.pdf.
[402] Statement provided by Mustafa to military investigators, 17 January 2004. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150542-1.pdf.
[403] Staff Sergeant Ivan Frederick. Copy of communications on file at Amnesty International. According to the Fay report, this deception was "so as not to draw the attention of the Iraqi guards and detainees".
[404] *Iraq: Detained in an unknown location*, http://web.amnesty.org/appeals/index/irq-010704-wwa-eng.

and often come to learn about their whereabouts informally (through released detainees) or when the person deprived of his liberty is released and returns home."

The suffering of relatives of the "disappeared" (see Point 3) has been found by the UN Human Rights Committee to amount to torture or cruel, inhuman and degrading treatment.[405] Similar cruelty is inflicted on the relatives of people held in indefinite incommunicado detention where the authorities fail to take steps to promptly inform the family of their loved one's arrest and whereabouts.

The family of Jamal Mar'i say that he left his native Yemen in 2001 to go to Pakistan to find work and pursue further studies. On 10 April 2004, his brother recalled: "Jamal set himself up in Karachi, Pakistan. While there, Jamal called and wrote to us regularly. It never felt as if he was very far away." Some time after 11 September 2001, a friend told the family that he had received a call from his son who was also in Karachi and knew Jamal. He said that he thought Jamal had been arrested in Karachi by US agents. Jamal's brother continued:

> "*Some weeks later, my mother received a telephone call from the International Committee of the Red Cross from Jordan to say that Jamal was detained there... Some time after receiving the call from the ICRC, my family received a message from Jamal via the ICRC, Jordan. In this short note, Jamal said that he was held in Jordan... Then, in April 2002, we received an ICRC message from him from the ICRC in Yemen. The message had been sent from Guantánamo Bay... In November 2003, Jamal's messages stopped coming. We don't know why... We have no way of finding out how he is; whether he is healthy, even whether he is alive. My mother has taken Jamal's disappearance the worst. She has developed high blood pressure and often sinks into bouts of very deep depression. In many ways, it would be preferable if we knew Jamal was dead for at least then we would be able to grieve and eventually get over his death. It's the simply not knowing what has happened to him that affects us all the most. If only we could hear his voice, learn that he is safe and well – that would make our lives so much better. Jamal's wife is beside herself with worry. His young children don't understand what has happened to their father and constantly ask where he is, why doesn't he call and when he is coming back home.*"[406]

The US authorities have shown little sympathy for the plight of families of detainees, spreading a level of distress and resentment in the community.[407]

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[405] *Maria del Carmen Almeida de Quinteros, on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf v. Uruguay*, Communication No. 107/1981 (17 September 1981), UN GAOR Supp. No. 40 (A/38/40) at 216 (1983), para. 14.

[406] Affidavit of Nabil Mohamed Mar'i. 10 April 2004. Sana'a, Yemen. The suffering of relatives of detainees was clear at the conference organized by Amnesty International in Sana'a. See *The Gulf and the Arabian Peninsula: Human rights fall victim to the "War on Terror"*. AI Index: MDE 04/002/2004, June 2004. http://web.amnesty.org/library/Index/ENGMDE040022004

[407] For example, Secretary Rumsfeld was asked if relatives would ever be able to visit detainees in Guantánamo. He replied, "Oh, I would doubt it... No, I would think that would be highly unlikely". Interview with the *Sunday Times*, 21 March 2002.

2.5 Access to the courts

It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad
US Supreme Court, 28 June 2004[408]

Central to the USA's "war on terror" detention policy has been to keep the detainees away from the courts. The administration chose Guantánamo precisely because it believed that "a district court cannot properly entertain an application for a writ of *habeas corpus* by an enemy alien detained at Guantánamo Bay Naval Base, Cuba," although it recognized that the issue was not "definitely resolved" in law.[409] It is clear that the US administration has seen its own judiciary, as well as international law, as an unwanted check on its activities.

A key safeguard against torture is for prisoners or others acting on their behalf to be able to invoke the power of the courts to challenge the legality of the detention and otherwise ensure the prisoner's safety. It can also serve as a safeguard against "disappearances" by asking the courts to locate a person who has "disappeared" (see Point 3).

In April 2004, arguing that the courts should be kept out of the administration's "war on terror" detentions, the government assured the US Supreme Court of its commitment to humane treatment. At oral arguments in the case of Yaser Esam Hamdi, a US citizen designated as an "enemy combatant" and held in indefinite incommunicado detention without charge or trial since December 2001, Justice Stevens asked: "Do you think there is anything in the law that curtails the method of interrogation that may be employed?" The government responded that "the United States is signatory to conventions that prohibit torture and that sort of thing. And the United States is going to honour its treaty obligations".[410] The official memorandums that have come into the public domain belie the government's assurances that it is committed to upholding international law and standards.

In the case of another US "enemy combatant", José Padilla, the four dissenting Justices made their feelings clear about unfettered executive power: "Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber".[411] During oral arguments in José Padilla's case, one of the four, Justice Ginsburg

[408] *Hamdi v. Rumsfeld*, No. 03-6696, decision of 28 June 2004.
[409] Memorandum for William Haynes, General Counsel, Department of Defense. *Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba.* From Patrick Philbin and John Yoo, Deputy Assistant Attorneys General. US Department of Justice, Office of Legal Counsel, 28 December 2001.
[410] *Hamdi v. Rumsfeld*, oral arguments, 28 April 2004.
[411] *Rumsfeld v. Padilla*, No. 03-1027, 28 June 2004 (Justice Stevens, dissenting). The Star Chamber was an English court created in 1487 by King Henry VII. The Star Chamber, comprising 20-30 judges, became notorious under Charles I's reign for handing down judgments favourable to the king and to Archbishop William Laud, who supported the persecution of the Puritans. It was abolished in 1641.

had asked the government: "So what is it that would be a check on torture? ... Suppose the executive says mild torture we think will get this information... Some systems do that to get information." The government replied: "Well, our executive doesn't…"[412] This answer was inaccurate. The administration has approved interrogation techniques which violate the prohibition on torture or cruel, inhuman or degrading treatment.

Finding that the US courts have jurisdiction over detainees in Guantánamo, the Supreme Court in June 2004 noted that "executive imprisonment has been considered oppressive and lawless" for almost eight centuries in English law.[413] The administration's response to this ruling has been inadequate, however. By mid-October 2004, more than three months after the decision, not a single Guantánamo detainee had appeared in court. Of the 68 detainees who had so far filed appeals for access to the US courts, only a small number had spoken to their lawyers.[414] Rather than facilitating judicial review, the administration has hastened a system of "Combatant Status Review Tribunals", administrative review bodies that determine, including on secret evidence and without legal counsel for the detainees, whether the latter are "enemy combatants" and should remain in detention.[415] The Pentagon has also said that it "believes the decision does not cover detainees held in other parts of the world".[416]

2.6 Recommendations under Point 2

The US authorities should:

- End the practice of incommunicado detention;
- Grant the International Committee of the Red Cross full access to all detainees according to the organization's mandate;
- Grant all detainees access to legal counsel, relatives, independent doctors, and to consular representatives, without delay and regularly thereafter;
- In battlefield situations, ensure where possible that interrogations are observed by at least one military lawyer with full knowledge of international law and standards as they pertain to the treatment of detainees;
- Grant all detainees access to the courts to be able to challenge the lawfulness of their detention. Presume detainees captured on the battlefield during international conflicts to be prisoners of war unless and until a competent tribunal determines otherwise;
- Reject any measures that narrow or curtail the effect or scope of the *Rasul v. Bush* ruling on the right to judicial review of detainees held in Guantánamo or elsewhere, and facilitate detainees' access to legal counsel for the purpose of judicial review.

[412] *Rumsfeld v. Padilla*, oral arguments, 28 April 2004.
[413] *Rasul v. Bush*, No. 03-334, decision of 28 June 2004.
[414] *US stymies detainee access despite ruling, lawyers say*. Washington Post, 14 October 2004.
[415] *USA: Administration continues to show contempt for Guantánamo detainees' rights*. AI Index: AMR 51/113/2004, 8 July 2004. http://web.amnesty.org/library/Index/ENGAMR511132004
[416] *Supreme Court affirms right to detain enemy combatants*, American Forces Information Service, news article, 29 June 2004.

Point 3 – No secret detention

In some countries torture takes place in secret locations, often after the victims are made to "disappear". Governments should ensure that prisoners are held only in officially recognized places of detention and that accurate information about their arrest and whereabouts is made available immediately to relatives, lawyers and the courts. Effective judicial remedies should be available at all times to enable relatives and lawyers to find out immediately where a prisoner is held and under what authority and to ensure the prisoner's safety.

3.1 Secrecy nurtures torture and "disappearance"

There was a debate after 9/11 about how to make people disappear.
Unidentified 'former US intelligence official'[417]

On 13 April 2004 in Yemen, Walid Muhammad Shahir Muhammad al-Qadasi spoke with Amnesty International in a cell in the Political Security Prison in Sana'a. He had recently been returned from detention in Guantánamo Bay. He recalled how he had been arrested in Iran in late 2001 and detained there for about three months before being handed over with other detained foreign nationals to the authorities in Afghanistan who in turn handed them over to the custody of the US. There they were kept in a prison in Kabul.

> *"The Americans interrogated us on our first night which we coined as 'the black night'. They cut our clothes with scissors, left us naked and took photos of us before they gave us Afghan clothes to wear. They then handcuffed our hands behind our backs, blindfolded us and started interrogating us. The interrogator was an Egyptian. He asked me about the names of all members of my family, relatives and friends. They threatened me with death, accusing me of belonging to al-Qa'ida.*
>
> *They put us in an underground cell measuring approximately two metres by three metres. There were ten of us in the cell. We spent three months in the cell. There was no room for us to sleep so we had to alternate. The window of the cell was very small. It was too hot in the cell, despite the fact that outside the temperature was freezing (there was snow), because the cell was overcrowded. They used to open the cell from time to time to allow air in. During the three-month period in the cell we were not allowed outside into the open air. We were allowed access to toilets twice a day; the toilets were located by the cell."*

Walid al-Qadasi said that the prisoners were only fed once a day and that loud music was used as "torture". He said that one of his fellow detainees went insane.

Walid al-Qadasi was eventually transferred to Bagram, where he faced a month of interrogation. Then his head was shaved, he was blindfolded, made to wear ear muffs and mouth mask, handcuffed, shackled, loaded on to a plane and flown out to Guantánamo. There, he said he was held in solitary confinement for the first month of what would become a two-

[417] Quoted in *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004.

year detention in the Naval Base. He said he was drugged for his transfer back to Yemen in April 2004.

Walid al-Qadasi's allegations depict a detention regime that violates many human rights standards – secret transfer and detention, no access to legal counsel, relatives or to a court, and cruel prison conditions and torturous treatment. As a former Commissioner of the US Immigration and Naturalization Service, James Ziglar, said in 2003: "The more secret government is, the more likely you're going to have abuses – there's no question about it".[418]

In October 2003, the American Civil Liberties Union and other US organizations filed a Freedom of Information Act (FOIA) request seeking information on the treatment and interrogation of detainees in US custody, and the transfer of detainees to countries known to use torture. Eleven months later, US District Judge Alvin Hellerstein noted that the government had, "with small exception", produced no information. He wrote that "[m]erely raising national security concerns cannot justify unlimited delay", and that the "glacial pace" of the government's response "shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires." Judge Hellerstein stated: "No one is above the law: not the executive, not the Congress, and not the judiciary." He ordered the government to produce or identify all the relevant documents by 15 October 2004.[419]

Secrecy surrounding detentions is dangerous for the prisoner, distressing for relatives, and detrimental to the rule of law. Secrecy has been an overarching characteristic of the US administration's detention policy in the "war on terror". Even at acknowledged US detention locations, such as Guantánamo Bay, Bagram air base, and Abu Ghraib, the US has not made public the identities or precise numbers of people whom it has held and is holding there. This denial of information has increased the suffering of relatives and obstructed efforts to ensure the humane treatment of the detainees.

The US authorities have pursued an approach of giving only approximate numbers of detainees being held at Guantánamo.[420] This lack of precision raises the possibility that individual detainees could be moved to and from the Naval Base, or between different US agencies, without any public knowledge of such transfers, as they would not be reflected in the approximate numbers of detainees announced by the Pentagon.

On 24 November 2003, the Department of Defense announced that 20 unidentified detainees had been released from Guantánamo three days earlier and "approximately 20" more, also unidentified, had been transferred to the base two days after that, leaving

[418] Quoted in *America's secret prisoners*, Newsweek, 18 June 2003.

[419] *American Civil Liberties Union, et al. v. Department of Defense, et al.* Opinion and Order 04 Civ. 4151, US District Court, Southern District of New York, 15 September 2004. The judge added that: "If the documents are more of an embarrassment than a secret, the public should know of our government's treatment of individuals captured and held abroad."

[420] For example, following the transfer of 10 detainees from Afghanistan to Guantánamo in September 2004, the Pentagon reported that this left "approximately 549" detainees at the base. It added that "because of operational and security considerations, no further details can be provided". Department of Defense News Release, 22 September 2004.

"approximately 660" detainees in custody in Guantánamo.[421] On 15 March 2004, the Department announced that there were "approximately 610" detainees in the base, that is, 50 fewer than four months earlier.[422] Between the two announcements, however, the Pentagon had disclosed the release or transfer to other countries of only 43 Guantánamo detainees – 26 Afghan and Pakistan nationals[423]; three child detainees (believed to be Afghan nationals)[424]; a Spanish national[425]; a Danish national[426]; seven Russian nationals[427]; and five British nationals[428]. In other words, "approximately" seven detainees were unaccounted for in the official announcements of releases and transfers from the base.

The UN Special Rapporteur on torture has said: "It should not be possible for persons to be handed over from one police or security agency to another police or security agency without a judicial order. Where this happens, the officials responsible for the transfers should be held accountable under the criminal law".[429]

Over two and half years after detentions began in Guantánamo, a chief spokesperson for the Pentagon was unable to answer why the administration had not released the identities of those held in the Naval Base, saying "I do not know why we haven't done more to announce names".[430] A US military spokesperson suggested that the reason for continuing secrecy about detainees held in Afghanistan was to protect their right to privacy under the Geneva Conventions, another illustration of a government's self-serving approach to international law.[431] In August 2004, the UN Independent Expert on Afghanistan, Professor M. Cherif Bassiouni, said that the US was holding 300 to 400 people at Kandahar and Bagram air bases.[432] Except for visits by the ICRC – to the extent that they have been allowed – the

[421] *Transfer of Guantanamo detainees complete*. Department of Defense News Release, 24 November 2003.
[422] *Transfer of Afghani and Pakistani detainees complete*. Department of Defense News Release, 15 March 2004.
[423] *Ibid.*
[424] *Transfer of juvenile detainees completed*. Department of Defense News Release, 29 January 2004.
[425] *Transfer of detainee complete*. Department of Defense News Release, 13 February 2004.
[426] *Transfer of detainee complete*. Department of Defense News Release, 25 February 2004.
[427] *Transfer of detainees complete*. Department of Defense News Release, 1 March 2004.
[428] *Transfer of British detainees complete*. Department of Defense News Release, 9 March 2004.
[429] Report on visit to Pakistan, UN Doc. E/CN.4/1997/7/Add 2, para. 106.
[430] Lawrence Di Rita, Principal Deputy Assistant Secretary of Defense for Public Affairs, Defense Department operational update briefing, 8 July 2004.
[431] "It's the coalition's continued policy to treat persons under confinement in the spirit of the Geneva Conventions. Part of that spirit is to ensure that the persons under confinement are not subject to any kind of exploitation. It is the coalition's position that allowing media into the facilities would compromise that protection". *US military vows to keep Afghan jails secret*. Reuters, 4 June 2004.
[432] On Kandahar, the ICRC has written: "The ICRC visited the US detention facility in Kandahar from December 2001 when it opened until its closure in June 2002. It requested renewed access to the detention place in early June after it resumed its function as a recognised US facility to helped persons deprived of freedom. The first ICRC visit to Kandahar detention facility took place in late June 2004." Operational update, 26 July 2004. It is not known how many detainees were held at Kandahar between June 2002 and June 2004, when the ICRC was not visiting.

detainees are held incommunicado. He said: "The lack of giving an opportunity for people to go and see these facilities is a lack of transparency that raises serious concerns about the legality of detention as well as the condition of those detentions."[433] Since mid-2003 many detainees have been held for longer periods in Bagram than was happening earlier in the US military operations in Afghanistan. In some cases detainees have been held for more than a year.[434]

In a statement for the Taguba investigation, a Colonel in the Judge Advocate General's Corps (i.e. a military lawyer), was asked about the activities in Abu Ghraib prison of "other government agencies" (OGA), a phrase used by the US military usually to mean the CIA. He recalled one particular case of three Saudi nationals – medical personnel working for the Coalition – who were taken into custody by the CIA and put in Abu Ghraib under false names[435]:

> "*The Saudi government was requesting officially through diplomatic channels for status of these three individuals and all we could say was that we didn't have them because we had no idea where they were. They weren't on any database, they weren't anywhere. It turns out that they had been held at Abu Ghraib in cellblock 1 for seven weeks and ultimately were released. We had a lot of egg on our face about that because we not only responded to the Saudi government that we didn't have them, but also to the ICRC, when in fact we did have them. When I visited Abu Ghraib in early January* [2004]*..., these individuals were described as ghosts. They were 11 prisoners in cellblock 1 at that time. At that point there were about 100 prisoners in cellblock 1, so approximately ten percent of their population were described as these ghosts. They were folks that didn't appear on anybody's books...*"[436]

The phenomenon of so-called "ghost detainees" was revealed in Major General Antonio Taguba's leaked report. He wrote that "on at least one occasion", military guards at Abu Ghraib held six to eight such detainees. The detainees were moved around the facility to hide them from the ICRC, a manoeuvre which Taguba said was "deceptive, contrary to Army Doctrine, and in violation of international law." The Fay report into Abu Ghraib found cases of eight "ghost detainees", but concluded that it could not determine the real number, or who was responsible.[437] On 9 September 2004, General Paul Kern, who oversaw the Fay investigation, said that the real number of "ghost detainees" was much higher than the eight

[433] *Afghanistan: UN expert denounces abuses in illegal prisons*. UN News Service, 22 August 2004.
[434] ICRC operational update, 26 July 2004.
[435] Fay report, page 54, *supra*, note 15.
[436] Deposition of Colonel Ralph Sabatino, Camp Doha, Kuwait, 10 February 2004, pages 28-29. http://www.publicintegrity.org/docs/AbuGhraib/Abu16.pdf. The Fay report revealed that the Saudi general in charge of the men, Ambassador Paul Bremer (the Coalition Provisional Authority's Administrator), the US Embassy in Riyadh, and the US Secretary of State had all requested a search for the three Saudis. Each was told that the three men were not known to be in US custody.
[437] Fay report (Jones, page 22), supra, note 15.

found – "the number is in the dozens, to perhaps up to 100".[438] Major General George Fay also said that he believed "it's probably in the dozens".[439]

Lieutenant Colonel Stephen Jordan, formerly director of the Abu Ghraib intelligence facility, has stated that "other government agencies" hid detainees in order that they could be moved out of the prison quickly, for example to Guantánamo.[440] In November 2003, Secretary of Defense Rumsfeld, acting on the request of the CIA's then director George Tenet, ordered military officials in Iraq to keep a detainee off any prison register.[441] In June 2004, Secretary Rumsfeld stated that "the decision was made that it would be appropriate not to [register the detainee] for a period."[442] He was asked why the ICRC had not been told of the detainee, and whether there were other such prisoners being detained without the knowledge of the ICRC. Secretary Rumsfeld responded that "there are instances where that occurs".[443] In June 2004, after seven months, the unidentified detainee had still not been registered with the ICRC. Secretary Rumsfeld stated that the detainee was not a "ghost detainee". Asked how this case was different from what the Taguba report described as "ghost detainees", Secretary Rumsfeld replied: "It is just different, that's all." However, he failed to explain how this case differed from those of other "ghost detainees", who under international standards are cases of enforced disappearance of persons due to the official failure to clarify their fate and whereabouts.

Secretary Rumsfeld was not questioned by the Fay investigation about this case, which concerned a detainee sometimes known as Triple-X, and reportedly held at the Camp Cropper detention facility.[444] However, General Paul Kern, who oversaw the Fay inquiry, said that "there are enough unknown questions about the 'ghost detainees' and what agreements were made with whom" for further investigation to be required.[445] For example, whether all such detainees were eventually transferred to military custody is unknown. At least one

[438] Oral testimony before the Senate Armed Services Committee, 9 September 2004.
[439] *Ibid.*
[440] "The deal was that they could bring detainees in, they would not put them in the regular screening process… [Be]cause once a detainee did that, you're kind of in there three to six to eight months. The OGA [i.e. CIA] folks wanted to be able to pull somebody in 24, 48, 72 hours if they had to get 'em to GITMO, do what have you." Lt. Col. Jordan, AR 15-6 investigation interview, with Major General Taguba, 21 February 2004, page 132. http://www.publicintegrity.org/docs/AbuGhraib/Abu32.pdf.
[441] "With respect to the detainee you're talking about, I'm not an expert on this, but I was requested by the Director of Central Intelligence to take custody of an Iraqi national who was believed to be a high-ranking member of *Ansar al-Islam*. And we did so. We were asked to not immediately register the individual. And we did that. It would – it was – he was brought to the attention of the Department, the senior level of the Department I think late last month. And we're in the process of registering him with the ICRC at the present time… What I can say is that I think it's broadly understood that people do not have be registered in 15 minutes when they come in. What the appropriate period of time is I don't know. It may very well be a lot less than seven months, but it may be a month or more." Secretary Rumsfeld, Defense Department regular briefing, 17 June 2004.
[442] Defense Department regular briefing, 17 June 2004.
[443] *Ibid.*
[444] *Army says CIA hid more Iraqis than it claimed*. New York Times, 10 September 2004.
[445] Testimony to Senate Armed Services Committee, 9 September 2004.

detainee, a Syrian national, was reportedly taken out of Iraq and held on a US Navy ship before being returned to Abu Ghraib in late 2003.[446] However, the USA has not yet conducted and made public the further investigation recognized as necessary by General Kern.

Secret detention is prohibited under international human rights standards. Principle 6 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states that "governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyers or other persons of confidence."[447] The Human Rights Committee, in an authoritative statement on the prohibition on torture and cruel, inhuman and degrading treatment, has stated that "to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention… to be kept in registers readily available and accessible to those concerned, including relatives and friends".[448] The UN Special Rapporteur on torture has also said that "the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention."[449] The Special Rapporteur reiterated this in August 2004.[450]

Amnesty International considers that the secret and unacknowledged detentions of the "ghost detainees" in Iraq, as revealed by the Taguba report, amount to "disappearances". As described in the following section, the organization also considers that other detainees held in undisclosed locations in the "war on terror", detained either under US control or in the custody of other countries with the USA's knowledge and acquiescence, or under US interrogation, have effectively been made to "disappear". The acknowledgement of their detentions has been at best limited and at worst non-existent, and their fate and whereabouts remain wholly unknown.

The UN Declaration on the Protection of All Persons from Enforced Disappearance, adopted by consensus by the community of nations, including the USA, states that "disappearances" occur when:

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[446] *Army says CIA hid more Iraqis than it claimed*. New York Times, 10 September 2004.
[447] Recommended by the UN Economic and Social Council resolution 1989/65 of 24 May 1989.
[448] Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 30 (1994), para. 11. Accurate and detailed registers of detainees are required under international law and standards, including the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), Articles 122 to 125 and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Articles 136 to 141.
[449] UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.
[450] UN Doc. A/59/324, 23 August 2004, para. 22.

> "*persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials or different branches or levels of Government,...followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law.*"[451]

Article 1 of the UN Declaration states that "any act of enforced disappearance is an offence to human dignity", which

> "*places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life*".

The UN Declaration states that: "All acts of enforced disappearance shall be offences under the criminal law punishable by appropriate penalties which shall take into account their extreme seriousness" (Article 4). Furthermore: "No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it" (Article 6). It makes clear that "disappearances" cannot be justified under any circumstances whatsoever, including "a threat of war, a state of war, internal political instability or any other public emergency" (Article 7). Article 10 states that: "Any person deprived of liberty shall be held in an officially recognized place of detention" and "be brought before a judicial authority promptly after detention". Article 10 further states that: "Accurate information on the detention of such persons and their place or places of detention, *including transfers*, shall be made promptly available to their family members, their counsel or to any other person having a legitimate interest in the information" (emphasis added).

Enforced disappearances have been recognized as crimes under international law since the judgment of the Nuremberg Tribunal in 1946.[452] International instruments adopted since that date have reiterated that enforced disappearances are crimes under international law.[453]

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[451] Adopted without a vote by the UN General Assembly on 18 December 1992 in resolution 47/133.

[452] Field Marshal Wilhelm Keitel was convicted by the Nuremberg Tribunal for his role in implementing Adolf Hitler's *Nacht und Nebel Erlass* (Night and Fog Decree) issued on 7 December 1941 requiring that persons "'endangering German security' who were not to be immediately executed" were to be made to "vanish without a trace into the unknown in Germany". Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), p. 88.

[453] Inter-American Convention on the Forced Disappearance of Persons, Preamble, adopted on 9 June 1994 in Belém do Pará, Brazil, at the 24th regular session of the OAS General Assembly; International Law Commission, 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 18

3.2 Secret detentions and 'other government agencies'

Notorious human rights abusers, including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors. Until recently, Saddam Hussein used similar means to hide the crimes of his regime.

President George W. Bush, 26 June 2003[454]

Since the 1970s, Amnesty International has documented how the use of "disappearances" in countries around the world leaves detainees vulnerable to other grave human rights violations including torture and extrajudicial execution.[455] A quarter of a century later, in the "war on terror", the US Central Intelligence Agency or "other government agencies" are alleged to have been responsible for holding an unknown number of "disappeared" – "ghost detainees" in US parlance – unregistered and unacknowledged prisoners hidden from the ICRC and from their relatives. Torture is alleged to have been used against detainees held in secret.

President Bush's memorandum of 7 February 2002 stating that the USA would treat detainees in the "war on terror" humanely, even "those who are not legally entitled to it", included the Director of the CIA as one of its recipients. It stated that "as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely".[456] This assurance did not include the CIA and other agencies and it omitted any reference to persons "rendered" to states that use torture in interrogation (see Point 12.1). The CIA is an independent agency responsible to the President through its Director and accountable to the country through Congress. The President has the authority to direct the CIA to conduct covert operations.

In his account of the US administration's response to the atrocities of 11 September 2001, Bob Woodward of the *Washington Post* describes a meeting of top US officials in Camp David on the weekend of 15 and 16 September 2001.[457] At the meeting, the then

(i); Rome Statute of the International Criminal Court, Article 7 (1)(i) and (2) (i); Elements of Crimes, Article 7 (1) (i). When the Elements of Crimes were adopted by the Preparatory Commission for the International Criminal Court, the US delegate, Lieutenant Colonel William Lietzau, stated that the United States was "happy to join consensus in agreeing that this elements of crimes document correctly reflects international law". Christopher Keith Hall, *The first five sessions of the UN Preparatory Commission for the International Criminal Court*, 94 Am. J. Int'l L. 773, 788 (2000).

[454] Statement by the President. United Nations International Day in Support of Victims of Torture.

[455] For instance, see Amnesty International's annual reports, or *"Disappearances" and political killings: Human rights crisis of the 1990s. A manual for action.* AI Index: ACT 33/01/94, February 1994. Amnesty International Dutch Section.

[456] Presidential memorandum, 7 February 2002. *supra,* note 11.

[457] Present were President George Bush, Vice President Dick Cheney, National Security Advisor Condoleezza Rice, Deputy National Security Advisor Stephen Hadley, Secretary of State Colin Powell, Deputy Secretary of State Richard Armitage, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, FBI Director Robert Mueller, CIA Director George Tenet, Deputy Secretary of Defense Paul Wolfowitz and Cofer Black, chief of the CIA Director's Counterterrorist Center. 9/11 Commission Report, Chapter 10, *supra,* note 18.

Director of the CIA, George Tenet, reportedly requested that "exceptional authorities" be granted to his agency: "This was a request for a broad intelligence order permitting the CIA to conduct covert operations... The CIA needed new, robust authority to operate without restraint".[458] Woodward continues:

> *"Tenet had brought a draft of a presidential intelligence order, called a finding, that would give the CIA power to use the full range of covert instruments, including deadly force...*[459] *The CIA chief came to a page headed 'Heavily Subsidize Arab Liaison Services'. He explained that with the additional hundreds of millions of dollars for new covert action, the CIA would 'buy' key intelligence services, providing training, new equipment, money for their agent networks, whatever they might need. Several intelligence services were listed: Egypt, Jordan, Algeria. Acting as surrogates for the United States, these services could triple or quadruple the CIA's resources, an extended mercenary force of intelligence operatives.*
>
> *"Like much of the world of covert activity, such arrangements carried risks. It would put the United States in league with questionable intelligence services, some of them with dreadful human rights records. Some had reputations for ruthlessness and using torture to obtain confessions... Bush said he understood the risks."*[460]

On the afternoon of 17 September 2001, according to Woodward's account, President Bush signed the Memorandum of Notification authorizing all the measures that the CIA Director had proposed two days earlier at the administration's Camp David meeting of the war cabinet.[461] It has since been reported that President Bush authorized the CIA to set up secret detention facilities outside the USA and to use harsh interrogation techniques.[462] The

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[458] Bob Woodward, *Bush at War*, page 76. "Another key component, [Director George Tenet] said, was to use 'exceptional authorities to detain al Qaeda operatives worldwide'. That meant the CIA could use foreign intelligence services or other paid assets. Tenet and his senior deputies would be authorized to approve 'snatch' operations abroad, truly exceptional power".

[459] Woodward continues here: "For more than two decades, the CIA had simply modified previous presidential findings to obtain its formal authority for counterterrorism. His new proposal, technically called a Memorandum of Notification, was presented as a modification to the worldwide counterterrorism intelligence finding signed by President Reagan in 1986. As if symbolically erasing the recent past, it superseded five such memoranda signed by President Clinton."

[460] Bob Woodward, *Bush at War*, page 76-77.

[461] *Ibid.* Page 101. Chapter 10 of the 9/11 Commission Report notes that at the Camp David meeting of the "war council", "Bush and his advisers discussed new legal authorities for covert action in Afghanistan, including the administration's first Memorandum of Notification on Bin Laden. Shortly thereafter, President Bush authorized broad new authorities for the CIA." The 9/11 Commission Report cites a National Security Council memorandum, dated 16 September, from "Rice to Cheney, Powell, O'Neill (Paul, Secretary of the Treasury), Rumsfeld, Ashcroft, Gonzales (Alberto, White House Counsel), Card (Andrew, White House Chief of Staff), Tenet, and Shelton (Hugh, Chairman of the Joint Chiefs of Staff)".

[462] *The roots of torture*, Newsweek, 24 May 2004. The White House Counsel has said that "the only formal, written directive from the President regarding the treatment of detainees" was his 7 February

US government then reportedly negotiated "status of forces agreements" with foreign governments to give immunity to US agents and private contractors in the secret facilities.[463] Another report quotes a former US intelligence official as saying that "there was a debate after 9/11 about how to make people disappear", with the reported result being secret agreements allowing the CIA to use facilities outside the USA unhindered by external scrutiny.[464]

A year after the Camp David meeting, one of its attendees, the former chief of the CIA's Counterterrorist Center, Cofer Black, conjured the spectre of torture and ill-treatment when the only detail he would give of the "very highly classified area" of "operational flexibility" was that "there was before 9/11 and after 9/11" and that "after 9/11 the gloves come off."[465] Three months after that statement, evidence emerged that the CIA was employing interrogation methods – so-called "stress and duress" techniques – which violated the prohibition on torture and ill-treatment, in secret detention facilities, and transferring detainees to the custody of countries with poor human rights records (see Point 12.1). A *Washington Post* report at this time alleged that the CIA was using hooding, sleep deprivation and forcing detainees to stand or kneel for hours in a secret facility in Bagram air base to which the ICRC had not had access.[466] The report quoted an official who had supervised the capture and transfer of detainees: "If you don't violate someone's human rights some of the time, you probably aren't doing your job. I don't think we want to be promoting a view of zero tolerance on this. That was the whole problem for a long time with the CIA."

In June 2003, the CIA's General Counsel, Scott Muller, gave assurances that although the CIA "does not comment on operational activities or practices…, in its various activities around the world the CIA remains subject to the requirements of US law."[467] As already noted, however, the interpretation of US law by administration lawyers in the wake of 11 September 2001 is a matter for serious concern. Scott Muller's assurances must now be viewed in the light of these memorandums. Indeed, the Fay report into Abu Ghraib found that the CIA operated outside the rule of law and encouraged military personnel to do the same (see below).

A CIA request for legal protections for its interrogators reportedly lay behind the now notorious memorandum on torture, dated 1 August 2002, written in the Justice Department

2002 memorandum, *supra*, note 11. Press briefing by White House Counsel, 22 June 2004, *supra*, note 16.

[463] *Ibid.* A UN expert has raised concern about the apparent absence of any status of forces agreement (SOFA) between the USA and Afghanistan, "which raises another serious legal concern". In other words, what is the status of the US forces in Afghanistan? *Afghanistan: UN expert denounces abuses in illegal prisons*. UN News Service, 22 August 2004.

[464] *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004.

[465] Hearing before the Senate and House Intelligence Committees, 26 September 2002.

[466] *US decries abuse but defends interrogations*. Washington Post, 26 December 2002.

[467] Letter to Miles Fischer and Scott Horton, Association of the Bar of the City of New York, 23 June 2003. The letter states: "Pursuant to Executive Order 12333, any allegations of unlawful behavior are reported by the CIA to the Department of Justice, and may be investigated both by that Department and by the Agency's own Presidentially appointed, Senate confirmed Inspector General". Executive Order 12333 is available at http://www.cia.gov/cia/information/eo12333.html#1.2

and sent to the White House.[468] It was reportedly written following discussions within the government about the legality of methods used by the CIA to interrogate Abu Zubaydah, an alleged leading member of *al-Qa'ida* arrested in Pakistan on 28 March 2002 and taken into US custody. He was reported to have been taken to a secret CIA interrogation facility in Thailand.[469] He had been shot in the groin during his arrest, and it is alleged that painkillers were used "selectively" to obtain his cooperation during interrogation.[470] The August 2002 memorandum includes the suggestion that the US prohibition on torture "does not preclude any and all use of drugs", a line repeated in the final report of the Pentagon Working Group in April 2003. As already noted, the memorandum concluded that interrogators could cause a great deal of pain before crossing the threshold to torture; that in any case the US President's authority as Commander-in-Chief could override the prohibition on torture; and that even if interrogators were prosecuted for torture, there were defences available to them by which they could escape criminal liability.

Allegations of torture and other cruel, inhuman or degrading treatment that were made before this and other government memorandums came to light today take on a new resonance. For example, in March 2003, the *New York Times* quoted a "Western intelligence official" as describing the treatment in Bagram air base of Omar al-Faruq, an alleged senior *al-Qa'ida* operative, as "not quite torture, but about as close as you can get". The official reported that over a three-month period, Omar al-Faruq was "fed very little, while being subjected to sleep and light deprivation, prolonged isolation and room temperatures that varied from 100 degrees [38 degrees centigrade] to 10 degrees [minus 12 degrees centigrade]".[471] It is not known where Omar al-Faruq, a Kuwaiti national, is now held.

Detainees kept in secret locations are those considered to have high intelligence value. In this respect "high value" also suggests "high risk" – of torture or ill-treatment made possible by the secrecy of the detention (itself a form of ill-treatment). Other "high value" *al-Qa'ida* suspects have been taken into US custody since the capture of Abu Zubaydah and, like him, reportedly held under CIA control in secret locations outside US territory. Their whereabouts are so secret that President Bush is said to have informed the CIA that he did not want to know where the detainees are being held.[472]

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[468] Bybee memo, 1 August 2002, *supra*, note 252.

[469] *Uncertainty about interrogation rules seen as slowing the hunt for information on terrorists*. New York Times, 28 June 2004. At the alleged time of the capture, Secretary of Defense Rumsfeld said that media reports suggesting that Abu Zubaydah might be transferred to a third country where torture could be used during interrogation were "irresponsible and wrong". However, he had refused to issue a categorical denial when asked if such a transfer could occur even if the prisoner remained under the control of the USA. Department of Defense news briefing, 3 April 2002. Amnesty International raised concern on this case with the government in its April 2002 Memorandum, *supra*, note 13. The whereabouts of Abu Zubaydah remain unknown two-and-a-half years after his capture, and he appears to have been "disappeared".

[470] *US decries abuse but defends interrogations*. Washington Post, 26 December 2002.

[471] *Questioning terror suspects in a dark and surreal world*. New York Times, 9 March 2003.

[472] *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004.

There have been reports that secret US facilities are located in Jordan, Diego Garcia, Pakistan, Egypt, Thailand, and Afghanistan. For example, there is reported to be a CIA facility in Kabul in the former Ariana hotel, and one known as "The Pit", also in Kabul. Khaled El Masri recently told Amnesty International that he was detained in Kabul in early 2004 (see also Point 12.1). He alleged that other detainees told him of a nearby detention facility in which there were around 200 detainees, most of whom "belonged" to the Afghan authorities, but about 10 of whom "belonged" to the US and would be moved whenever the ICRC visited. Such reports of secret detention facilities are by definition not yet confirmed and the allegations have been denied or ignored by the authorities.[473] At the time of writing, Amnesty International had not received a response to a letter it wrote in August 2004 to the Acting Director of the CIA raising Khaled El Masri's allegations.[474] The organization is concerned that, if these allegations are correct, the detainees have been "disappeared".

Citing "international intelligence sources", an Israeli newspaper has alleged that at least 11 of the most senior alleged members of *al-Qa'ida* in custody, including Abu Zubaydah, Riduan Isamuddin (see page 184), Khalid Sheikh Mohammed (see below) and Ramzi bin al-Shibh, are being held in a secret CIA facility in Jordan.[475] There, the newspapers states, CIA interrogators can apply interrogation methods banned under US law in a country whose close relationship with the USA makes leaked information about the detainees less likely. The government of Jordan has "categorically denied" the allegations, as it has done previously.[476] There is evidence that Maher Arar, a Canadian/Syrian national who was deported from the USA in October 2002, may have been held in a CIA facility in Jordan before being transferred to Syria where he was allegedly subjected to severe torture (see Point 12.1).[477]

"Disappearances"

Some individuals allegedly held in unknown locations may have been held for as long as three years. It is not known whether they are alive or dead, whether they are held in a US facility in Afghanistan, in Guantánamo, or in a facility in another country, under US or non-

[473] For example, a UK parliamentary committee noted in 2004 that, in response to questions about the Diego Garcia reports, Prime Minister Tony Blair had "replied that the US authorities and the British Representative on Diego Garcia had confirmed that there were not, and never had been, any terrorist detainees held on the island nor on any of the vessels anchored there". Intelligence and Security Committee, Annual Report 2003-2004. At a Department of Defense briefing on 14 July 2004, a Pentagon spokesman, asked whether there were any detainees at Diego Garcia, replied: "I don't know. I simply don't know".

[474] Letter from AI Secretary General Irene Khan to CIA Acting Director John McLaughlin, dated 20 August 2004. Copied to President Bush, Secretary of Defense Rumsfeld, and Secretary of State Powell.

[475] *CIA holding Al-Qaida suspects in secret Jordanian lockup*. Haaretz, 13 October 2004. This report followed a report by Human Rights Watch. *The United States' "Disappeared": The CIA's Long-Term "Ghost Detainees"*. October 2004. http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf.

[476] *Jordanian official denies reports of CIA detention facility*. Haaretz, 14 October 2004. *Jordan denies it has US prisons on its territory*. AFP in Jordan Times, 21 June 2004.

[477] *Arar recalls turmoil of his arrival in Jordan*. Toronto Star, 15 October 2004. An earlier report suggested that Maher Arar had been held in a CIA debriefing facility before being handed over to Syria. *Ottawa stumped by Syria tipoff*. National Post (Canada), 30 July 2003.

US control, or on a ship off Diego Garcia or elsewhere. This refusal or failure to acknowledge in whose custody they are currently detained or clarify the whereabouts of the detainees, leaving them outside the protection of the law for a prolonged period, places them squarely within the scope of the UN Declaration on the Protection of All Persons from Enforced Disappearance (see page 106).[478]

The 9/11 Commission Report on the 11 September 2001 attacks revealed that it had been "authorized to identify by name only ten detainees whose custody has been confirmed officially by the US government."[479] It did not say when this confirmation occurred, or whether the detainees were or had been in direct US custody or where they were or had been held. Nor did it say whether any of the detainees had at any point been transferred between the USA and other countries.

For example, of one of the 10 detainees, Abd al Rahim al Nashiri, the 9/11 Commission Report states only that "Nashiri's November 2002 capture in the United Arab Emirates finally ended his career as a terrorist". The Commission explained that its access to information on the detainees had been "limited to the review of intelligence reports based on communications received from the locations where the actual interrogations take place".[480] It was allowed no further input or access on the grounds that it would "disrupt the sensitive interrogation process". These minimal details clearly do not suffice to establish:

- whether the 10 prisoners were held by the US authorities (rather than by other countries) and, if so, under which authorities they were held, and when they were first in US custody;
- whether they are still in US custody and, if so, where they are held and under what conditions; if not, what happened to them after they ceased to be in US custody.

Concerned persons, including relatives and human rights monitors, are left in the dark about the whereabouts, fate, and well-being of the detainees.

[478] In addition, Article II of the Inter-American Convention on Forced Disappearance of Persons, adopted in 1994, states: "For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees." The USA has not ratified the Convention.
[479] The 10 are: Khalid Sheikh Mohammed, Abu Zubaydah, Riduan Isamuddin (also known as Hambali), Abd al Rahim al Nashiri, Tawfiq bin Attash (also known as Khallad), Ramzi Binalshibh, Mohamed al Kahtani, Ahmad Khalil Ibrahim Samir al Ani, Ali Abd al Rahman al Faqasi al Ghamdi (also known as Abu Bakr al Azdi), and Hassan Ghul. Of these 10 men, Amnesty International understands that at least at some point Mohamed al Kahtani was held in Guantánamo, but it is not known if he is still held there.
[480] In its extensive footnotes, the 9/11 Commission cites "interrogation reports" of the detainee in question, naming the detainee if it is one of the 10. If it is not one of the 10, the Commission Report simply refers to "interrogation of detainee". There are numerous examples of the latter, with interrogation reports dated from late-2001 to mid-2004.

As in the case of the "disappeared" in US custody in Iraq, the ICRC has been denied access to or information about detainees kept in undisclosed locations. Indeed, the organization has not even been told where such locations are. In January 2004 it issued a press release in which it stated:

> *"Beyond Bagram and Guantánamo Bay, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations. For the ICRC, obtaining information on these detainees and access to them is an important humanitarian priority and a logical continuation of its current detention work in Bagram and Guantánamo Bay."*[481]

In May 2004, the ICRC revealed that it has "repeatedly appealed to the American authorities for access to people detained in undisclosed locations".[482] By late July 2004, the US authorities were continuing to deny access to the ICRC.[483] This remained the case as of 19 October 2004.

Those not included in the 9/11 Commission's list of 10 detainees, but who are believed to be or to have been in US custody at unknown locations include: Ibn al-Shaikh al-Libi, a Libyan national taken into custody in Afghanistan in January 2002; Omar al-Faruq, arrested in Indonesia on 5 June 2002 (see above); Sayf al-Islam al-Masri, arrested in early October 2002 in Georgia; and Muhammad Mansur Jabara, dual national of Kuwait and Canada, arrested in Oman in March 2002 and reportedly transferred to the USA, possibly via Canada. In December 2002, Amnesty International wrote to the US government for clarification on the whereabouts and legal status of these individuals.[484] The organization has never had a reply. It has also never had a reply to its request for clarification on the whereabouts of Yemeni national Jamil Qasim Saeed Mohammed, reportedly transferred from Pakistan custody to US custody three years ago (see Point 12.1).

Other detainees whose whereabouts are unknown include Adil Al-Jazeeri, an Algerian national, who was reportedly handed over by Pakistan to US authorities in July 2003 after being held incommunicado for a month and allegedly subjected to "tough questioning". He was flown out of Peshawar to an undisclosed location, possibly Bagram, for US interrogation.[485] Amnesty International has had no clarification from the authorities as a result of its urgent appeal on the case.[486]

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[481] *United States: ICRC President urges progress on detention-related issues*, 16 January 2004.
[482] *US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC*. Operational update, 14 May 2004.
[483] ICRC operational update, 26 July 2004.
[484] *USA: Beyond the Law: Update to Amnesty International's April Memorandum to the US Government on the rights of detainees held in US custody in Guantánamo Bay and other locations*. AI Index: AMR 51/184/2002, http://web.amnesty.org/library/Index/ENGAMR511842002
[485] *Terror suspect flown out of Pakistan*. Associated Press, 14 July 2003.
[486] http://web.amnesty.org/library/Index/ENGAMR511032003.

Abu Zubair al-Haili, a Saudi national, was arrested in Morocco in June 2002 by the authorities there. A US official was reported as saying that Zubair al-Haili had "a wealth of information", to which the USA would have access.[487] It is not clear if al-Haili has ever been transferred to US custody. Another detainee, Saudi national Mustafa al-Hawsawi, was reportedly arrested in Pakistan on 1 March 2003 and subsequently flown to an undisclosed location in US custody.

Torture alleged

One of the 10 detainees whose detention has been "confirmed" via the 9/11 Commission Report is Khalid Sheikh Mohammed, arrested in Pakistan along with Mustafa al-Hawsawi. At that time, asked about how Khalid Sheikh Mohammed would be treated during interrogation, the White House spokesman replied that "the standard for any type of interrogation of somebody in American custody is to be humane and to follow all international laws and accords dealing with this type subject. That is precisely what has been happening, and exactly what will happen."[488] Since then, it has been alleged that the CIA subjected Khalid Sheikh Mohammed to a torture technique known as "water boarding" in which the prisoner is forcibly pushed under water to the point that he believes he will drown.[489] According to current and former counterterrorism officials, this and other techniques were reportedly authorized under a set of secret rules for the interrogation of high-level *al-Qa'ida* detainees endorsed by the Justice Department and the CIA early in the "war on terror".[490]

A Pentagon spokesperson has said of the alleged use of "water boarding" that "it is not a technique that's part of this approval, and based upon everything I know, that is an absolute false report."[491] Nevertheless, "asphyxiations" of detainees by US soldiers have been alleged in Iraq,[492] and the technique of "water-boarding" is similar to an interrogation method that was requested for use at Guantánamo in late 2002. A memorandum, dated 11 October 2002, requested approval of four "Category III" techniques for use against "the most uncooperative detainees" held in Guantánamo.[493] One of the techniques requested was "use of

[487] *Top al Qaeda leader in custody*. CNN.com, 18 June 2002.
[488] Ari Fleischer, Press Briefing, 3 March 2003.
[489] *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004. Citing statements by counterterrorism officials, this article alleges that "detainees have also been sent to third countries, where they are convinced that they might be executed, or tricked into believing they were being sent to such places. Some have been hooded, soaked with water and deprived of food, light and medications."
[490] *Ibid.*
[491] Press briefing, 22 June 2004, *supra*, note 16.
[492] Members of the 223rd Military Intelligence Battalion reportedly abused detainees in a detention facility in Samarra, north of Baghdad, in 2003, including by forcing "into asphyxiations numerous detainees in an attempt to obtain information". *Abuse of captives more widespread, says army survey*. New York Times, 26 May 2004.
[493] Memorandum for Commander, Joint Task Force 170. Subject: *Request for approval of counter-resistance strategies*. Signed by Jerald Phifer, LTC, USA. Director, J2. http://www.defenselink.mil/news/jun2004/d20040622doc3.pdf

wet towel and dripping water to induce the misperception of suffocation". The request noted that such techniques were used by "other US government agencies" (e.g. the CIA).

In late June 2004, it was reported that the CIA had suspended the use of its "enhanced interrogation techniques", such as feigning suffocation, stress positions, light and noise bombardment, and sleep deprivation. One former CIA official was quoted as saying: "The whole thing has stopped until we sort out whether we are sure we're on legal ground".[494] It is shocking that any such legal review is considered necessary for techniques that so flagrantly flout international law and standards prohibiting torture and ill-treatment.

Shrouded in secrecy

The CIA's activities in the "war on terror" remain shrouded in secrecy. In June 2004, the White House Counsel refused to "get into questions related to the CIA".[495] Two months later, the Schlesinger review into Pentagon detention policies found that:

> "*CIA personnel conducted interrogations in [Department of Defense] detention facilities. In some facilities these interrogations were conducted in conjunction with military personnel, but at Abu Ghraib the CIA was allowed to conduct its interrogations separately.*"[496]

The Schlesinger Panel revealed that it had not had "full access to information involving the role of the Central Intelligence Agency in detention operations; this is an area the Panel believes needs further investigation and review." The Panel's chairman, John Schlesinger, acknowledged at the press conference to release the report on 24 August 2004 that his investigators had only "had partial access to the CIA…We did not have a sharing".

The following day, the Fay report into Abu Ghraib was released. It reserved particular criticism for the CIA, noting that the agency's "detention and interrogation practices led to a loss of accountability, abuse, reduced interagency cooperation, and an unhealthy mystique that further poisoned the atmosphere at Abu Ghraib".[497] It found that the CIA had held a number of "ghost detainees". At least one of them – Manadel al-Jamadi (see Point 6) – had died in custody. It found that CIA personnel had used aliases, and detained people under false names. It found that the CIA officers had generally operated outside the military's rules and procedures, citing an instance where a CIA officer had loaded his gun during an interrogation. General Fay told the Senate Armed Services Committee that the CIA had refused to provide the information he requested for his investigation.[498]

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[494] *CIA puts harsh tactics on hold.* Washington Post, 27 June 2004.
[495] Department of Defense Deputy General Counsel, Press briefing, 22 June 2004, *supra*, note 16.
[496] Schlesinger report, page 70, see *supra*, note 30.
[497] Fay report, page 52-53, *supra*, note 15.
[498] "I made the request to CIA chief of station through General Fast. She received no response and I followed up a number of times and still received no response. Then when I came back to the United States and continued my investigation here, still getting no response from CIA after making additional inquiries, I eventually made an appointment with the inspector general of the CIA… I was informed that CIA was doing its own investigation and that…they would not provide me with the information

3.3 Recommendations under Point 3

The US authorities should:

- Clarify the fate and whereabouts of those detainees reported to be or to have been in US custody or under US interrogation in the custody of other countries, to whom no outside body including the International Committee of the Red Cross are known to have access, and provide assurances of their well-being. These detainees include but are not limited to those named in the 9/11 Commission Report and in this Amnesty International report as having been in custody at some time in undisclosed locations;
- End immediately the practice of secret detention wherever it is occurring, and under whichever agency. Hold detainees only in officially recognized places of detention;
- Not collude with other governments in the practice of "disappearances" or secret detentions, and expose such abuses where the USA becomes aware of them;
- Maintain an accurate and detailed register of all detainees at every detention facility operated by the US, in accordance with international law and standards. This register should be updated on a daily basis, and made available for inspection by, at a minimum, the International Committee of the Red Cross, and the detainees' relatives and lawyers or other persons of confidence;
- Make public and regularly update the precise numbers of detainees in US custody specifying the agency under which each person is held, their identity, their nationality and arrest date, and place of detention;
- Either charge and bring to trial, in full accordance with international law and standards and without recourse to the death penalty, all detainees held in US custody in undisclosed locations, or else release them;
- Comply without delay with Freedom of Information Act requests, and related court orders, aimed at clarifying the fate and whereabouts of such detainees;
- Make public and revoke any measures or directives that have been authorized by the President or any other official that could be interpreted as authorizing "disappearances", torture or cruel, inhuman or degrading treatment, or extrajudicial executions.

that I requested." Major General Fay, oral testimony to the Senate Armed Services Committee, 9 September 2004.

Point 4 – Provide safeguards during detention and interrogation

All prisoners should be immediately informed of their rights. These include the right to lodge complaints about their treatment and to have a judge rule without delay on the lawfulness of their detention. Judges should investigate any evidence of torture and order release if the detention is unlawful. A lawyer should be present during interrogations. Governments should ensure that conditions of detention conform to international standards for the treatment of prisoners and take into account the needs of members of particularly vulnerable groups. The authorities responsible for detention should be separate from those in charge of interrogation. There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention

4.1 Keeping powers of interrogation and detention apart

It is essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees.
Major General Geoffrey Miller, commander of Guantánamo[499]

After receiving a briefing on the report produced by his appointees on the Schlesinger Panel, Secretary of Defense Rumsfeld said: "I think the interesting thing about the Schlesinger Panel is their conclusion that, in fact, the abuses seem not to have anything to do with interrogation at all…".[500] In fact, the Schlesinger report's first paragraph contains the sentence: "[W]e do know that some of the egregious abuses at Abu Ghraib which were not photographed did occur during interrogation sessions and that abuses during interrogation sessions occurred elsewhere." The day after the Fay report into Abu Ghraib was issued, Secretary Rumsfeld said that: "I have seen nothing yet that suggests that there was any abuse that was related to interrogations. So all of the press and all of the television, thus far, that tries to link the abuse that took place to interrogation techniques in Iraq has not yet been demonstrated – quite the contrary." Later in the same press conference, Secretary Rumsfeld said that he had been advised that the Fay report had found "two or three instances where a detainee in Iraq…who should not have been abused during an interrogation process, but was abused".[501]

An administration that has adopted a selective disregard for the Geneva Conventions and international human rights law in order to give free rein to its interrogators, and authorized interrogation techniques that flout international standards, is likely to want to downplay any evidence that its policies have led to torture. Secretary Rumsfeld appears to have taken a selective view of the investigations so far conducted, promoting evidence that

[499] Miller report, *supra*, note 120.
[500] Secretary Rumsfeld interview with KTAR "Real Life with David Leibowitz". 26 August 2004. Secretary Rumsfeld was briefed by the Schlesinger Panel on 24 August. Department of Defense News Release, 24 August 2004.
[501] Secretary Rumsfeld Press Conference in Phoenix, Arizona. Department of Defense News Transcript, 26 August 2004.

fitted the administration's earlier claims that this was a problem restricted to a few aberrant soldiers, and ignoring evidence to the contrary.

There is much evidence that what happened in Abu Ghraib and elsewhere has been intelligence-driven. While the Fay report claims that the worst of the sexual and physical torture depicted in the Abu Ghraib photographs were the actions of a "small group of morally corrupt and unsupervised soldiers and civilians", it also points to wider abuses and suggests that even the abuses depicted in the photographs could be linked to a climate set by the pursuit of intelligence. It is this pursuit that has driven the USA's "war on terror" detention policies as a whole, from Afghanistan to Guantánamo to undisclosed locations. The lifting of a basic safeguard – the separation of the powers of interrogation and detention – is a thread that runs from Afghanistan to Abu Ghraib.

In letters and emails written before he was charged in the Abu Ghraib abuses, Staff Sergeant Ivan Frederick wrote:

> "*I questioned some of the things that I saw... Such things as leaving inmates in their cell with no clothes or in female's underpants, handcuffing them to the door of their cell. I questioned this and the answer I got was this is how Military Intelligence (MI) wants it done...CJTF [Combined Joint Task Force] has witnessed how the prisoners are handled such as handcuffed to the door of their cell, placed in isolation room with no clothes, lights, ventilation, window, water or to use the toilet. MI has been present and witnessed such activity. MI has encouraged and told us great job that they were now getting positive results and information.*"[502]

The Taguba report cited numerous examples of how guards were allegedly used to soften up detainees. One guard recalled "how her job was to keep detainees awake". She said that Military Intelligence [MI] "wanted to get them to talk. It is [the guards'] job to do things for MI and OGA [other government agencies, e.g. CIA] to get these people to talk." Another guard recalled that intelligence officials had said things like "loosen this guy up for us"; "make sure he has a bad night"; "make sure he gets the treatment". Asked how interrogators broke new detainees, a military police guard replied: "detainees were brought in subjected to sleep deprivation, cold showers every 30 minutes, cuffed and forced to stand for long periods of time and PT [physical training], i.e. push-ups, side straddle hops, etc."[503] A military intelligence soldier told the Taguba investigation:

> "*The MPs* [military police] *did prepare prisoners prior to interrogations by having them do physical exercises and yelling at them. The interrogators would verbally discuss, with a MP, a detainee and his cooperativeness and various methods to deal*

[502] Copy on file at Amnesty International.
[503] Sworn statement of Keith Comer, 372nd Military Police Company, 9 February 2004. http://www.publicintegrity.org/docs/AbuGhraib/Abu15.pdf.

with a detainee such as physical exercise at random hours of the night and yelling."[504]

The Fay report found that "although self-serving", the claims of military guards that they were acting at the direction of intelligence officials "do have some basis in fact… The climate created at Abu Ghraib provided the opportunity for such abuse to occur." Part of this climate was that "the delineation of responsibilities seems to have been blurred when military police soldiers, untrained in interrogation operations, were used to enable interrogations. Problems arose in the following areas: use of dogs in interrogations, sleep deprivation as an interrogation technique and use of isolation as an interrogation technique."[505]

Far from the "two or three cases" referred to by Secretary Rumsfeld in his 26 August press conference, the Fay report found 16 incidents in which abuse by guards "was, or was alleged to have been, requested, encouraged, condoned, or solicited" by military intelligence personnel. This included the use of isolation with sensory deprivation, removal of clothing and humiliation, the use of dogs to instil fear, and physical abuse. In 11 cases, military intelligence officers were found to have actually directed the torture or ill-treatment. In addition, the report found that military intelligence personnel "were also found not to have fully comported with established interrogation procedures and applicable laws and regulations". Poorly defined and shifting interrogation policies were also a problem, and "as a result, interrogation activities sometimes crossed into abusive activity". [506]

In Iraq, the blurring between intelligence and detention roles appears not to have been restricted to Abu Ghraib. In its February 2004 report, the ICRC noted that ill-treatment, sometimes "tantamount to torture", was systematic when the detainee was suspected of involvement in a security offence or deemed to have "intelligence" value and held in detention supervised by military intelligence. Guards from Camp Whitehorse near Nasiriya testified at a military hearing in May 2004 that they had been instructed by intelligence officials to use a technique known as 50/10, in which detainees were required to stand for 50 minutes out of every hour until the arrival of interrogators as much as eight hours later. A military investigator concluded that someone from military intelligence "must have directed or strongly suggested" that guards use the tactic.[507] An interrogator in the case also reportedly made pre-trial statements saying that sleep deprivation was useful in maintaining the "shock of capture".[508] This echoes the language of a memorandum, signed by the commanding officer in Iraq, Lieutenant General Sanchez, on 14 September 2003 (see Point 1.2). Sent to interrogators, this document reportedly sanctioned the use of isolation, and "sleep

[504] Sworn statement of Luciana Spencer, 66th Military Intelligence Group, 21 January 2004. http://www.publicintegrity.org/docs/AbuGhraib/Abu11.pdf.
[505] Fay report (Jones, page 13), *supra*, note 15.
[506] Fay report, page 7, *supra*, note 15.
[507] *Report cites marines in Iraqi's death at a camp*. Los Angeles Times, 24 May 2004.
[508] *Reservists' testimony details sleep deprivation at US facility in Iraq*. LA Times, 28 August 2004.

management", as well as "yelling, loud music, and light control… to create fear, disorient detainees and capture shock".[509]

In Afghanistan, the USA adopted a "template whereby military police actively set the favourable conditions for subsequent interviews" – presumably meaning that guards in some way were meant to "soften up" detainees prior to their interrogation.[510] The Fay report referred to the US practice in Afghanistan of "removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation."[511]

There are numerous examples from Afghanistan. In May 2003 in Kabul, former detainee Sayed Abbasin recalled to Amnesty International how in the US air base at Bagram he had been held in handcuffs and shackles for the first week, kept under 24-hour lighting and woken by guards when trying to sleep, not given enough food, not allowed to talk to or look at other detainees, and forced to stand and kneel for hours. During this time he was interrogated six or seven times. He recalled his transfer to Kandahar air base – blindfolded, a black bag over his head and taped around his neck, his hands and legs tied. He said the handling was so rough, he would not have been surprised if someone would have died. In Kandahar, again the detainees were not allowed to look at the soldiers' faces. If they did, they were made to kneel for an hour. If they looked twice, they were made to kneel for two hours. He says he was interrogated five or six times in Kandahar, before being transferred to Guantánamo Bay.

In late 2002, at the time that Major General Geoffrey Miller took over as commander of Guantánamo, Secretary of Defense Donald Rumsfeld reportedly gave military intelligence control of the detainee operations at the base, including the guards.[512] In August and September 2003, Major General Miller went to Iraq to advise on how to obtain better intelligence from US detentions there. His report stated that it was "essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees". He made a number of recommendations to this end, "the vast majority of which were implemented following the visit".[513] His recommendations were based on his experience in Guantánamo, a detention regime of which he has said "we're enormously proud… to be able to set that kind of environment where we were focussed on gaining the maximum amount of intelligence".[514]

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[509] *Documents helped sow abuse, army report finds*. Washington Post. 30 August 2004.
[510] *Report on Detention and Corrections Operations in Iraq*. Office of the Provost Marshal General of the Army, page 27. 5 November 2003. http://www.publicintegrity.org/docs/AbuGhraib/Abu5.pdf.
[511] Fay report, page 29, *supra* note 15.
[512] *The roots of torture*. Newsweek, 24 May 2004.
[513] Major General Miller, Coalition Provisional Authority Briefing. Department of Defense News Transcript, 4 May 2004. His report recommended that the US military in Iraq dedicate and train a detention guard force subordinate to military intelligence that "sets the conditions for the successful interrogation and exploitation of internees/detainees." Miller report, *supra*, note 120.
[514] Coalition Provisional Authority Briefing, 4 May 2004.

For its part, Amnesty International believes that the totality of the detention conditions – harsh, isolating and indefinite – faced by the majority of detainees held there has amounted to cruel, inhuman or degrading treatment in violation of international law. Between January 2002 and June 2004, when the US Supreme Court moved to begin to restore the rule of law to Guantánamo, hundreds of detainees were held virtually incommunicado in small cells with limited opportunity to exercise, no access to television, radio, or newspapers, no access to the courts, their families or lawyers, subjected to repeated interrogations, with no indication of when, if ever, they would be released or made subject to some form of legal process. The ICRC has long since said that it has witnessed a serious deterioration in the mental health of a large number of the detainees because of the indefinite nature of their detention. It has apparently driven numerous inmates to the point of suicide. Shah Mohammed, a 20-year-old Pakistani man who spent more than a year in Guantánamo, recalled how he had attempted suicide more than once: "I tried four times, because I was disgusted with my life. It is against Islam to commit suicide, but it was very difficult to live there. A lot of people did it."[515]

On 14 June 2004, Secretary Rumsfeld said that "a person being held in, for the sake of argument, Guantánamo, who does not know how long they will be held, some people would characterize that as the uncertainty of not knowing when they might be tried or released as a form of mental torture. Therefore, that word gets used by some people in a way that is fair from their standpoint, but doesn't fit a dictionary definition of the word that one would normally accept."[516] He did not explain what he would consider the "dictionary definition" of cruel, inhuman or degrading treatment to encapsulate. According to international standards, this term "should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental."[517] Regarding administrative detention of Palestinians by the Israeli army (under six-month orders, renewable indefinitely), the UN Committee against Torture stated that "the Committee continues to be concerned that

[515] *Tales of despair from Guantánamo.* New York Times, 17 June 2003. Military records reportedly show that there was an increase in suicide attempts three months after Major General Miller took over command of the detention facility. *Flurry of suicide attempts at Guantánamo.* AP, 22 June 2004. An Abu Ghraib detainee, Hussein, has also said that his treatment in US custody – stripping, isolation, beating, hooding, and sexual humiliation – drove him to consider suicide. On 18 January 2004, military investigators asked him "How did you feel when the guards were treating you this way?" He replied: "I was trying to kill myself but I didn't have any way of doing it." http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/19446.pdf.

[516] Department of Defense News Transcript, 14 June 2004. A Justice Department memorandum on torture, dated 1 August 2002, gave some suggestions on when the threshold for "severe mental pain or suffering" amounting to torture under US law might be met. The memorandum, which attempted to create an unacceptably narrow definition of torture, nevertheless said that "we think that pushing someone to the brink of suicide, *particularly when the person comes from a culture with strong taboos against suicide*, and it is evidenced by acts of self-mutilation, would be a sufficient disruption of the personality" to meet this requirement (emphasis added). Bybee memorandum, 1 August 2002, *supra*, note 252.

[517] Note to Principle 6, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UN General Assembly resolution 43/173 of 9 December 1988.

administrative detention does not conform with article 16 of the Convention [prohibiting cruel, inhuman or degrading treatment]."[518]

The separation of the authorities responsible for detention and those responsible for interrogation is an important safeguard against torture or cruel, inhuman or degrading treatment. The UN Committee against Torture has said that it "expects that the detention and interrogation functions will be separated."[519] The UN Special Rapporteur on torture has stated that the period that detainees are held "in facilities under the control of their interrogators or investigators… should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted."[520]

4.2 Isolation as an interrogation technique

Without question, the isolation of a prisoner from the general population for an indefinite period of time raises Eighth Amendment issues, and due process concerns.
US federal judge, 27 August 2004[521]

In occupied Iraq, the ICRC reported the USA's systematic resort to keeping detainees "completely naked in totally empty concrete cells and in total darkness, allegedly for several consecutive days." A US military intelligence official told the ICRC delegates that this practice was "part of the process" – a process which the ICRC said "appeared to be a give-and-take policy whereby persons deprived of their liberty were 'drip-fed' with new items (clothing, bedding, hygiene articles, lit cell, etc.) in exchange for their 'co-operation'." [522] The Fay report on Abu Ghraib found indications of "the routine use of total isolation and light deprivation."

Isolation is one of the interrogation techniques authorized by Secretary of Defense Rumsfeld in his December 2002 and April 2003 memorandums.[523] According to leaked Department of Defense documents, one of the concerns that the ICRC raised with the US authorities at Guantánamo was the "excessive isolation" of detainees in punishment cells for refusing to provide information in interrogations. According to the Department's leaked notes of a meeting between the ICRC and the Guantánamo authorities in October 2003, the ICRC was concerned that there had been no improvement on this issue. The official notes of the meeting state:

> "*The ICRC focused on the effects that the interrogations were having on the mental health of the detainees. The ICRC feels that interrogators have too much control over*

[518] Report of the Committee against Torture, UN Doc. A/57/44 (2001-2002), para. 52(e).
[519] UN Doc. A /50/44 (1995), para. 176, referring to Jordan.
[520] UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.
[521] *Hamdi v. Rumsfeld*, In the US District Court for the Eastern District of Virginia. The Eighth Amendment of the US Constitution prohibits, among other things, "cruel and unusual punishment".
[522] ICRC report, February 2004, supra, note 77.
[523] Action memo, *supra*, note 49. Memorandum for the Commander, SOUTHCOM, *supra*, note 50.

the basic needs of detainees. That the interrogators attempt to control the detainees through the use of isolation in which the detainees were kept; the level of comfort items detainees can receive; and also the access of basic needs to the detainees".[524]

According to the official record of the meeting, Major General Miller, the Guantánamo Commander, responded that the detainees "are enemy combatants picked up on the field of battle in Afghanistan. There is no issue with interrogation methods. The focus of ICRC should be the level of humane detention being upheld not the interrogation methods. JTF GTMO [Joint Task Force Guantánamo] treats all detainees humanely."[525]

Sayed Abbasin recalled to Amnesty International in May 2003 being put in an isolation cell without blankets for five days as punishment for exercising in his cell.[526] In an interview for Amnesty International in August 2003, former Guantánamo detainee Muhammad Naim Farooq said that he had witnessed two cases of suicide attempts, one by a fellow Afghan detainee, and one by an Iranian. He said that both were "punished with solitary confinement, without any clothes. I could not see for how long". Released Swedish detainee Mehdi Ghezali has said that after six months of cooperating in interrogations, he decided to remain silent: "I was punished with isolation and was brought to a special block where prisoners were kept solely to be isolated… There was a very strong light in these cells, too. In these cells there were small windows, but you couldn't see anything through them".[527] He says that the first time he was put in isolation, it was for five weeks, but that some detainees were isolated for up to four months.

Solitary confinement can be cruel, unnecessary and damaging to the physical and mental health of a prisoner. International standards increasingly favour its restriction or elimination.[528] In his August 2004 report to the UN General Assembly, the UN Special

[524] Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03, supra*, note 52.
[525] *Ibid.*
[526] *Report of the ICRC*, February 2004, *supra*, note 77.
[527] Interview with Amnesty International, Sweden, 27 July 2004.
[528] Article 7 of the UN Basic Principles for the Treatment of Prisoners states: "Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged." The Human Rights Committee has stated that "prolonged solitary confinement... may amount to acts prohibited by article 7 [of the ICCPR]". General Comment on Article 7, *supra*, note 177, para. 6. The Inter-American Court of Human Rights has held that "prolonged isolation and deprivation of communication" amounts to cruel and inhuman treatment. *Velasquez Rodriguez* Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), para. 187. The European Committee for the Prevention of Torture has stated that "a solitary confinement-type regime... can have very harmful consequences for the person concerned. Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible." See e.g. 2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991, CPT/Inf (92) 3 [EN], 13 April 1992, para. 56. The Special Rapporteur on torture has stated: "Judges should not have the power to order solitary confinement, other than as a measure in cases of breach of institutional discipline, for more than two days." Report on a visit to Chile, UN Doc. E/CN.4/1996/35/Add.2, 4 December 1996, para. 76(c).

Rapporteur on torture reiterated that solitary confinement can in itself "constitute a violation of the right to be free from torture".[529]

In July 2004, Guantánamo detainee Moazzam Begg wrote that he had been held in solitary confinement since 8 February 2003, which means that by October 2004 he had been in isolation for approximately 600 days.[530] In July 2003, he was one of six foreign nationals made subject to the Military Order that President Bush signed on 13 November 2001.[531] Under the Order, the six could be held in indefinite detention without charge or trial, but at the same time they became eligible for trial by military commission. They were subsequently removed to a separate part of the detention facility in Guantánamo Bay known as Camp Echo, where they were held in solitary confinement in reportedly windowless cells, with 24-hour video surveillance. According to a leaked Pentagon document, in a meeting with the Guantánamo authorities in October 2003, the ICRC expressed shock "to see that Camp Echo had expanded", and belief that the facility was "extremely harsh and has very strict interrogations".[532]

Another of the six men named under the Military Order in July 2003, Salim Ahmed Hamdan, a Yemeni national, was moved to Camp Echo in December 2003, and was reportedly still there in October 2004. Dr Daryl Matthews, a forensic psychiatrist, testified in late March 2004 that:

> "*Mr Hamdan has described his moods during this period of solitary confinement as deteriorating, and as encompassing frustration, rage (although he has not been violent), loneliness, despair, depression, anxiety, and emotional outbursts. He asserted that he has considered confessing falsely to ameliorate his situation. [His military lawyer] has described Mr Hamdan's condition to me, as observed during their meetings, as initially agitated and withdrawn, with a brightening mood as the visit proceeds, but ending with Mr Hamdan begging him not to leave… It is my opinion, to a reasonable medical certainty, that Mr Hamdan's current conditions of confinement place him at significant risk for future psychiatric deterioration, possibly including the development of irreversible psychiatric symptoms.*"[533]

Deliberate treatment having these effects on a detainee clearly violates international law. If Dr Matthews' prognosis were to materialise, Salim Ahmed Hamdan's treatment could qualify as torture even under the narrow definition suggested in the August 2002 Justice Department memorandum. The latter suggests that to qualify as torture, "the acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage…[T]he development of a mental disorder such as post-traumatic stress disorder, which can last

[529] UN Doc. A/59/324, para. 20.
[530] Letter from Moazzam Begg, *supra*, note 74.
[531] *President determines enemy combatants subject to his Military Order*. Department of Defense News Release, 3 July 2003.
[532] Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03, supra*, note 52.
[533] *Swift v. Rumsfeld*. US District Court, Western District of Washington. Declaration of Daryl Matthews, 31 March 2004.

months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement [to constitute torture under US law]". To be criminally liable for torture, the memorandum suggests, the perpetrator must "specifically intend to cause prolonged mental harm". Dr Matthews' declaration was signed in March 2004. The ICRC had, even before Salim Hamdan was put isolation, made clear its concern about psychological deterioration among the Guantánamo detainees. The authorities cannot claim ignorance.

In July 2004, released Guantánamo detainee Mehdi Ghezali told Amnesty International that he was moved to Camp Echo for the last week of his detention. He said that he was watched over all the time by a camera, in a cell that was permanently lit.[534] He said that he was not allowed to leave the cell once for the entire week. He was interrogated during the week and told to sign a document which he refused. On the day of his release, he was again ordered by the US to sign the document – and Swedish diplomats advised him to do so or he would not be released. The document stated that he agreed never to join *al-Qa'ida* or the Taleban. He felt that by signing it he had been coerced into an admission of such an association.

In its leaked February 2004 report on Coalition abuses in Iraq, the ICRC stated:

> "*Since June 2003, over a hundred 'high-value detainees' have been held for nearly 23 hours a day in strict solitary confinement in small concrete cells devoid of daylight. This regime of complete isolation strictly prohibited any contact with other persons deprived of their liberty, guards, family members (except through Red Cross Messages) and the rest of the outside world. Even spouses and members of the same family were subject to this regime… Most had been subject to this regime for the past five months.*"

The ICRC pointed out that such use of solitary confinement contravened the Third and Fourth Geneva Conventions and recommended that the authorities "set up an internment regime which ensures respect for the psychological integrity and human dignity of the persons deprived of their liberty".

In 2000, the UN Committee against Torture criticized the "excessively harsh regime of the 'super-maximum' prisons" in the USA.[535] Four years later, in May 2004, the US authorities opened "Camp Five" at Guantánamo Bay. This appears to have been modelled on the "super-maximum" security prisons on the US mainland. Detainees are held in solitary confinement for up to 24 hours a day in concrete cells and are under 24-hour video surveillance. Camp Five is reported to have a capacity for a detainee population of 100.

[534] Interview with Amnesty International, Sweden, 27 July 2004. He said: "There was a little green book in the cell, on which it said 'Record'. The guards constantly came into the cell and wrote down what he did and what time it was. They wrote down completely meaningless things, such as 'prisoner stands up, prisoner sits down, prisoner walks around the cell'".
[535]

4.3 Specific protection for women and child detainees

The US continues to detain two juveniles i.e. detainees under 18 years of age at Guantánamo Bay. The ICRC does not consider Guantánamo Bay an appropriate place to detain juveniles.
International Committee of the Red Cross, May 2004.[536]

Children, women and men are all alleged to have been subjected to torture or other cruel, inhuman or degrading treatment by US agents in the "war on terror". International legal standards contain specific provisions for the case of women and children taken into custody.

Child detainees

Children should be separated from adult detainees unless it is considered not in the child's best interest to do so.[537] In October 2002, an adult detainee Abdullah recalled to Amnesty International his arrest and alleged ill-treatment by US forces in Afghanistan the previous March when he was held for four days. He says that when he was taken to Kandahar air base, he was put in a cage, under a tent, with about 14 others, including a boy of about 15 years old. The Taguba report into the torture and ill-treatment in Abu Ghraib refers to the alleged rape of a 15-year-old detainee by an adult detainee in the prison.

The conditions of detention and treatment of children have caused serious concern. Seventeen-year-old Akhtar Mohammed, for example, stated that US soldiers kept him in solitary confinement in a shipping container for eight days following his arrest with others in Uruzgan province in Afghanistan in January 2002.[538] Mohammed Ismail Agha was aged 13 when he was taken into US custody in Afghanistan in late 2002 and held in Bagram air base for six weeks. He was nevertheless considered to be a "threat to US security" and was subsequently held in US custody without charge or trial for more than a year, including at Guantánamo Bay. He has alleged that he was held in solitary confinement in Bagram and subjected to sleep deprivation and stress positions: "They were interrogating me every day and in the first three or four days giving just a little food, and giving punishment". He said he was forced to sit on his haunches for three or four hours at a time, even when he wanted to sleep.[539] He said:

> "*It was a very bad place. Whenever I started to fall asleep, they would kick on my door and yell at me to wake up. When they were trying to get me to confess, they made me stand partway, with my knees bent, for one or two hours. Sometimes I couldn't bear it anymore and I fell down, but they made me stand that way some more.*"[540]

[536] Operational update, 14 May 2004.
[537] Article 37(c), UN Convention on the Rights of the Child.
[538] *Villagers released by American troops say they were beaten, kept in 'cage'.* Washington Post, 11 February 2002. *Released Afghans tell of beatings.* New York Times, 11 February 2002.
[539] *Afghan boy talks about Guantánamo.* Associated Press, 7 February 2004.
[540] *An Afghan boy's life in US custody.* Washington Post, 12 February 2004.

Mohammed Ismail Agha was released back to Afghanistan from Guantánamo in late January 2004 with two other child detainees. Article 3 of the Convention on the Rights of the Child states: "In all actions concerning children… the best interests of the child shall be a primary consideration". Alongside Somalia (which has not functioned as a state for over a decade), the USA is the only country in the world not to have joined this Convention. As a signatory, however, it is bound to respect its provisions.[541] The Pentagon made clear that the decision for the releases was not concerned with the best interests of the children but only with the perceived best interests of the USA. The releases came about after determination that "the juvenile detainees no longer posed a threat to our nation, that they have no further intelligence value and that they are not going to be tried by the US government for any crimes."[542] The Pentagon did not, however, offer an explanation about how three children between the ages of 13 and 15 had been considered to be such a threat to the USA that it felt justified in violating international safeguards on the treatment of children.[543]

In July 2004, the ICRC reported that it "believes that the US continues to detain two juveniles i.e. detainees under 18 years of age at Guantánamo Bay".[544] The ICRC has stated that it "does not consider Guantánamo Bay an appropriate place to detain juveniles." Amnesty International agrees and has repeatedly written to the authorities on this matter, urging their release or fair trial in accordance with international standards.

International law and standards recognize the particular vulnerability of children and require, among other things, that children should be detained only as a last resort and for the shortest time possible. The definition of a "child", according to most international legal standards, is anyone under the age of 18. In communications with Amnesty International on the subject of child detainees in Guantánamo, the USA has only referred to those children under 16 years old.

Canadian national Omar Khadr, who was reported to be 15 years old at the time of his arrest in Afghanistan and was transferred in late 2002 from there to Guantánamo, was still held in Camp Delta without access to legal counsel or his family two and a half years later.[545]

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[541] Under Article 18 of the Vienna Convention on the Law of Treaties, a country that has signed a treaty must do nothing to defeat its object and purpose pending ratification.

[542] *Transfer of juvenile detainees completed.* US Department of Defense news release, 29 January 2004.

[543] After April 2003, the military authorities had evidently recognized that children have special needs and vulnerabilities, and segregated the three youngest children from the adult detainees and provided them with educational and recreational opportunities as well as specialist care. Nevertheless, a year of military detention in Bagram air base in Afghanistan and Guantánamo Bay, even in the less harsh environs of Camp Iguana in the latter location, is not an appropriate course for the US Government to have taken in order to meet its obligations on the treatment of child detainees.

[544] Operational update, 26 July 2004.

[545] International law prohibits the use of the death penalty against child offenders, people who were under 18 at the time of the crime. The USA is the only country in the world which openly executes child offenders in its normal criminal justice system and claims for itself the right to do so. Under US constitutional law, 16 is the minimum age (at the time of the crime) for a defendant to be eligible for the death penalty. However, Omar Khadr has been feared to be at risk of a death sentence if tried by a US military commission outside the USA despite being 15 at the time of his capture and alleged role in

Article 40 of the Convention on the Rights of the Child states that "every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action". Article 37(b) of the Convention stresses that "the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a last resort and for the shortest appropriate period of time". Amnesty International is therefore disturbed by the Pentagon's position that: "Age is not a determining factor in detention".[546]

There have also been allegations of torture or ill-treatment of children taken into US custody in Iraq.[547] The Fay report found that on 19 September 2003, a 17-year-old Syrian detainee was interrogated in Abu Ghraib. He was naked, and was covering his genital area with an empty food bag. He was ordered to raise his hands, causing him to drop the bag and exposing himself to the interrogation team, including two females. The Fay investigation considered that this act of humiliation violated the Geneva Conventions. It found that the interrogators had used the teenager's nudity as an interrogation technique – with the incentive of having his clothing returned if he cooperated – as well as using stress positions.[548]

On 18 January 2004, an Abu Ghraib detainee, Kasim, told military investigators that he saw a guard raping "a kid, his age would be about 15-18 years. The kid was hurting very bad… And the female soldier was taking pictures".[549] Another Abu Ghraib detainee, Thaar, gave military investigators a statement, in which he said:

> "*I saw lots of people getting naked for a few days getting punished in the first days of Ramadan. They came with two boys naked and they were cuffed together face to face and [the guard] was beating them and a group of guards were watching and taking pictures from top and bottom and there was three female soldiers laughing at the prisoners.*"[550]

Dogs have been used against children. The Fay report found that on or around 8 January 2004, a leashed but unmuzzled dog was allowed into a cell holding two juvenile detainees "and 'go nuts on the kids', barking and scaring them. The juveniles were screaming and the smaller one tried to hide behind [the other]. [The soldier] allowed the dog to get within about one foot [0.3m] of the juveniles."[551] Huda Hafez Ahmad has alleged that when

the shooting death of a US soldier. In the 'war on terror', the administration has taken the position that the US Constitution does not protect foreign nationals held outside sovereign US territory.

[546] *Transfer of juvenile detainees completed.* US Department of Defense news release, 29 January 2004.

[547] There were 162 juvenile detainees in Coalition facilities around November 2003. Report on Detention and Correction Operations in Iraq. Office of the Provost Marshal General of the Army, 5 November 2003. http://www.publicintegrity.org/docs/AbuGhraib/Abu5.pdf.

[548] Fay report, page 89, *supra*, note 15.

[549] Translation. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151108.pdf

[550] Translation. http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150427.pdf

[551] Fay report, page 85, *supra*, note 15.

she was held in Abu Ghraib she "saw one of the guards allow his dog to bite a 14-year-old boy on the leg. The boy's name was Adil".[552]

Women detainees

Huda Hafez Ahmad, a 39-year old woman, was taken into US custody when she went to look for her sister, Nahla, who had been detained. The two women were not seen by a lawyer for more than six months.[553] Huda Ahmad has made serious allegations that she was subjected to torture and ill-treatment. She has said that in late 2003 she was arrested when she went to the US base in the al-A'dhamiya neighbourhood of Baghdad. She said that she was handcuffed and blindfolded after her arrest and left in a cold room with only a wooden chair where she was left overnight. She alleged that she was hit in the face, and was made to stand for 12 hours with her face against a wall. She alleged that she was put in a minibus in the military compound with 18 other detainees and subjected to loud music and sleep deprivation for the next three days. On 4 January 2004, she was transferred to Abu Ghraib, where she said she was held in a cell on her own for several months. She said that on 24 February 2004, she was put into a one-metre-square cell and doused in cold water as punishment for giving an elderly woman detainee some food.[554]

Huda Alazawi said that neither she nor the other women detainees held at that time at Abu Ghraib were sexually assaulted by US personnel. Allegations of ill-treatment or torture of women detainees have been published in the media and by human rights organizations. Some women detainees in Iraq have spoken after their release to Amnesty International under condition of anonymity. Their accounts included being beaten, threatened with rape, humiliating treatment and long periods of solitary confinement.

There have been reports of sexual abuse, possibly including rape. Among the "intentional abuse of detainees by military police [MP] personnel" found by the Taguba report was "a male MP guard having sex with a female detainee", as well as "videotaping and photographing naked male and female detainees". Military investigators found that "the female detainees were made to pose for soldiers taking pictures and on one occasion one female was instructed to expose her breasts for a soldier to take her picture".[555]

Female prisoners should be separated from male prisoners and should only be attended and supervised by female guards.[556] There should be no contact between male guards and female prisoners without the presence of a female guard. Three US military personnel received non-judicial punishment for their role in the assault of a female detainee on 7 October 2003. The Fay report on Abu Ghraib relates that:

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[552] *After Abu Ghraib*. The Guardian, 20 September 2004. This report uses the name Huda Alazawi.
[553] Amnesty International appeal, *Bring justice to thousands still illegally detained in Iraq*, http://web.amnesty.org/pages/irq-110504-action-eng.
[554] *After Abu Ghraib, op cit*.
[555] Criminal Investigation Division report, 28 January 2004. http://www.publicintegrity.org/docs/AbuGhraib/Abu11.pdf.
[556] Rule 8 and 53. UN Standard Minimum Rules for the Treatment of Prisoners.

> "*First the group took her out of her cell and escorted her down the cellblock to an empty cell. One unidentified soldier stayed outside the cell; while another held her hands behind her back, and the other forcibly kissed her. She was escorted downstairs to another cell where she was shown a naked male detainee and told the same would happen to her if she did not cooperate. She was then taken back to her cell, forced to kneel and raise her arms while one of the soldiers removed her shirt. She began to cry, and her shirt was given back as the soldier cursed at her and said they would be back each night.*"[557]

Amnesty International believes that the rape of a prisoner by a prison, security or military official always constitutes torture. Other sexual abuse of prisoners by such officials always constitutes torture or ill-treatment.[558] Such torture or inhumane treatment would also constitute war crimes. This was born out in the *ad hoc* Tribunals for former Yugoslavia and Rwanda. In the cases of *Akayesu*[559] and *Celebici*,[560] rape was identified specifically as an act of torture when it takes place at the instigation of a public official, and in the case of *Furundzija*,[561] when it takes place during interrogation. In the case of *Kunarac, Kovac and Vukovic*, [562] the defendants were convicted of rape as a crime against humanity and rape as a crime under international customary law. The Tribunals convicted men of acts such as sexual enslavement, forced nudity and sexual humiliation – in addition to rape and sexual assault – thus recognizing such acts as serious international crimes.

Inter-prisoner sexual violence may also constitute torture or ill-treatment if the authorities have failed to ensure compliance with rules such as those requiring the separation of male or female prisoners or otherwise failed to take appropriate action.

4.4 Independent inspection: ICRC, UN and human rights monitors

> "*[T]he International Committee of the Red Cross (ICRC) and other humanitarian organizations conduct visits to prisons and other places of detention in an effort to prevent or remedy torture.*"
>
> The United States' Commitment to Fight Torture, US State Department[563]

The vast majority of the USA's "war on terror" detainees have been held incommunicado except for visits by the ICRC. The ICRC has been visiting people detained in connection with armed conflicts since 1915 during World War I. The organization's practice of visiting

[557] Fay report, page 72, *supra*, note 15.
[558] See *Combating torture: a manual for action*, 2003. AI Index: ACT 40/001/2003, pages 74-76.
[559] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-*T*, Judgment of 2 September 1998
[560] *Prosecutor* v. *Zejnil Delalic et al.* ("Celali case"), Case No. IT-96-21, ICTY Trial Chamber II, Judgment of 16 November 1998
[561] *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, ICTY Trial Chamber II, Judgment of 10 December 1998.
[562] *Prosecutor v. Kunarac et al*, Case No. IT-96-23 and IT-96-23/1, Trial Chamber II, Judgment of 22 February 2001.
[563] Bureau of International Organization Affairs, 4 November 2002.

prisoners of war was codified in the Geneva Conventions of 1949. When refusing permission for Amnesty International to visit the detainees, the US authorities have emphasised that they have granted the ICRC such access. The ICRC does not normally publish its findings, but makes confidential recommendations to the government in question.

The ICRC does not have a permanent presence at the US detention facilities to which it has access. For example, it visited the Guantánamo prison camp 18 times in the first 29 months of detentions there (to June 2004). Detainees are thus held entirely incommunicado between ICRC visits. If ICRC delegates visit a detention facility, for example, every two weeks, and even if they were to meet all detainees, a detainee could be held for up to this length of time and released without having had any contact with the outside world.

From late 2001 to mid-2003, many detainees were held in the US air base in Bagram in Afghanistan for relatively short periods prior to their transfer to Guantánamo Bay or release. In any case, the ICRC does not have access to the detainees immediately after arrest.[564] The ICRC had access to the detention facility at the Kandahar air base from December 2001 until its closure in June 2002. The organization requested and was granted renewed access to the facility in June 2004 after discovering that detentions had resumed there.[565] It is not known how many detainees were held at Kandahar between June 2002 and June 2004, when the ICRC was not visiting. Afghan national Syed Nabi Siddiqi has alleged that he was ill-treated at the base at that time (see page 25). The ICRC has not had access to some 20 other US holding facilities in Afghanistan, including at Gardez where Syed Nabi Siddiqi says he was initially held, and where eight Afghan soldiers were allegedly tortured by US Army Special Forces during their two-week detention in March 2003. The alleged torture included beatings, immersion in cold water, and electric shocks. One of the detainees, 18-year-old Jamal Naseer, died in custody (see Point 6.2).[566]

Two Afghan men, Dilawar and Mullah Habibullah, died in Bagram air base in December 2002. Both had been held entirely incommunicado. Neither had been seen by the ICRC. Afghan national Wazir Mohammed told Amnesty International in Kabul in February 2004 that during his nearly two months in US custody in Bagram and Kandahar air bases in mid-2002, he never saw anyone from the ICRC. He has alleged that he was subjected to sleep deprivation as well as being forced to crawl on his knees from his cell to his interrogation. He was then held for 18 months in Guantánamo Bay. He said that during that time he saw an ICRC delegate once – on his first day in detention in Cuba.

As already noted, US personnel have hidden detainees from the ICRC, or refused the organization access to detainees on the grounds of "military necessity" in highly questionable circumstances (see pages 14-16). There are other examples of a disturbing attitude to the ICRC on the part of the US authorities:

- A senior US Army officer reportedly said that military officials responded to a November 2003 ICRC report on abuses in Abu Ghraib by proposing that its

[564] ICRC operational update, 26 July 2004.
[565] *Ibid.*
[566] *US probing alleged abuse of Afghans*, Los Angeles Times, 21 September 2004.

inspectors should make appointments before visiting, in order that they did not interrupt interrogations.[567] Brigadier General Janis Karpinski, formerly in charge of Abu Ghraib prison, told the Taguba investigation that a military intelligence official had told her: "The reason we don't want the ICRC to go in there anymore is because it interrupts the isolation process", and techniques including sleep deprivation.[568]

- Saddam Salah Abood Al-Rawi has alleged that he was held in solitary confinement for three months in Abu Ghraib to late March 2004, after being tortured and ill-treated during an 18-day interrogation prior to that. According to what he told the Office of the UN High Commissioner for Human Rights: "At the time of a Red Cross visit to the Abu Ghraib prison in January 2004, he was warned that if he said anything to the Red Cross visitor which the prison guards did not like, he would not live to regret it. He stated that when he was interviewed by the Red Cross visitor, he did not dare to say anything about the treatment he had suffered."[569]
- The ICRC itself has raised the case of an Iraqi detainee interrogated in the vicinity of Camp Cropper, who "alleged he had been hooded and cuffed with flexi-cuffs, threatened to be tortured or killed, urinated on, kicked in the head, lower back and groin, force-fed a baseball which was tied into the mouth using a scarf and deprived of sleep for four consecutive days. Interrogators would allegedly take turns ill-treating him. When he said he would complain to the ICRC he was allegedly beaten more."[570]

In addition to the ICRC, other independent experts should be granted access to detainees. On 25 June 2004, a meeting of United Nations experts issued a joint statement in light of "a number of recent developments that have seriously alarmed the international community with regard to the status, conditions of detention and treatment of prisoners in specific places of detention". They expressed their "unanimous desire" that the Special Rapporteur on the Independence of Judges and Lawyers, the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, "visit, together, and at the earliest possible date, those persons arrested, detained or tried on grounds of alleged terrorism or other violations, in Iraq, Afghanistan, the Guantánamo Bay military base and elsewhere, with a view to ascertain… that international

[567] *Officer says army tried to curb Red Cross visits to prison in Iraq*, New York Times, 18 May 2004.
[568] Article 15-6 investigation interview with Major General Taguba, 15 February 2004. http://www.publicintegrity.org/docs/AbuGhraib/Taguba_Report.pdf.
[569] Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human rights: The present situation of human rights in Iraq, UN Doc. E/CN.4/2005/4, 9 June 2004, paras. 56-57. He said that he was subjected to sleep deprivation, kicking, beating, and threatened with rape and transfer to Guantánamo Bay if he did not "confess".
[570] ICRC February 2004 report, *supra*, note 77.

human rights standards are properly upheld with regard to these persons".[571] More than three months later, the US government had not authorized the visits.

4.5 Recommendations under Point 4

The US authorities should:

- Immediately inform anyone taken into US custody of his or her rights, including the right not to be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment; their right to challenge the lawfulness of their detention in a court of law; their right to access to relatives and legal counsel, and their consular rights if a foreign national;
- Ensure at all times a clear delineation between powers of detention and interrogation;
- Keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of anyone in US custody, with a view to preventing any cases of torture or cruel, inhuman or degrading treatment;
- Ensure that conditions of detention strictly comply with international law and standards;
- Prohibit the use of isolation, hooding, stripping, dogs, stress positions, sensory deprivation, feigned suffocation, death threats, use of cold water or weather, sleep deprivation and any other forms of torture, or cruel, inhuman or degrading treatment as interrogation techniques;
- Bring to trial in accordance with international fair trial standards all detainees held in Guantánamo, or release them;
- Ensure compliance with all aspects of international law and standards relating to child detainees;
- Ensure compliance with all international law and standards relating to women detainees;
- Invite all relevant human rights monitoring mechanisms, especially the UN Special Rapporteur on Torture, the Committee against Torture, the Working Group on Enforced or Involuntary Disappearances (1980) and the Working Group on Arbitrary detention to visit all places of detention, and grant them unlimited access to these places and to detainees;
- In addition to the ICRC, grant access to national and international human rights organizations, including Amnesty International, to all places of detention and all detainees, regardless of where they are held.

[571] *Protection of human rights and fundamental freedoms in the context of anti-terrorism measures.* Joint statements by special rapporteurs of UN human rights commission. United Nations Press Release, 25 June 2004.

Point 5 – Prohibit torture in law

Governments should adopt laws for the prohibition and prevention of torture incorporating the main elements of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and other relevant international standards. All judicial and administrative corporal punishments should be abolished. The prohibition of torture and the essential safeguards for its prevention must not be suspended under any circumstances, including states of war or other public emergency.

5.1 Putting the President above the law, detainees below the law

Customary international law does not provide legally-enforceable restrictions on the interrogation of unlawful combatants under DOD control outside the United States… The United States Constitution does not protect those individuals… Defenses relating to Commander-in-Chief authority, necessity and self-defense or defense of others may be available to individuals whose actions would otherwise constitute [torture]…
Pentagon Working Group conclusions, April 2003[572]

Any person detained by states anywhere in the world should be protected by the following layers of law:

- **Domestic law:** This should include provisions reflecting the state's international legal obligations to respect rules of human rights and humanitarian law treaties to which it is party. In the case in point, US laws should reflect the absolute prohibition on torture and other ill-treatment extant in both these strands of law.
- **International treaties:** In the case of the USA, these treaties include the ICCPR, the UN Convention against Torture and the four Geneva Conventions, all of which, as noted, prohibit torture and ill-treatment absolutely.
- **Relevant rules of customary international law:** These rules comprise international rules derived from state practice and regarded as legal obligations (*opinio juris*). Such rules are generally binding on all states, regardless of whether or not they are party to treaties codifying these rules. It is universally agreed that the prohibition on torture and other ill-treatment is, indeed, part of customary international law. The widespread ratification of treaty provisions containing these prohibitions, together with the nearly universal prohibition in constitutions and national laws around the world, is evidence of such a customary international law rule.[573]

[572] Pentagon Working Group Report, 4 April 2003, *supra*, note 56 (DOD = Department of Defense).
[573] See for instance, *Restatement (Third) of Foreign Relations Law* § 702: Customary International Law Of Human Rights (1987), clause d. In a famous case, *Filartiga v. Peña-Irala*, 630 F.2d 876, a US Circuit Court determined that torture is prohibited under customary international law. In doing so, it relied in part on state practice at the international level, on the Universal Declaration of Human Rights,

In addition, the prohibition is recognized as a peremptory norm of international law (*jus cogens*), for example by the UN Human Rights Committee[574], the ICTY[575], and the American Law Institute.[576]

As outlined below, in the "war on terror", the US administration has sought to strip "terrorist" suspects detained by its forces abroad of every single one of these protections, placing detainees in effect beyond the reach, or protection, of the law, with the exception of military law which the President may in effect also ignore.

Domestic law: The Pentagon Working Group report of April 2003 makes the administration's position clear that "the United States Constitution does not protect those individuals who are not United States citizens and who are outside the sovereign territory of the United States." Keeping foreign detainees held abroad from the protection of the US judiciary has been a central tenet of the administration's "war on terror" policy. This was only rejected on 28 June 2004 by the US Supreme Court's *Rasul v. Bush* decision finding that the US courts had jurisdiction over the Guantánamo detainees. Even then, the administration has sought to curtail the impact of the ruling (see page 99).

The Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, signed by President Bush on 13 November 2001, expressly states that anyone named under it will not be able to "seek any remedy" in any court in the USA or anywhere else in the world, thereby ruling out access to judicial redress for any human rights violation that may have occurred during arrest, detention, interrogation or prosecution. It also makes anyone named under it eligible for trial under the "exclusive jurisdiction" of military commissions.

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the UN Declaration on the Protection of All Persons from Being Subjected to Torture and regional human rights treaties, all of which prohibit torture *and* cruel, inhuman or degrading treatment.

[574] "The proclamation of certain provisions of the [ICCPR] as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7)." Human Rights Committee, General comment no. 29: States of emergency (article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

[575] A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia recently stated: ". . . at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime." *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T (Trial Chamber, 10 December 1998), para. 156.

[576] See *Restatement (Third) of Foreign Relations Law* § 702: Customary International Law Of Human Rights (1987), comment n.

International treaty law: In his central policy memorandum of 7 February 2002 President Bush set out his country's view of the status of "al Qaeda and Taliban" detainees. The President determined, *inter alia*, the following:

- That "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world";
- That "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees";
- That, "because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war".[577]

To this may be added the administration's consistent position that human rights treaties do not apply to detainees outside US territory. As it claimed in the *Rasul* case, "by its own terms, the ICCPR is inapplicable to conduct by the United States outside its sovereign territory."[578]

Customary international law: In a remarkable rejection of a long history of US jurisprudence confirming that international law is part of the law of the USA[579], a Department of Justice memorandum, submitted to the White House in preparation for the President's February 2002 memorandum, and which the latter seems to accept in its entirety, concludes, *inter alia*, that, "customary international law has no binding legal effect on either the President or the military".[580]

With both national and international legal protections discarded, would "terrorist" detainees enjoy, in the USA's view, *any* legal protection, international or otherwise? In this regard, the President's memorandum of February 2002 is instructive:

> "*Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.*"

By this statement, it is clear that:

- There are detainees who in the USA's view "are not legally entitled" to be treated humanely.
- The USA would nevertheless assert that it would treat those detainees "humanely."

[577] Presidential memorandum, *supra*, note 11.
[578] *Rasul et al v. Bush*, Brief for the Respondents, March 2004, p. 49 (emphasis in original).
[579] See, for example, *The Paquete Habana*, 175 U.S. 677 (1900)
[580] Memorandum Re: *Application of treaties and laws to al Qaeda and Taliban detainees*, 22 January 2002, *supra*, note 250. See also Pentagon Working Group April 2003 report, *supra*, note 56, page 6.

However, three crucial problems arise here:

- The "humane" treatment would be pursued "as a matter of policy" rather than as a matter of the state's international legal obligations.[581]
- The USA's pledge to treat those detainees "in a manner consistent with the principles of Geneva," would only be "to the extent appropriate and consistent with military necessity." Although the Geneva Conventions in particular, and international humanitarian law in general, permit military necessity to play a role in deciding whether certain acts (such as destruction or appropriation of property) are legal, it prohibits other acts, such as targeting civilians and ill-treating detainees and prisoners, in all circumstances, regardless of whether or not they could be, or are perceived as being, militarily beneficial. The USA thus downgraded the right to be free from torture and ill-treatment from a fundamental, absolute right to one subjugated to considerations of military advantage.
- The Geneva Conventions certainly contain a "principle" of humane treatment, but the President ordered that the "Geneva principles" only be applied subject to "military necessity." The USA would provide its own version of "humane treatment", replacing a well-defined, binding legal rule with a vague, ill-defined, non-legal notion subject to the whims of military commanders and politicians.

This position has not remained on the level of hypothetical statements. It was followed by an official policy combining a declaratory commitment to "humane treatment" with actual interrogation methods which are patently inhumane. Thus in his memorandum of January 2003,[582] Secretary of Defense Rumsfeld ordered that "[I]n all interrogations, you should continue the humane treatment of detainees, regardless of the type of interrogation technique employed." Among such "humane" techniques, which had been approved by Secretary Rumsfeld previously, and under the present memorandum may still be used, albeit "only" with Secretary Rumsfeld's prior approval, are:[583]

- "The use of stress positions (like standing) for a maximum of four hours";
- "Use of the isolation facility for up to 30 days";
- "Deprivation of light and auditory stimuli";
- Use of "a hood placed over his head during transportation and questioning";

[581] It should be noted that this position was officially reiterated by the USA, see for instance "letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights". UN Doc. E/CN.4/2003/G/73, 7 April 2003, p. 4. See also the Secretary of Defense Memo for Commander, SOUTHCOM: *Counter-Resistance Technique in the War on Terrorism*, 16 April 2003.
[582] Secretary for Defense Memorandum for the Department of Defense General Counsel Ref: Detainee interrogations, Dated: 15 January 2003.
[583] As detailed in Memo for Commander Joint Task Force 170, Dated: 11 October 2002. http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf

- "Removal of clothing";
- "Using detainees individual phobias (such as fear of dogs) to induce stress";
- "Use of mild, non-injurious physical contact such as grabbing, poking in the chest with a finger and light pushing".

There is no explicit limitation on combining some or all of these methods.

Green light for torture: Under US law a wartime President can order torture

At the heart of this disregard for international law lies the notion, explained and justified in detail by the 1 August 2002 Justice Department memorandum to the White House and the Pentagon Working Group report of April 2003, that,

> *In order to respect the President's inherent constitutional authority to manage a military campaign, 18 U.S. C. § 2340A* [the US law prohibiting torture by US agents abroad] *as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.*[584]

Having argued in flagrant contradiction to international law, that torture is limited to acts that would cause pain "associated with… death, organ failure, or serious impairment of body functions"; that for death threats to be torturous the threat must be of "imminent death";[585] that cruel, inhuman or degrading treatment or punishment should be viewed as applying to only punishments; and that certain (in effect all) human rights and humanitarian law treaties do not apply to the "war on terror" generally and to "terrorist" detainees in particular, the memorandum and the Pentagon Working Group report claim, in effect, that none of this matters: the President is authorized by the US Constitution to order absolutely anything he wishes in his capacity as Commander-in-Chief of the armed forces, as no laws, either international or national, can touch him.[586]

This is reflected in the Secretary for Defense's instructions regarding "interrogation techniques." While later memorandums have limited the scope of "techniques" which military interrogators may use routinely, the Secretary for Defense has left an opening for unspecified and unlimited "additional interrogation techniques". In a memorandum to the Commander of US Southern Command, Secretary Rumsfeld wrote:

> "*If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.*"[587]

[584] Pentagon Working Group report, page 21, *supra*, note 56. See similarly Bybee memorandum, 1 August 2002, page 2, *supra*, note 252.
[585] Pentagon Working Group report, page 18, *supra*, note 56.
[586] *Ibid.*, pages 20-24.
[587] Memo for Commander, SOUTHCOM, 16 April 2003, *supra*, note 50.

Throughout the "war on terror", the US administration has repeatedly stated that it is committed to the rule of law as one of the "non-negotiable demands of human dignity". This is clearly far from the case if it believes that there is no legal limit to what the President can instruct the armed forces to do, including blatant violations of international law.

5.2 Domestic legislation to comply with international law

Domestic law cannot be invoked as a justification for the failure to comply with international treaty obligations and customary international law.
United Nations Special Rapporteur on torture, August 2004[588]

On 15 May 2000, the Committee against Torture issued its findings on the Initial Report of the USA on its implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee was concerned by the failure of the USA "to enact a federal crime of torture in terms consistent with article 1 of the Convention". It recommended that the USA should enact such a law as well as withdraw its reservations, interpretations and understandings relating to the Convention (see Point 11).

Article 4 of the UN Convention against Torture states: "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture." Article 5 requires the USA to ensure that its laws cover crimes committed by its nationals wherever committed or by anyone present in US territory whom the USA does not extradite.

The US government has not made torture a distinct crime under federal law, except with regard to acts committed outside US territory. This latter law, 18 U.S.C. § 2340, makes it a criminal offence for any person acting in an official capacity "outside the United States" to commit or attempt to commit torture. The law was enacted in 1994 in order to meet the requirements of Article 5 of the UN Convention against Torture. The statute defines torture "in a manner compatible with the United States reservations to the Convention",[589] that is, arguably narrower than the definition contained in Article 1 of the Convention (see Point 11.2).[590] It was the potential narrowness of this definition which the August 2002

[588] UN Doc. A/59/324, para. 15.
[589] USA's report to the Committee against Torture, CAT/C/28/Add.5, para. 188, 9 February 2000.
[590] In line with the USA's ratification of the UN Convention against Torture, 18 U.S.C. § 2340 states: (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from - (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

memorandum from the Justice Department attempted to accentuate when advising that US agents could use harsh interrogation methods without fear of being prosecuted for torture. For example:

> "*We conclude that torture as defined in and proscribed by Sections 2340-2340A, covers only extreme acts... Because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment fail to rise to the level of torture. Further we conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander-in-Chief powers may be unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.*"[591]

The UN Special Rapporteur on torture has taken issue with this. In his August 2004 report he stressed that "the definition contained in the Convention cannot be altered by events or in accordance with the will or interest of States." He additionally stressed that "the prohibition applies equally to torture and to cruel, inhuman or degrading treatment or punishment".[592]

The Schlesinger Panel also took an apparently narrow definition of torture. Releasing the panel's report on 24 August 2004, Chairman John Schlesinger said that "there is a problem in defining torture. We did not find cases of torture, however".[593] In the actual report, the panel suggested a definition of torture as "any treatment that causes permanent harm". This reflects the language in the USA's reservation to the UN Convention against Torture and in 18 U.S.C. § 2340 which refers to "prolonged mental harm". Indeed, the Schlesinger report appears to take an even narrower view than the August 2002 Justice Department memorandum. The latter pointed to the "prolonged mental harm" clause, in arguing that the "acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage". As already noted, the Pentagon Working Group report of April 2003 adopted a narrow interpretation of torture, advising that even if the agent accused of torture knew that severe pain would result from his actions, "if causing such harm [was] not his objective, he lacks the requisite specific intent [to be guilty of torture]."

The Working Group also advised that 18 U.S.C. § 2340 "does not apply to the conduct of US personnel at GTMO [Guantánamo]". To keep the detainees away from the judiciary, the administration for two years argued that the Naval Base was outside the jurisdiction of the US courts because Cuba had ultimate sovereignty over the territory. Now the Working Group report was holding that as far as the Torture Statute was concerned, the Guantánamo Naval Base fell within the USA and therefore members of the US military, civilian employees or contractor employees could not be prosecuted under 18 U.S.C. § 2340.

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[591] Bybee memorandum, 1 August 2002, *supra*, note 252.
[592] UN Doc. A/59/324, para. 16.
[593] Press Conference with members of the Independent Panel to Review Department of Defense Detention Operations. Department of Defense News Transcript, 24 August 2004.

The USA PATRIOT Act extended US criminal jurisdiction over certain crimes committed at US facilities abroad, thereby excluding them from the reach of 18 U.S.C. § 2340 (by reducing the area defined as "outside the United States" under that law). This appears recently to have been at least partially remedied (see Point 7.1).

The USA must ensure that its criminalization of torture covers all the conduct prohibited by the USA's international obligations and is applicable to all its detention centres wherever they are. Furthermore, given the argument presented in various US government memorandums that the President's Commander-in-Chief powers could override the prohibition on torture, in order to be consistent with the UN Convention against Torture, the USA must ensure that its law must not allow any exceptional circumstances whatsoever to be invoked as justification for torture (Article 2.2).

It follows from this that any special measures giving any state agents immunity from prosecution for torture must be revoked. The law must also not allow an order from a superior officer or a public authority to be invoked as a justification for torture (Article 2.3).

5.3 Recommendations under Point 5

The US authorities should:

- Enact a federal crime of torture, as called for by the Committee against Torture, that also defines the infliction of cruel, inhuman or degrading treatment as a crime, wherever it occurs;
- Amend the Uniform Code of Military Justice to criminalize expressly the crime of torture, as well as a crime of infliction of cruel, inhuman or degrading treatment or punishment, wherever it occurs, in line with the Convention against Torture and other international standards;
- Ensure that all legislation criminalizing torture defines torture at least as broadly as the UN Convention against Torture;
- Ensure that legislation criminalizing torture and the infliction of cruel, inhuman or degrading treatment covers all persons, regardless of official status or nationality, wherever this conduct occurred, and that it does not allow any exceptional circumstances whatsoever to be invoked as justification for such conduct, or allow the authorization of torture or ill-treatment by any superior officer or public official, including the President.

Point 6 – Investigate

All complaints and reports of torture should be promptly, impartially and effectively investigated by a body independent of the alleged perpetrators. The methods and findings of such investigations should be made public. Officials suspected of committing torture should be suspended from active duty during the investigation. Complainants, witnesses and others at risk should be protected from intimidation and reprisals.

6.1 Investigative record does not inspire confidence

In order to ensure impartiality, it is necessary to avoid entrusting the investigation to persons who have close personal or professional links with the persons suspected of having committed such acts, or who may have an interest in protecting these persons or the particular unit to which they belong.

Commentary on Article 12 of the UN Convention against Torture[594]

As a State Party to the UN Convention against Torture, the USA "must ensure that its competent authorities proceed to a prompt and impartial investigation", wherever there is "reasonable ground to believe" that an act of torture or cruel, inhuman or degrading treatment has been committed "in any territory under its jurisdiction" (Articles 12 and 16). In addition, anyone who alleges that he or she has been subjected to torture or cruel, inhuman or degrading treatment or punishment "has the right to complain to, and to have his case promptly and impartially examined by, [the State party's] competent authorities" (Articles 13 and 16). According to the Committee against Torture, such an investigation must be made "whatever the origin of the suspicion", which can include information provided by non-governmental organizations.[595] Similarly, the Geneva Conventions require that allegations of torture or inhuman treatment be investigated and those responsible brought to justice.[596]

Early in the "war on terror", on the night of 23/24 January 2002, US Special Forces in Uruzgan province in Afghanistan took 27 villagers into custody. All 27 were released on 6 February 2002 after two weeks in detention once it was determined that they were villagers mistakenly identified by US forces as Taleban or *al-Qa'ida* members. It is alleged that at the scene of the raid the villagers had their hands and feet tied, were blindfolded and hooded, and flown to the US base at Kandahar. Having arrived at the base the prisoners were allegedly beaten, kicked and punched by soldiers, made to lie on their stomachs with their hands tied behind their backs and their legs chained, whereupon soldiers walked across their backs.

[594] Burgers, J. Herman and Hans Danelius, 1988, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht, The Netherlands, Martinus Nijhoff, ISBN 90-247-3609-9. Page 145.

[595] *Blanco Abad v. Spain, Communication No. 59/1996, Views of the Committee against Torture, UN Doc. CAT/C/20/D/59/1996 14 May 1998, para. 8.2. and Khaled Ben M'Barek v. Tunisia, Communication No. 60/1996, Views of the Committee against Torture, UN Doc. CAT/C/23/D/60/1996, 10 November 1999, para. 11.9.*

[596] Article 129 Third Geneva Convention and Article 146 Fourth Geneva Convention.

US Central Command's executive summary of the investigation into the case said that "none of the detainees were mistreated or unnecessarily abused." Secretary Rumsfeld asserted that "investigation" was not the right term to describe what was being conducted into the Uruzgan raid – as it implied "more formality or a disciplinary action" – but suggested it was aimed more at "what kind of lessons might be learned".[597] His assertion should be assessed against international principles which state that the purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment includes: (a) clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families; (b) identification of measures needed to prevent recurrence; and (c) facilitation of prosecution and/or, as appropriate disciplinary sanctions.[598]

Asked to clarify whether he meant that there would be no disciplinary action against any military personnel involved in the raid and its aftermath, the Secretary of Defence replied: "Why would there be? I can't imagine why there would be any." This was despite stating that he did not know if the Central Command investigation had been completed. In April 2002, Amnesty International raised its concerns with the US authorities about this case and the inadequacy of the official investigation into it.[599] It has never received a reply or a copy of the full investigation report as requested. Similarly, Amnesty International received no reply on the case of alleged ill-treatment of 34 Afghans taken into custody during a raid on a compound near Kandahar in the early hours of 18 March 2002 (see page 23).

Since then, there have been allegations of torture or ill-treatment used against detainees in US custody in Afghanistan, Guantánamo Bay, Iraq, and undisclosed locations.[600] There have been further indications of inadequate investigations.

After a US helicopter was shot down in Iraq in early January 2004, the US military said that "enemy personnel posing as media" had been taken into custody and "were now being questioned".[601] Four days later, a military spokesperson said that "we determined through questioning these individuals that they were probably at the wrong place at the wrong time".[602] *Reuters* news agency took testimony from three of its employees, Salem Ureibi,

[597] Department of Defense news briefing, 21 February 2002.
[598] UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by General Assembly resolution 55/89, 4 December 2000.
[599] *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, *supra*, note 13. AI was also concerned by statements from senior military officials which seemed to prejudge the findings of the investigation. According to Central Command in March 2002, "this incident is closed". *Status of investigations during Operation Enduring Freedom*, US Central Command, 29 March 2002.
[600] For example, another detainee alleged that he had been beaten by US guards in Kandahar air base before being transported to Guantánamo Bay in February 2002. According to the military authorities, the detainee "had signs of physical injury", but that they had been caused when the detainee had "struggled and fought" with his guards. It considered that case also now closed. *Status of investigations during Operation Enduring Freedom*. US Central Command, 29 March 2002.
[601] Brigadier General Mark Kimmitt. Coalition Provisional Authority Briefing, 2 January 2004.
[602] 82nd Airborne Division Commanding General's Briefing from Iraq, 6 January 2004.

Ahmad Muhammad Hussein al-Badrani and Sattar Jabar al-Badrani, who alleged that they had been beaten and subjected to sleep deprivation, stress positions, hooding, and sexual and religious humiliation in US military custody near Fallujah.

> "*Around 11 they took me for interrogation. It was in a metal container, a caravan, with chairs.* [Ahmad demonstrates how he was forced to kneel, with his feet in the air and his arms raised in the air.] *If my hands or feet went down they would hit me. The interrogation lasted three or four hours. They put tissue in my mouth. I could hardly breathe. They said that we had fired at the helicopter. I said: 'I swear to God it wasn't me.' They said: 'If you swear to God again, we'll break you into a thousand pieces'...There was a shoe on the ground and they told me to chew it and to lick it... They made me lie on the ground with my backside in the air. They were taking photographs...They had music played very loud on huge speakers and they made us dance. It was played straight into our ears. There was abuse throughout the night. We were beaten on the ground. They placed tape on our mouths, and bags on our heads...*"[603]

Reuters called for a full investigation into its employees' allegations. On 27 January 2004, the company wrote to the US authorities noting that three weeks had passed since the detentions and repeated its call for a full investigation. The letter states: "It has become clear that the military either does not yet appreciate the significance of the matters we have raised or – even worse – fully understands their seriousness but is deliberately attempting to downplay them or ignore them". On 29 January, *Reuters* received an unclassified executive summary of the military investigation, which stated that the "detainees were purposefully and carefully put under stress, to include sleep deprivation, in order to facilitate interrogation; they were not tortured". The news agency described the investigation as "woefully inadequate" and demanded a more thorough inquiry, noting that the military had relied only on the accounts of soldiers and had not interviewed the detainees themselves. Following the revelations in late April 2004 of the torture and ill-treatment of detainees in Abu Ghraib, *Reuters* called for their employees' allegations to be "reviewed thoroughly, objectively and with a new view towards their veracity". The company was provided with a letter, dated 5 March 2004, from the commander of US forces in Iraq, Lieutenant General Ricardo Sanchez, stating that the investigation, clearing military personnel of any misconduct, was thorough and objective and its conclusions sound. The three men, who had not been interviewed by the military as part of its investigation, decided to make their allegations public in mid-May 2004.[604] In mid-October 2004, the Pentagon revealed that it was reviewing whether to re-open the case.[605]

Broader reviews initiated in 2004 have raised further questions about the adequacy of the official response to the allegations of torture and ill-treatment of detainees. One such

[603] Interview with Ahmad Mohammad Hussein al-Badrani, 8 January 2004. Transcript provided by Reuters.
[604] Information as provided to Amnesty International by Reuters, 19 July 2004.
[605] *US considers reopening inquiry into possible abuse before Iraq prison scandal.* New York Times, 13 October 2004.

review was conducted by the Army Inspector General, Lieutenant General Paul Mikolashek, initiated in February 2004. It was "not an investigation of any specific incidents or units, but rather a comprehensive review of how the Army conducts detainee operations in Afghanistan and Iraq".[606] It did not include operations at Guantánamo Bay, or of the Defense Intelligence Agency or the CIA. During a Senate Armed Services Committee hearing on 19 May 2004, two months before completion of the report, Army General John Abizaid, the top commander at US Central Command, testified that "I specifically asked the IG of the Army, did he believe that there was a pattern of abuse of prisoners in the Central Command area of operation, and he looked at both Afghanistan and Iraq, and he said no". Referring to Abu Ghraib, General Abizaid added that "I believe that we have isolated incidents that have taken place". This mirrored the position taken by senior members of the administration, including President Bush and Defense Secretary Rumsfeld, following broadcast of the Abu Ghraib torture photographs. On 21 July 2004, Lieutenant General Mikolashek issued his report which maintained the focus of blame on a small number of low-ranking personnel.[607]

The Department of Defense has insisted that the Abu Ghraib torture came to light as a sign of effective self-policing by the military.[608] The Department and the wider administration had failed, however, adequately to investigate earlier evidence of torture and ill-treatment in Afghanistan, Guantánamo and Iraq, raised by organizations including the ICRC and Amnesty International. In late April 2004, *CBS News* broadcast the now infamous Abu Ghraib photographs and the *New Yorker* magazine published *Torture at Abu Ghraib* by journalist Seymour Hersh. After Hersh published a book on the subject in September 2004, the Pentagon responded that "detainee operations in Afghanistan, Iraq, and elsewhere have been examined extensively – both within the Department of Defense and by an independent panel led by former Secretary of Defense Jim Schlesinger. The US military itself – not Mr Hersh or any other reporter – first publicized the facts of the abuses at Abu Ghraib in January 2004, four months before Mr Hersh 'broke' the story".[609]

The Pentagon's claim that the military "first publicized the facts" is a reference to a four-line press release issued on 16 January 2004 by US Central Command in Florida which

[606] Executive summary. *Detainee Operations Inspection*. Department of the Army: The Inspector General, 21 July 2004.

[607] The report found that the "abuses that have occurred in both Afghanistan and Iraq... were unauthorized actions taken by a few individuals, coupled with the failure of a few leaders to provide adequate monitoring, supervision, and leadership over those Soldiers. These abuses, while regrettable, are aberrations when compared to their comrades in arms who are serving with distinction." *Detainee Operations Inspection*. Army Inspector General, 21 July 2004.

[608] The investigation was initiated after a soldier gave a compact disc containing photos of the torture and ill-treatment of detainees to military investigators on 13 January 2004. Amnesty International had raised allegations of torture and ill-treatment by US forces in Iraq with the authorities in July 2003. Recently, the Pentagon said: "The US military – not journalists – first publicized the facts of the abuses at Abu Ghraib in January. It was the military's subsequent investigations that unearthed almost all of the disturbing details and photographs used by critics to castigate this department". *Where Abu Ghraib abuses began*. Lawrence Di Rita, Pentagon Spokesman, New York Times, 20 October 2004.

[609] Department of Defense statement on Seymour Hersh book. DoD news release. 10 September 2004.

stated that an "investigation has been initiated into reported incidents of detainee abuse at a Coalition Forces detention facility." It gave no more detail, suggesting that "release of specific information concerning the incidents could hinder the investigation".[610] However, it was only after some of the Abu Ghraib photographs, the ICRC's February 2004 confidential report into abuses by Coalition forces, and details of the administrative investigation of Major General Antonio Taguba (the Taguba report) were leaked to the press that the authorities began to display an increased responsiveness and initiated a number of wider policy reviews, including the Schlesinger inquiry.

6.2 Investigating deaths in custody

The deaths reveal much about the true nature of the still-emerging prisoner scandal. First, only a minority of them occurred at Abu Ghraib prison… Second, the administration has done its best to cover up the killings: They have been reported only after news of them leaked to the media, and details about most of them are still undisclosed… Investigations have been shoddy and secretive.

Editorial, *Washington Post*, 28 May 2004[611]

Among the abuses committed by US personnel in Abu Ghraib found by the Taguba investigation were incidents of military police "taking photographs of dead Iraqi detainees". Also in Iraq, the ICRC's February 2004 report on abuses by Coalition forces said that the organization had collected "allegations of deaths as a result of harsh internment conditions, ill-treatment, lack of medical attention, or the combination thereof…"

As with the allegations of torture and ill-treatment by US agents in general, this issue is not limited to Abu Ghraib or to Iraq. An Afghan detainee reportedly died of hypothermia in a CIA facility in Kabul in 2002 after Afghan guards soaked him in water and left him overnight shackled to a wall. Abdul Wahid, an Afghan civilian, died on 6 November 2003 in a US Forward Operating Base at Gereshk in Helmand Province as a result of "multiple blunt force injuries". He had been in custody for 48 hours before his death. His body was reportedly given back to his family two months after his death. Other detainees have died in US custody in Afghanistan (see below).

On 21 May 2004, the Department of Defense revealed that the Army Criminal Investigation Command was currently conducting 33 investigations of death in custody cases, 30 of which involved deaths inside facilities.[612] Nine of these 30 cases were the subject of ongoing military investigations of military personnel. Eight of these nine cases involve deaths

[610] *Detainee treatment investigation*. US Central Command, 16 January 2004. There is also an American Services News Article, *Military Accuses Six of Abusing Detainees in Iraq*, dated 20 March 2004.

[611] *The homicide cases*. Washington Post, 28 May 2004.

[612] At the 21 May briefing, after questioning, the official thought the 33 cases involved 37 deaths. According to the official, two of the four cases categorized as "justifiable homicide" involved more than one victim. The incidents in question occurred at Abu Ghraib in November 2003 (four victims) and at Abu Ghraib again in April 2004 (two victims).

"classified by medical authorities as homicides, which involve suspected assaults of detainees either before or during interrogation sessions that may have led to the detainee's death".[613] Of these nine cases, three were in Afghanistan and six in Iraq (including two in Abu Ghraib). A 10th case categorized as a homicide had been closed by the military and "turned over to another government agency".

The recently discovered death of an 18-year-old Afghan army recruit in the US base in Gardez in Afghanistan in March 2003 has raised additional concern about whether all deaths in custody have been revealed. Local Afghan officials were allegedly pressured to cover up the death, which has only come to light as a result of a non-governmental investigation.[614] Jamal Naseer's body, said to be covered in bruises, was allegedly turned over to local police with no documentation of his death and no autopsy conducted. A US investigation was not initiated until 18 months later. Jamal Naseer had reportedly been arrested with seven other Afghan soldiers on 1 March 2003 by US Special Forces (see page 24).

At its 21 May 2004 briefing, the Department of Defense released 23 death certificates – three of prisoners who had died in US custody in Afghanistan, and 20 who had died in Iraq. There appears to have been a sudden haste in the completion of these certificates. Twenty of them had only been completed, with the required second signature, in the 10 days before the Pentagon released them. Some of the victims had been dead for months.

In Iraq, Dilar Dababa died in a classified interrogation facility in Baghdad on 13 June 2003, and his death certificate was signed on 14 May 2004. He died of "closed head injury with a cortical brain contusion and subdural hematoma." According to Pentagon documents obtained by the *Denver Post*, while in custody he "was subjected to both physical and psychological stress". He was handcuffed to a chair and the chair secured to a pipe in the room because he was allegedly combative and an escape risk.[615]

Also in Iraq, Abdul Jaleel died in US custody in the Forward Operating Rifles Base in Al Asad on 9 January 2004, five days after being taken into custody. His death certificate, which found cause of death to be "blunt force injuries and asphyxia", was signed on 13 May 2004. Internal Pentagon documents reveal that in the initial part of his detention he had been put in isolation and shackled to a pipe that ran along the ceiling. During questioning he was allegedly beaten and kicked in the stomach and ribs. Later, because he was allegedly uncooperative and disruptive, his hands were shackled to the top of his cell door, and he was gagged. He died in this position.[616]

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[613] Senior Military Official. Defense Department Background Briefing, 21 May 2004. The ninth case "is what we believe to be a natural death and we're pending an autopsy".
[614] For full details of this case, see: *A torture killing by US forces in Afghanistan*. Crimes of War Project, www.crimesofwar.org, and *US probing alleged abuse of Afghans*. Los Angeles Times, 21 September 2004.
[615] *Brutal interrogation in Iraq*. The Denver Post, 19 May 2004.
[616] *Ibid.*

Three of the death certificates released by the Pentagon were of deaths of Afghan nationals in US custody in Afghanistan. One was of Dilawar, who died in the US air base in Bagram on 10 December 2002 from "blunt force injuries to lower extremities complicating coronary artery disease". His death certificate was signed on 20 May 2004. He was one of two Afghan men – the other being Mullah Habibullah (named on the death certificate as "Ullah, Habib" – to have died from blunt force injuries in Bagram in December 2002. Mullah Habibullah was allegedly beaten by a US soldier while in restraints. Dilawar was allegedly subjected to prolonged forced standing, while shackled and with his hands chained above his shoulders. Both men were beaten by "multiple soldiers", mainly on the legs possibly so that fewer wounds would be visible.[617]

Manadel al-Jamadi died in Abu Ghraib on 4 November 2003 from "blunt force injuries complicated by compromised respiration". His death certificate was signed on 13 May 2004. According to the Fay report, Manadel al-Jamadi had resisted arrest, and was struck on the head with a gun-butt by a member of a Navy Seal unit "to subdue him". He was brought into Abu Ghraib by CIA officers without being registered. His head was covered with an empty sandbag and guards were ordered not to remove it when they took him to a shower room that was being used for interrogation. Less than an hour later, he collapsed and died. An autopsy revealed that he had died of a blood clot in the head, likely as a result of injuries sustained upon arrest.

The death of Major General 'Abd Hamad Mawhoush in US custody in Al Qaim detention facility in northwest Baghdad illustrates possible shortcomings of military investigations into deaths in custody.

- According to the death certificate 'Abd Hamad Mawhoush died on 26 November 2003. The cause of death was given as "asphyxia due to smothering and chest compression". The "mode of death" was recorded as "homicide". The death certificate was finally signed on 12 May 2004 and made public on 21 May 2004.
- On 27 November 2003, the military issued a press release saying that 'Abd Mawhoush had "died this morning during an interview with US forces". Already, therefore, there was a discrepancy in the date of death.
- There was a greater discrepancy in the cause of death. The military news release was titled: "*Iraqi General Dies of Natural Causes*". It claimed that the prisoner had "said he didn't feel well and subsequently lost consciousness" and died despite efforts to resuscitate him. The military said that the death is "currently under investigation".
- Amnesty International wrote to the US authorities on 3 December 2003 calling for the investigation to be prompt, thorough, impartial and independent, and for its findings to be made public. To this date, the organization has never had a reply to its letter.

[617] *US Army inquiry implicates 28 soldiers in deaths of 2 Afghan detainees*. New York Times, 15 October 2004.

- According to Department of Defense documents obtained by the *Denver Post* newspaper, 'Abd Hamad Mawhoush had turned himself in to the US authorities in November. After two weeks in custody, "two soldiers with the 66th Military Intelligence Company slid a sleeping bag over his body, except for his feet, and began questioning him as they rolled him repeatedly from his back to his stomach… Then one of the soldiers, an interrogator, sat on Mawhoush's chest and placed his hands over the prisoner's mouth". It was during this interrogation that the prisoner "became non-responsive". According to the Pentagon documents, the two soldiers received reprimands and were barred from further interrogations.[618]
- On 21 May 2004, a Pentagon spokesperson said that the military investigation into 'Abd Mawhoush's death was one of the nine that was "ongoing". Four soldiers were subsequently reported to have been charged with murder and were facing possible courts-martial at the time of writing.[619]

Another of the death certificates released by the Pentagon on 21 May 2004 concerned 52-year-old Nagem Sadun Hatab who was detained at Camp Whitehorse detention facility near Nasiriya. He died on 6 June 2003, three days after his arrest, as a result of "strangulation". The death certificate added that he had been "found unresponsive in outside isolation". According to the report of a military investigation, obtained by the *Los Angeles Times*, on 4 June Nagem Hatab had been hit and kicked in the chest by US soldiers. On 5 June, the prisoner was reported to be lethargic, not eating and drinking very little, and possibly having difficulty breathing. He had diarrhoea and was covered in faeces. The camp commander ordered that he be stripped and taken outside the cellblock. According to the military investigation, he was left "naked outside in the sun and heat for the rest of the day and into the night. Shortly after midnight, Mr Hatab was found dead." An autopsy found that he had suffered seven broken or cracked ribs and a broken hyoid bone (the bone at the base of the tongue). However, the military investigator found that no tests could be carried out on Nagem Hatab's bodily fluids because they were mishandled and destroyed.[620] This meant that no murder or manslaughter charges could be brought as the exact cause of death could not be determined.[621]

There remain many questions around such cases, including those of at least 14 people whose death certificates were not released by the Pentagon on 21 May 2004. One such case is that of Mohammed Munim al-Izmerly, a prominent Iraqi scientist taken into US custody on 25 April 2003. He was taken, handcuffed and hooded, to an unknown location. He was held for the next nine months, possibly at the "high value detainees" section at Baghdad International Airport where the ICRC's February 2004 report found conditions of solitary confinement that violated the Geneva Conventions. On 11 January 2004, Dr al-Izmerly's family was allowed to visit him for the first time, having been taken there blindfolded and

[618] *Brutal interrogation in Iraq*. Denver Post, 19 May 2004.
[619] *Four US soldiers charged with murder*, Associated Press, 5 October 2004.
[620] *Report cites marines in Iraqi's death at a camp*. Los Angeles Times, 24 May 2004.
[621] In September 2004, the court-martial of Major Clarke Paulus was delayed so that prosecutors could search for missing evidence.

driven around in loops so that they would not know his location. On his wrist they saw a plastic band with the now well-known photograph of Saddam Hussein at the point of his capture. On 17 February 2004, the family received the news from the ICRC that 65-year-old Mohammed al-Izmerly was dead. He had died over two weeks earlier on 31 January 2004. The family commissioned their own autopsy which concluded that he had died from blunt force injury to the back of the head.[622]

Abdul Wali died in a US base near Asadabad in Kunar Province in Afghanistan on 21 June 2003. On 17 June 2004, the Justice Department announced the charging of a CIA contractor with assaulting Abdul Wali during interrogations on 19 and 20 June 2003 (see Point 7). Justice Department officials reportedly stated that he had been charged with assault rather than murder because no autopsy had been performed on Abdul Wali to establish the cause of death.

The absence of autopsies of people who have died in custody has been a cause for serious concern. At its 21 May 2004 briefing, when the Department of Defense revealed that the Army Criminal Investigation Command was investigating 33 investigations of death in custody cases, it reported that 15 of the cases involved people who were found to have died from "natural" or "undetermined" causes. In five of these 15 cases, autopsies had not been conducted. According to internal Pentagon documents obtained by the *Denver Post*, the five include an Abu Ghraib detainee who was taken to medical personnel "gasping for air" and a detainee in a detention facility in Mosul who was found "unresponsive by guards conducting routine wake-up calls." In both cases, the documents state that the "investigation was closed".[623] In such circumstances, it cannot be said that a proper investigation has occurred. Indeed the Pentagon official admitted at the briefing that "a case-by-case determination would need to be performed as to whether the proper judgment was applied" in not conducting an autopsy.

The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions state that investigations of deaths in custody must include an adequate autopsy, conducted by experts able to function impartially and independently from anyone or any agency associated with a possible perpetrator.

In June 2004, after the *Denver Post* had obtained the internal Pentagon documents showing that autopsies had not been conducted in all cases, the Department of Defense issued new guidance on the procedures for investigation into deaths in military custody. The Pentagon stated that the new procedures were "part of a series of efforts to strengthen policies and eliminate procedural weaknesses that have come to light as a result of the deplorable events at Abu Ghraib".[624] The procedures leave the decision as to whether an autopsy will be performed to the Office of the Armed Forces Medical Examiner (AFME), although "it is presumed that an autopsy shall be performed, unless an alternative determination is made by

[622] *Suspicion surrounds death of Iraqi scientist in US custody*. Los Angeles Times, 28 May 2004 and *"I will always hate you people"*. The Guardian (UK), 24 May 2004.
[623] *Skipped autopsies in Iraq revealed*. Denver Post, 21 May 2004.
[624] *DoD issues death investigation procedures*. Department of Defense news release, 10 June 2004.

the [AFME]".[625] The new procedures do not cover other government agencies such as the CIA.

International standards require that all deaths in custody be investigated by a judicial or other competent authority to determine the cause of death.[626] The purpose of the investigation "shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death".[627] Governments shall ensure that anyone identified by the investigation as having participated in the death is brought to justice. International humanitarian law similarly obliges states to investigate into all suspicious cases of death.[628]

The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment requires states parties, of which the USA is one, to investigate all allegations of torture and cruel, inhuman or degrading treatment or punishment. Article 12 states: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." Article 14 states that "in the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."

The Geneva Conventions prohibit torture and ill-treatment. Article 147 of the Fourth Geneva Convention and Article 130 of the Third Geneva Convention list the following acts as grave breaches, that is, war crimes, if committed against persons protected by the respective Convention: wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health. Article 146 of the Fourth Geneva Convention and Article 129 of the Third Geneva Convention require each state party "to search for persons alleged to

[625] *Procedures for Investigation into Deaths of Detainees in the Custody of the Armed Forces of the United States*. Memorandum signed by Secretary of Defense Donald Rumsfeld, dated 9 June 2004.
[626] Principle 34 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: "Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case... The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation."
[627] Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.
[628] Article 131 of the Fourth Geneva Convention provides that "Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power. A communication on this subject shall be sent immediately to the Protecting Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protecting Power. If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible." See similarly the Third Geneva Convention, Art. 121.

have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts".

The cases of deaths in US custody during the "war on terror" provide more evidence of a widespread problem of torture and ill-treatment, including denial of medical care. Investigations have been slow, autopsies and documentation have been less than stringently applied and officials have been quick to suggest natural causes. Progress in investigations and prosecutions appears to have been more a result of an increased responsiveness following the Abu Ghraib scandal than an inherent willingness to bring swift, transparent and firm action to bear in such cases. The US government has been accused of not taking seriously the killing of civilians in the wider war – for example, by not keeping a count of such deaths. This attitude appears to have infected the official approach to deaths in custody as well.

6.3 Recommendations under Point 6

US Congress should:

- Establish an independent commission of inquiry into all aspects of the USA's "war on terror" detention and interrogation policies and practices. Such a commission should consist of credible independent experts, have international expert input, and have subpoena powers and access to all levels of government, all agencies, and all documents whether classified or unclassified (see page 49).

The US authorities should:

- Ensure that all allegations of torture or cruel, inhuman or degrading treatment involving US personnel, whether members of the armed forces, other government agencies, medical personnel, private contractors or interpreters, are subject to prompt, thorough, independent and impartial civilian investigation in strict conformity with international law and standards concerning investigations of human rights violations;
- Ensure that such investigations include cases in which the USA previously had custody of the detainee, but transferred him or her to the custody of another country, or to other forces within the same country, subsequent to which allegations of torture or ill-treatment were made;
- Ensure that the investigative approach at a minimum complies with the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Ensure that the investigation of deaths in custody at a minimum comply with the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, including the provision for adequate autopsies in all such cases;
- In view of evidence that certain persons held in US custody have been subjected to "disappearance", the US authorities should initiate prompt, thorough and impartial investigations into the allegations by a competent and independent state authority, as provided under Article 13 of the UN Declaration on the Protection of All Persons from Enforced Disappearance.

Point 7 – Prosecute

Those responsible for torture must be brought to justice. This principle should apply wherever alleged torturers happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. Governments must exercise universal jurisdiction over alleged torturers or extradite them, and cooperate with each other in such criminal proceedings. Trials must be fair. An order from a superior officer must never be accepted as a justification for torture.

7.1 No impunity: from contractors to commander-in-chief

States must honour their obligations, including that to vigorously combat the impunity of perpetrators of torture. Those who conceive of or authorize any form of torture and other cruel, inhuman or degrading treatment, and those who commit such acts, should not go unpunished. Independent bodies must prosecute those responsible, and the punishment must reflect the seriousness of the offence.

United Nations Secretary-General Kofi Annan, 17 June 2004[629]

One of the shocking aspects of the Abu Ghraib torture photographs is the apparent sense of impunity being enjoyed by military guards who appear in them. Such was this sense of impunity that a photo of naked detainees piled up together was reportedly being used as a screen saver on one of the computers at the prison.[630] Impunity allows torture and ill-treatment to flourish.

As already noted in Point 1.2, a discussion of impunity is a theme that appears in various government memorandums that have come into the public domain. For example, the August 2002 memorandum to the White House from the Justice Department suggested possible defences for agents accused of torture and took the position that there was a wide array of interrogation techniques that while qualifying as cruel, inhuman or degrading treatment would not rise to the level of torture and thus not qualify for prosecution under the US torture law 18 U.S.C. § 2340 (see below). The administration must publicly disown these documents and reject the notion that there can be any justification or impunity at any level, be it military or civilian, for torture or other cruel, inhuman or degrading treatment.

Need for civilian investigations and prosecutions

On 10 September 2004, seeking to demonstrate the adequacy of the official investigative and prosecutorial response to allegations of abuse by US forces, of which the Schlesinger Panel stated that there had been about 300 cases, the Pentagon reported that 45 military personnel had been referred to courts-martial, 23 soldiers had been administratively separated (a non-

[629] United Nations Press Release. UN Doc. SG/SM/9373. OBV/428.

[630] "I saw a screen saver for a computer that was up in the isolation area. The screen saver had detainees naked in a pyramid". Sworn statement, Luciana Spencer, *supra*, note 504

punitive release from service), and 12 had been referred for General Officer Letters of Reprimand (a type of written warning).[631]

As a matter of principle, across all countries, Amnesty International takes the position that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law, such as torture, in independent and impartial civilian courts. Although a military justice system may be well-suited for trying armed forces personnel for purely military offences, such as insubordination or being drunk on duty, this is not the case for serious human rights violations.

In his July 2002 report to the Sub-Commission on the Promotion and Protection of Human Rights, the UN Special Rapporteur on the administration of justice through military tribunals noted a "growing consensus on the need to exclude serious human rights violations committed by members of the armed forces (or the police) from the jurisdiction of military tribunals".[632] He added that more and more countries are adopting legislation to this end.

The UN Special Rapporteur on the independence of judges and lawyers has noted that, "in regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice".[633] The Working Group on Arbitrary Detention has said that insofar as military justice continues, it should not try civilians or military personnel whose victims include civilians.[634]

The Inter-American Commission on Human Rights has taken the position that military personnel accused of human rights violations be tried in ordinary civilian courts.[635] The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has expressed concern about "trials of members of the security forces before military courts where, it is alleged, they evade punishment because of an ill-conceived *esprit de corps*, which generally results in impunity".[636] International law and standards specifically prohibit trials in military

[631] Department of Defense statement on Seymour Hersh book. 10 September 2004.
[632] Issue of the administration of justice through military tribunals. Report submitted by Mr Louis Joinet pursuant to Sub-Commission decision 2001/103. UN Doc. E/CN.4/Sub.2/2002/4, 9 July 2002, para. 22.
[633] UN Doc. E/CN.4/1998/39/Add.1, 19 February 1998, para. 78. The Special Rapporteur pointed out that the Human Rights Committee has reached a similar conclusion, and noted that: "In the light of its General Comment No. 13, the Committee considered that the trial of civilians by military tribunals was irreconcilable with the administration of fair, impartial and independent justice". UN Doc. E/CN.4/Sub.2/2002/4, para. 12.
[634] UN Doc. E/CN.4/1999/63, 18 December 1998, para. 80.
[635] In its Report on Terrorism and Human Rights, the Inter-American Commission on Human Rights states: "A state's military courts may prosecute members of its own military for crimes relating to the functions that the law assigns to military forces and, during international armed conflicts, may try privileged and unprivileged combatants, provided that the minimum requirements of due process are guaranteed. Military courts may not, however, prosecute human rights violations or other crimes unrelated to military functions, which must be tried by civilian tribunals." OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 261(b).
[636] UN Doc. A/51/457, at para. 125, 7 October 1996, para. 125.

or special courts of members of the security forces or other officials accused of participating in "disappearances".[637]

In a June 2004 report, the current Special Rapporteur on the administration of justice through military tribunals laid out a set of principles on this issue. Principle 3 states:

> "*In all circumstances, the jurisdiction of military courts should be abolished in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations, such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.*"

The Rapporteur explained:

> "*Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such incidents. It is therefore important that civilian courts be able, from the very beginning, to conduct an inquiry and prosecute and try persons charged with such violations. The ex officio initiation of the preliminary inquiry by a civilian judge is a decisive step for avoiding all forms of impunity. The competence of the civilian judge should also make it possible to take the rights of the victims fully into account, at all stages of the proceedings… [T]he best guide should be the requirement of ensuring a fair trial before an independent and impartial tribunal and to guarantee fully the rights of the victims: even when an isolated act is involved, one may question the willingness of the military hierarchy to shed full light on an incident that is likely to damage the army's reputation and esprit de corps.*"[638]

A military commander's ability to prevent prosecutions

The Army Criminal Investigation Command, responsible for investigations into abuses by the military, is described by the Pentagon as an "independent investigative agency" whose agents "do not work for commanders in the field".[639] However, it is the commanders in the field who decide whether to pursue judicial or disciplinary action, or to do nothing. For example, military investigations have implicated 28 soldiers in the deaths of two Afghan detainees, Dilawar and Mullah Habibullah, in Bagram air base in December 2002 (see Point 6.2). Army investigators recently submitted a report of their findings, and from that point the decision on what action to pursue rested with the soldiers' commanders.[640] By 19 October 2004, charges

[637] Article 16 of the UN Declaration on the Protection of All Persons from Enforced Disappearance: "Persons alleged to have committed any of the acts of [enforced disappearance] shall be… tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts." See also Article IX of The Inter-American Convention on Forced Disappearance of Persons.
[638] UN Doc: E/CN.4/Sub.2/2004/7, 14 June 2004, paras. 17 and 19.
[639] Defense Department Background Briefing, 21 May 2004.
[640] CID Public Affairs Office, telephone interview with Amnesty International, 19 October 2004. The spokesperson said that the time taken to complete the investigation reflected the complexity of the case.

had only been brought against a reserve soldier, Sergeant James Boland, of the 377th Military Police Company. He was charged with assault, maltreatment and dereliction of duty.

Cases in which commanders decided not to order a criminal judicial action include:

- An Iraqi detainee died at the Packhorse US forward operating base on 11 September 2003 when he was shot for throwing rocks. The US soldier faced a court-martial for using excessive force, but reportedly asked, and was allowed by his commander, to leave the army with demotion.[641]
- Lieutenant Colonel Allen West was facing the possibility of a court-martial and 11 years in prison for allegedly watching four of the soldiers under his command beat information out of Iraqi detainee Yahya Hamudy in August 2003 at a US military base in Taji, north of Baghdad. Lt. Col. West then allegedly threatened to kill the detainee, taking him outside, putting him on the ground, and firing his gun. His commanding officer chose administrative action rather than a court-martial and Lt. Col. West was fined.[642]

Prosecutions under the Uniform Code of Military Justice

The USA's Uniform Code of Military Justice (UCMJ) is applicable to US troops worldwide, and can also be used to prosecute certain civilians "in time of war… serving with or accompanying an armed force in the field".[643] However, this will not cover civilian contractors who have no military status in peacetime.[644] It may also not cover CIA personnel even if they are accompanying the armed forces.[645] The fact that a person is eligible for trial by court-martial (a military criminal trial court) under the UCMJ does not make him or her ineligible for trial in the ordinary US courts.

While the UCMJ does not expressly criminalize "torture", there are several offences recognized under it which can be used to punish acts of torture or ill-treatment.[646] They include "cruelty", "maltreatment", "assault", as well as manslaughter or murder in cases in which the alleged ill-treatment resulted in death. Thus, Staff Sergeant Ivan Frederick, accused

[641] *Few details emerge from inquiry of Iraqi, Afghan prisoner deaths*. AP, 8 May 2004.
[642] *US officer fined for harsh interrogation tactics*. CNN.com, 13 December 2003.
[643] 10 U.S.C. § 802(a)(10).
[644] "The broad statutory application of the UCMJ to civilians associated in various ways with the armed forces has been judicially limited in deference to the requirements of Article III, Section II, of the Constitution and the Fifth and Sixth Amendments protecting the right to trial by jury. As so limited, the UCMJ does not apply to civilians who have no military status in peacetime, even if they are accompanying United States forces overseas as employees or dependents." *Human rights standards applicable to the United States' interrogation of detainees*. Association of the Bar of the City of New York, http://www.abcny.org/pdf/HUMANRIGHTS.pdf.
[645] *Ibid*. "No cases directly address whether CIA operatives conducting para-military operations with the regular armed forces or interrogations within a military base are considered civilians for purposes of UCMJ application".
[646] However, it might be possible to prosecute military personnel for torture in courts-martial, via the torture statute 18 U.S.C. § 2340. *Ibid*.

of subjecting detainees in Abu Ghraib to sexual humiliation, jumping and stomping on detainees, and making a hooded detainee stand on a box with wires attached to his hands and to believe that he would be electrocuted if he fell off the box, was and could not be charged with "torture" under the UCMJ. At the time of writing, he was reported to be planning to plead guilty to four counts of assault, maltreating a detainee, committing an indecent act and dereliction of duty in a plea bargain in which eight other counts would be dropped.[647]

Amnesty International believes that greater protection would exist were the UCMJ to be amended expressly to outlaw torture. This would send a clear message at all levels that acts falling within the definition of Article 1 of the UN Convention against Torture will not be tolerated or prosecuted under the guise of a lesser offence, and would serve to strengthen the deterrence as well as the punishment of such crimes.

The appearance of leniency

Article 4(2) of the UN Convention against Torture requires states to make torture, attempted torture, and complicity or participation in torture "punishable by appropriate penalties which take into account their grave nature". In light of this, concerns can be raised about a number of cases of torture and other violations where punishments do not appear to have been commensurate to the offence.

- In August 2004, Private Edward Richmond was sentenced to three years in prison, convicted by a court-martial of the voluntary manslaughter of Muhamad Husain Kadir, an Iraqi civilian, on 28 February 2004. The soldier reportedly shot the unarmed detainee, who was handcuffed, in the back of the head. It was alleged that Private Richmond had earlier said that he wanted to kill an Iraqi. He was charged with premeditated murder, which carries a potential life sentence, but the court-martial panel of military soldiers and officers reduced the charge to voluntary manslaughter, which carries a maximum prison term of 15 years. The court-martial returned a sentence of three years, and the defendant was awarded 47 days of time served, even though he was not held in confinement before the trial.[648] His alleged response to the sentence was "I was going to be in the army for three more years anyway".[649]
- In contrast, in a court-martial in Iraq in September 2003, Sergeant Oscar Nelson was sentenced to seven years in prison for the involuntary manslaughter of a fellow US soldier in May 2003. Nelson was accused of driving recklessly in a military vehicle when it overturned, killing Specialist Nathaniel Caldwell.[650]
- In mid-2003, two sergeants with the 84th Engineering Company reportedly ordered soldiers to subject electric shocks to Iraqi "intruders" accused of trespassing at the military camp. According to an investigative report obtained by the *Denver Post*, the

[647] *Soldier to plead guilty in Iraq abuse case.* Associated Press, 20 October 2004.
[648] *Soldier gets 3-year term in shooting.* Honolulu Star-Bulletin, 6 August 2004.
[649] *Schofield soldier convicted.* Honolulu Advertiser, 6 August 2004.
[650] *Army sergeant sentenced to seven years in prison for Humvee crash in Iraq that killed soldier.* Associated Press, 3 September 2003.

detainees were stripped, beaten and shocked with a "blasting device". After a court-martial in February 2004 one of the sergeants was fined two thirds of one month's pay and banned from going to the internet café for 30 days. The other sergeant received a fine and rank reduction.[651]

- In another case, a sergeant told his subordinates to "rough up" two Iraqi detainees. He had apparently given similar orders before. The Sergeant received a reduction in rank and a punitive censure. Two of his subordinates received terms of confinement of 30 days and 45 days respectively.[652]
- Privates Andrew Sting and Jeremiah Trefney pleaded guilty to charges of, *inter alia*, assault, cruelty and maltreatment in a case in which an Iraqi detainee was subjected to electric shocks for being disruptive on 13 April 2004 in a US temporary detention facility in Mahmudiya, south of Baghdad. They were sentenced to one year in prison and eight months in prison respectively, reduction in rank and a bad conduct discharge.[653]
- In contrast, on 3 June 2004 a court-martial sentenced Sergeant Abdullah William Webster to 14 months in prison for refusing to participate in the war on Iraq on the basis of his religious beliefs.[654]

Provisions permitting Justice Department prosecutions

The US Justice Department can prosecute civilian contractors, CIA agents or military personnel for certain war crimes and torture committed outside the USA.[655] The various laws under which US soldiers and officials could be tried may require amendment to bring them into line with the UN Convention against Torture, and to ensure that they criminalize torture fully and wherever it occurs (see Point 5 and its recommendations). They include:

[651] *Wider Iraqi abuse shown*. Denver Post, 26 May 2004.
[652] *Detainee Operations Inspection*. Department of the Army Inspector General. 21 July 2004, page 20.
[653] *Marine Sergeant to face court-martial in abuse*. Washington Post, 12 June 2004. In e-mails to the *Washington Post*, another of the soldiers charged in the incident, Sergeant Matthew Travis, wrote how at the facility, "We would punish a detainee for talking or misbehaving by making him stand for about 45 min[utes] or put[ting] him in a cage outside by himself."
[654] Amnesty International considers him to be a prisoner of conscience. See Urgent Action 267/04, 17 September 2004, http://web.amnesty.org/library/Index/ENGAMR511372004.
[655] In regard to allegations of torture or ill-treatment by private contractors, the UN Special Rapporteur on torture has recalled the Human Rights Committee's position that, "the positive obligations on States parties to ensure [International] Covenant [on Civil and Political] rights will only be fully discharged if individuals are protected by the State, not just against violation of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities". UN Doc. A/59/324, 23 August 2004, para. 19, quoting HRC General Comment No. 31 (2004), para. 8.

- The War Crimes Act. This law, 18 U.S.C. § 2441, criminalizes certain war crimes committed inside or outside the USA by anyone who is a member of the armed forces or is a US national. Under the Act, a war crime includes conduct defined as a grave breach of the Geneva Conventions, or constituting a violation of common Article 3 of the Conventions. The latter prohibits, *inter alia*, cruel treatment, torture, and outrages upon personal dignity, in particular humiliating and degrading treatment.
- The Torture Statute. This law, 18 U.S.C. § 2340, makes it a criminal offence for any US national acting in an official capacity "outside the United States" to commit or attempt to commit torture. The law was enacted in 1994. Anyone who conspires to commit the acts prohibited under the statute can be subject to the same penalties as the actual perpetrator. This law, however, defines torture in an arguably narrower way than the UN Convention against Torture (see Point 5).[656]
- The Military Extraterritorial Jurisdiction Act (MEJA) of 2000. This law, 18 U.S.C. § 3261 criminalizes conduct committed by "members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States" that would be punishable by more than one year's imprisonment if engaged in within the USA. The text of MEJA (18 U.S.C. § 3267(1)(A)) was recently amended to define the term "employed by the Armed Forces outside the United States" to include civilian employees, contractors, or employees of contractors, not only of the Department of Defense, but also of "any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas". MEJA remains largely untested as by mid-September 2004, four years after it was enacted, the "implementing regulations" required to fully implement the law had not been passed.

Justice Department initiates prosecution

In June 2004, the US Justice Department charged a civilian contractor with assaulting an Afghan detainee, 28-year-old Abdul Wali, in a US military base near Asadabad in Kunar Province in Afghanistan a year earlier. Abdul Wali had handed himself into the US military voluntarily. It is alleged that David Passaro, a contractor working with the CIA, assisted in the interrogation. According to the indictment, David Passaro "beat Abdul Wali, using his hands and feet, and a large flashlight", during interrogations on 19 and 20 June 2003.[657] Abdul Wali died in custody on 21 June 2003. It is not clear why it took a year to bring charges in the case, and it seems that no murder charges were brought because an autopsy was not conducted. Amnesty International never received a reply to a letter it wrote on 23 June 2003 calling for a full investigation into the case and for anyone found responsible to be brought to justice.

[656] Also, its reach was narrowed by the PATRIOT Act, which extended US criminal jurisdiction over certain crimes committed abroad (and thereby reduced the area of what is defined as falling "outside the United States" under 18 U.S.C. § 2340). However, legislation was recently passed that may have rectified this problem, defining the "United States" as "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States".
[657] *U.S. v. Passaro.* No: 5:04-CR-211-1, (E.D.N.C West Div.17 June 2004).

The Justice Department said that it could prosecute David Passaro thanks to the USA PATRIOT Act, Section 804 of which provides jurisdiction over crimes committed by US nationals in military facilities in other countries.[658] In announcing the charges against David Passaro on 17 June 2004, Attorney General John Ashcroft said that it "would have been more difficult to investigate and prosecute" the case without the PATRIOT Act. However, the PATRIOT Act meant that at that time Passaro could not be charged with torture under 18 U.S.C. § 2340 (see note 656), and the remainder of federal law does not expressly criminalize torture (see Point 5). The Justice Department refused to provide further clarification, sought by Amnesty International in repeated requests, on why prosecution was not pursued under the War Crimes Act. In February 2002, Attorney General Ashcroft had advised President Bush that not applying the Geneva Conventions to the Afghanistan situation would "provide the highest assurance" against future prosecutions under the War Crimes Act of "American military officers, intelligence officials, or law enforcement officials" (see page 58).

In order to prevent arbitrariness – with, for example, civilian contractors charged with similar or the same crimes as military personnel, but tried in different jurisdictions – and to avoid any perception of inappropriate military justice leniency or lack of impartiality, Amnesty International believes that all those personnel, civilian or military, of low rank or high, should be tried in the ordinary civilian courts. Any trials must conform fully to international standards for fair trial, and the death penalty – which could be available under the UCMJ, the War Crimes Act and the Torture Statute in cases of torture or ill-treatment resulting in death – must not be imposed.

7.2 Recommendations under Point 7

The US authorities should:

- Publicly reject all arguments, including those contained in classified or unclassified government documents, promoting impunity for anyone suspected of torture and cruel, inhuman or degrading treatment, including the ordering of such acts;
- Bring to trial all individuals – whether they be members of the administration, the armed forces, intelligence services and other government agencies, medical personnel, private contractors or interpreters – against whom there is evidence of having authorized, condoned or committed torture or other cruel, inhuman or degrading treatment;
- Any person alleged to have perpetrated an act of "disappearance" should, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities for prosecution and trial, in accordance with Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance;
- Ensure that all trials for alleged perpetrators comply with international fair trial standards, and do not result in imposition of the death penalty.

[658] USA PATRIOT Act, 6 § 804, 18 U.S.C. § 7 (9).

Point 8 – No use of statements extracted under torture

Governments should ensure that statements and other evidence obtained through torture may not be invoked in any proceedings, except against a person accused of torture.

8.1 The fruit of a poisonous tree

[B]y using torture, or even by adopting the fruits of torture, a democratic state is weakening its case against terrorists, by adopting their methods, thereby losing the moral high ground an open democratic society enjoys.

Senior United Kingdom Judge, August 2004[659]

Under Article 15 of the UN Convention against Torture, any statement made as a result of torture is inadmissible in evidence in "any proceedings", except in proceedings against the alleged perpetrator of the torture. Other international standards exclude not only any statements extracted under torture, but also those elicited as a result of other cruel, inhuman or degrading treatment or punishment.[660] The Committee against Torture has stated that "the existence, in procedural legislation, of detailed provisions on the inadmissibility of unlawfully obtained confessions and other tainted evidence" is one of the essential means in preventing torture.[661] The Human Rights Committee, in its interpretation of the International Covenant on Civil and Political Rights (ICCPR), has stated that the "law must prohibit the use or admissibility in judicial proceeding of statements or confessions obtained through torture or other prohibited treatment", i.e., including the cruel, inhuman or degrading treatment prohibited by Article 7 of the ICCPR.[662] This applies not only to statements made by the accused, but also to statements made by any witness. Prosecutors must reject any evidence that they believe has been coerced.[663] The UN Special Rapporteur on torture has recommended that, on the question of the admissibility of statements or confessions, "the

[659] *A and others v Secretary of State for the Home Department*, Court of Appeal (Civil Division), on appeal from the Special Immigration Appeals Commission. [2004] EWCA Civ 1123, 11 August 2004, Lord Justice Neuberger, dissenting.

[660] Article 12, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 69(7) of the Rome Statute of the International Criminal Court; Principle 27, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[661] UN Doc. A/54/44 (1999), para. 45.

[662] CCPR General comment 20, para. 12, 10 March 1992, *supra*, note 188.

[663] Guideline 16 of the UN Guidelines on the Role of Prosecutors (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, September 1990) states: "When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice."

burden of proof should be on the State to demonstrate the absence of coercion."[664] The Geneva Conventions also prohibit the use of confessions or other information extracted by "moral or physical coercion".[665]

The Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, which President Bush signed on 13 November 2001, allows for foreign detainees named under it to be brought to trial by military commissions, executive bodies, not impartial or independent courts.[666] The rules for the military commissions do not expressly exclude statements extracted under torture or other coercive methods.

By October 2004, 15 foreign nationals had been made subject to the Military Order and four had been charged in preparation for trial by military commission. The first six were moved to solitary confinement in Camp Echo some time after they were made subject to the Order in July 2003. Held in windowless cells for months, there has been serious concern for their well being and susceptibility to making coerced statements. Moazzam Begg, one of the first six named under the Military Order, has said that he has been held in solitary confinement in Guantánamo Bay, including in Camp Echo, since February 2003, following a year in US custody in Bagram air base in Afghanistan. He has said that "any documents presented to me by US law enforcement agents were signed and initialled under duress".[667]

Amnesty International is concerned that any guilty pleas or detainee testimony brought before the military commissions could be the result of the coercive nature of the conditions in which detainees have long been held without any legal process, whether in US custody in Afghanistan or Guantánamo generally, Camp Echo or Camp Five (see Point 4) specifically, or in undisclosed locations elsewhere in the world, as well as unlawful interrogation techniques used against them. According to a declaration by Dr Daryl Matthews, a forensic psychiatrist who visited Guantánamo in 2003 at the invitation of the Pentagon, Salim Ahmed Hamdan, isolated for months in Camp Echo, said that he "considered confessing falsely to ameliorate his situation".[668]

The military commissions, designed to secure convictions on lower standards of evidence, will have the power to admit coerced evidence. A February 2002 memorandum from the Justice Department to the Pentagon, made public by the administration on 22 June

[664] Report on Turkey. UN Doc. E/CN.4/1999/61/Add.1, para113 (c).
[665] Article 99 of the Third Geneva Convention provides: "No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused". Article 31 of the Fourth Geneva Convention: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties".
[666] *USA: A deepening stain on US justice*, AI Index: AMR 51/130/2004, 19 August 2004. http://web.amnesty.org/library/Index/ENGAMR511302004
[667] Letter from Guantánamo, dated 12 July, *supra*, note 74.
[668] *Swift v. Rumsfeld*. US District Court, Western District of Washington. Declaration of Daryl Matthews, 31 March 2004. International standards state that: "It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person". UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 21.

2004, states that "incriminating statements may be admitted in proceedings before military commissions even if the interrogating officers do not abide by the requirements of *Miranda*[669] [the US Supreme Court decision stipulating the rights of suspects and conduct of interrogators]".[670] The memorandum describes the military commissions as "entirely creatures of the President's authority as Commander in Chief… and are part and parcel of the conduct of a military campaign".

US nationals cannot be made subject to the Military Order. Thus John Walker Lindh, a US citizen captured in Afghanistan, was not brought under its provisions but before the ordinary civilian courts (see Point 2.2). In the event, he reached a plea arrangement, as part of which he dropped his allegations of torture and ill-treatment. However, it is clear that the administration believed that its incommunicado interrogation of Lindh would not necessarily have jeopardized the admissibility of any statements extracted from him. The February 2002 Justice Department memorandum to the Pentagon advised that it was not unethical for John Walker Lindh to have been interrogated incommunicado by Department of Defense lawyers even if they knew he was represented by another attorney. It suggested that an executive order from the President allowing such interrogations would, in any event, fall under the "President's authority as Commander in Chief to take necessary and appropriate measures to acquire information about enemy forces". The memorandum asserted that even if the government had acted unethically in questioning Lindh in the way that it had, "it would not follow that the evidence obtained in that questioning would be inadmissible at trial".

The memorandum concluded that statements extracted from interrogations conducted for intelligence-gathering, rather than prosecutorial purposes, would "likely be admissible" in trial in a normal US court even if the person interrogated had not been advised of his or her rights before questioning. Interrogations under these circumstances that were conducted for a mixture of intelligence-gathering and prosecutorial purposes, the memorandum suggested, might be admissible depending on the facts of the specific case in question.

Two former Guantánamo detainees wrote in May 2004 recalling: "After three months in solitary confinement under harsh conditions and repeated interrogations, we finally agreed to confess [to being present at a meeting with Osama bin Laden]. Last September an agent from MI5 [British secret service] came to Guantánamo with documentary evidence that proved we could not have been in Afghanistan at the time... In the end we could prove our alibis, but we worry about people from countries where records are not as available."[671]

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[669] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[670] Memorandum for William J. Haynes, II, General Counsel, Department of Defense. *Re: Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan*. Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 26 February 2002. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.26.pdf.

[671] Letter to US Senate Armed Services Committee from Shafiq Rasul and Asif Iqbal, 13 May 2004. http://www.ccr-ny.org/v2/reports/docs/llr%20to%20Sentate%2012may04v2.pdf

8.2 Recommendations under Point 8

The US authorities should:

- Ensure that no statement coerced as a result of torture or other cruel, inhuman or degrading treatment, including long-term indefinite detention without charge or trial, or any other information or evidence obtained directly or indirectly as the result of torture or cruel, inhuman or degrading treatment, regardless of who was responsible for such acts, is admitted as evidence against any defendant, except the perpetrator of the human rights violation in question;
- Revoke the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, and abandon trials by military commission;
- Expose and reject any use of coerced evidence obtained by other governments from people held in their own or US custody;
- Refrain from transferring any coerced evidence for the use of other governments.

Point 9 – Provide effective training

It should be made clear during the training of all officials involved in the custody, interrogation or medical care of prisoners that torture is a criminal act. Officials should be instructed that they have the right and duty to refuse to obey any order to torture.

9.1 Training has been found wanting

[G]enerally training was inadequate. The [Military Police] detention units did not receive detention-specific training during their mobilization period, which was a critical deficiency.
Schlesinger report, August 2004

Article 7 of the International Covenant on Civil and Political Rights prohibits torture or other cruel, inhuman or degrading treatment or punishment. In its general comment on this Article, the Human Rights Committee has stated that: "Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training."[672] Articles 10 and 16 of the UN Convention against Torture similarly require states to ensure that education and information regarding the prohibition of torture and cruel, inhuman or degrading treatment are "fully included" in the training of any state agent who may be involved in the custody, interrogation or treatment of any detainee or prisoner.

There have been numerous indications of inadequacies in the training of US personnel involved with detainees. There were shortcomings identified in training in

[672] General Comment 20, 1992, para. 10, *supra*, note 188.

interrogation and detention policies and procedures, as well as in cultural awareness (see page 22). Despite the Army Inspector General's finding in July 2004 that abuses by US personnel in Afghanistan and Iraq were "aberrations", the issue of training was a prominent feature in his report, with the word "training" appearing 589 times.[673] Among his findings were:

- "*Interrogations were conducted...in some forward locations, by leaders and Soldiers with no training in military interrogation tactics, techniques and procedures*";
- "*To satisfy the need to acquire intelligence as soon as possible following capture, some officers and non-commissioned officers (NCOs) with no training in interrogation techniques began conducting their own interrogation sessions...*"
- "*The medical personnel interviewed stated that they did not receive any specific training in detainee operations*".
- "*To offset the shortage of interrogators, contractors were employed, however, 35% (11 of 31) of contract interrogators lacked formal training in military interrogation policies and techniques*".

In November 2003, the Army Provost Marshal General's report on US detention operations in Iraq found that: "The 800th MP (I/R) [Internment/Resettlement] Brigade units did not receive corrections specific training during their mobilization period".[674] Major General Taguba repeatedly cited inadequate training in his report on US detentions in Iraq. Among his findings were:

- "*Soldiers were poorly prepared and untrained to conduct I/R operations...throughout their mission*";
- "*Several interviewees insisted that the MP and MI Soldiers at Abu Ghraib (BCCF) received regular training on the basics of detainee operations; however, they have been unable to produce any verifying documentation, sign-in rosters, or soldiers who can recall the content of this training*";

One of four US Marines charged in the abuse of an Iraqi prisoner on 13 April 2004 in a temporary facility in Mahmudiya, south of Baghdad, has said that his unit was unprepared for detention duties: "We didn't get good training".[675] Similarly, the running of another temporary facility in Iraq, Camp Whitehorse, near Nasiriya, was assigned to a reserve Marine unit whose personnel were not trained in detentions. A military investigation into abuses in the facility noted that the Major assigned to run the facility in late May 2003, who was subsequently charged in the death of a detainee, had received no training in the handling of prisoners, the management of a detention facility or the Geneva Conventions.[676] A US Army Reserve Specialist assigned to Abu Ghraib prison is reported to have said that in two years

[673] *Detainee Operations Inspection*. Department of the Army: The Inspector General, 21 July 2004.
[674] Ryder report, *supra*, page 19, note 510.
[675] *Marine Sergeant to face court-martial in abuse*. Washington Post, 12 June 2004.
[676] *Report cites marines in Iraqi's death at a camp*. Los Angeles Times, 24 May 2004.

with the reserves, "she never heard the words 'Geneva Conventions', nor did she receive more than a few days of training on how to guard enemy prisoners of war".[677]

The Fay report into the torture and ill-treatment in Abu Ghraib found shortcomings in military training – mentioning the word 193 times in its 143 pages. It noted evidence that "little, if any, training on Geneva Conventions was presented to contractor employees". It suggested that "prior to deployment, all contractor linguists or interrogators should receive training in the Geneva Conventions standards for the treatment of detainees/prisoners." Amnesty International welcomes this recommendation, as such training is necessary, but it must be coupled with official respect at all levels of government for the Geneva Conventions. As has already been noted, the administration's decision to reject the applicability of the Geneva Conventions to the "war on terror" detainees ended up causing confusion among interrogators in Iraq and contributing to the torture and ill-treatment.

The Fay report suggests that part of the problem was that "army training at [Fort Huachuca army intelligence center] never included training on interrogation techniques using sleep adjustment, isolation, segregation, environmental adjustment, dietary manipulation, the use of military working dogs, or the removal of clothing." Nor should it. Such practices should be prohibited, not built into training programs.

9.2 Recommendations under Point 9

The US authorities should:

- Ensure that all personnel involved in detention and interrogation, including all members of the armed forces or other government agencies, private contractors, medical personnel and interpreters, receive full training, with input from international experts, on the international prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and their obligation to expose it;
- Ensure that all members of the armed forces and members of other government agencies, including the CIA, private contractors, medical personnel and interpreters, receive full training in the scope and meaning of the Geneva Conventions and their Additional Protocols, as well as international human rights law and standards, with input from international experts;
- Ensure that full training be similarly provided on international human rights law and standards regarding the treatment of persons deprived of their liberty, including the prohibition on "disappearances", with input from international experts;
- Ensure that all military and other agency personnel, as well as medical personnel and private contractors, receive cultural awareness training appropriate to whatever theatre of operation they may be deployed into.

[677] *Behind the walls of Abu Ghraib*. Newsweeek, 22 May 2004.

Point 10 – Provide reparation

Victims of torture and their dependants should be entitled to obtain prompt reparation from the state including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation.

10.1 Reparation means more than just money

We contribute to the UN Fund for the Victims of Torture…We also provide protection, counselling, and where necessary and possible, relocation in the United States. We stand with the victims to seek their healing and recovery, and urge all nations to join us in these efforts to restore the dignity of every person affected by torture.

President George W. Bush, 26 June 2004[678]

Article 14 of the UN Convention against Torture states: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation." Similarly, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly in 1975, states that: "Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation in accordance with national law".[679]

The Alien Tort Claims Act allows non-US nationals to file lawsuits for civil damages for acts of torture occurring outside the USA.[680] The Torture Victims Protection Act allows both foreign nationals and US citizens to claim damages against any individual who engages in torture or extrajudicial killing under "actual or apparent authority" of any government.

The UN Special Rapporteur on torture has emphasized that

"*a combination of medical assistance, financial support, social re-adaptation, legal redress and, in some cases, public acknowledgement is, in the Special Rapporteur's opinion, crucial. Only interdisciplinary assistance that integrates these various*

[678] President's statement on the UN International Day in Support of Victims of Torture. The Committee against Torture has welcomed the USA's contributions to the UN Voluntary Fund for Victims of Torture, established in 1981.

[679] The Committee against Torture has told states in general terms that they should provide compensation to victims of torture, and on one occasion has recommended the establishment of a national compensation fund for that purpose. Committee against Torture, conclusions and recommendations regarding Cuba, UN Doc. A/53/44 (1998), para 118(h); See also regarding, for instance, Bolivia, UN Doc. A/56/44 (2000-2001), para. 96; Ukraine, UN Doc. A/57/44 (2001-2002), para. 58(o).

[680] 28 U.S.C. § 1350.

aspects can ensure adequate, effective and prompt reparation commensurate to the gravity of the violation and the harm suffered."[681]

As emphasized by the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, the issue of reparation should focus not only on monetary compensation, but consider restitution, satisfaction, guarantees of non-repetition, and rehabilitation.[682] Restitution might include restoration of liberty, legal rights, social status, family life and citizenship, return to one's place of residence, restoration of employment and return of property. A contributor to satisfaction, for example, may be an official apology and acceptance of responsibility.

Rehabilitation is an important form of reparation. The development of techniques and facilities for the care and treatment of torture survivors has been an important achievement of recent decades. There are undoubtedly people who have suffered physical and psychological sequelae as a result of their time in US custody during the "war on terror". Some, as noted, have died. In its February 2004 report on Iraq, the ICRC described the case of a detainee who had been kept in isolation and "was unresponsive to verbal and painful stimuli. His heart rate was 120 beats per minute and his respiratory rate 18 per minute. He was diagnosed as suffering from somatoform (mental) disorder, specifically a conversion disorder, most likely due to the ill-treatment he was subjected to during interrogation." The ICRC also reported that its medical personnel had examined detainees "presenting signs of concentration difficulties, memory problems, verbal expression difficulties, incoherent speech, acute anxiety reactions, abnormal behaviour and suicidal tendencies. These symptoms appeared to have been caused by the methods and duration of interrogation." An ICRC medical examination of another detainee alleged to have been subjected to torture and ill-treatment "revealed haematoma in the lower back, blood in urine, sensory loss in the right hand due to tight handcuffing with flexi-cuffs, and a broken rib."

Amnesty International has spoken to former Guantánamo detainees who have said that they suffer physical and psychological after-effects of their time in US custody. In February 2004, nearly a year after he was released from Guantánamo, Afghan national Sayed Abbasin was still suffering from eyesight and knee problems that he said were the result of his time in custody. He had told Amnesty International that he had been forced to kneel for hours and was subjected to sleep deprivation in US custody in Afghanistan. In May 2003, another released Afghan, Mohammad Taher, told Amnesty International that he had suffered mentally from his detention and that he was having difficulty remembering things. More than two months after his release from Guantánamo, UK national Tarek Dergoul said that he was suffering from "nightmares, flashbacks, migraines, depression and memory loss".[683] Swedish national Mehdi Ghezali, a former Guantánamo detainee, told Amnesty International in July

[681] UN Doc. A/59/324, para. 58.
[682] E/CN.4/2000/62, Annex. As prepared by the UN Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.
[683] Witness statement of Tarek Dergoul in the case of *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 69, 21 May 2004.

2004 that parts of his right foot are completely "dead" as a result of tight shackling. He said that he was suffering nightmares after his two and a half years in captivity.

Those who have been subjected to arbitrary arrest also have a right to compensation. Article 9.5 of the International Covenant on Civil and Political Rights, which the USA ratified in 1992, states: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". There are undoubtedly many people who have been subjected to unlawful arrest by the USA in the "war on terror".

10.2 Recommendations under Point 10

The US authorities should:

- Ensure that anyone who has suffered torture or ill-treatment while in US custody has access to, and the means to obtain, full reparation including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, wherever they may reside;
- Ensure that all those who have been subject to unlawful arrest by the USA receive full compensation.

Point 11 – Ratify international treaties

All governments should ratify without reservations international treaties containing safeguards against torture, including the UN Convention against Torture with declarations providing for individual and inter-state complaints. Governments should comply with the recommendations of international bodies and experts on the prevention of torture.

11.1 Playing fast and loose with international law

President Bush regards the defense and advancement of human rights as America's special calling, and he has made the promotion of human rights an integral and active part of his foreign policy agenda.

Secretary of State Colin Powell, 25 February 2004[684]

Amnesty International has long been critical of the USA's pick-and-choose approach to international law and standards. This is a country that has been slow to commit itself to human rights treaties and has attached unprecedented conditions to those it has ratified.

This approach has been evident in the "war on terror". In the various government communications that have come into the public domain, a clear picture emerges of an administration that views international law and standards as obstacles to be overcome rather than obligations to be met. The worst that can happen, these documents suggest, is some diplomatic tension. Thus, for example, the Pentagon Working Group Report on Detainee

[684] Remarks on The Country Reports on Human Rights Practices for 2003. Washington, DC.

Interrogations in the Global War on Terrorism provides a "discussion of international law that, although not binding on the United States, could be cited to [sic] by other countries to support the proposition that the interrogation techniques used by the US contravene international legal standards".[685] Similarly, an August 2002 memorandum from the Justice Department to the White House noted that "although decisions by foreign or international bodies are in no way binding authority on the United States, they provide guidance about how other nations will likely react to our interpretation [of the Convention against Torture]".[686]

When any state, let alone a country as powerful as the USA, insists on its right to adopt a selective approach to international law and standards, their integrity is eroded. Why should any other state not then claim for itself the prerogative to adhere to only those portions of international law which suit its purposes?

11.2 UN Convention against Torture

The US played a leading role in developing and drafting the Convention against Torture, signing it in 1992. In October 1994, the U.S. ratified the Convention, which entered into force on November 20th, 1994.

US Assistant Secretary of State, 1999[687]

The USA's 1994 ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment came with various "reservations, declarations and understandings" attached. The effect of these conditions was to limit the application of the treaty by ensuring that it offered no greater protection than already existed under US law. In 2000, having considered the USA's initial report, the Committee against Torture, the expert body established by the treaty to oversee its implementation, called on the USA to "withdraw its reservations, interpretations and understandings relating to the Convention".[688] Four years later, the USA has not taken this action. Instead, government officials have cited those same ratification conditions to advise that harsh interrogation techniques could be authorized with impunity.

In May 2004, the Committee against Torture revealed that it had written to the USA to ask it to present its second now long overdue periodic report by 1 October 2004.[689] The Committee's letter drew the US government's attention "in particular to article 2.1 of the Convention [against Torture], according to which each State party should take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". The Committee stated that the report should include updated information concerning the situation of places of detention in Iraq up to the time of the

[685] Pentagon Working Group, *supra*, note 56.
[686] Bybee Memorandum, *supra*, note 252.
[687] On-the-Record Briefing on the *Initial Report of the United States of America to the UN Committee Against Torture*. As released by the Office of the Spokesman, Washington, DC, October 15, 1999.
[688] UN Doc. A/55/44 (1999-2000), para. 180(a).
[689] In May 2000 the Committee had asked the USA to present its second report by 19 November 2001.

submission of the report.[690] The USA has not responded to the request and no report has been filed. The USA's second periodic report to the Human Rights Committee under the ICCPR was due on 7 September 1998, and its third report was due on 7 September 2003. The USA has filed neither.

The USA attached an understanding of what is meant by torture to its ratification of the UN Convention against Torture.[691] It is a definition that is arguably narrower than that contained in Article 1.1 of the Convention.[692]

A memorandum from the US Justice Department to the Pentagon, dated 1 August 2002, emphasised the narrowness of the US definition of torture in advising that there was broad scope for US agents to engage in harsh interrogation tactics in the "war on terror". It pointed out that both the Reagan and first Bush administrations, in their moves to ratify the Convention, "consistently emphasise[d] the extraordinary or extreme acts required to constitute torture".[693] The same approach was indicated in a letter from the Justice Department to the White House, also dated 1 August 2002. The letter stated that the US "understanding" on torture "accomplished two things":

> "*First, it made crystal clear that the intent requirement for torture was specific intent. By its terms, the Torture Convention might be read to require only general intent... Second, it added form and substance to the otherwise amorphous concept of mental pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity comparable to that required in the context of physical torture*".[694]

The USA also lodged a condition to Article 16 of the UN Convention against Torture. Article 16 states: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

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[690] *Committee against Torture concludes thirty-second session*. UN Press Release, 21 May 2004.

[691] "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

[692] The Government of the Netherlands entered an objection on 26 February 1996 objecting, among other things, to the US understanding on the grounds that "it appears to restrict the scope of the definition of torture under Article 1 of the Convention."

[693] Bybee Memorandum, 1 August 2002, *supra*, note 252.

[694] Letter to Alberto Gonzales, Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

To this Article, the USA attached the following "understanding": "the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only in so far as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

The August 2002 Justice Department memorandum emphasized that the USA's ratification history in relation to the Convention "confirm[s] our view that the treaty… prohibits only the worst forms of cruel, inhuman or degrading treatment or punishment". In October 2002, a military lawyer recommended the approval of interrogation techniques, requested for use at Guantánamo, including stress positions, isolation, sensory deprivation, hooding, 20-hour interrogations, stripping, forced grooming, use of dogs to inspire fear, exposure to cold water or weather, death threats and use of wet towel and dripping water to induce the misperception of suffocation. In doing so, she noted the USA's reservation to Article 16 of the UN Convention against Torture, and concluded: "The United States is only prohibited from committing those acts that would otherwise be prohibited under the United States Constitutional Amendment against cruel and unusual punishment." She added that the "United States ratified the treaty with the understanding that the convention would not be self-executing, that is, that it would not create a private cause of action in US Courts."[695]

This memorandum was written two years after the Committee against Torture urged the USA to withdraw all its conditions to the ratification of the treaty, including the reservation to Article 16, which it stated was "in violation of the Convention [and] the effect of which is to limit the application of the Convention".[696]

Article 16 also states that: "In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment." Thus, under Article 10, the state must ensure that all its agents are educated and informed about the prohibition on cruel, inhuman or degrading treatment. Article 11 requires the state to keep under systematic review interrogation rules, instructions, methods and practices with a view to preventing any cases of cruel, inhuman or degrading treatment. Under Article 12, the state must ensure prompt and impartial investigation of all allegations of cruel, inhuman or degrading treatment of detainees in any territory under its jurisdiction.

It is quite clear from the various communications that have come into the public domain that far from meeting this obligation, the US administration actively undermined it.

[695] Memorandum for commander, Joint Task Force 170, 11 October 2002, *supra*, note 126.

[696] UN Doc. A/55/44 (199-2000), para. 179(b). The USA attached an identical reservation to its 1992 ratification of the International Covenant on Civil and Political Rights, Article 7 of which also prohibits cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has firmly stated that the US reservation is "contrary to the object and purpose of the treaty" and urged that it be withdrawn. Concluding Observations of the Human Rights Committee, UN Doc. CCPR/C/79/Add.50 (1995), para. 14.

11.3 Geneva Conventions

We expect them to be treated humanely, just like we'll treat any prisoners of theirs that we capture humanely... If not, the people who mistreat the prisoners will be treated as war criminals.

President Bush, after US soldiers captured by Iraqi forces[697]

The US administration's selective approach to the Geneva Conventions has been part of a policy which has sown confusion about interrogation rules among the US armed forces, and given a green light to torture and other cruel, inhuman or degrading treatment or punishment (see pages 9-14). Official investigations have concluded that versions of interrogation techniques developed for use against detainees in Afghanistan and Guantánamo, who by presidential decree became unprotected by the Geneva Conventions, later emerged in Iraq, where the conventions were held by the US government to apply.

Former Secretary of Defense Harold Brown, one of the four members of the Schlesinger Panel, has said that "the underlying context for abuses [in Iraq] was framed by two judgments that were made before combat operations began".[698] One was a failure to plan for detention operations as the possibility of a major insurgency was not foreseen. The second was the decision to reject the Geneva Conventions for those held in Afghanistan and Guantánamo, "which allowed interrogation methods beyond those long customary under Army Field Manual 34-52". Following Secretary Rumsfeld's approval of beyond-doctrine interrogation techniques for use in Guantánamo, "various versions of expanded lists migrated unauthorized to Afghanistan, and to Iraq where the Geneva Conventions continued to apply. That migration of rules (and of personnel) led to confusion about what interrogation practices were authorized and to several changes in directions to interrogators. I believe that was a contributing factor in the abuse of detainees."[699] The Schlesinger Panel as a whole concluded that the "existence of confusing and inconsistent interrogation techniques contributed to the belief that additional interrogation techniques were condoned".

The USA ratified the four Geneva Conventions in 1955. It has signed, but did not ratify, Additional Protocol I to the Geneva Conventions. The USA has recognized the "fundamental guarantees" of Article 75 of Additional Protocol I as reflecting customary international law.[700] In a 22 January 2002 memorandum, the Justice Department advised the White House and the Pentagon that the Geneva Conventions would not apply to "the

[697] President Bush discusses military operation. White House, 23 March 2003.
[698] Dr Harold Brown, written testimony to the Senate Armed Services Committee, 9 September 2004.
[699] *Ibid.*
[700] See USA: *Restoring the rule of law: The right of Guantánamo detainees to judicial review of the lawfulness of their detention.* AI Index: AMR 51/093/2004, June 2004. http://web.amnesty.org/library/Index/ENGAMR510932004

detention conditions of al Qaeda prisoners… We also conclude that customary international law has no binding legal effect on either the President or the military…"[701]

The White House Counsel advised that the President should reject the notion that the USA's selective approach to the Geneva Conventions would put US soldiers at risk, adding that "we can still bring war crimes charges against anyone who mistreats US personnel". Alberto Gonzales has also said that the President's decision "is not controversial within the Executive Branch".[702] There had been controversy, however. The Legal Adviser at the Department of State wrote to the White House Counsel:

> "*The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of* [Department of State] *lawyers and, as far as is known, the position of every other party to the Conventions. It is consistent with UN Security Council Resolution 1193 affirming that 'All parties to the conflict (in Afghanistan) are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions'… A decision that the Conventions apply…demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations… A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts*."[703]

Indeed, the Schlesinger report noted that the Legal Advisor to the Chairman of the Joint Chiefs of Staff and "many service lawyers" were among those who had been concerned that rejecting provisions of the Geneva Conventions would "undermine the United States military culture which is based on a strict adherence to the law of war".[704]

The approach to the Geneva Conventions taken by the US administration in the "war on terror" has flown in the face of, for example, Department of Defense [DoD] directive No. 5100.77 of 9 December 1998.[705] This states that: "It is DoD policy to ensure that: The law of war obligations of the United States are observed and enforced by the DoD Components.[706]

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[701] Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense. Re: *Application of treaties and laws to al Qaeda and Taliban detainees*. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 22 January 2002.

[702] Press briefing by White House Counsel Judge Alberto Gonzales. 22 June 2004, *supra*, note 16.

[703] Memorandum to Counsel to the President. Subject: Comments on your paper on the Geneva Conventions. From: William H. Taft, IV. 2 February 2002.

[704] Final Report of the Independent Panel to Review DoD Detention Operations. August 2004, page 34.

[705] http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf

[706] The directive defines the law of war as: "That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens,

An effective program to prevent violations of the law of war is implemented by the DoD Components. All reportable incidents committed by or against US or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action."[707]

11.4 Ignoring or misusing international expert opinion

In fact, these [international] decisions have found various aggressive interrogation methods to, at worst, constitute cruel, inhuman, and degrading treatment, but not torture.
Justice Department advice to the White House on interrogations[708]

Many of what the August 2002 Justice Department memorandum described as "the wide array of acts that constitute cruel, inhuman or degrading treatment or punishment, but do not amount to torture" – if one were to adopt "an aggressive interpretation of what amounts to torture, leaving that label to be applied only to where extreme circumstances exist" – are listed in the April 2003 final report of the Pentagon Working Group, and have been alleged in Afghanistan, Guantánamo and Iraq.

The August 2002 memorandum cited two court decisions outside the USA to support its apparent endorsement of interrogation techniques since used in the "war on terror". One was a 1978 decision by the European Court of Human Rights finding that although five techniques applied together during the interrogation of prisoners held under emergency legislation in Northern Ireland "undoubtedly amounted to inhuman or degrading treatment… they did not occasion suffering of the particular intensity and cruelty implied by the word torture". [709] The Justice Department's memorandum failed to note that the European Commission on Human Rights had earlier found that the techniques had amounted to torture.[710] The memorandum also ignored that in a subsequent decision, 20 years later, the European Court of Human Rights stated that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future… the increasingly high standard being required in the area of the protection of human

including treaties and international agreements to which the United States is a party, and applicable customary international law."

[707] It defines 'reportable incident' as any "possible, suspected, or alleged violation of the law of war."

[708] Bybee Memorandum, 1 August 2002, *supra*, note 252.

[709] *Ireland v. UK*, 18 January 1978, para. 167. The five techniques involved being hooded, forced to stand leaning with only the fingers touching the wall, subjected to continuous noise and deprived of sleep, food and drink.

[710] *Ireland v. UK*, Report of the Commission, 25 January 1976, Yearbook, p.792. The memorandum also ignored criticism of the European Court's decision by a leading authority on torture who said that the decision involved "unsatisfactory reasoning from an authoritative judicial body". Rodley, Nigel S., 1999, *The treatment of prisoners under international law*, 2nd edition, Oxford, UK, Clarendon Press, page 92. Amnesty International had also criticized the Court's decision at the time.

rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[711]

The second decision cited by the Justice Department memorandum in support of techniques which it said fell short of torture was one handed down by the Supreme Court of Israel in 1999.[712] The case involved interrogation techniques used by that country's General Security Service and included shaking, being forced to sit or stand in a painful position, being forced to squat on the tips of the toes; excessive tightening of handcuffs; hooding; and the playing of extremely loud music; and sleep deprivation. The US Justice Department memorandum said that "while the Israeli Supreme Court concluded that these acts amounted to cruel and inhuman treatment, the court did not expressly find that they amounted to torture". The memorandum is misleading. The Israel court had avoided the question altogether, neither concluding that the techniques amount to torture nor that they did not, nor yet that they did or did not constitute "cruel and inhuman treatment." The Court said that "a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever… Human dignity includes the dignity of the suspect being interrogated." Nevertheless, the Supreme Court of Israel allowed in effect for torture and cruel, inhuman and degrading treatment to be used in "ticking bomb" cases, and determined that the "defence of necessity" would be available to torturers in such cases, a theme which some of the US memorandums picked up, but which both the Committee against Torture[713] and the Human Rights Committee[714] firmly rejected.

The Justice Department memorandum also failed to note that the Committee against Torture has given its opinion on the interrogation techniques used in Israel. The Committee said that the techniques included: "(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill, and are, in the Committee's view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case".[715] The Pentagon Working Group report on interrogations in the "war on terror" also noted that "techniques are usually used in combination".

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[711] *Selmouni v. France*, 28 July 1999, para. 101. An *amicus curiae* brief signed by 175 British parliamentarians in support of justice for the Guantánamo detainees recalled how the UK's response to the Northern Ireland situation was found by the European Court to be disproportionate. The parliamentarians suggested that "such examples stand out as 'a caution that in times of distress the shield of military necessity and national security must not be used to protect government institutions from close scrutiny and accountability'".

[712] *The Public Committee Against Torture in Israel v. The Government of Israel et al., Taq-El (3), ruling of 6 September 1999.*

[713] UN Doc. A/57/44 (2001-2002), para. 53(i).

[714] Concluding observations of the Human Rights Committee: Israel. UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 18.

[715] UN Doc. A/52/44, paras 253-260, 9 May 1997.

The thinking shown in the August 2002 memorandum was displayed two months later when a military lawyer recommended approval of interrogation techniques requested for use at Guantánamo. She noted that the "British authorities developed practices of interrogation such as forcing detainees to stand for long hours, placing black hoods over their heads, holding the detainees prior to interrogation in a room with continuing loud music, and depriving them of sleep, food and water". She noted that the European Court had found that such techniques had not amounted to torture, and herself went on to recommend approval of techniques including stress positions, stripping, hooding, isolation, sensory deprivation, use of dogs to inspire fear, "the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family", "exposure to cold weather or water", and the "use of a wet towel and dripping water to induce the misperception of suffocation".[716]

Hooding

The US authorities have chosen to ignore various decisions and recommendations of international bodies and experts. For example, the USA has routinely used hooding or blindfolding of detainees, both during transportation and interrogation. Secretary of Defense Rumsfeld authorized hooding as an interrogation technique in Guantánamo. Yet the UN Committee against Torture has said that blindfolding during interrogation "should be expressly prohibited".[717] The UN Special Rapporteur on torture has stated: "The practice of blindfolding and hooding often makes the prosecution of torture virtually impossible, as victims are rendered incapable of identifying their torturers. Thus, blindfolding or hooding should be forbidden."[718] An Iraqi detainee in Abu Ghraib, Kasim, said on 18 January 2004 to investigators: "The transfer from Camp B to the Isolation was full of beatings, but the bags were over our heads, so we couldn't see their faces". Another Abu Ghraib detainee told investigators that a US soldier "started beating me, him, and five other American police. I could see their feet only, from under the bag".[719]

In its February 2004 report, the ICRC found allegations of systematic abuses, some of them "tantamount to torture". It noted that the USA's practice of hooding was "used to prevent people from seeing and to disorient them, and also to prevent them from breathing freely. One or sometimes two bags, sometimes with an elastic blindfold over the eyes which, when slipped down, further impeded proper breathing. Hooding was sometimes used in conjunction with beatings thus increasing anxiety as to when blows would come. The practice of hooding also allowed the interrogators to remain anonymous and thus to act with impunity." In Camp Umm Qasr and its predecessor Camp Bucca, the ICRC found that hooding was "part of standard intimidation techniques used by military intelligence personnel to frighten inmates into cooperating".

[716] Memorandum for commander, Joint Task Force 170, 11 October 2002, *supra*, note 126.
[717] UN Doc. A/48/44/Add. 1 para. 48(a). (Report on Turkey).
[718] UN Doc. E/CN.4/2002/76, 27 December 2001, Annex 1.
[719] Translations of sworn statements given to military investigators.
http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151108.pdf and
http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/10.pdf

The UK authorities – the government whose past practices the US administration's memorandums cited in justifying, *inter alia*, the use of hooding – have suggested that hooding during interrogation violates the Geneva Conventions: "Interviews of detainees conducted or observed by UK intelligence personnel have, with the following exception, been conducted in a manner consistent with the principles laid down in the Geneva Convention. In June 2003, two [censored] interviewed an Iraqi detainee [censored] at [censored]. The detainee was brought in hooded and shackled by the US military, and remained so during the one-hour interview. The [censored] understood these measures to be for security purposes, and did not report it at the time since they were not then aware that hooding was unacceptable."[720] In addition, the UK authorities have also told Amnesty International that:

> "*It is UK policy that interviews are carried out well within the terms of the Geneva Conventions. UK Military Interrogators are trained to a high standard in methods of questioning. The Joint Service Intelligence Organisation's Training Documentation states that the following techniques are expressly and explicitly forbidden*:
>
> - *Physical punishment of any sort (beatings etc.);*
> - *The use of stress privation;*
> - *Intentional sleep deprivation;*
> - *Withdrawal of food, water or medical help;*
> - *Degrading treatment (sexual embarrassment, religious taunting, etc.);*
> - *The use of 'white noise';*
> - *Torture methods such as thumb screws etc*".[721]

Except for the latter technique, all these methods have allegedly been used by US agents during the "war on terror".

11.5 Optional Protocol to the UN Convention against Torture

The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Article 1, Optional Protocol to the UN Convention against Torture

In 2002, the USA attempted to block the adoption of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Protocol will establish a system of both regular visits to places of detention by an

[720] Intelligence and Security Committee, Annual Report 2003-2004, para. 78, page 23. http://www.cabinetoffice.gov.uk/publications/reports/intelligence/annualir0304.pdf.

[721] *Iraq: UK Ministry of Defence Response to Amnesty International, 30 June 2004*. Attachment to a letter to AI Secretary-General Irene Khan from The Rt Hon Adam Ingram MP, 1 July 2004.

international body of experts, and sustained regular visits conducted by national visiting bodies.

The vast majority of states from Africa, Asia, Europe and Latin America, gave their support to the Optional Protocol. It was adopted by 104 votes in favour and only eight against. A proposal by the USA that would have effectively denied many developing countries the opportunity to join this initiative was defeated. The USA and Japan had sought to make states which ratify the Optional Protocol solely responsible for the costs of the instrument, rendering effective torture prevention a privilege only for wealthy states. The proposal was contrary to the long-standing practice of funding all human rights mechanisms from the UN regular budget.

The Optional Protocol was formally adopted at the UN General Assembly on 18 December 2002. It was opened for signature from 4 February 2003. As of 1 October 2004, 29 states had signed the Protocol and four had become states parties.[722] The USA has neither signed nor acceded to the Protocol. It should do so, and show its commitment to eradicating torture and cruel, inhuman or degrading treatment or punishment from any facilities under its jurisdiction and control, as well as facilitate the operation of mechanisms which the international community believes would be effecting in bringing about such eradication.

11.6 International Criminal Court

The Rome Statute established the International Criminal Court and criminalized inhumane treatment, unlawful deportation and imprisonment. The United States not only failed to ratify the Rome Statute, but also later withdrew from it.

Legal advice to Pentagon recommending approval of harsh interrogation techniques[723]

The USA is opposed to the International Criminal Court. Although President Clinton signed the Rome Statute of the ICC just before he left office, the Bush administration has made it clear that it will not ratify it and therefore does not consider itself bound under international law not to undermine its object and purpose.[724]

The US Justice Department reminded the White House in August 2002 that "[a]lthough President Clinton signed the Rome Statute, the United States has withdrawn its signature from the agreement… effectively terminating it. The United States, therefore, cannot be bound by the provisions of the ICC Treaty nor can US nationals be subject to ICC prosecution." The memorandum advised that, even if the ICC "could in some way act upon the United States and its citizens, interrogation of an al Qaeda operative could not constitute a crime under the Rome Statute." The memorandum argued that "[e]ven if certain interrogation methods being contemplated amounted to torture", the ICC would not have jurisdiction

[722] Albania, Denmark, Liberia, Malta, UK.

[723] Memorandum for commander, Joint Task Force 170, 11 October 2002, *supra*, note 126.

[724] In May 2002, the USA wrote to the UN Secretary-General that it "does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000". The only other government to take this approach is that of Israel which also signed the Rome Statute on 31 December 2000, but has since stated its intention not to ratify it.

because the crimes would not amount to crimes against humanity and would not constitute war crimes because President Bush "has appropriately determined that al Qaeda members are… not entitled to the protections of any of the Geneva Conventions." The memorandum concluded that although the USA's "war on terror" interrogations "cannot fall within the jurisdiction of the ICC… it would be impossible to control the actions of a rogue prosecutor or judge…We cannot predict the political actions of international institutions".[725]

Even as the USA has waged its "war on terror", it has been pressurizing governments around the world to enter into impunity agreements which commit them not to surrender to the ICC any US nationals accused of genocide, crimes against humanity or war crimes. The April 2003 final report of the Pentagon Working Group on Detainee Interrogations in the Global War on Terrorism advises that some states with whom the USA has not entered into such agreements may "perceive certain interrogation techniques to constitute torture or inhuman treatment". Such states, the Working Group says, "may attempt to use the Rome Statute to prosecute individuals found in their territory responsible for such interrogations. In such cases, the US Government will reject as illegitimate any attempt by the ICC, or a state on its behalf, to assert the jurisdiction of the Rome Statute over US nationals without the prior express consent of the United States".[726]

11.7 Recommendations under Point 11

The US authorities should:

- Make a public commitment to fully adhere to international human rights and humanitarian law and standards – treaties, other instruments, and customary law – and respect the decisions and recommendations of international and regional human rights bodies;
- Make a public commitment to fully adhere to the Geneva Conventions, and to respecting the advice and recommendations of the International Committee of the Red Cross;
- Ratify Additional Protocols I and II to the Geneva Conventions;
- Withdraw all conditions attached to the USA's ratification of the UN Convention against Torture;
- Provide the USA's overdue second report to the Committee against Torture, as requested by the Committee;
- Withdraw all limiting conditions attached to the USA's ratification of the International Covenant on Civil and Political Rights;
- Provide the USA's overdue reports to the Human Rights Committee;

[725] Letter to Alberto Gonzales, Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.
[726] Pentagon Working Group report, *supra*, note 56.

- Ratify the Optional Protocol to the UN Convention against Torture;
- Ratify the UN Convention on the Rights of the Child;
- Ratify the American Convention on Human Rights;
- Ratify the Inter-American Convention on Forced Disappearance of Persons without any reservations and implement it by making enforced disappearances a crime under US law over which US courts have jurisdiction wherever committed by anyone.
- Ratify the Rome Statute of the International Criminal Court.

Point 12 – Exercise international responsibility

Governments should use all available channels to intercede with the governments of countries where torture is reported. They should ensure that transfers of training and equipment for military, security or police use do not facilitate torture. Governments must not forcibly return a person to a country where he or she risks being tortured.

12.1 International security cooperation or outsourcing torture?

Under the name 'extraordinary rendition', the CIA reportedly sends terrorism suspects, sometimes on the flimsiest of evidence, to foreign countries that are known to employ torture in prisoner interrogation… Extraordinary rendition is outsourcing torture, and it is morally repugnant to allow such a practice to continue.

Edward Markey, Member of US Congress, 24 June 2004[727]

Governments have a duty to protect the safety of the public, to investigate crime and to bring those responsible to justice. Amnesty International recognizes that governments will need to cooperate to this end where the threats or crimes in question cross national boundaries. Human rights and respect for international law must be at the centre of the search for justice and security, however.

Recent evidence that the USA is not exercising its international human rights responsibilities to oppose and expose torture came from the former UK ambassador to Uzbekistan. The ambassador had protested to the UK Foreign Office about torture in Uzbekistan and that information obtained under torture was being passed by the Uzbek authorities to the USA, specifically the Central Intelligence Agency, and thence to the UK. In a leaked UK Foreign Office report, Ambassador Craig Murray reportedly stated: "Tortured dupes are forced to sign confessions showing what the Uzbek government wants the US and UK to believe – that they and we are fighting the same war against terror… This is morally, legally and practically wrong".[728] The ambassador was subsequently dismissed from his post.

[727] *Markey introduces legislation to prevent the US from transferring prisoners to nations known to practice torture.* News release (from Ed Markey's congressional office), 23 June 2004.
[728] *Intelligence from tortured Uzbeks attacked.* Financial Times (UK), 11 October 2004.

Also of deep concern is that the USA has instigated or involved itself in transfers of detainees between itself and other countries that bypass human rights protections and the rule of law. The USA refers to these transfers as "renditions".[729] The UN Special Rapporteur on torture has recently expressed serious concern about such transfers.[730]

Article 3 of the UN Convention against Torture states that no State Party shall expel, return or extradite a person to another State where there are "substantial grounds for believing that he would be in danger of being subjected to torture". The USA conditioned its ratification of the Convention on the understanding that, under Article 3, the phrase "substantial grounds" means "if it is more likely than not" that someone would be tortured. This unilateral interpretation of Article 3 places a higher burden of proof on the individual seeking protection than is intended under the treaty. This is clear from the general comment by the Committee against Torture which states that, in assessing whether a claim meets the test under Article 3, the risk of torture must go "beyond mere theory or suspicion" but "*does not have to meet the test of being highly probable*" (emphasis added).[731]

Three years after the Committee against Torture asked the US government to remove all its conditions to its ratification of the Convention, in June 2003, the government made it clear that it was maintaining its position on Article 3. Faced with concern over transfers of detainees to other countries, the authorities gave assurances that:

> "*the United States does not 'expel, return (refouler) or extradite' individuals to other countries where the US believes it is 'more likely than not' that they will be tortured. Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, the United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. We can assure you that the United States*

[729] The USA has built on a pre-existing policy of "renditions" in its "war on terror". In 1990, for example, Mexican national Humberto Álvarez-Machaín, wanted in the USA for his alleged involvement in the murder of a federal agent, was abducted from Mexico by agents working for the US. In 1993, the UN Working Group on Arbitrary Detention concluded that the abduction had been an arbitrary detention – a violation of international law. Yet, in 1997, Mir Aimal Kasi, a Pakistan national, was abducted from a hotel room in Pakistan by FBI agents, and taken off in handcuffs, shackled, hooded and gagged. Within 48 hours he was on a plane to the USA with the FBI, who turned him over to the authorities in Virginia, where he was wanted for the murder of a CIA employee. Mir Kasi was sentenced to death by an all-white jury and executed in 2002.

[730] "The Special Rapporteur is seriously concerned about an increase in practices that undermine this principle [of *non-refoulement* where there is a risk of torture]. One such practice is for the police authorities of one country to hand over persons to their counterparts in other countries without the intervention of a judicial authority and without any possibility for the persons concerned to contact their families or their lawyers. The Committee against Torture, while recognizing the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose, found that practice to be in violation of article 3 of the Convention as well as of the right to due process." A/59/324, para. 29.

[731] *M.R.P. v. Switzerland*, Communication no. 122/1998, Views of the Committee against Torture, UN Doc. CAT/C/25/D/122/1998, 24 November 2000, para. 6.4.

would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honoured".[732]

As with the guarantees given by this administration about its commitment to the humane treatment of detainees in the "war on terror", even this qualified assurance must be treated with some scepticism. For there is mounting evidence of US involvement in numerous transfers between itself and other countries which raise serious human rights concerns relating to the prohibition on arbitrary detention, the right to a fair trial, and the right to be protected from torture and cruel, inhuman or degrading treatment. From early in the "war on terror" there have been allegations of secret transfers of detainees. In March 2002, for example, it was alleged that "dozens of people" had been transferred by the USA to countries where they could be interrogated. In some cases, it was alleged that US intelligence agents remained closely involved in the interrogation.[733] In April 2002, it was reported that "Egyptian and Jordanian jails recently received scores of Arab prisoners affiliated with the *al-Qa'ida* organization after the United States had decided to transfer them from Afghanistan".[734]

Cases involving secret transfers of detainees to or from US custody include:

- Maher Arar, a Canadian/Syrian national, was transferred from US custody to Syria via Jordan in October 2002. He was allegedly subjected to severe torture in Syria and held for months in cruel, inhuman and degrading conditions.[735]
- Yemeni national Jamil Qasim Saeed Mohammed was reportedly handed over to US custody by Pakistan agents on 26 October 2001 and flown out of Karachi International Airport in secret aboard a US Gulfstream jet. He was reportedly taken to Jordan. His current whereabouts are unknown. Amnesty International has never received a response to its requests to the US authorities for information on the case.[736]
- Moazzam Begg was seized by Pakistan and US agents from his flat in Islamabad in Pakistan on 31 January 2002 and taken away in the boot of a car. Despite a *habeas corpus* appeal pending in a Pakistan court, he was transferred to US custody in Bagram air base in Afghanistan, and from there to Guantánamo Bay where he remains. In a letter sent from Guantánamo, dated 12 July 2004 and copied to Amnesty

[732] Letter to US Senator Patrick J. Leahy from William J. Haynes, General Counsel of the Department of Defense, 25 June 2003.
[733] *US behind secret transfer of terror suspects*. Washington Post, 11 March 2002.
[734] *Scores of al-Qa'ida Arab prisoners reportedly flown to Egypt, Jordan*. BBC, citing text of a report carried in Jordanian weekly, Al-Majd on 1 April 2002.
[735] Page 31, *USA: The threat of a bad example*, supra, note 95.
[736] Amnesty International has raised this case with the USA in its *Memorandum to the US Attorney General Amnesty International's concerns relating to the post 11 September investigations*, AI Index: AMR 51/170/2001, November 2001, http://web.amnesty.org/library/Index/ENGAMR511702001; and its April 2002 *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AMR 51/053/2002, http://web.amnesty.org/library/Index/ENGAMR510532002.

International, Moazzam Begg alleges that in Afghanistan he was "physically abused, and degradingly stripped by force, then paraded in front of several cameras toted by US personnel". He writes that he was denied natural light and fresh food for a year in Bagram before being transferred to Guantánamo where he was subsequently held in indefinite solitary confinement.[737]

- In June 2003, five men – Turkish nationals Ibrahim Habaci and Arif Ulusam, Saudi national Faha al Bahli, Sudanese national Mahmud Sardar Issa, and Khalifa Abdi Hassan of Kenya – were arrested and held incommunicado at an undisclosed location in Malawi. Shortly after a court ordered that they should be brought before it, they were secretly transferred out of the country. Although the USA denied involvement in the arrests, an official of the Malawian government wrote to Amnesty International that "the arrests were not done by the Malawi Police but by the National Intelligence Bureau and the USA Secret Agents who controlled the whole operation. From the time the arrests were made, the welfare of the detainees, their abode and itinerary for departure were no longer in the hands of the Malawian authorities… In Malawi we do not know where these people are but they are in hands of the Americans who took them out of the country using a chartered aircraft. They should now be going through investigations at a location only known by the USA." At the end of July, it was reported that the five had been taken to Zimbabwe and held there for a month before being sent to Sudan where they were released, apparently after no evidence was found linking them to *al-Qa'ida*.[738]
- Riduan Isamuddin, also known as Hambali, an Indonesian national, was arrested on 11 August 2003 in Thailand. The US authorities subsequently confirmed that he was in their custody, but refused to say where.[739] Amnesty International has received no clarification from the US authorities on the case following the organization's urgent appeal.[740] President Bush referred to the detainee as a "known killer" and a "lethal terrorist", but Hambali remains detained incommunicado without charge in an undisclosed location.[741]
- In January 2002 Muhammad Saad Iqbal Madni, an Egyptian/Pakistan national, was reportedly arrested in Indonesia at the behest of the CIA. Two days later, without having had access to a lawyer or to the courts, he was reportedly put aboard a US-registered Gulfstream jet and flown to Egypt.[742]
- Mohammed Haydar Zammar, a Syrian-born German national, was arrested in Morocco in November 2001 and secretly transferred to Syria two weeks later where he was allegedly tortured. US agents allegedly took part in his interrogation in

[737] Letter from Moazzam Begg, *supra*, note 74.
[738] Page 29-30, *USA: Threat of a bad example*, supra, note 95.
[739] *Press Gaggle by Scott McClellan and a Senior Administration Official*, 14 August 2003.
[740] http://web.amnesty.org/library/Index/ENGAMR511192003.
[741] *Global message*. President's remarks on 18 August 2004. White House.
[742] *US behind secret transfer of terror suspects*. Washington Post, 11 March 2002.

Morocco and allegedly knew that he would be transferred to Syria.[743] Three years later, he was still held in incommunicado solitary confinement in appalling conditions in a tiny cell in a Syrian military intelligence facility. Amnesty International was very concerned for his health and well-being.[744]

- Jamal Mar'i, a Yemen national, was reportedly arrested in Pakistan by US agents and held in Jordan for several weeks or months before transfer to Guantánamo.[745]
- Bisher Al-Rawi, an Iraqi national legally resident in the UK, and Jamil Al-Banna, a Jordanian national with refugee status in the UK, were arrested in the Gambia in November 2002. US agents took part in their interrogation during which time they were allegedly threatened. After two months in incommunicado detention they were secretly transferred to Bagram, and later to Guantánamo Bay where they remain.[746]
- Bansayah Belkacem, Lahmar Saber, Mustafa Ait Idir, Hadj Boudellaa, Lakhdar Boumediene and Mohamed Nechle are Algerian nationals who were seized by US officials in Bosnia-Herzegovina on 18 January 2002 in violation of an order by the Human Rights Chamber for Bosnia and Herzegovina. The representative in Bosnia-Herzegovina for the UN High Commissioner for Human Rights characterized the case as one of "extrajudicial removal from sovereign territory". The detainees were subsequently transferred to Guantánamo Bay where they remain.[747] President Bush referred to the case in uncritical fashion in his State of the Union address on 29 January 2002, displaying a disturbing lack of respect for the presumption of innocence: "Our soldiers…seized terrorists who were plotting to bomb our embassy". The six detainees remain detained without charge or trial after more than 30 months.
- Mamdouh Habib, an Australian detainee, arrested in Pakistan, was transferred to Guantánamo via Egypt and Afghanistan.[748] He was allegedly subjected to torture in Egypt.[749] At the time of writing, he was still held without charge or trial in Guantánamo Bay.
- Numerous detainees, including five Kuwaitis, were transferred out of custody in Pakistan into US custody in late 2001 and flown to the US air base in Kandahar. This was despite a *habeas corpus* petition pending in the Peshawar High Court.[750]

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[743] *Al Qaeda recruiter reportedly tortured*. Washington Post, 31 January 2003.
[744] *Syrian-born German held three years without charge in rat-infested Syrian 'tomb'*. AI Index: MDE 24/066/2004, 8 October 2004. http://web.amnesty.org/library/Index/ENGMDE240662004
[745] Affidavit of Nabil Mohamed Mar'i, 10 April 2004, Sana'a, Yemen, *supra*, note 406.
[746] Page 33, *USA: The threat of a bad example*, *supra*, note 95.
[747] Page 35, *USA: The threat of a bad example*, *supra*, note 95.
[748] *Habib v. Bush*, Brief for Appellants (consolidated cases). United States Court of Appeals for the District of Columbia Court. Appeals from the United States District Court for the District of Columbia, 24 September 2002.
[749] For example, *Downer rejects medic call on US detainees*. The (Melbourne) Age, 24 May 2004.
[750] See *Pakistan: Transfers to US custody without human rights guarantees*, AI Index: ASA 33/014/2002, June 2002. http://web.amnesty.org/library/Index/ENGASA330142002.

- Egyptian asylum-seekers, Ahmed Hussein Mustafa Kamil 'Agiza and Muhammad Muhammad Suleiman Ibrahim El-Zari were forcibly deported from Sweden to Egypt on board a US government-leased Gulfstream jet in the custody of about six masked security agents.[751] Before putting them on the plane, the latter had reportedly cut off the two men's clothes with scissors, changed them into red overalls and handcuffed and shackled them. They "were very quiet" according to a Swedish police officer, who was unable to distinguish their nationality. "When they gave orders to each other, they kept their voices down. It seemed like they had done this before."[752]
- German national of Lebanese origin Khalid El Masri alleges that he was detained in Macedonia on 31 December 2003 and held incommunicado by unidentified individuals before being taken, blindfolded and handcuffed, to a location where he could hear aeroplanes. He says that he was stripped of his clothing by having them cut from his body. When his blindfold was removed he says he saw six masked men in black, and that he was given a diaper and blue track suit to wear, handcuffed and shackled, and taken to a plane. He was flown to custody in Afghanistan, he believes, where he was interrogated, including by people he believes were US agents, while held incommunicado detention at an unknown location. He says that he was held until late May 2004 before being flown back to Europe and to Germany. In August 2004, Amnesty International wrote to the US authorities asking for information on this case. By early October 2004, the organization had not received a reply.
- Pakistan national Saifullah Paracha had been scheduled to fly to Thailand for a business meeting on 5 July 2003. He rang his daughter from Karachi airport just before boarding his flight but he never arrived at the meeting. For the next month his family had no idea of his whereabouts. His wife's inquiries with the Thai and Pakistan authorities met with no success. Then after a month the family heard on NBC News that Saifullah Paracha had been detained by US authorities. Subsequently his wife received a letter via the International Committee of the Red Cross explaining that her husband was in US custody at Bagram air base in Afghanistan.[753]

In July 2004, an article by US law professor John Yoo was published in which he wrote that the UN Convention against Torture "is generally inapplicable to transfers effected in the context of the current armed conflict because it has no extraterritorial effect (except in the case of extradition) and, hence, cannot apply to al Qaeda and Taliban prisoners detained outside of US territory at Guantanamo Bay or in Afghanistan."[754] In 2002, then a Deputy Assistant Attorney General in the US Justice Department, John Yoo co-authored more than one of the government memorandums that have come to light since the revelations of torture

[751] See *Sweden: Concerns over the treatment of deported Egyptians*. AI Index: AMR 51/42/001/2004, 28 May 2004, http://web.amnesty.org/library/Index/ENGEUR420012004
[752] *A secret deportation of terror suspects*. Washington Post, 25 July 2004. The Gulfstream jet, which was allegedly involved in another rendition from Pakistan, was reported to be registered to a Massachusetts company owning two aircraft with permits to land at US military bases around the world.
[753] AI Worldwide Appeal. http://web.amnesty.org/appeals/index/afg-010704-wwa-eng
[754] John Yoo, *Transferring terrorists*. 79 Notre Dame Law Review, 1183, 1229 (2004).

and ill-treatment against detainees in Abu Ghraib.[755] There are reported to be government memorandums advising that US authorities could benefit with impunity from information extracted under torture in other countries if it could be shown that the detainees in question were not formally in US custody.[756] The Senate Judiciary Committee has requested to be provided with a copy of one such document, but by 13 October 2004, the administration had not done so.[757]

12.2 Double standards – setting a bad example

Because the promotion of human rights is an important national interest, the United States seeks to hold governments accountable to their obligations under universal human rights norms and international human rights instruments…

US State Department[758]

Each year the US State Department issues reports on human rights practices in other countries. Under each entry there is a section on "torture and other cruel, inhuman or degrading treatment or punishment". These entries show that the USA has been practicing what it condemns in other countries. Examples from the latest report[759] include:

- China: "prolonged periods of solitary confinement, incommunicado detention, beatings, shackles, and other forms of abuse."
- Egypt: "Principal methods of torture reportedly employed by the police and the SSIS included victims being: stripped and blindfolded…"
- Indonesia: "psychological torture cases reportedly included food and sleep deprivation, sexual humiliation".
- Iran: "Some prisoners were held in solitary confinement or denied adequate food or medical care to force confessions."
- Jordan: "The most frequently reported methods of torture included beatings; sleep deprivation, extended solitary confinement, and physical suspension."

[755] For example: "[W]e concluded that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of al Qaeda or Taliban prisoners. We also conclude that customary international law has no binding legal effect on either the President or the military…". John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel. *Application of Treaties and Laws to al Qaeda and Taliban Detainees*. Memorandum for William J. Haynes II, General Counsel, Department of Defense. 9 January 2002.

[756] *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004.

[757] Described as: Memorandum from the Department of Justice, *Re: Liability of interrogators under the Convention against Torture and the Anti-Torture Act when a prisoner is not in US custody*.

[758] http://www.state.gov/g/drl/hr/

[759] Country Reports on Human Rights Practices – 2003. Released by the Bureau of Democracy, Human Rights, and Labor, 25 February 2004. http://www.state.gov/g/drl/rls/hrrpt/2003/index.htm

- Burma (Myanmar): "They routinely subjected detainees to harsh interrogation techniques designed to intimidate and disorient. There were reports in past years that prisoners were forced to squat or assume stressful, uncomfortable, or painful positions for lengthy periods."
- Pakistan: "sexual assault; prolonged isolation…denial of food or sleep…public humiliation."
- Turkey: "Human rights observers said that, because of reduced detention periods, security officials mostly used torture methods that did not leave physical traces, including repeated slapping; exposure to cold; stripping and blindfolding; food and sleep deprivation; threats to detainees or family members..."

Some of the entries reveal a breathtaking level of hypocrisy. The State Department's entry on Cuba, for example, includes:

> *Prisoners sometimes were held in "punishment cells", which usually were located in the basement of a prison, were semi-dark all the time, had no water available in the cell, and had a hole for a toilet. No reading materials were allowed, and family visits were reduced to 10 minutes from 1 or 2 hours. There was no access to lawyers while in the punishment cell.*

In the US Naval Base in Guantánamo Bay in Cuba during the same year, 2003, hundreds of men were held without access to lawyers or to families. At least six detainees have been held in isolation for many months in windowless cells of Camp Echo (see Point 4.2). Many detainees are reported to have been placed in isolation in punishment cells and had their "comfort items" removed. One detainee, for example, has recalled:

> "*During my time in Guantanamo Bay I did about a year and three months in the isolation block. I was sent there for various reasons. One was that I would refuse to give them back the food after they did not give me enough time to eat it. They would give you food and then try to collect it five minutes later. The absolute maximum you were allowed to have the food was thirty minutes. I would be eating at my pace and wouldn't give it back to them and then because of this refusal they put me in isolation. Other things for which I was punished also included speaking in isolation since you were able to speak to the person next to you. I was also punished for translating for other people who were complaining from Arabic to English since my Arabic became quite good.*"[760]

The State Department's entry on Iraq, referring to the period before the US-led invasion in March 2003, listed "extended solitary confinement in dark and extremely small compartments" among the torture techniques. The latter was one of the torture techniques used in Iraq that the US government cited in its build up to the invasion of that country.[761]

[760] Witness statement of Tarek Dergoul in the case of *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 69, 21 May 2004.
[761] *A Decade of Deception and Defiance, supra,* note 12.

The State Department did not mention that in the second half of 2003, the occupying US forces were doing the same. In its February 2004 report, the ICRC stated that:

> *Several military intelligence officers confirmed to the ICRC that it was part of the military intelligence process to hold a person deprived of his liberty naked in a completely dark and empty cell for a prolonged period to use inhumane and degrading treatment, including physical and psychological coercion, against persons deprived of their liberty to secure their cooperation…*
>
> *Since June 2003, over a hundred 'high value detainees' have been held for nearly 23 hours a day in strict solitary confinement in small concrete cells devoid of daylight… Most had been subject to this regime for the past five months.*

Concern about such unlawful treatment of these detainees is heightened by the fact that many were reported to be "in poor physical health, and more advanced in age than the typical detainee population".[762]

A July 2002 report sponsored by the non-partisan US think tank, the Council on Foreign Relations, concluded that the US government was failing to counter the fact that "around the world, from Western Europe to the Far East, many see the United States as arrogant, hypocritical, self-absorbed, self-indulgent, and contemptuous of others".[763] On the day of publication, the White House responded that it would set up an Office of Global Communications to play a coordinating role in countering such perceptions. As the President's spokesman put it, "better coordination of international communications will help America to explain what we do and why we do it around the world."[764] Amnesty International pointed out that "in the area of human rights, at least, the USA will need to move beyond public relations and into substantive change if it wishes to improve its reputation abroad".[765]

12.3 Recommendations under Point 12

The US authorities should:

- Withdraw the USA's understanding to Article 3 of the UN Convention against Torture, and publicly state the USA's commitment to the principle of *non-refoulement,* and ensure that no legislation undermines this protection in any way;
- Cease the practice of "renditions" that bypass human rights protections; ensure that all transfers of detainees between the USA and other countries fully comply with international human rights law.

[762] Ryder report, page 26, *supra*, note 510.
[763] *Public diplomacy: A strategy for reform.* A report of an Independent Task Force on Public Diplomacy sponsored by the Council on Foreign Relations. 30 July 2002.
[764] Ari Fleischer, White House press briefing, 30 July 2002.
[765] *USA: Human rights v. public relations.* AI Index: AMR 51/140/2002, 24 August 2002. http://web.amnesty.org/library/Index/ENGAMR511402002.

Conclusion

The United States condemns unequivocally the despicable practice of torture. We have fought to eliminate it around the world. Political will is critical. The United States has led international efforts to put pressure on governments to publicly condemn torture; enact legislation; investigate and prosecute abusive officials; train law enforcement officers and medical personnel, and provide compensation and rehabilitation for victims.
US State Department, November 2002[766]

Less than a month after the US State Department issued the above "fact sheet", the Secretary of Defense authorized interrogation techniques for use in Guantánamo that flew in the face of the USA's claims to be leading the global struggle against torture. A few months later, variations on those techniques emerged in combination in Abu Ghraib prison in Iraq. Such methods have also been used by US personnel in Afghanistan. Yet the US administration still claimed that what happened at Abu Ghraib was an aberration. Although subsequent military investigations have shown that alleged US abuses have not been confined either to Abu Ghraib or to a few soldiers, there remains a need for a full commission of inquiry that takes a genuinely comprehensive and independent look at the USA's "war on terror" detention and interrogation policies and procedures, and examines the activities of all government agencies and all levels of government. Full accountability is crucial.

Amnesty International regrets that the US administration has failed to put human rights at the heart of its response to the crime against humanity that occurred in the USA on 11 September 2001. Notably, among the recommendations of the 9/11 Commission into the attacks were that the United States must in future "offer an example of moral leadership in the world", be "committed to treat people humanely", and "abide by the rule of law".

The atrocities of 11 September 2001 have been compared to the Japanese attack on the US fleet in Pearl Harbour in Hawaii 60 years earlier. Within weeks of that attack, the Attorney General of California, Earl Warren, had become a strong supporter of internment of Japanese Americans. Earl Warren later became Governor of California, and was the Republican Party's vice-presidential nominee in 1948. In 1953 he was appointed by President Eisenhower to the post of Chief Justice of the US Supreme Court, a position he held until 1969. In his autobiography, Earl Warren recalled with regret his role in the removal of Japanese Americans to internment camps, an episode now widely viewed as a stain on US history. He wrote: "I have since deeply regretted the removal order and my own testimony advocating it… It was wrong to react so impulsively without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state. It demonstrates the cruelty of war when fear, get tough military psychology, propaganda, and racial antagonism combine with one's responsibility for public security to produce such acts".[767]

[766] *The United States' Commitment To Fight Torture.* US State Department, 4 November 2002.
[767] *The Memoirs of Earl Warren* (1977). Quoted in *A Prison Beyond the Law*, by Joseph Margulies. Virginia Quarterly Review, July 2004. Joe Margulies was lead counsel for the plaintiff in *Rasul v. Bush*.

Judge Richard Goldstone, a justice on the Constitutional Court of South Africa, and former chief prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, has said that he believes "that a future American President will have to apologise for Guantánamo." He also said that detention and interrogation techniques allegedly used by the USA in Afghanistan, and since elsewhere, would constitute torture under the UN Convention against Torture.[768] On 6 May 2004, President Bush offered an apology for the humiliation suffered by Iraqi prisoners in Abu Ghraib and their families, but his administration continued to pursue its unlawful detention policies in Guantánamo and elsewhere, to the distress of those held and their relatives, and to the detriment of the rule of law.

A detainee's right to appear before a court is a fundamental safeguard against arbitrary arrest, "disappearance" and torture. Yet after the US Supreme Court's landmark *Rasul v. Bush* decision in June 2004 that the US courts have jurisdiction over the Guantánamo detainees, the administration has sought to curtail the impact of that decision, even as allegations of torture and ill-treatment in Guantánamo have continued to emerge. In similar vein, even after all the post-Abu Ghraib investigations, it is not clear what interrogation policies are being applied where. What is known, however, is that practices including incommunicado and secret detention are still in place. In *Rasul*, the Supreme Court said that indefinite executive detention without access to counsel was "unquestionably" illegal.[769] So, too, are torture and cruel, inhuman or degrading treatment, which such policies facilitate.

Thirty years ago, Amnesty International wrote, and writes again now:

> "*Cancer is an apt metaphor for torture and its spread through the social organism. The act of torture cannot be separated from the rest of society; it has its consequences, it degrades those who use it, those who benefit from it, and it is the most flagrant contradiction of justice, the very ideal on which the state wishes to base its authority... Just as states that say to give in to terrorism is to invite the loss of many more lives, so to give in to the use of torture is to invite its spread and the eventual debasement of the whole society. Torture is never justified. The absolute prohibition on torture is the only acceptable policy. The system that uses it only mocks any noble ends it might profess... Torture is the ultimate human corruption.*"[770]

In his November 2003 speech on the Guantánamo detentions cited at the beginning of this report, senior UK judge Lord Steyn advised that "in order to understand and to hold governments to account we do well to take into account the circles of history".[771]

By learning the lessons of history we make it less likely that we will repeat our mistakes. To authorize, commit or turn a blind eye to torture or cruel, inhuman or degrading treatment is always a mistake.

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[768] *Inside Guantánamo*. BBC TV, Panorama, 5 October 2003.
[769] *Rasul et al. v. Bush et al.*, No. 03-334, decided 28 June 2004. Footnote 15.
[770] *Report on Torture*, Amnesty International, 1973.
[771] Guantánamo Bay: The legal black hole. Johan Steyn, 27th F.A. Mann Lecture, 25 November 2003.

Compilation of recommendations under 12-Point Program

Amnesty International continues to call for a commission of inquiry, fully independent of government, into all aspects of the USA's "war on terror" detentions, with a view to achieving full accountability for any human rights violations that have occurred. Meanwhile, in order to prevent further such abuses, Amnesty International urges the government to consider the organization's 12-point program against torture and to put in place policies and practices which reflect the absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment.

Amnesty International's recommendations to the US authorities based on the organization's 12-Point Program for the Prevention of Torture by Agents of the State

1. Condemn torture

The highest authorities of every country should demonstrate their total opposition to torture. They should condemn torture unreservedly whenever it occurs. They should make clear to all members of the police, military and other security forces that torture will never be tolerated.

The US authorities should:

- Provide a genuine, unequivocal and continuing public commitment to oppose torture *and* cruel, inhuman or degrading treatment under any circumstances, regardless of where it takes place, and take every possible measure to ensure that all agencies of government and US allies fully comply with this prohibition;
- Review all government policies and procedures relating to detention and interrogation to ensure that they adhere strictly to international human rights and humanitarian law and standards, and publicly disown those which do not;
- Make clear to all members of the military and all other government agencies, as well as US allies, that torture or cruel, inhuman or degrading treatment will not be tolerated under any circumstances;
- Commit to a program of public education on the international prohibition of torture and ill-treatment, including challenging any public discourse that seeks to promote tolerance of torture or cruel, inhuman or degrading treatment.

2. Ensure access to prisoners

Torture often takes place while prisoners are held incommunicado — unable to contact people outside who could help them or find out what is happening to them. The practice of incommunicado detention should be ended. Governments should ensure that all prisoners are brought before an independent judicial authority without delay after being taken into custody. Prisoners should have access to relatives, lawyers and doctors without delay and regularly thereafter.

The US authorities should:

- End the practice of incommunicado detention;
- Grant the International Committee of the Red Cross full access to all detainees according to the organization's mandate;
- Grant all detainees access to legal counsel, relatives, independent doctors, and to consular representatives, without delay and regularly thereafter;
- In battlefield situations, ensure where possible that interrogations are observed by at least one military lawyer with full knowledge of international law and standards as they pertain to the treatment of detainees;
- Grant all detainees access to the courts to be able to challenge the lawfulness of their detention. Presume detainees captured on the battlefield during international conflicts to be prisoners of war unless and until a competent tribunal determines otherwise;
- Reject any measures that narrow or curtail the effect or scope of the *Rasul v. Bush* ruling on the right to judicial review of detainees held in Guantánamo or elsewhere, and facilitate detainees' access to legal counsel for the purpose of judicial review.

3. No secret detention

In some countries torture takes place in secret locations, often after the victims are made to "disappear". Governments should ensure that prisoners are held only in officially recognized places of detention and that accurate information about their arrest and whereabouts is made available immediately to relatives, lawyers and the courts. Effective judicial remedies should be available at all times to enable relatives and lawyers to find out immediately where a prisoner is held and under what authority and to ensure the prisoner's safety.

The US authorities should:

- Clarify the fate and whereabouts of those detainees reported to be or to have been in US custody or under US interrogation in the custody of other countries, to whom no outside body including the International Committee of the Red Cross are known to have access, and provide assurances of their well-being. These detainees include but are not limited to those named in the 9/11 Commission Report and in this Amnesty International report as having been in custody at some time in undisclosed locations;

- End immediately the practice of secret detention wherever it is occurring, and under whichever agency. Hold detainees only in officially recognized places of detention;
- Not collude with other governments in the practice of "disappearances" or secret detentions, and expose such abuses where the USA becomes aware of them;
- Maintain an accurate and detailed register of all detainees at every detention facility operated by the US, in accordance with international law and standards. This register should be updated on a daily basis, and made available for inspection by, at a minimum, the International Committee of the Red Cross, and the detainees' relatives and lawyers or other persons of confidence;
- Make public and regularly update the precise numbers of detainees in US custody specifying the agency under which each person is held, their identity, their nationality and arrest date, and place of detention;
- Either charge and bring to trial, in full accordance with international law and standards and without recourse to the death penalty, all detainees held in US custody in undisclosed locations, or else release them;
- Comply without delay with Freedom of Information Act requests, and related court orders, aimed at clarifying the fate and whereabouts of such detainees;
- Make public and revoke any measures or directives that have been authorized by the President or any other official that could be interpreted as authorizing "disappearances", torture or cruel, inhuman or degrading treatment, or extrajudicial executions.

4. Provide safeguards during detention and interrogation

All prisoners should be immediately informed of their rights. These include the right to lodge complaints about their treatment and to have a judge rule without delay on the lawfulness of their detention. Judges should investigate any evidence of torture and order release if the detention is unlawful. A lawyer should be present during interrogations. Governments should ensure that conditions of detention conform to international standards for the treatment of prisoners and take into account the needs of members of particularly vulnerable groups. The authorities responsible for detention should be separate from those in charge of interrogation. There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention.

The US authorities should:

- Immediately inform anyone taken into US custody of his or her rights, including the right not to be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment; their right to challenge the lawfulness of their detention in a court of law; their right to access to relatives and legal counsel, and their consular rights if a foreign national;

- Ensure at all times a clear delineation between powers of detention and interrogation;
- Keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of anyone in US custody, with a view to preventing any cases of torture or cruel, inhuman or degrading treatment;
- Ensure that conditions of detention strictly comply with international law and standards;
- Prohibit the use of isolation, hooding, stripping, dogs, stress positions, sensory deprivation, feigned suffocation, death threats, use of cold water or weather, sleep deprivation and any other forms of torture, or cruel, inhuman or degrading treatment as interrogation techniques;
- Bring to trial in accordance with international fair trial standards all detainees held in Guantánamo, or release them;
- Ensure compliance with all aspects of international law and standards relating to child detainees;
- Ensure compliance with all international law and standards relating to women detainees;
- Invite all relevant human rights monitoring mechanisms, especially the UN Special Rapporteur on Torture, the Committee against Torture, the Working Group on Enforced or Involuntary Disappearances (1980) and the Working Group on Arbitrary detention to visit all places of detention, and grant them unlimited access to these places and to detainees;
- Grant access to national and international human rights organizations, including Amnesty International, to all places of detention and all detainees, regardless of where they are held.

5. Prohibit torture in law

Governments should adopt laws for the prohibition and prevention of torture incorporating the main elements of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and other relevant international standards. All judicial and administrative corporal punishments should be abolished. The prohibition of torture and the essential safeguards for its prevention must not be suspended under any circumstances, including states of war or other public emergency.

The US authorities should:

- Enact a federal crime of torture, as called for by the Committee against Torture, that also defines the infliction of cruel, inhuman or degrading treatment as a crime, wherever it occurs;

- Amend the Uniform Code of Military Justice to criminalize expressly the crime of torture, as well as a crime of infliction of cruel, inhuman or degrading treatment or punishment, wherever it occurs, in line with the Convention against Torture and other international standards;
- Ensure that all legislation criminalizing torture defines torture at least as broadly as the UN Convention against Torture;
- Ensure that legislation criminalizing torture and the infliction of cruel, inhuman or degrading treatment covers all persons, regardless of official status or nationality, wherever this conduct occurred, and that it does not allow any exceptional circumstances whatsoever to be invoked as justification for such conduct, or allow the authorization of torture or ill-treatment by any superior officer or public official, including the President.

6. Investigate

All complaints and reports of torture should be promptly, impartially and effectively investigated by a body independent of the alleged perpetrators. The methods and findings of such investigations should be made public. Officials suspected of committing torture should be suspended from active duty during the investigation. Complainants, witnesses and others at risk should be protected from intimidation and reprisals.

US Congress should:

- Establish an independent commission of inquiry into all aspects of the USA's "war on terror" detention and interrogation policies and practices. Such a commission should consist of credible independent experts, have international expert input, and have subpoena powers and access to all levels of government, all agencies, and all documents whether classified or unclassified.

The US authorities should:

- Ensure that all allegations of torture or cruel, inhuman or degrading treatment involving US personnel, whether members of the armed forces, other government agencies, medical personnel, private contractors or interpreters, are subject to prompt, thorough, independent and impartial civilian investigation in strict conformity with international law and standards concerning investigations of human rights violations;
- Ensure that such investigations include cases in which the USA previously had custody of the detainee, but transferred him or her to the custody of another country, or to other forces within the same country, subsequent to which allegations of torture or ill-treatment were made;
- Ensure that the investigative approach at a minimum complies with the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

- Ensure that the investigation of deaths in custody at a minimum comply with the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, including the provision for adequate autopsies in all such cases;
- In view of evidence that certain persons held in US custody have been subjected to "disappearance", the US authorities should initiate prompt, thorough and impartial investigations into the allegations by a competent and independent state authority, as provided under Article 13 of the UN Declaration on the Protection of All Persons from Enforced Disappearance.

7. Prosecute

Those responsible for torture must be brought to justice. This principle should apply wherever alleged torturers happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. Governments must exercise universal jurisdiction over alleged torturers or extradite them, and cooperate with each other in such criminal proceedings. Trials must be fair. An order from a superior officer must never be accepted as a justification for torture.

The US authorities should:

- Publicly reject all arguments, including those contained in classified or unclassified government documents, promoting impunity for anyone suspected of torture and cruel, inhuman or degrading treatment, including the ordering of such acts;
- Bring to trial all individuals – whether they be members of the administration, the armed forces, intelligence services and other government agencies, medical personnel, private contractors or interpreters – against whom there is evidence of having authorized, condoned or committed torture or other cruel, inhuman or degrading treatment;
- Any person alleged to have perpetrated an act of "disappearance" should, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities for prosecution and trial, in accordance with Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance;
- Ensure that all trials for alleged perpetrators comply with international fair trial standards, and do not result in imposition of the death penalty.

8. No use of statements extracted under torture

Governments should ensure that statements and other evidence obtained through torture may not be invoked in any proceedings, except against a person accused of torture.

The US authorities should:

- Ensure that no statement coerced as a result of torture or other cruel, inhuman or degrading treatment, including long-term indefinite detention without charge or trial, or any other information or evidence obtained directly or indirectly as the result of torture or cruel, inhuman or degrading treatment, regardless of who was responsible for such acts, is admitted as evidence against any defendant, except the perpetrator of the human rights violation in question;
- Revoke the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, and abandon trials by military commission;
- Expose and reject any use of coerced evidence obtained by other governments from people held in their own or US custody;
- Refrain from transferring any coerced evidence for the use of other governments.

9. Provide effective training

It should be made clear during the training of all officials involved in the custody, interrogation or medical care of prisoners that torture is a criminal act. Officials should be instructed that they have the right and duty to refuse to obey any order to torture.

The US authorities should:

- Ensure that all personnel involved in detention and interrogation, including all members of the armed forces or other government agencies, private contractors, medical personnel and interpreters, receive full training, with input from international experts, on the international prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and their obligation to expose it;
- Ensure that all members of the armed forces and members of other government agencies, including the CIA, private contractors, medical personnel and interpreters, receive full training in the scope and meaning of the Geneva Conventions and their Additional Protocols, as well as international human rights law and standards, with input from international experts;
- Ensure that full training be similarly provided on international human rights law and standards regarding the treatment of persons deprived of their liberty, including the prohibition on "disappearances", with input from international experts;
- Ensure that all military and other agency personnel, as well as medical personnel and private contractors, receive cultural awareness training appropriate to whatever theatre of operation they may be deployed into.

10. Provide reparation

Victims of torture and their dependants should be entitled to obtain prompt reparation from the state including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation.

The US authorities should:

- Ensure that anyone who has suffered torture or ill-treatment while in US custody has access to, and the means to obtain, full reparation including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, wherever they may reside;
- Ensure that all those who have been subject to unlawful arrest by the USA receive full compensation.

11. Ratify international treaties

All governments should ratify without reservations international treaties containing safeguards against torture, including the UN Convention against Torture with declarations providing for individual and inter-state complaints. Governments should comply with the recommendations of international bodies and experts on the prevention of torture.

The US authorities should:

- Make a public commitment to fully adhere to international human rights and humanitarian law and standards – treaties, other instruments, and customary law – and respect the decisions and recommendations of international and regional human rights bodies;
- Make a public commitment to fully adhere to the Geneva Conventions, and to respecting the advice and recommendations of the International Committee of the Red Cross;
- Ratify Additional Protocols I and II to the Geneva Conventions;
- Withdraw all conditions attached to the USA's ratification of the UN Convention against Torture;
- Provide the USA's overdue second report to the Committee against Torture, as requested by the Committee;
- Withdraw all limiting conditions attached to the USA's ratification of the International Covenant on Civil and Political Rights;
- Provide the USA's overdue reports to the Human Rights Committee;
- Ratify the Optional Protocol to the UN Convention against Torture;
- Ratify the UN Convention on the Rights of the Child;
- Ratify the American Convention on Human Rights;

- Ratify the Inter-American Convention on Forced Disappearance of Persons without any reservations and implement it by making enforced disappearances a crime under US law over which US courts have jurisdiction wherever committed by anyone.
- Ratify the Rome Statute of the International Criminal Court.

12. Exercise international responsibility

Governments should use all available channels to intercede with the governments of countries where torture is reported. They should ensure that transfers of training and equipment for military, security or police use do not facilitate torture. Governments must not forcibly return a person to a country where he or she risks being tortured.

The US authorities should:

- Withdraw the USA's understanding to Article 3 of the UN Convention against Torture, and publicly state the USA's commitment to the principle of *non-refoulement,* and ensure that no legislation undermines this protection in any way;
- Cease the practice of "renditions" that bypass human rights protections; ensure that all transfers of detainees between the USA and other countries fully comply with international human rights law.

REPORT, CENTER FOR CIVIL RIGHTS,
"THE STATE OF CIVIL LIBERTIES ONE YEAR LATER," 2002

The State of Civil Liberities: One Year Later
Erosion of Civil Liberties in the Post 9/11 Era
A Report Issued By The Center for Constitutional Rights

The Center for Constitutional Rights is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys working on behalf of civil rights activists in the Deep South, CCR is committed to the creative use of law as a positive force for social change.

Since September 11th, CCR has worked to ensure that the fear of terrorism does not erode the rights and liberties that define American society. We have filed seven lawsuits to challenge particularly egregious violations of Constitutional rights and international law related to the government response to the attacks of one year ago, both within the United States and in the detention camp at Guantanamo Bay, Cuba. These suits seek to uphold the principle that government action is only legitimate when it accords with fundamental rights of the people as well as the rule of law.

Summary

On September 11, 2001 the United States was brutally attacked by terrorists. The immediate damage included the destruction of the World Trade Center and a wing of the Pentagon, as well as the deaths of thousands of people. Since that time, the Bush Administration, the United States Justice Department and the United States Congress have enacted a series of Executive Orders, regulations, and laws that have seriously undermined civil liberties, the checks and balances that are essential to the structure of our democratic government, and indeed, democracy itself.

The Constitution of the United States separates the federal government into three distinct branches and provides a system of "checks and balances" that prevent any one branch of government from accumulating excessive power. The Executive branch, by using Executive Orders and emergency interim agency regulations as its tools of choice for combating terrorism, has deliberately chosen methodologies that are largely outside the purview of both the legislature and the judiciary. These Executive Orders and agency regulations violate the U.S. Constitution, the laws of the United States, and international and humanitarian law. As a result, the war on terror is largely being conducted by Executive fiat and the constitutional guarantees of both citizens and non-citizens alike have been seriously compromised.

Additionally, the actions of the government have been shrouded in a cloak of secrecy that is incompatible with democratic government. Hundreds of non-citizens have been rounded up and detained, many for months, in violation of constitutional protections, judicial decisional authority and INS policy. The government has repeatedly resisted requests for information regarding the detainees by loved ones, lawyers and the press; it has denied detainees access to legal representatives; and has conducted its hearings in secret, in some cases denying the very existence of such hearings. In a democracy, the actions of the government must be transparent or our ability to vote on policies and the people who create those policies becomes meaningless.

Perhaps the most disturbing aspect of the government's actions has been its attack on the Bill of Rights, the very cornerstone of our American democracy. The War on Terror has seriously compromised the First, Fourth, Fifth and Sixth Amendment rights of citizens and non-citizens alike. From the USA PATRIOT Act's over-broad definition of domestic terrorism, to the FBI's new powers of search and surveillance, to the indefinite detention of both citizens and non-citizens without formal charges, the principles of free speech, due process, and equal protection under the law have been seriously undermined.

Finally, the United States' actions with regard to prisoners held at Camp Delta at the Guantanamo Bay naval station have been in direct violation of the Geneva Conventions. These prisoners are being held as "unlawful combatants," a term that has no meaning in international law. The government's disregard for international law can only serve to encourage other nations to act likewise and undermine the very War on Terrorism it seeks to fight.

The result of all of these actions has been the deliberate, persistent, and unnecessary erosion of the basic rights that protect every citizen and non-citizen in the United States. A free society demands the rule of law. Without it, democracy is meaningless. The government has consistently refused to recognize the protections afforded by the US Constitution and international law, and in doing so, it has failed in its responsibility to maintain a democratic society that is both open to, and accountable to, the people.

Introduction

In the year since terrorists attacked the World Trade Center and the Pentagon, there has been a dramatic transformation in the relationship between the government and the people of this country. In the name of fighting terrorism, the Executive Branch has assumed sweeping powers that show little regard for the principles embedded in the United States Constitution or the protections afforded by it. In the process, the Executive Branch has undermined the political compact between government and the governed that is essential to a democratic system. This Report offers an assessment of the state of checks and balances that are the pillars of our constitutional system, and of individual civil liberties guaranteed under that system, in the wake of the Administration's security efforts.

In order to ensure the continued existence of our free and democratic society, we must continue to follow those basic principles that maintain the balance between the need to govern effectively and the need to maintain individual freedoms. We believe that there are at least five basic principles that define this balance:

1. The Government must be accountable to the people through fair elections in which each citizen has a single and fairly counted ballot.

2. The Government may impose punishment only after the conclusion of fair, open, transparent, and objective procedures designed to protect the rights of the accused and determine innocence or guilt. In particular, these principles must include the right to be free from coerced interrogation, the right to have an objective and independent judge and jury, and the right to a skillful, independent and unintimidated lawyer.

3. The Government may not discriminate against individuals or groups on the basis of arbitrary categories such as race, ethnicity, religion, political belief or gender.

4. The Government must abide by the system of checks and balances set forth in the Constitution that prevent the aggregation of power in the hands of one person or in a single branch of government.

5. People must be free to express ideas, regardless of their content, without fear of reprisal.

In addition, as a participant in the global economy and as a world leader, this country is bound by existing and emerging international legal standards that establish the basic human rights to which all persons are entitled. Our adherence to this principle and our responsibility as one of the world's leading democracies to adhere to the treaties and covenants that bind nations, must also be examined.

Since September 11th, each of these six principles has been severely compromised. In addition, our credibility in the international arena has suffered, as well.

The 2000 Presidential Election brought to light serious inequities in the electoral system, problems that have yet to be seriously addressed. Concerns regarding the other five principles have become increasingly more urgent as the months pass and actions by the United States Department of Justice (the "Justice Department") and the White House trespass on the once inviolable cornerstones of American Democracy:

- Hundreds of individuals have been held in preventive detention. Arrested in conjunction with the terrorism investigation, as many as 1,200 individuals were detained for an extended period without any criminal charge lodged against them, and in most cases, without any basis in immigration law.
- An order allowing law enforcement agents to monitor attorney-client conversations undermines the principle that all criminal defendants are entitled to a fair and competent defense.
- The Justice Department has limited the discretion of immigration judges and the immigration appeals process in ways that threaten the objectivity and independence of the immigration court system.
- The President's Executive Order authorizing military tribunals has stripped away many constitutional protections afforded the accused.
- Governmental actions have targeted individuals of Middle Eastern descent, South Asian descent and of the Muslim faith in violation of laws prohibiting governmental discrimination against ethnic and religious minorities.[1]
- Through its use of interim regulations and executive orders, the Executive Branch has usurped the authority and powers assigned to the Legislative Branch.
- By mandating the use of military tribunals for those accused of terrorism, the Executive Branch has deprived the judiciary of its role in deciding criminal cases, and has made the same branch of government both the prosecutor and the judge.
- Key provisions of the USA PATRIOT Act and relaxed guidelines for FBI investigations threaten the right to dissent by raising the possibility of harassment by investigators, by permitting searches on little evidence, and by creating the risk of felony prosecution for minor criminal violations.

This Report details the ways in which the actions of the Executive Branch, and more specifically the Bush Administration, have threatened people's basic freedoms and the foundation of democracy in this country. The first section of the Report discusses the undermining of the Separation of Powers doctrine, the political mechanism that the framers of the Constitution included to protect against the consolidation of governmental power in the hands of a single individual or entity. The second section of the Report addresses the need for transparency in government, and the deliberate efforts by the Bush Administration, to evade rules intended to

hold the government accountable to the people. The third section examines the erosion of the freedoms guaranteed in the Bill of Rights. The fourth section addresses the Bush Administration's disregard for international and humanitarian law and the final section assesses the Executive Branch's refusal to adhere to some of the most important international covenants in existence, and the ramifications of these breaches.

I. Governing by Decree: The Administration's Undermining of the Separation of Powers Principle
By creating three separate branches of government, the framers of the Constitution sought to divide the responsibilities of governing and thereby reduce the risk of any one branch abusing governmental power. Over the history of this country, the Separation of Powers doctrine has proved to be flexible and resilient. While in practice, the separation of authority has occasionally deviated from the framers' intent, attempts to alter the division substantially in favor of one branch have generally failed.[2] However, the past year has been marked by the persistent and frequently successful efforts of the Executive Branch to expand its powers at the expense of both the Legislature and the Judiciary. Given the many other ways in which the Executive Branch's actions threaten the integrity of the democratic process and the freedoms guaranteed by the Constitution, these encroachments are especially disturbing.
Although Congress has plainly been willing to provide law enforcement agencies with many tools deemed necessary to fight terrorism, the Justice Department and the White House have seen fit to conduct their domestic anti-terrorism efforts largely by Executive fiat. The USA PATRIOT Act - hastily drafted and passed with little or no Congressional debate under pressure from the President - grants sweeping new powers to law enforcement agencies. However, even greater extralegal powers have been provided to these agencies by the implementation of 11 Executive Orders,[3] 10 new agency interim regulations, and 2 final regulations implemented by the Justice Department.[4]

Interim regulations are issued by government agencies to implement new policies and practices to be used by agency officials, and go into effect without Congressional input and without any provision for prior public comment. Executive Orders are issued solely at the behest of the President, without any required involvement by other branches of government or governmental agencies. By changing how agencies operate and the rules they must enforce, both interim regulations and Executive Orders have the effect of law. However, they remain wholly outside the purview of the Legislative Branch, and to a more limited extent, outside the reach of the judiciary as well. The dramatic increase in the use of these mechanisms raises several concerns. First, through such mechanisms, the Executive Branch usurps the powers constitutionally accorded to Congress, and thereby upsets the balance of power among the branches of government. Second, in bypassing the Legislature, the Executive Branch evades all mechanisms for accountability to the people. Finally, by relying on Executive Orders, the President acts without the official input and expertise of the governmental agencies charged with enforcing the law in the specific areas of the orders.

An interim regulation issued on September 20th illustrates both the undue power accorded to the Executive Branch and the disdain shown by it for the proper role of Congress. The September 20th regulation expanded the power of the Immigration and Naturalization Service ("INS") to detain immigrants without charge. It states that:

> a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, [as to] whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest. . . will be issued.

The phrase a "reasonable period of time," appears to provide the INS with the discretion to hold someone indefinitely. It directly contravenes the very law that Congress enacted to provide greater powers to law enforcement agencies to combat terrorism. Section 412 of the USA PATRIOT Act explicitly prohibits detaining immigrants suspected of terrorism for more than seven days without formal charges. Once the USA PATRIOT Act became law, thirty-six days after the September 20th interim regulation was issued, the Justice Department might have been expected to revise its regulation to bring it into conformity with the law enacted by Congress. It did not. This discrepancy is more striking when one considers the difference in scope. Section 412 only applies to immigrants who the Attorney General has certified that he has reasonable grounds to believe are engaged in terrorist activity. The interim regulation applies to all immigrants. This leaves the Justice Department with something of a dilemma: it must disregard Section 412 or else apply those standards to all immigrants, on pain of providing accused terrorists with more protections than ordinary out-of-status immigrants.

The September 20th interim regulation also illustrates how the Administration has sought to remove itself from constraints imposed upon the Executive Branch by the judiciary. The regulation flies in the face of a recent Supreme Court ruling, *Zadvydas v. Davis*,[5] which holds that the due process clause of the Constitution applies to all persons physically located within the borders of the United States, including deportable immigrants. The Supreme Court's decision plainly means that non-citizens may not be held without charge or without access to judicial process. Nevertheless, the Administration continues to do just that. In fact, many of the detainees were held long past the time in which they could have been sent to their countries of residence without charge or explanation.

Another example of the Administration's actions seeking to evade judicial scrutiny and review involves an interim regulation issued on October 31, 2001. This regulation allows federal agents to monitor privileged attorney-client communications. In very limited circumstances, such surveillance was permitted prior to issuance of the interim regulation provided that it was authorized by a judge. Under the interim regulation, however, a court order is not required unless the investigator wishes to conduct surveillance without notifying all of the parties being monitored. Otherwise, all that is needed is the approval of the Attorney General. Furthermore, while the regulation includes some minor provisions nominally intended to prevent privileged communications from being passed on to prosecutors, exceptions to this protection in the name of national security are left to the discretion of the investigators. Although judicial oversight of prosecutors' assertion of such exceptions might provide an appropriate check on possible abuses by investigators, the new rules make no provision for independent oversight by the judiciary or anyone outside the Justice Department.

Equally disturbing are changes that undermine the nominal independence of immigration judges from the Justice Department. Immigration Judges, as well as the Board of Immigration Appeals (BIA) above them in the hierarchy, are part of the Department of Justice, and report to the Attorney General. However, these judges are independent from the Attorney General's Office with regard to the decisions they render, which are binding on the INS. Another interim regulation issued on October 31st gives District Directors of the INS who act as prosecutors in immigration cases, the power to stay orders issued by immigration judges to release immigration detainees, pending their appeals to the BIA. This change is tantamount to making the ruling of a judge subordinate to the discretion of the prosecutor. Actions such as this and the blanket order closing all immigration hearings in cases designated by the Justice Department[6] have curtailed the discretion and authority of immigration judges, and an order in February directing the BIA to streamline its operations by removing half of its judges raises the specter of a political litmus test to weaken the independence of the remaining judges.[7] Moves such as these led the judges' union, the National Association of Immigration Judges, to ask Congress to move immigration courts out from under the jurisdiction of the Justice Department. [8]

Perhaps the Administration's most disturbing act undermining the separation of powers was the adoption of an executive order on November 13th authorizing the establishment of military tribunals to try accused terrorists. In recent years, federal courts have proven very adept at trying terrorism cases, and prosecutors have won important victories involving the embassy bombings in Tanzania and Kenya as well as the 1993 attack on the World Trade Center. The Executive Order, however, has removed such cases from federal courts and placed them in the hands of the military. The Executive has taken on the most fundamental role of the Judicial Branch, and has encroached upon the responsibilities of the Legislative Branch, which is constitutionally granted sole authority to create "tribunals inferior to the Supreme Court." Indeed, the degree to which the Order concentrates power in the hands of the Executive is breathtaking: it gives the President the power to decide who will be tried under the system, to create the rules by which trial will proceed, to appoint those who will serve as judge, prosecutor, and defense attorney, to set penalties once guilt is determined (including execution), and to decide all appeals.

These are just a few of the ways in which our system of checks and balances has been undermined by the Administration's actions over the past 12 month. Many of the actions described later in this Report also involve encroachments on the authority of the Legislative and Judicial Branches. By using executive orders and interim regulations to substantially alter the direction and powers of law enforcement, the Bush Administration has avoided deliberation on how these matters should be handled, and unilaterally implemented changes in the law that the Executive Branch is sworn to uphold. Its actions to limit the input of the judiciary, including weakening even the nominal independence of the immigration courts, remove substantial oversight on the legality of its actions. Judicial review is arguably the most important check on potential abuses of power by the other branches of government, inasmuch as the judiciary is responsible for determining the constitutionality of laws enacted by the Legislature and the actions taken by the Executive. By encroaching on the legislative function at the same time that it seeks to insulate its actions from judicial review, the Executive Branch has seriously undermined the integrity of this process.

II. Governing in Secret: Shrouding Governmental Operations And Evading Public Accountability

The government's accountability to the people is one of the cornerstones of a democracy. Elections are the primary mechanism by which the people voice and assert their opinions with regard to the actions of the government. If these actions are not open to public scrutiny, elections as a means of holding government accountable are rendered meaningless. In many of its actions since taking office, the Bush Administration has sought to shield itself from public scrutiny. While this is also true for areas unrelated to civil liberties, the secrecy that has enveloped the terror investigation is perhaps the greatest cause for concern.

The secrecy surrounding those arrested and detained by the FBI and the INS has often reached Kafkaesque proportions for detainees and their families. People were taken from their homes without warning or explanation. Loved ones were not told where the individuals were being taken, or why. For many hundreds or perhaps thousands of persons rounded up in this manner and detained, no charges or explanations for their detention were given either publicly or in private. In some cases, no explanation was ever given during their months-long incarceration.
The conditions under which the detainees were held also worked to prevent family members, lawyers, and human rights workers from obtaining information about them and offering assistance. Many of those detained were held in solitary confinement, and were completely denied the means to contact the outside world.[9] Family members and attorneys for the detainees were denied access to them and information as to their whereabouts for months. There were numerous reports of individuals spending weeks making the rounds of the four main jails in the New York region where detainees were being held, asking each time whether their loved ones were being held, only to be turned away. For example, Amnesty International reports that a Pakistani woman was repeatedly told that her husband and brother were not being held in the Metropolitan Detention Center in Brooklyn, even though she could produce letters posted by them

from within the facility.[10] As a result of being held incommunicado, many detainees were denied access to legal representation, sometimes for the entire time they were held.

This cloak of secrecy received its first official imprimatur when Chief Immigration Judge Michael Creppy issued a memorandum to all immigration judges and court administrators on September 21st, 2001. In the memorandum, Judge Creppy instructed all immigration courts to close the immigration hearings of a broad class of individuals designated by the Justice Department. Family members and journalists, as well as the general public, were to be barred from attendance. Cases were not to be listed on the calendar of scheduled immigration hearings, and court staff were instructed to provide no information whatsoever about such hearings, and were not to confirm even whether a hearing had been scheduled. Press requests were to be referred to the Public Affairs Office in Virginia and other requests were to be made in writing and submitted under the Freedom of Information Act ("FOIA"), a process that frequently takes months. All cases were to be given a special code that would ensure that no information could be accessed through the INS's toll-free number used by attorneys to follow their clients' cases through the court system.

The restriction of public access to hearings violates long-standing judicial procedure that dates back to the founding of the American Republic. Since the immigration court system was established some 50 years ago, there has been a presumption that its proceedings would be open to the public. In limited instances, where sensitive information has been presented, judges have been permitted to hold individual hearings, or portions of hearings, behind closed doors. These closures have been undertaken at the discretion of the individual judge, however, and were based upon the specific facts of each case. A blanket policy covering an entire class of cases abandons this longstanding policy by eliminating judicial discretion and case-by-case consideration. In addition, the secrecy policy in these cases not only limits what the public and the press is permitted to know, but also strains the information provided to judges regarding the reasons that a closed hearing has been requested by the Justice Department.

In October of 2001, a demand was made by a coalition of 19 civil liberties, human rights, public policy, and immigrants' groups to Attorney General John Ashcroft under the Freedom of Information Act asking how many people had been detained, the nationality and/or ethnicity of these people, the basis upon which people have been detained - whether they include immigration violations, criminal charges, material witness needs, possible terrorism charges, or other grounds - the basis for the government's request to hold secret proceedings and to place attorneys under gag orders, the facts regarding access to counsel for the detainees, and the number of cases in which the government is relying on secret evidence. After the Justice Department's refusal to disclose its criteria for holding closed hearings, its refusal to disclose the number of closed hearings held to date, and its decision to no longer release tallies of the number of detainees being held, the coalition filed a lawsuit on December 5th to enforce the federal public disclosure law.

On January 11, 2002, the government released a small amount of information, with the explanation that divulging anything more would jeopardize the investigation by enabling terrorist groups to glean information on how the investigation was proceeding.

On August 2, 2002, a federal court ordered the Justice Department to release the identities of all those detained. Judge Gladys Kessler noted that the government had made no statement whatsoever that any of the detainees had any connections to terrorism, and stated that "[t]he government has provided no information on the standard used to arrest and detain individuals initially."[11] By ordering the release of the names of those detained, Judge Kessler's ruling accepted the plaintiffs' argument that the government had acted in violation of the Freedom of Information Act, and repudiated the government's suggestion that this kind of secrecy is necessary for an effective investigation. The ruling stands for the principle that secret detentions

are not permissible in the United States. The tone of the response of the Justice Department was defiant, replete with statements that such rulings only impede the effort to stop terrorism.

On August 26, 2002, a federal appeals ruled that the Creppy memo was unconstitutional, stating that "democracies die behind closed doors. . . . When the government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."[12]

III. Governing above the Law: The Erosion of the Bill of Rights

Beyond the Bush Administration's arrogation of new and expansive powers to the Executive Branch, and beyond even its insistence on a new standard of secrecy in government, perhaps most disturbing is the Administration's willingness to cast aside the protections afforded by the Bill of Rights.

The rights to freedom of speech and assembly, to petition government for redress of grievances, and to freedom of religion guaranteed by the First Amendment are integral to our democratic society. Equally important are those rights guaranteed by the Fourth, Fifth, and Sixth Amendments that protect us against unreasonable searches and seizures, arbitrary detention, and unfair trials. When these rights are systematically violated, and the violations are not addressed, the basic structure of the relationship between government and the people is gravely endangered. When such infringements are codified into law, as many have been in the past year, the danger increases exponentially.

Our concerns are two-fold. First, in the past twelve months, there have been widespread abuses of the rights conferred by the Constitution. These abuses have targeted mainly non-citizens, but as the cases of citizens Jose Padilla and Yaser Esam Hamdi indicate, there is no reason to think that the threat is in any way confined to those who lack American citizenship. Second, and perhaps of greater concern than specific abuses, are the ways in which civil liberties have been eroded by the introduction of sweeping new laws, and by the codification of abusive practices through executive order and interim rules.

The First Amendment

The First Amendment protects our rights of free speech and assembly, the independence of the press,[13] and prohibits official establishment or denigration of any particular religion. Free speech rights can be construed as having two facets, the right to have unfettered access to ideas, and the right to express ideas freely. The right to peaceable assembly is inextricable from the right to free speech given that demonstrations and other political activity are protected as expressive conduct. While government actions threaten all these rights conferred by the First Amendment, it is our free speech and assembly rights which are most at risk.

The USA PATRIOT Act contains provisions that will chill or even criminalize people's legitimate expressions of their political views. For example, the Act creates a new category of crime, domestic terrorism, which blurs the line between speech and criminal activity. Section 802 of the Act defines domestic terrorism as "acts dangerous to human life that are a violation of criminal laws" that "appear to be intended to influence the policy of a government by intimidation or coercion." This definition is so vague that acts of civil disobedience may be construed to violate the law. Civil disobedience typically seeks to influence government policy, and therefore may be construed as an attempt to coerce that change. Furthermore, the portion of the definition stating that acts must be "dangerous to human life" is extremely broad: it does not distinguish between intentional acts and those that might cause inadvertent harm. Thus, a spontaneous demonstration that blocks the path of an ambulance might invite charges of domestic terrorism under the new law. Such a broad definition invites abuse, in which the distant possibility of danger creates a pretext under which political activists can be arrested and charged with felony domestic terrorism, rather than the misdemeanor charges that they typically incur. This new crime will

inhibit free speech regardless of whether it is enforced because it creates the fear of a disproportionate response to legitimate political expression.

Section 411 of the USA PATRIOT Act also threatens First Amendment rights both by punishing expression and limiting our access to ideas. Section 411 expands the types of association with terrorist activity that are considered deportable offenses in ways that curtail the free speech rights of many immigrants. It amends the Immigration and Nationality Act to expand the definition of "engage in terrorist activity" to include soliciting funds, membership or other material support to designated terrorist organizations, even when those organizations also engage in lawful political and humanitarian ends, and when the activities support only those legitimate ends. It also makes the list of terrorist organizations open-ended, such that support for any organization the state department eventually certifies as terrorist - and not merely those that are already listed - is a deportable offense. Under Section 411, it is entirely possible for non-citizens to be deported for supporting an organization that they do not know is engaged in terrorist acts.[14]

Beyond its effect on the free speech rights of immigrants, Section 411 of the Act infringes upon the First Amendment rights of all Americans to have unfettered access to ideas. Under this provision, entry into the United States is made contingent on a political litmus test: individuals associated with groups "whose endorsement of acts of terrorist activity the Secretary of State has determined undermines the United States' efforts to reduce or eliminate terrorist activity" will be denied entry. This restriction is similar to that used in the McCarran-Walter Act - the law which denied entry into the country to any foreign national associated with a communist party or movement. Many prominent scholars and intellectuals were banned from this country because of their perceived association with communism, raising widespread concerns about the ways in which the Act inhibited the flow of information within the United States. It is highly likely that similar cases will occur under Section 411, diluting debate and the free exchange of ideas within our borders, and limiting many opportunities to engage with the peoples of the world.

If these sections of the USA PATRIOT Act raise concerns about the future of free expression in this country, these concerns are far from allayed by the actions of the Justice Department. Beginning immediately after September 11th, reports surfaced of FBI agents questioning citizens about their political views and activities. In one incident in October of 2001, a retired man in San Francisco was questioned extensively about his politics after he voiced doubts about the war in Afghanistan in his health club. Three days later, a college student in North Carolina was interviewed after the FBI received reports that she was displaying an "un-American poster."[15] Agents performed an extensive background check, and questioned her about her mother, who is in the armed forces, and about her opinions about the Taliban.

Such incidents cast a disturbing light on new guidelines that relax restrictions on FBI infiltration and surveillance of political and religious groups. These restrictions were put in place to curb the abuses of the notorious "COINTELPRO" effort of the 1960s and 70s that harmed many political activists and widely undermined public trust in government. While the new rules place some checks on agents, they nonetheless threaten First Amendment rights. The rules allow agents to investigate political groups for any endorsement of violence, even where no imminent threat has been exists. This flies in the face of *Brandenberg v. Ohio*, a 1969 Supreme Court case that found that the advocacy of non-imminent violence is protected speech.[16] Furthermore, once a group has been approved for investigation, there is nothing in the guidelines to prevent the FBI from monitoring the group's legitimate, First Amendment-protected activities such as demonstrations, writings, and information such as membership data and financial transactions. Such unfettered access invites harassment.

The new definition of crime of domestic terrorism could open the doors to a federal investigation with potentially devastating consequences. Together, these developments are likely to have a

chilling effect on the free association and assembly rights of a wide range of dissident groups. The consequences of this suppression of First Amendment rights are not confined to the damage done to individuals. By undermining the ability of Americans to hear unpopular opinions, and by permitting the unfettered monitoring of individuals on the basis of their political affiliation, these policies threaten to choke off currents of thought and expression that often lead to greater justice for all. As one author writes:

> What chance would the civil rights movement have stood of bringing about an end to de jure racial segregation in the 1950s and 1960s if it had been operating under today's rules of surveillance? Rosa Parks, Martin Luther King, Jr., Fred Shuttlesworth, and the activists who stood beside them could have been charged with the crime of domestic terrorism for their acts of nonviolent civil disobedience. Their every move, their political activities, their personal relationships, their financial transactions, and their private records could have been monitored and recorded. And [referring to provisions allowing for cooperation with local law enforcement] their dossiers could have been indexed in a law enforcement database and shared instantaneously with local police departments throughout the Deep South.[17]

The Fourth Amendment

The Fourth Amendment protects against unreasonable searches and seizures, and requires law enforcement officers to obtain a warrant from a judge certifying that there is probable cause to believe that criminal activity has taken place before for any search. Because government investigations can have a chilling effect on speech, Fourth Amendment rights have been closely linked to those protected by the First Amendment.[18] In addition, the Fourth Amendment ensures that law enforcement agencies and officers do not act maliciously or conduct investigations where no credible evidence of wrongdoing exists.

Soon after September 11th, an undated letter from Assistant Attorney General Daniel Bryant indicated a growing hostility to Fourth Amendment protections in the Bush Administration, writing that:

> The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others. Here, for Fourth Amendment Purposes, the right to self-defense is not that of an individual and its citizens.... If the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches.[19]

This disdain for Fourth Amendment protections was played out when hundreds of immigrants were detained without criminal charges, long beyond the point at which tourist and student visa violations provided legal grounds for holding them in custody. If detainees were and are being held pursuant to a criminal investigation, the Fourth Amendment requires the government to formally charge them with a crime, and provide a court hearing within 48 hours to determine whether there is probable cause to justify their detention. By refusing to take these actions, the government has violated the rights of hundreds of those detained in the course of their investigation.

Equally disturbing are the provisions of the USA PATRIOT Act that greatly weaken the requirement that investigators show probable cause for many types of searches. Prior laws governing electronic communications provided for a lower standard than probable cause to put a trace on telephone calls, allowing investigators to determine who a suspect is calling, but not to monitor the conversations themselves. Under the Act, the same standard is applied to email communications - investigators are allowed to access "dialing, routing and signaling information" without a showing of probable cause. However, routing information on email cannot be physically separated from the content of the message. This means that FBI agents must be entrusted to examine the address information while disregarding the content of the message. Such a practice is tantamount to doing away with the probable cause requirement for reading the content of email communications.

Under the USA PATRIOT Act, the standards for wiretapping have been significantly weakened. Two other provisions of the Act allow the FBI to use concerns about foreign agents as a pretext for conducting criminal searches without probable cause, and to extend these searches, via roving wiretap, to individuals who are not the subject of a warrant. Traditionally, search warrants had to specify the place to be searched, so as to prevent arbitrary extensions of the warrant by errant officers. This limitation applied to wiretaps too, until 1986, when Congress authorized the use of roving taps to track particular suspects as they moved. Under a 1998 amendment, roving wiretaps on a particular telephone may only be monitored when the suspect is actually using that phone. Under Section 206 of the Act, however, the use of roving wiretaps has been extended, but the requirement of actual use is omitted. In addition, under the Foreign Intelligence Surveillance Act of 1978, wiretapping related to the domestic activities of hostile foreign groups was allowed, but only when gathering intelligence was the sole purpose of the surveillance. Information could not be gathered for criminal investigations. Under Section 218 of the USA PATRIOT Act, this restriction has been weakened - foreign intelligence gathering need only be a "significant purpose," of an investigation that may be primarily criminal in nature. Together, these provisions permit law enforcement agents to do exactly what two Courts of Appeal have prohibited. Both the Fourth and the Ninth Circuit Courts of Appeal have held that the Foreign Intelligence Surveillance Act "is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches."[20]

The Fifth Amendment

The Fifth Amendment protects residents of the United States from criminal punishment without basic protections, such as a thorough explanation of the charges, the right to be free from self-incrimination, and the right to be free from the imposition of multiple punishments for the same crime. The Due Process Clause of the Fifth Amendment is in many ways the heart of the rights guaranteed by the Constitution - stating that defendants must be afforded "due process of law" -- the Clause has been interpreted and applied in great detail by court rulings. In particular, in conjunction with the Fourteenth Amendment, the Due Process Clause requires that all residents of the U.S. be accorded equal protection under the law and thus prohibits discrimination on the basis of race, ethnicity, or religion.

Several provisions of the USA PATRIOT Act substantially erode due process rights as they apply to non-citizens. Section 412 specifies that the Attorney General has the power to detain non-citizens who are under suspicion of terrorist activity. Such detentions are allowed on a finding that there is "reasonable grounds to believe" that the individual is a terrorist.[21] Reasonable suspicion of criminal activity allows a police officer to make no more than a brief investigatory stop. Under Section 412, the Attorney General's statement permits the arrest and detention of a suspect for up to seven days.[22] The Attorney General is not required to share the evidence on which detention is based with the detainee and as a result the detainee is not in a position to dispute that evidence.

The President's Executive Order establishing military tribunals also raises serious due process concerns. The Fifth Amendment guarantee against compelled self-incrimination is not available to those charged under the Order, raising the possibility of coercive psychological and physical tactics being used to extract confessions regardless of their truth. The Fifth Amendment's due process guarantees suffer additional blows under the Order through the structure and staffing of the military tribunals. While in a traditional criminal trial the judge is entirely independent of the prosecutor and sits by virtue of an appointment from the judicial branch as opposed to the Executive branch, *all* of the key roles in the military tribunal process are to be filled by military officers acting upon designation by the President. The evidence will be presented by military

officers acting as prosecutors, and will be weighed by military officers acting as judges, all of whom report through the chain of command to the President in his role as Commander-in-Chief. Even "detailed" defense counsel - the attorney who will work under the guidance of the Chief Defense Counsel - will be military officers. Although the Rules for Military Tribunals would permit the accused to retain his own civilian attorney, that attorney must first be found eligible for access to information classified as SECRET under Defense Department guidelines. Even then, the privately-retained civilian attorney is merely *permitted* to participate in the accused's defense; the appointed military defense counsel remain in charge of the defense and may not be dismissed by the accused. In addition, the Rules state that civilian defense counsel - even if he or she has SECRET level clearance - will not be permitted to be present during any portion of the tribunal proceeding that is ordered closed by the Presiding Officer or the President. In this manner, the military tribunals-staffed and controlled by military officers who work directly at the behest of the President-abandon and offend the Constitution's due process guarantee of an independent judiciary.

In its roundup and detention of hundreds or perhaps thousands of Arab and Muslim immigrants, the government violated due process and equal protection rights on a grand scale. More than 1,000 people were detained in the investigation, and most were held without criminal charges or adequate grounds under immigration law. In specific terms, the detentions violate due process and equal protection rights in the following ways:

> I. Detainees were held without being notified of the reason for their detainment. Of 718 cases the government has disclosed, 317 were brought before a judge more than the mandated limit of 48 hours after arrest. Thirty-six individuals were provided hearings more than 27 days after arrest, 13 after more than 40 days, and 9 after 50 days. In at least one case, a detainee did not see a judge until 119 days after being taken into custody.
>
> II. Many detainees were held on minor immigration charges. In most cases, these violations did not warrant incarceration, and in any case, they provide grounds for detention only until an order of deportation has been issued. Numerous detainees were held for weeks or months past the issuance of a deportation order and scheduled deportation dates in violation of due process requirements.
>
> III. Detainees were sometimes subjected to coercive and involuntary interrogations, and many were not advised of their right to retain an attorney. These interrogations were presumably meant to extract confessions or other incriminating evidence, but the due process clause prohibits forced interrogation.
>
> IV. All detainees had their personal property confiscated upon detention, and there were numerous instances in which key identification papers, money, clothing, and jewelry were not returned upon their release. This amounts to a seizure of private property by the state. Such a seizure without either legal grounds or judicially mandated compensation violates the Fifth Amendment.
>
> V. There is considerable evidence that detainees have been singled out on the basis of their racial and ethnic backgrounds and religious convictions, rather than any specific evidence of wrongdoing. Further, measures taken against them were often out of proportion compared to the standard course of action - many were held for tourist visa violations, for example, that normally would result in an individual's release on bond. Their detention violates the equal protection guarantee implicit in the due process clause.

These Fifth Amendment concerns focus most specifically on non-citizens. But due process rights are explicitly granted without regard to citizenship or immigration status. In 1896, the Supreme Court ruled in *Wong v. United States* that immigrants as well as citizens enjoy rights guaranteed by the U.S. Constitution. This principle was reaffirmed again in 2001, when the Court ruled in

Zadvydas v. Davis that the due process clause applies to all persons within the boundaries of the United States, including deportable aliens. The abuses described above cannot be explained away by the immigration status of the detainees; in its dragnet approach, and its disregard for the fundamentals of criminal procedure, the government has seriously infringed upon the guarantee of due process under the law.

The Sixth Amendment

The Sixth Amendment ensures the unbiased and timely completion of criminal proceedings, mandating among other things, a clear specification of the criminal charges being alleged, the opportunity to refute evidence, an expeditious trial, and legal representation for the defendant. Immigration proceedings do not offer the same guarantees: for example, an immigration detainee has the right to an attorney, but not to one appointed by the state.

All of the individuals held on immigration charges were kept in custody until they had been cleared of any criminal suspicion, turning the presumption innocense until proven guilty on its head. Furthermore, the immigration detainees who attempted to seek legal assistance were thwarted in their efforts by excessive restrictions on prison telephone usage, and by the fact that the lists of legal services providers made available by the prisons was often hopelessly out of date. Meanwhile, attorneys seeking to work with detainees were routinely turned away. For many detainees, access to an attorney was hindered in these ways for weeks or even months.

Even more disturbing are reports that detainees have been actively prevented from obtaining legal assistance. According to a report released by Amnesty International, some detainees who requested an attorney were turned down by prison officials.[23] In many cases, immigration detainees were interrogated by the FBI, triggering their Sixth Amendment rights to court-appointed counsel. These detainees were not informed of their rights in this respect, and representation was not provided.

The most serious and well-known threat to Sixth Amendment rights arise from the interim regulation issued by the Attorney General on October 31, 2001 discussed above. The regulation allows agents to monitor conversations between attorneys and prisoners, contravening the venerable principle of attorney-client privilege, wherever "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism."[24] Both attorney and client must be notified unless a court order has been obtained. The regulation stipulates that privileged discussions will not be disclosed. This regulation is troubling in several respects. First, although such surveillance has been allowed in the past under limited circumstances, the approval of a judge has always been required. Under the new rule, the Attorney General has the power to approve such requests, even though the office of the Attorney General also oversees the criminal investigations that presumably would not have access to the information collected. Likewise, though it is not specified, it is likely that the "privilege team" responsible for determining what communications are protected will also be Justice Department employees, creating the possibility of collusion between those investigating the case for criminal purposes and those monitoring to guard against future terrorist acts.

These aspects of the rule invite abuse. Even if the potential for abuse is not exploited, the rule will likely have a chilling effect on attorney-client communications. Because a court order would allow agents to monitor conversations without the knowledge of either party, neither attorney nor client can ever be sure that their conversations are not being heard. Loose definitions in the text of the regulation heighten such concerns - it is up to agents' supervisors to determine, e.g., what counts as an "imminent act of violence," or what communications "are not related to the seeking or providing of legal advice" and hence may be disclosed to other parties. Under these provisions, a broad category of suspects may have legitimate cause to worry that their conversations will be

monitored, even though no substantive connection exists between their cases and any terrorist plot.[25] With no way to determine for sure whether they are under surveillance or not, even innocent clients in detention may be afraid to disclose facts of their case to their attorney.

The interim rule is likely to inhibit detainees from talking freely with their attorneys, and recent events in conjunction with the rule have given attorneys pause before representing such clients at all. On April 9, 2002, Attorney General John Ashcroft announced the indictment of criminal defense attorney Lynne Stewart on charges that she provided material support to a foreign terrorist organization. The accusation - which Stewart unequivocally denies - was based on information gleaned by listening into conversations between the attorney and her client, Sheikh Omar Abel Rahman, a jailed Muslim cleric with ties to Egyptian terrorists. The surveillance was authorized under the Foreign Intelligence Surveillance Act discussed above; future monitoring in her case, however, will be done pursuant to the interim rule.

Without a meaningful guarantee of appropriate attorney-client privilege, the Sixth Amendment right to assistance of counsel is rendered meaningless. By implementing vague guidelines protecting privileged information from disclosure to criminal investigators, and by failing to include any provision for independent oversight, the interim rule raises the possibility that discussions between the client and his attorney may end up in the hands of prosecutors. Because no detainee can be sure that agents are not monitoring their conversations, it is likely that many will shy away from full and honest discussions with their attorneys. In this way, the rule undermines the right to a fair trial and a vigorous defense.

IV. Governing In A Vacuum

Although the United States has an obligation and right to arrest and try the perpetrators of the horrendous crimes of September 11, it must do so in compliance with fundamental principles of national, human rights and humanitarian law. It has not done so. The United States' failure to abide by these fundamental principles sets a precedent for the actions of other states, states that will see U.S. actions as supporting their own violations of international law and human dignity.

Thousands of prisoners were captured by U.S. and Northern Alliance forces in Afghanistan last Fall. On January 11, 2002, the United States military began transporting these prisoners to Camp X-Ray at the U.S. Naval Station in Guantanamo Bay, Cuba. It was reported that the transferred prisoners could face trials by military commission under the Military Order and possibly the death penalty.[26] Since that time, there have been allegations of ill-treatment of the prisoners in transit and at Guantanamo, including reports that they were shackled, hooded and sedated during the 25-hour flight from Afghanistan, that their beards and heads were forcibly shaved, and that upon arrival at Guantanamo they were housed in small cells that fail to protect against the elements.[27] A number of international bodies including the European Union, the International Committee of the Red Cross ("ICRC") and a number of foreign governments have expressed grave concerns over the treatment of the detainees, their confinement conditions and the refusal of the United States to afford them status under the Geneva Conventions.[28]

On January 16, 2002, the United Nations High Commissioner for Human Rights issued a statement regarding the Guantanamo detentions, noting that:

> "All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the Geneva Conventions of 1949.
>
> The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention.

> All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention.
>
> Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention."[29]

It is the official position of the United States' government that none of the detainees are POWs. Instead, officials have repeatedly described the prisoners as "unlawful combatants" who are not subject to the Geneva Conventions.[30] The Government has stated that the Taliban prisoners did not meet the criteria for POWs set forth in the Conventions and that they were therefore not entitled to the protections of the Conventions.[31] This determination was made without the convening of a competent tribunal required by Article 5 of the Third Geneva Convention.[32]

Although the ICRC rarely acknowledges publicly differences with governments, it did so with regard to the United States' refusal to treat the Taliban and al Quida detainees as POWs. On February 8, the day after announcement of the United States' position, Darcy Christen, a spokesperson for the ICRC, said of the detainees: "They were captured in combat [and] we consider them prisoners of war."[33] The ICRC emphasized that it was up to a court to decide if a detainee was not a POW:

> You cannot simply…decide what applies to one person and what applies to another. This has to go to a court because it is a legal decision not a political one.[34]

In its Press Release of February 9, the ICRC again stated that captured "members of armed forces and militias associated to them" are protected by Geneva III and that there "are divergent views between the United States and the ICRC" as to the procedures "on how to determine that the persons detained are not entitled to prisoner of war status."[35]

Interrogation of the Guantanamo prisoners began on January 23, 2002. No detainees were allowed to have lawyers present during questioning by officers from several United States' civilian and military agencies.[36] The U.S. military has reportedly built several windowless plywood structures on the outskirts of the detention center for the purpose of obtaining information from the detainees held there.[37]

There are presently 598 prisoners held incommunicado at Guantanamo and the government has said that it will build facilities for holding up to 2000 persons. There are no indications that the detainees have been informed of their rights under the Geneva Conventions, the ICCPR, the American Declaration on the Rights and Duties of Man ("ADRDM"), the Vienna Convention on Consular Relations, or any other international instrument which safeguards the fundamental human rights of detainees.[38] As a result, prisoners at Camp X-Ray are completely unable either to protect or to vindicate violations of their fundamental rights under domestic and international law.

In published statements, both the Secretary of Defense and other officials recently indicated the United States may hold the detainees under these conditions indefinitely.

The United States has repeatedly refused the entreaties of the international community to treat the detainees under the procedures established under the Geneva Conventions. The Third Geneva Convention applies to the treatment and legal status of POWs. The convention requires that persons captured during an international armed conflict are presumed to be POWs until a competent tribunal determines otherwise.[39] Instead of following these procedures, which require individual determinations as to whether or not a combatant is a POW, the United States has simply decided en masse that none of the Taliban or Al Qaeda detainees is a POW. This non-individualized determination made by United States' officials is contrary to the procedures established by the clear commands of the Third Geneva Convention.

As a result, none of the detainees are receiving the protections afforded POWs - protections to which they are entitled-- until the United States convenes a competent tribunal to determine their status. These include a prisoner's right under Articles 70 and 71 of the Third Geneva Convention to write directly to his family "informing his relatives of his capture, address and state of health" and to send and receive correspondence. POWs are also entitled to treatment and housing similar to that of U.S. soldiers, issuance of identity cards, protection from interrogation camps (which is what Guantanamo appears to be) and the use of coercion during interrogation. A POW also has the right to engage in hostilities without criminal penalty and valuable procedural protections in any prosecution for war crimes-- protections equivalent to those given to a U.S. soldier during a court-martial.[40] As military commissions cannot try U.S. soldiers, neither can they try the detainees at Guantanamo.

Human Rights Violations Relating To the Arbitrary, Incommunicado, and Prolonged Detention of the Guantanamo Prisoners

The United States' treatment of the Guantanamo detainees violates norms of international humanitarian law relating to the treatment of individuals detained during times of international armed conflict. United States' actions violate international human rights norms as well. It is a widely accepted principle of international law that the application of international humanitarian law does not "exclude or displace" the application of international human rights law, since both share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity."[41]

The United States' treatment of the Guantanamo detainees violates virtually every human rights norm relating to preventive detention. The United States has denied the detainees access to counsel, consular representatives, and family members, has failed to notify them of the charges they are facing, has refused to allow for judicial review of the detentions, and has expressed its intent to hold the detainees indefinitely. Meanwhile, the United States has continued to interrogate the prisoners.

Violations Relating to Trial Before Military Commissions

Through the establishment of the Military Tribunal system by Executive Order, the United States has indicated its intention to subject certain detainees to trial before military commissions, in which they could face the death penalty. These tribunals or commissions could begin processing cases at any time. Meanwhile, the detainees have been given no facilities to begin preparing their defense, and no court has reviewed the validity of their prolonged detention.

The military commissions established by the Order fail to provide minimal guarantees of due process. Instead, the commissions are designed to ensure swift convictions and possible death sentences based on secret evidence. Only the executive branch of the United States' government would review the convictions and death sentences, with no right to judicial review, and no right to appeal. In short, trials before military commissions would be skewed in favor of the government, would fail to provide adequate due process protections.

On February 25, 2002, the Center filed a petition with the Inter-American Commission for Human Rights seeking the Commission's intervention and requesting the issuance of Precautionary Measures to protect the rights of persons detained at Guantanamo, including their right to an independent determination as to their legal status and their right to be free from trial before commissions that fail to afford defendants fundamental due process rights.

On March 13, 2002, the Inter-American Commission on Human Rights granted the Center's request in part and requested that the U.S. Government convene competent tribunals to determine the detainees' legal status. The Commission found that as matters stood, those persons detained were held at the "wholly unfettered discretion of the U.S. government." To date, the government has failed to comply with the Commission's request, claiming the Commission neither had jurisdiction over the situation nor the authority to act as it did.

5. Conclusion

The Bush Administration's war against terrorism, without boundary or clear end-point, has led to serious abrogation of the rights of the people and the obligations of the federal government. Abuses, of Fourth and Fifth Amendment rights in particular, have been rampant, but more

disturbing is the attempt to codify into law practices that erode privacy, free speech, and the separation of powers that is the hallmark of our democracy.
Particularly dismaying are two trends on display in government actions. In its conduct of the terrorism investigation, the government has disregarded its responsibility to maintaining a democratic society. Encroachments on the separation of powers threaten the return of authoritarian rule, inasmuch as that division of authority was set to make sure that no one in government holds a disproportionate amount of power. Short of this, they undermine the oversight provided by the legislative and judicial branches over executive authority, and invite abuses by an unchecked government. Further, by seeking to hide its actions under the mantle of national security, the Administration weakens the accountability of government to the people, inasmuch as an informed public is essential to an effective democratic system. Finally, it is abridgment of First Amendment rights, the government - Congress as well as the President - threatens to choke off legitimate expressions of dissenting political viewpoints, undermining the free flow of ideas that is the hallmark of thriving democratic debate.
At the same time, government actions also undercut its obligations to maintain the rights that make our society free. New legislation, hard-line regulations in the Justice Department, and the impunity with which the Administration has abused the rights of detainees all pose a threat. The free speech and assembly rights as well as the freedom of the press guaranteed by the First Amendment have variously been compromised by government actions, hampering the flow of ideas, and creating possible penalties for their expression. The rights conferred by the Fourth, Fifth and Sixth Amendments guarantee against arbitrary and malicious persecution of individuals by the state; by weakening those protections, the government has opened the doors to new encroachments on the liberties that all residents of the United States rightfully enjoy.

Endnotes

1. While many of the detainees have been Muslim, it should be noted, some were not, so while it may be said that the government *sought* to discriminate on the basis of religion, the effort was not entirely successful. In the days immediately after September 11th, there were many reports of members of the Sikh faith being singled out for questioning. Further, at least one Hindu man was subject to indefinite detention; he is now a plaintiff in the Center's suit *Turkmen et al. v. Ashcroft et al.*

2. *See, e.g., United States v. United States District Court*, a Supreme Court ruling rejecting an argument by the Nixon Administration to the effect that the President has the inherent authority to suspend articles of the Constitution in times of emergency.

3. *See* www.whitehouse.gov/news/orders.

4. *Cf.* "Executive Branch Actions," A White Paper by the American Immigration Lawyers Association, 8/15/02.

5. *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491 (2001).

6. *See* discussion of the "Creppy Memo," below.

7. *See* "ACLU Decries Ashcroft Scheme to Gut Immigration Courts," press release, American Civil Liberties Union, (March 20, 2002).

8. "Immigration Judges seek independence from Justice Department," *Los Angeles Times*, 1/31/02

9. Similarly, within days of the attacks on September 11th, the Federal Bureau of Prisons pursuant to a directive issued by the Department of Justice, commenced the 24-hour lockdown of political prisoners incarcerated in federal facilities. This lockdown was unannounced and unexpected. The lockdown order resulted in the placement of prisoners in administrative segregation, with no provision for contact with family, friends or counsel, no exercise, and no avenue for filing a grievance about the punishment.

10. "AI's Concerns Regarding Post September 11 Detentions in the USA," Amnesty International, March 2002, pp. 6-7, fn.

11. *Center for National Security Studies v. United States Department of Justice*, No. Civ. A 01-2500 (GK) (Aug. 15, 2002).

12. AI's Concerns Regarding Post September 11 Detentions in the USA," Amnesty International, March 2002, pp. 6-7, fn.

13. The Creppy memo discussed above, by excluding journalists from public proceedings, violates the free press guarantees of the First Amendment (as well as the due process rights of accused immigration violators under the Fifth Amendment). Courts in Michigan and New Jersey have ruled that the closures are unconstitutional on this basis, and on August 26th, a federal appeals court upheld the Michigan ruling. See *Detroit Free Press v. Ashcroft*, Case No. 02-1437 (6th Cir., August 26, 2002); *North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002).

14. Section 411 also stretches the definition of terrorism past its natural breaking point. Under that section, a terrorist act is one committed with a "weapon or dangerous device (other than for mere monetary gain)." Conceivably, this would make ordinary crimes committed by non-citizens terrorist acts, provided money is not the motive.

15. The poster concerned the application of the death penalty in Texas under then-Governor George Bush.

16. *Brandenberg v. Ohio*, 395 U.S. 444 (1969).

17. Nancy Chang, *Silencing Political Dissent: How Post September 11Anti-Terrorism Measures Threaten Our Civil Liberties*, Seven Stories Press, 2002, pp. 123-24.

18. *United States v. United States District Court for the Eastern District of Michigan*, 313 U.S. 297 (1972).

19. Undated letter to Sens. Bob Graham, Orrin Hatch, Patrick Leahy and Richard Shelby, p. 9. Letter on file with CCR.

20. This threat to Fourth Amendment rights was dealt a serious setback in May 2002, when the Foreign Intelligence Surveillance Court, empowered to authorize foreign intelligence wiretaps, rejected a Justice Department request for broader powers to share information gathered by counterintelligence agents with criminal investigators. The opinion, which noted numerous instances where it was mislead by the FBI under the Clinton investigation, found that the powers sought defied the intent of Congress when it passed the Foreign Intelligence Surveillance Act, and were not "reasonably designed" to protect the privacy rights guaranteed by the Fourth Amendment.

21. Note, too, that this finding need only be made by the Attorney General, not an independent judge, as required for a normal arrest.

22. Most detainees have been held for significantly longer, and it is unclear whether the Justice Department is applying Section 412 to its investigation.

23. Ibid, p. 16

24. "Special Administrative Measure for the Prevention of Acts of Violence or Terrorism," 66 Fed. Reg. 55062.

25. Note that this rule applies to all prisoners, including pretrial detainees, immigration cases and material witnesses, and not just criminal convicts whose rights are curtailed under the Constitution.

26. *See* e.g., Richard Sisk, *Airport Gun Battle Firefight Erupts As Prisoners Are Flown To Cuba*, New York Daily News, Friday, January 11, 2002 at 27.

27. *See* e.g., Amnesty International, USA: *AI calls on the USA to end legal limbo of Guantanamo prisoners*, AI Index: AMR 51/009/2002, issued 15/01/2002, at http://web.amnesty.org/ai.nsf/Index/AMR510092002. The detainees have been confined in makeshift eight-by-eight foot cells made of chain link fence, with corrugated metal roofs and concrete slab floors. The open-air cages are surrounded by razor wire and guard towers; prisoners have reportedly been provided with thin foam mattresses and rations in plastic bags. Tony Winton, Guantanamo Gets Ready to House War Prisoners; Site Once Held Boat People, The Record, Thursday, January 10, 2002 at A13. See also: BBC, Inside Camp X-Ray, available at http://news.bbc.co.uk/hi/english/static/in_depth/americas/2002/inside_camp_xray/default.stm.

28. Lynne Sladky, *More Scrutiny on Suspects' Treatment*, Associated Press, Tuesday January 22, http://dailynews.yahoo.com/h/ap/20020122/wl/guantanamo_prison_38.html.

29. *Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay*, Cuba, 16 January 2002, at: http://www.unhchr.ch/huricane/huricane.nsf/newsroom.

30. *Davis Bloom and Soledad O'Brien, Former Defense Secretary William Cohen Discusses the Status of Prisoners Held by US in Guantanamo Bay and Afghanistan*, NBC News, Saturday, January 12, 2002.

31. *See*: http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

32. Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949 (ratified by the United States without reservation on 2 August 1955) (Geneva III), Article 5.

33. Richard Waddington, *Guantanamo Inmates Are POWs Despite Bush View - ICRC*, Reuters, February 9, 2002.

34. Id.

35. ICRC, Communication to the press No. 02/11, February 9, 2002.

36. Jane Sutton, *Prisoners at Guantanamo Bay Face First Questioning*, Reuters, Wednesday January 23, at http://dailynews.yahoo.com/h/nm/20020123/ts/attack_guantanamo_dc_27.html.

37. Reuters, *'Good Cop, Bad Cop Gets Al Qaeda to Talk*, Friday February 1, at: http://story.news.yahoo.com/news?tmpl=story&u=/nm/20020201/ts_nm/attack_interrogations_dc_1.

38. *See* United Nations General Assembly Resolution on the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Resolution 43/173 (9 December 1988), Principle 11; United Nations Basic Principles on the Role of

Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, (27 August to 7 September 1990), Principles 1 to 8; Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal for Rwanda and the Former Yugoslavia and Rwanda (As Amended) 29 November 1999, Rules 5, 9, 12 and 67.

39. Geneva III, Articles 4 & 5

40. Pows can be charged with war crimes committed both before and during hostilities, Art.85, but the trials of such crimes must be before the same courts employing the same procedures as those of the detaining power. Art. 102, Geneva III.

Coard et al v United States, Case 10,951, Inter-Am. C.H.R. Report No. 109/99, (1999), para.39.

REPORT, NANCY CHANG & ALAN KABAT, CENTER FOR CIVIL RIGHTS, "SUMMARY OF RECENT COURT RULINGS ON TERRORISM-RELATED MATTERS HAVING CIVIL LIBERTIES IMPLICATIONS," MARCH 8, 2004

SUMMARY OF RECENT COURT RULINGS ON TERRORISM-RELATED MATTERS HAVING CIVIL LIBERTIES IMPLICATIONS[1]

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and
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March 8, 2004

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[1] Nancy Chang and the Center for Constitutional Rights are counsel of record in a number of cases described in this paper, including *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003), *Humanitarian Law Project, et al., v. Ashcroft, et al.*, 352 F.3d 382 (9th Cir. 2003) ("*Humanitarian Law Project I*"), *Humanitarian Law Project, et al. v. Ashcroft, et al.*, 2004 U.S. Dist. LEXIS 926 (C.D. Cal. Jan. 23, 2004) ("*Humanitarian Law Project II*"), *Haddad v. Ashcroft*, 221 F. Supp. 2d 799 (E.D. Mich. 2002), and *Turkmen, et al., v. Ashcroft, et al.*, No. 02 CV 2307 (JG) (E.D.N.Y.). In addition, Nancy and the Center have submitted amicus briefs in support of several individuals whose cases are described in this paper, including Jose Padilla, Lynne Stewart, and John Walker Lindh.

Alan Kabat and Bernabei & Katz, PLLC, are counsel of record in *Burnett, et al. v. Al Baraka Investment and Development Corporation, et al.*, 274 F. Supp. 2d 86 (D.D.C. 2003), and *32 County Sovereignty Committee v. Department of State*, 292 F.3d 797 (D.C. Cir. 2002).

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Introduction

In the eleven years since the 1993 bombing of the World Trade Center in New York City, criminal prosecutions, civil lawsuits, habeas petitions, and other legal proceedings involving persons and groups alleged to have engaged in or supported terrorism have proliferated. The number of such proceedings has escalated sharply with the September 11, 2001 terrorist attacks on the United States and the subsequent enactment of the USA Patriot Act and introduction of executive anti-terrorism measures, and this trend has continued unabated to the present. Unfortunately, information documenting these legal developments is scattered about in case reporters, newspapers, and journals, and it has been difficult for the general public – and even lawyers – to obtain an overview of this rapidly evolving body of law. In order to assist interested members of the public, press, and the bar, we provide this compilation and analysis of recent court rulings on terrorism-related matters.

In times of national crisis, the executive branch and Congress traditionally implement measures in the name of security that expand the power of the government and contract the civil liberties of citizens – and, to a far greater degree, non-citizens. While the courts have traditionally served as a check on abuses of power by the political branches, they also have a strong tradition of deferring to the political branches on matters of national security. The period following the September 11, 2001 attacks has proven no exception to these general rules. One trend that we identify in this paper is an increased willingness on the part of the government to resort to what may be pretextual grounds for detaining those whom it wishes to investigate for terrorist ties but for whom it lacks the probable cause required under the Fourth Amendment to

hold in criminal detention. Another trend we identify is an increase in prosecutions that appear to impose guilt on the basis of political and religious associations with individuals and groups suspected of terrorism.

As the cases discussed below illustrate, the federal courts have divided between those that have scrutinized, and found wanting, the government's rationale for actions that curtail our freedoms, and those that have accepted the rationales presented by the government at face value. At present, the U.S. Supreme Court has not issued any substantive decisions on the lawsuits discussed in this paper. On November 10, 2003, however, the Supreme Court agreed to review consolidated cases (*Rasul* and *Al-Odah*) that present the issue of whether the federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated by the United States military in Guantanamo Bay, Cuba. And on January 9, 2004, the Supreme Court agreed to review the case (*Hamdi*) of a U.S. citizen who was designated by the President as an enemy combatant in 2002 and who has been held in incommunicado detention in a military brig ever since; on February 20, 2004, the Supreme Court granted certiorari in another case brought by an enemy combatant (*Padilla*). However, in 2003 and early 2004, the Supreme Court denied petitions for certiorari review in three cases that challenged the secrecy surrounding INS detentions of non-citizens in the aftermath of the September 11 attacks (*North Jersey Media Group, Center for National Security Studies,* and *M.K.B.*).

We intend to update this paper on a periodic basis in order to incorporate new legal developments falling within our area of focus – civil rights and civil liberties in an age of terrorism. Information on new developments in the cases discussed in this paper and on cases that ought to be incorporated into future editions would be greatly appreciated, as would suggestions and corrections regarding our presentation of the cases in this paper. Please bear in mind that space and time limitations preclude us from presenting an exhaustive description of each case. Your comments should be submitted to Nancy Chang at nchang@ccr-ny.org and to Alan Kabat at kabat@bernabeiandkatz.com.

I. The Detention of Non-Citizens of Special Interest to the Government's Terrorism Investigation Based on Immigration Charges.

A. The Blanket Closure of Immigration Hearings to the Press and Public.

On September 21, 2001, Chief Immigration Judge Michael Creppy issued a directive barring the press and public on a blanket basis from attending immigration hearings of individuals detained by the Immigration and Naturalization Service (INS)[2] and classified by the government as being of "special interest" to its investigation of the September 11, 2001 terrorist attacks. The U.S. Courts of Appeal for the Third and Sixth Circuits split on the question of

[2] On March 1, 2003, the INS was transferred from the Department of Justice to the Department of Homeland Security, and the INS's enforcement functions were assumed by the Bureau of Immigration and Customs Enforcement (BICE).

whether the Creppy Directive comports with the First Amendment, and the U.S. Supreme Court declined review of this issue.[3]

The Sixth Circuit ruled in August 2002 that the press has a First Amendment right of access to the immigration hearings covered by the Creppy Directive unless the judge assigned to hear the matter has made an individualized determination that secrecy is required in order to protect national security. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), *reh'g en banc denied* (Jan. 22, 2003). As Judge Damon Keith, the author of the Sixth Circuit opinion, explained: "Democracies die behind closed doors . . . . When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation." *Id.* at 683. In a similar vein, Judge Nancy Edmunds of the U.S. District Court in Detroit held in a related case, *Haddad v. Ashcroft*, 221 F. Supp. 2d 799 (E.D. Mich. 2002), that the Creppy Directive interferes with an INS detainee's right under the Due Process Clause to a fair and open immigration hearing.

But in November 2002, the Third Circuit deferred to the judgment of the Department of Justice (DOJ) and held that the Creppy Directive was constitutional. *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003). In doing so, the Third Circuit reversed the ruling of Chief Judge John Bissell of the U.S. District Court for New Jersey, who, in May 2002, had enjoined the operation of the Creppy Directive on the grounds that it was not narrowly tailored to serve the national security interests asserted by the government and therefore could not withstand the strong presumption of access to government proceedings under the First Amendment. *North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002). The Third Circuit denied rehearing *en banc*, and the media plaintiffs' petition to the Supreme Court for certiorari review was denied in May 2003.

B. Freedom of Information Act Requests for Information on Non-Citizens Detained by the INS Following the September 11, 2001 Terrorist Attacks.

DOJ refused to comply with a Freedom of Information Act (FOIA) request filed in October 2001 by dozens of public interest organizations seeking the identities of the many hundreds of non-citizens who were arrested and detained by the INS in the wake of September 11. Judge Gladys Kessler of the U.S. District Court for the District of Columbia ordered DOJ to release the INS detainees' names under supervised conditions. *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 103 (D.D.C. 2002).

Instead of doing so, DOJ obtained a stay of the order from Judge Kessler and appealed her decision to the U.S. Court of Appeals for the D.C. Circuit. On June 17, 2003, the D.C. Circuit reversed Judge Kessler's order and held that DOJ did not have to release the detainees' names under any conditions, over a strong dissenting opinion by Judge Tatel. *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003). The majority opinion (authored by Judge Sentelle, and joined by Judge Henderson) deferred to the government's assertion of national security concerns and concluded that FOIA's law enforcement exemption, 5 U.S.C. § 552(b)(7)(A), shielded the names of detainees from public disclosure. *Id.* at 926-32.

[3] The Third Circuit covers Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands; the Sixth Circuit covers Kentucky, Michigan, Ohio, and Tennessee.

This exemption allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records of information . . . could reasonably be expected to interfere with enforcement proceedings." U.S.C. § 552(b)(7)(A).

The panel also held that the names of the detainees' attorneys could be withheld under the law enforcement exemption since that information might allow Al Qaeda operatives or others to contact the attorneys and compile a list of the detainees. *Id.* at 932-33. The panel rejected the plaintiffs' First Amendment challenge, which was based on earlier decisions upholding the right of the public to obtain arrest records, on the grounds that the records being sought were not individual criminal judicial proceedings, but instead were comprehensive listings compiled from non-judicial records in a special investigation to prevent terrorism. *Id.* at 933-36. Judge Tatel's dissent recognized that while "uniquely compelling governmental interests are at stake," the majority's approach was misguided:

> While the government's reasons for withholding *some* of the information may well be legitimate, the court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the principles of openness in government that FOIA embodies.

Id. at 937 (Tatel, J., dissenting).

The plaintiffs filed their petition for certiorari review with the Supreme Court on September 29, 2003. However, on January 12, 2004, the Supreme Court denied the request. *Center for National Security Studies v. Department of Justice*, 124 S. Ct. 1041 (2004); *see also* C. Lane, "Secrecy Allowed on 9/11 Detention," *Washington Post*, Jan. 13, 2004, at A-1, A-8.

C. Civil Rights Lawsuits Brought by INS Detainees Seeking Damages and Other Relief.

In April 2002, the Center for Constitutional Rights filed *Turkmen v. Ashcroft*, a civil rights suit for money damages and declaratory and injunctive relief, on behalf of a class of male non-citizens from the Middle East and South Asia with no ties to terrorism who were arrested following the September 11 attacks on the pretext of minor immigration violations and were improperly detained for months on end. *Ibrahim Turkmen, Asif-Ur-Rehman Safi, Syed Amjad Ali Jaffri, Yasser Ebrahim, Hany Ibrahim, Shakir Baloch, and Akil Sachveda v. John Ashcroft, Robert Mueller, James Ziglar, et al.*, No. 02 CV 2307 (JG) (E.D.N.Y.). On June 18, 2003, plaintiffs amended their complaint to incorporate newly revealed findings made by the DOJ's Office of the Inspector General (OIG) in a report released on June 2, 2003, "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." This report and a second OIG report issued on December 5, 2003, "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York," document that these detainees languished for months in INS detention without opportunity for release on bond until they were cleared of terrorist ties by the FBI, and that those detainees who were held in Brooklyn's

Metropolitan Detention Center were subjected to a communications blackout and a widespread pattern and practice of physical and verbal abuse by prison guards. *See also* D. Eggen, "Tapes Show Abuse of 9/11 Detainees," *Washington Post*, Dec. 19, 2003, at A-1, A-18, A-19; P. von Zielbauer, "Detainees' Abuse Is Detailed," *N.Y. Times*, Dec. 19, 2003, at A-23; T. Perrotta, "Report Claims Detainees Denied Rights in 9/11 Aftermath," *N.Y. Law Journal*, Dec. 24, 2003.

As amended, the *Turkmen* complaint alleges that post-September 11 INS detainees were arbitrarily classified as being "of interest" to the government's terrorism investigation notwithstanding the absence of evidence tying them to terrorism. The complaint further alleges that these detainees were subjected to a set of policies and practices that violated their rights under the First, Fourth, Fifth, and Sixth Amendments, including beatings by prison guards, interference with their ability to practice their religion, delayed notice of the charges on which they were being held, a blanket policy of denying them release on bond, a communications blackout that interfered with their ability to retain counsel and seek access to the courts, and a "hold until cleared policy" under which the INS refused to return them to their countries of origin until the FBI had cleared them of terrorist ties. The named defendants – the United States, Attorney General John Ashcroft, FBI Director Robert Mueller, former INS Commissioner James Ziglar, and the current and past Wardens of the Metropolitan Detention Center – moved to dismiss the complaint on jurisdictional and qualified immunity grounds. Judge John Gleeson of the U.S. District Court for the Eastern District of New York is expected to rule on this motion shortly.

In September 2002, Hady Hassan Omar filed an individual civil rights action for money damages. Mr. Omar, an Egyptian, was arrested on September 12, 2001, and detained by the INS for a total of 73 days, while apparently being investigated by the FBI for terrorist ties. *Hady Hassan Omar v. Casterline, et al.*, 288 F. Supp. 2d 775 (W.D. La. 2003). Omar alleged in his complaint that he was subjected to severe bodily and mental injury by prison guards who repeatedly and unnecessarily conducted invasive cavity searches, mistreated him, denied him access to counsel, and interfered with his religious practices.

On September 10, 2003, Judge Little of the U.S. District Court for the Western District of Louisiana issued an opinion on a motion for summary judgment filed by the defendants – who included a Special INS Agent and the Warden and employees of the Pollock Penitentiary in Louisiana, where Omar was detained – each of whom argued that the claims against him should be dismissed on the grounds that he had qualified immunity from suit. *Omar*, 288 F. Supp. 2d 775. Judge Little dismissed Omar's claims against Special INS Agent Vence Carmach based on a finding that Omar had failed to allege Carmach's personal involvement in any of the constitutional violations alleged in the complaint. *Id.* at 779. In addition, Judge Little dismissed Omar's claims based on a body cavity search and probe that was conducted on him when he first entered the Pollock Penitentiary. Treating Omar's status to be equivalent to that of a pretrial detainee, the Judge concluded on a Fourth Amendment analysis that the safety and security concerns of the search outweighed the intrusiveness of the search. Similarly, he concluded on a due process analysis that the search was a reasonable measure in light of the prison's security concerns. *Id.* at 779-781. However, Judge Little did conclude that Omar's First Amendment claim for violation of his right to practice his religion could proceed to trial. Omar alleged that defendants had fed him pork and had refuse to tell him the time of day or date (so that he could

not follow his prayer schedule or observe Ramadan), even after he told them of his religious beliefs. *Id.* at 781-82.

At least one of the September 11 INS detainees remained in custody through the beginning of 2004, more than two years after he was cleared of any involvement with terrorist activities, due to what a magistrate judge found to be governmental misconduct and incompetence. U.S. Magistrate Judge Kenneth Schroeder of the U.S. District Court for the Western District of New York concluded that the continued detention of Benamar Benatta arose from a "sham" created by the FBI and immigration officers who attempted, through a "subterfuge" to hold Benatta in criminal detention without any legal justification. *United States v. Benatta*, No. 01-CR-247E, 2003 WL 22202371, at *4 (W.D.N.Y. Sept. 12, 2003). Not only did Judge Schroeder find that "the facts of this case clearly establish[ed] that there was collusion between the INS and the FBI in the treatment of the defendant," *id.* at *7, but he found that the prosecutors were part of this cover-up; he went on to criticize "the prosecution's attempt to put a 'spin' on what was done in this case," *id.* at *8, and the prosecutors' "incompetence and negligence," *id.* at *10. He recommended dismissal of the indictment because: "This type of government malfeasance or negligence should not be tolerated since it 'falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying' the criminal prosecution of the defendant." *Id.* at *12; *see also* M. Powell, "A Prisoner of Panic After 9/11; Algerian-Born Detainee Seen as Victim of Excess," *Washington Post*, Nov. 29, 2003 at A-1, A-4, A-5. Shortly after Judge Schroeder issued his recommendation, the government agreed to dismiss the criminal charges. However, Benatta remains subject to immigration charges and is requesting asylum as a refugee from Algeria. *See* M. Powell, "Release from Jail Sought for Cleared Terrorism Suspect," *Washington Post*, Dec. 31, 2003, at A-4.

The U.S. Court of Appeals for the Ninth Circuit held that Harpal Singh Cheema, a Sikh lawyer, and his wife, Rajwinder Kaur, both of whom are refugees from India, could not be deported under the Immigration and Nationality Act (INA), at 8 U.S.C. §§ 212(a)(3)(B)(iv) and 241(a)(4)(B), based on a bare government allegation that they had engaged in terrorist activity. Instead, the statute requires a determination of "whether there are reasonable grounds to believe that the alien is a danger to the security of the United States." *Cheema v. INS,* 350 F.3d 1035, 1041 (9th Cir. 2003). Thus, even if Cheema had engaged in terrorist activity with respect to the Sikh separatist movement in India, the INS had proffered no evidence, let alone the requisite "substantial evidence," *id.* at 1042, showing that such activity had affected the national security of this country. The majority opinion, by Judge Noonan, recognized that "one country's terrorist can often be another country's freedom fighter," *id.*, and noted that Americans, and even the American government, had a long history of supporting rebels abroad, going back to 1848, and including support for such diverse figures as Nelson Mandela, Eamon De Valera, Ben Gurion, the Nicaraguan Contras, and the Solidarity Movement in Poland. *Id.* at 1043. Thus, the Ninth Circuit ordered that the deportation orders be rescinded, but remanded the petitions for asylum for a proper determination. *Id.* at 1044. The court recognized that Cheema and his wife were understandably concerned about the potential consequences of deportation to India, as opposed to continued detention: "to be offered indefinite imprisonment as an alternative to likely torture is to be offered a harsh choice." *Id.* at 1041. The dissenting opinion, by Judge Rawlinson, averred that even minor terrorist attacks abroad can have worldwide repercussions, citing the example of the assassination in Sarajevo that led to World War I. *Id.* at 1044-45. It remains to

be seen whether this decision will have an impact on analogous provisions, introduced by the USA Patriot Act, which can be used to prosecute individuals. *See also* B. Egelko, "Court Orders Jailed Sikh Activist Freed; He Funded Foreign Terrorists, but Wasn't Deemed Dangerous," *San Francisco Chronicle*, Dec. 3, 2003. On February 18, 2004, the government petitioned the Ninth Circuit for rehearing *en banc*.

On January 22, 2004, the Center for Constitutional Rights filed a suit challenging the decision by U.S. officials to send, under its "extraordinary renditions" program, Maher Arar, a 33-year-old naturalized Canadian citizen, to Syria, where he was interrogated under torture about possible terrorist ties. *Arar v. Ashcroft, et al.*, No. 1:04-CV-00249-DGT (E.D.N.Y.) (Brooklyn). Arar asserts that he has no involvement whatsoever in any terrorist activities. He was arrested by FBI and INS agents on September 26, 2002, while transiting through JFK Airport to a connecting flight to Canada on his return from a family vacation and coercively interrogated by them. These officials deprived Arar of contact with his family, consulate, and lawyer and, after two weeks, summarily removed him to Syria, where he was detained for close to a year and interrogated under torture. *See* "Canadian Sues U.S. Officials; Terror Suspect Was Deported to Syria, Jailed and Tortured," *Washington Post*, Jan. 23, 2004, at A-17. Syria is one of seven countries that the Bush administration has designated as a sponsor of state terrorism. Arar asserts that U.S. government officials deported him to Syria precisely because that country uses methods of interrogation that contravene the Convention against Torture, a treaty signed and ratified by the United States in 1994, and that would not be legal or morally acceptable in this country. He claims that U.S. officials acted in violation of the Torture Victims Protection Act and Due Process Clause of the Fifth Amendment. On January 28, 2004, the Canadian government announced that it would conduct a public inquiry into the role of Canadian officials in Arar's arrest and deportation to Syria. *See* K. Harris, "'Great Day' for Justice; Maher Arar Gets Public Inquiry," *The Toronto Sun,* Jan. 29, 2004, at 5; *see also* "Mr. Arar's Lawsuit" [editorial], *Washington Post*, Feb. 2, 2004, at A-16.

II. The Detention of Material Witnesses for Grand Juries.

Two judges in the Southern District of New York have reached different conclusions in determining whether the Material Witness statute, 18 U.S.C. § 3144, authorizes the government to detain individuals when it deems their testimony to be material to a grand jury proceeding. The government, reading this statute expansively, has secretly locked up an undisclosed number of terrorism suspects – believed to number in the dozens – even though it lacks probable cause to hold them on criminal or immigration charges. Judge Shira Scheindlin concluded that the material witness statute "carve[s] out a carefully limited exception to the general rule that an individual's liberty may not be encroached upon unless there is probable cause to believe that he or she has committed a crime." *United States v. Awadallah*, 202 F. Supp. 2d 55, 58 (S.D.N.Y. 2002). Construing the statute narrowly, she ruled that it does not extend to grand jury proceedings. Judge Michael Mukasey, however, concluded that "[t]he duty to disclose knowledge of crime rests upon all citizens" and "is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness." *In re Application of the United States for a Material Witness Warrant*, 213 F. Supp. 2d 287, 299 (S.D.N.Y. 2002). Judge Mukasey ruled that the application of the material witness statute to grand jury proceedings does not

violate the Fourth Amendment. The government appealed Judge Scheindlin's ruling to the Second Circuit. The appellate argument took place on April 10, 2003, and the Second Circuit issued its decision on November 7, 2003, which reversed the district court and held that Awadallah could be detained under the material witness statute. *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003). *See generally* R. McFadden, "Court Reinstates Charges in 9/11-Related Case," *N.Y. Times*, Nov. 8, 2003, at A-11; E. Walsh, "Court Upholds a-Post 9/11 Detention Tactic," *Washington Post*, Nov. 8, 2003, at A-11; M. Hamblett, "Prosecutors Win Big in Terrorism Ruling," *N.Y. Law Journal*, Nov. 10, 2003. On January 7, 2004, Awadallah filed a petition for rehearing *en banc* with the Second Circuit. *United States v. Awadallah*, No. 02-1269.

At least one material witness has been revealed to have been detained based on a false statement. *In re Application of the United States for a Material Witness Warrant*, 214 F. Supp. 2d 356 (S.D.N.Y. 2002). Abdallah Higazy, an Egyptian student, was a guest at the Millennium Hilton Hotel, across the street from the World Trade Center, at the time of the September 11 attacks. A security guard at the hotel, Ronald Ferry, claimed that a radio transceiver was found in the safe in Higazy's room, along with his passport and a copy of the Koran. In a telling example of how law enforcement agents exert intense psychological pressure on suspects in their custody, Higazy is reported to have "confessed" on a polygraph test that the radio transceiver was his. *Id.* at 359. In fact, the radio transceiver was found in the room of another hotel guest, an airline pilot. The government was forced to dismiss the indictment of Higazy, and Ferry was charged with making false statements to which he pled guilty. In December 2002, Higazy filed a civil rights lawsuit against the FBI agent and Hilton charging false arrest.

Earlier this year, the U.S. District Court for the District of Oregon held that a material witness could be detained pending completion of grand jury proceedings, while it concluded that the material witness statute did not allow public disclosure of the reasons for detaining the witness. *In re Grand Jury Material Witness Detention*, No.03-49-MISC-CR, 2003 WL 21674456 (D. Or. Apr. 7, 2003). Even though the identity and detention of this witness – Maher Hawash – was well known to the general public, his detention hearing was closed in order to prevent disclosure of information relating to the grand jury. Subsequently, the government indicted Hawash, along with six other defendants, for conspiracy to support al Qaeda and the Taliban. *See* Part V, Section B, *infra*.

III. The Military Detention of Enemy Combatants and Foreign Nationals.

A. The Detention of American Citizens Designated as Enemy Combatants.

In the first half of 2002, the executive branch claimed, for the first time, the extraordinary power to detain United States citizens wholly outside of the legal system – on an indefinite basis – under the military powers reserved to it in Article II of the Constitution. The Department of Defense has been holding at least two American citizens –Yasser Hamdi, an alleged Taliban fighter who was captured in Afghanistan, and Jose Padilla, an alleged "dirty bomber" who was arrested at a Chicago airport – in incommunicado detention as "enemy combatants" for well over a year. The government has taken the position that it may hold enemy combatants in military

custody without notifying them of the charges against them, without allowing them access to counsel or the outside world, and without providing with them a trial before an impartial arbiter until "the end of hostilities." In response to habeas petitions that have been filed on behalf of both Hamdi and Padilla, the government has also taken the position that the courts lack jurisdiction to conduct a *de novo* hearing on whether its designation of enemy combatants is supported by the evidence.

The Fourth Circuit, in *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *reh'g denied*, 337 F.3d 335 (4th Cir. 2003) (*en banc*), largely accepted the DOD's designation of Yasser Hamdi as an enemy combatant despite the fact that the evidence against Hamdi consisted solely of hearsay – the unchallenged declaration of Michael Mobbs, an employee of the Department of Defense, asserting that Hamdi was captured in the zone of active combat, but providing little in the way of detail. In her dissent from rehearing *en banc*, Judge Diana Gribbon Motz warned that "the panel embarks on a perilous new course – approving the Executive's designation of enemy combatant status not on the basis of facts stipulated or proven, but solely on the basis of an unknown Executive advisor's declaration, which the panel itself concedes is subject to challenge as 'incomplete[]' and 'inconsistent' hearsay." *Hamdi*, 337 F.3d at 371. On October 1, 2003, Hamdi's attorneys submitted their petition to the Supreme Court for certiorari review. *Hamdi v. Rumsfeld, petition for cert. filed* (U.S. Oct. 1, 2003) (No. 03-6696); *see also* J. Markon, "High Court Urged to Review Hamdi Detention," *Washington Post*, Oct. 2, 2003, at B-3. Fred Korematsu, the lead plaintiff in the World War II Japanese detention camp cases, submitted an amicus brief in support of Hamdi and the Guantanamo detainees. *See* "The Court's Conscience" [editorial], *Washington Post*, Oct. 10, 2003, at A-26.

While Hamdi's petition for certiorari was pending, DOD unexpectedly agreed to allow Hamdi access to counsel, on the same day that the government's opposition to Hamdi's petition was to be filed. *See* J. Markon & D. Eggen, "U.S. Allows Lawyer for Citizen Held as 'Enemy Combatant,'" *Washington Post*, Dec. 3, 2003, at A-1, A-7; D. Eggen, "Decision to Allow Lawyer for 'Enemy Combatant' Is New Policy," *Washington Post*, Dec. 4, 2003, at A-10; J. Markon, "Military to Watch Prisoner Interview," *Washington Post*, Jan. 31, 2004, at B-3.

On January 9, 2004, the Supreme Court granted Hamdi's petition for certiorari. *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004). *See* C. Lane, "High Court to Weigh Detention of Citizens," *Washington Post*, Jan. 10, 2004, at A-3. Oral argument is scheduled for April 28, 2004.

In the case of Jose Padilla, Judge Michael Mukasey issued an order as a matter of discretion, rather than right, granting limited access to counsel. *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003); *see also Padilla v. Rumsfeld*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). Unlike Hamdi, Padilla was a civilian and was arrested in the United States, far from the field of battle. By order dated April 9, 2003, Judge Mukasey certified several questions for immediate review, including the following: "Does the President have the authority to designate as an enemy combatant an American citizen captured within the United States, and through the Secretary of Defense, to detain him for the duration of armed conflict with al Qaeda?" Additional questions certified by Judge Mukasey address the burden that the government must meet to detain an enemy combatant, whether Padilla has the right to present facts in support of his habeas corpus petition, and whether it was a proper exercise of the court's discretion and authority to direct that Padilla be afforded access to counsel for the purpose of presenting facts in

support of his habeas petition. The U.S. Court of Appeals for the Second Circuit agreed to consider this case on an interlocutory basis. In August 2003, an outpouring of amicus curiae briefs opposing Padilla's executive detention was filed by bar organizations, retired judges, law professors, legal organizations, including the Center for Constitutional Rights, and others. *See generally* P. Span, "Enemy Combatant Vanishes Into a 'Legal Black Hole,'" *Washington Post*, July 30, 2003, at A-1, A-8; M. Hamblett, "Government Argues Jose Padilla Has Few Rights," *N.Y. Law Journal*, July 29, 2003; T. Adcock, "Padilla Defense Turns Attorney's Life Upside Down," *N.Y. Law Journal*, Aug. 26, 2003; N. Hentoff, "Bush's Vanished Prisoner: He Wonders Whether He Will See the Light of the Day Again," *Village Voice*, Oct. 10, 2003.

A Second Circuit panel consisting of Judges Pooler, Parker, and Wesley heard arguments in this case on November 17, 2003. *See* M. Garcia, "Appeals Court Weights Case of Enemy Combatant," *Washington* Post, Nov. 18, 2003, at A-3; W. Glaberson, "Judges Question Detention of American," *N.Y. Times*, Nov. 18, 2003, at A-17; M. Hamblett, "Tough Questions for U.S. on Detention," *Legal Times*, Nov. 24, 2003, at 12. On December 18, 2003, the Second Circuit held that the President could not detain Padilla as an enemy combatant, without express congressional authority, thereby rejecting the government's view that the President's inherent constitutional authority allowed him to do so. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003); *see also* N.A. Lewis & W. Glaberson, "U.S. Courts Reject Detention Policy in 2 Terror Cases," *N.Y. Times*, Dec. 19, 2003, at A-1, A-22; M. Powell & M. Garcia, "Seized Citizen Is Ordered Released," *Washington Post*, Dec. 19, 2003, at A-1, A-24. The majority opinion, by Judges Pooler and Parker, held that "clear congressional authorization is required for detentions of American citizens on American soil because 18 U.S.C. § 4001(a) (2002) (the "Non-Detention Act") prohibits such detentions absent specific congressional authorization." *Padilla*, 352 F.3d at 699. The partial dissent, by Judge Wesley, while recognizing that Padilla should have access to counsel, asserted that the Congressional joint resolution, passed shortly after September 11, 2001, authorized the President to take actions necessary to "thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens." *Id.* at 726.

The U.S. government announced that it would seek expedited appeal to the Supreme Court. *See* C. Lane, "Showdown on Terrorism Case; Administration Seeks Fast Track for High Court Appeal," *Washington Post*, Jan. 8, 2004, at A-2; A. Gearan, "Court May Hear Case of Terror Suspect, White House Fights Release of Man in 'Dirty Bomb' Case," *Washington Post*, Jan. 17, 2004, at A-3. The Second Circuit granted the government's request to stay the order freeing Padilla. *See* "Appeals Court Stays Order to Free Padilla," *Washington Post*, Jan. 23, 2004, at A-2. Meanwhile, one commentator suggested that it is improbable that Padilla would have the expertise to obtain the materials for making a "dirty bomb" (which the prosecution alleged he was attempting to do). *See* L.Z. Koch, "Dirty Bomber? Dirty Justice," *Bulletin of Atomic Scientists*, Jan.-Feb. 2004, at 59.

On February 20, 2004, the U.S. Supreme Court granted certiorari and ordered an expedited briefing schedule in *Padilla*. The case is scheduled for oral argument on April 28, 2004, immediately following the *Hamdi* oral argument. *Rumsfeld v. Padilla*, No. 03-1027, 2004 WL 95802 (U.S. Feb. 20, 2004); *see also* C. Lane, "Court Accepts Case of 'Dirty Bomb' Suspect," *Washington Post*, Feb. 21, 2004, at A-4; N.A. Lewis, "Supreme Court Will Hear 3rd Detainee Case in April," *N.Y. Times*, Feb. 21, 2004, at A-9; T. Mauro, "Weighing the Balance of

Power," *Legal Times*, Feb. 23, 2004, at 1, 10. Meanwhile, the government announced that Padilla could see his attorney, but subject to monitoring by government officials. *See* T.E. Ricks & M. Powell, "2nd Suspect Can See Lawyer," *Washington Post*, Feb. 12, 2004, at A-16; M. Powell, "Lawyer Visits 'Dirty Bomb' Suspect," *Washington Post*, Mar. 4, 2004, at A-10.

In late February 2004, Alberto Gonzales, White House Counsel, in a speech to the American Bar Association, described the process by which the administration determines whether U.S. citizens could be designated as enemy combatants, using an analytical framework based on the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942). *See* V. Blum, "Bush Counsel: How U.S. Classifies Terror Suspects," *Legal Times*, Mar. 1, 2004, at 1, 13; S. Taylor, "Progress on Gitmo Process," *Legal Times*, Mar. 1, 2004, at 54.

On June 23, 2003, the government announced a third enemy combatant designation in the case of a non-citizen – Ali Saleh Kahlah Al-Marri, a foreign student from Qatar – and transferred him from the Illinois prison, where he had been in detention since late 2001 – first as a material witness and then as a criminal defendant – to military custody in South Carolina. *United States v. Ali Saleh Kahlah Al-Marri*, Nos. 03-M-6020 and 03-CR-10044 (C.D. Ill.) (Peoria). On July 8, 2003, Al-Marri filed a petition for writ of habeas corpus with the U.S. District Court for the Central District of Illinois. *Al-Marri v. Bush*, No. 03-CV-1220 (C.D. Ill.). On July 27, 2003, Judge Michael Mihm dismissed Al-Marri's petition on the ground that the Illinois district court did not have venue over his petition now that he was in South Carolina. *See generally* R.A. Serrano, "Combatant Loses Bid for Freedom," *L.A. Times*, July 29, 2003; J. Edwards, "In the Forefront of Terror Cases," *N.J. Law Journal*, Aug. 8, 2003. On August 25, 2003, Judge Mihm denied Al-Marri's motion for reconsideration; Al-Marri then filed a notice of appeal to the Seventh Circuit. On March 8, 2004, the Seventh Circuit, in an opinion by Judge Easterbrook, affirmed the district court's decision, on the grounds that the habeas statute, 28 U.S.C. § 2241, only allowed a petition to be filed in the federal district in which the petitioner is detained. *Al-Marri v. Rumsfeld*, No. 03-3674 (7th Cir. Mar. 8, 2004). The Seventh Circuit also criticized the Second Circuit's *Padilla* decision on the grounds that habeas jurisdiction can only be based on the person responsible for maintaining custody (the Commander of the Naval Brig in Charleston, South Carolina), not the person who authorized the custody (Defense Secretary Rumsfeld). *Id.*

The Association of the Bar of the City of New York recently issued an extensive 166-page report, which questioned the detention of Americans as enemy combatants. *See* Ass'n of the Bar of the City of N.Y., Committee on Federal Courts, "The Indefinite Detention of 'Enemy Combatants': Balancing Due Process and National Security in the Context of the War on Terror," (Feb. 6, 2004), online at: <http://www.abcny.org/pdf/1C_WL06!.pdf>.

B. The Detention of Foreign Nationals at the Guantanamo Bay Naval Base and Other Overseas Locations.

On March 11, 2003, the U.S. Court of Appeals for the D.C. Circuit ruled in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), that U.S. courts lack jurisdiction to hear cases filed on behalf of foreign nationals detained outside the sovereign territory of the United States. The petitioners in *Al Odah* and two related cases decided at the same time – one of which, *Rasul v. Bush*, No. 02-5288 (D.C. Cir.), is being litigated by the Center for Constitutional Rights – are being detained at the U.S. naval base on Guantanamo Bay, Cuba. In *Al-Odah*, the petitioners,

relatives of 12 Kuwaiti citizens who were detained while allegedly serving as humanitarian volunteers in Afghanistan and Pakistan, challenged their detention as violating their Fifth Amendment due process rights and their rights under international law. The *Al-Odah* petitioners seek injunctive relief ordering the government to inform them of the charges against them and to allow their counsel and families to visit them. Similarly, the *Rasul* petitioners, relatives of two Australian detainees and a British detainee, seek a proceeding comporting with the Due Process Clause of the Fifth Amendment and international law at which their legal status would be determined and the propriety and terms of their continued detention would be reviewed.

The D.C. Circuit concluded that the U.S. base in Guantanamo was not within the sovereign territory of the United States, notwithstanding the fact that, under the terms of a lease agreement dating back to 1903, the United States has exclusive jurisdiction and control over the entire territorial area. The D.C. Circuit held that since the lease agreement did not relinquish Cuba's "ultimate sovereignty" over Guantanamo, it lacked jurisdiction to hear any case involving non-citizens detained in Guantanamo. The court relied heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a decision in which the Supreme Court held that Nazi war prisoners tried before military commissions in China and detained by the U.S. military in military-occupied Germany were not within the sovereign territory of the United States and did not have any rights cognizable in U.S. courts. In September 2003, the *Rasul* and *Al-Odah* petitioners filed a petition for writ of certiorari with the U.S. Supreme Court. Fred Korematsu submitted an amicus brief in support of the Guantanamo detainees, along with many others. *See* "The Court's Conscience" [editorial], *Washington Post*, Oct. 10, 2003, at A-26. At around the same time, the International Committee of the Red Cross charged that the U.S. government's actions at Guantanamo were unacceptable and intolerable, given the indefinite detentions that had then lasted for nearly two years. *See* N.A. Lewis, "Red Cross Criticizes Indefinite Detention in Guantanamo Bay," *N.Y. Times*, Oct. 10, 2003, at A-1, A-24.

On November 10, 2003, the Supreme Court granted the petitions for writs of certiorari filed by *Al-Odah* and *Rasul* on the limited question of whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. *Rasul v. Bush*, 124 S. Ct. 534 (2003). These cases were consolidated, and argument is scheduled for April 20, 2004. This is the first grant of review by the Supreme Court of a case challenging the government's response to the September 11 attacks. *See* L. Greenhouse, "Justices to Hear Case of Detainees at Guantánamo," *N.Y. Times*, Nov. 11, 2003, at A-1, A-14; C. Lane, "Justices to Rule on Detainees' Rights," *Washington Post*, Nov. 11, 2003, at A-1, A-5; C. Lane, "Supreme Court Revisits Enemy Combatants," *Washington Post*, Nov. 23, 2003, at A-3. More than a dozen groups, including a group of retired judges, have filed amici briefs on behalf of the petitioners. While the brief filed by military defense lawyers assigned to represent the Guantanamo detainees during the military tribunals agreed with the government that the President has the power to indefinitely detain enemy combatants, the brief argued that the detainees should still have the ability to seek judicial review of their detention through the filing of habeas petitions with the federal courts. *See* V. Blum, "Military Lawyers Urge Role for High Court; Amicus Brief by Defenders of Accused Terrorists Argues Justices Should Assert Jurisdiction over Tribunals," *Legal Times*, Jan. 19, 2004, at 1, 12; J. Toobin, "Inside the Wire," *The New Yorker*, Feb. 9, 2004, at 36-41.

Meanwhile, the government announced in early 2004 plans to release some of the Guantanamo detainees to their home countries, which may potentially moot the habeas petitions before the Supreme Court. *See* G. Frankel, "U.S. Agrees to Free 5 Britons, Dane from Guantanamo Jail," *Washington Post*, Feb. 20, 2004, at A-20; P. Baker, "U.S. Sends to Russia 7 Held at Guantanamo," *Washington Post*, Mar. 2, 2004, at A-14. Several of the remaining 650 detainees at Guantanamo have been designated for trial before a military tribunal or designated as eligible for such a trial. Defense Secretary Rumsfeld announced that the remaining prisoners would be subjected to annual reviews by a three-member review panel of military officers. Human rights groups questioned whether these annual reviews would provide sufficient due process. *See* J. Mintz, "U.S. Outlines Plan for Detainee Review," *Washington Post*, Mar. 4, 2004, at A-10.

On December 18, 2003, the U.S. Court of Appeals for the Ninth Circuit held that the detainees at Guantanamo were entitled to access to counsel and a judicial forum to challenge their detention. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003). The majority opinion, written by Judge Reinhardt and joined by Judge Shadur, held that "we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement." *Id.* at 1283. Judge Graber, dissenting, concluded that the Supreme Court's decision in *Johnson v. Eisentrager* was controlling and supported the government's position, and averred that the Ninth Circuit should have waited for the Supreme Court's resolution of *Al-Odah* and *Rasul* before deciding this case. *Id.* at 1305-06. *See also* N.A. Lewis & W. Glaberson, "U.S. Courts Reject Detention Policy in 2 Terror Cases," *N.Y. Times*, Dec. 19, 2003, at A-1, A-22; J. Mintz, "Hearing Ordered for Terrorism Detainee; 9th Circuit Ruling Could Lead to Court Dates for Others at Guantanamo Bay," *Washington Post*, Dec. 19, 2003, at A-19. On January 28, 2004, Justice O'Connor granted the government's request for a stay of the Ninth Circuit's order pending resolution by the Supreme Court of the government's petition for certiorari. On February 17, 2004, Justice O'Connor denied Gherebi's request that he be permitted a visit from counsel or provided information about his case; and on March 3, 2004, the government filed its petition for writ of certiorari. *Bush v. Gherebi*, No. 03-1245; *Gherebi v. Bush*, No. 03A693.

The Ninth Circuit previously ruled that various concerned clergy, lawyers, and law professors did not have standing to bring a habeas petition filed on behalf of these detainees, because they lacked a sufficiently close connection to the detainees. *Coalition of Clergy, Lawyers & Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002).

IV. Sixth Amendment Rights of Criminal Defendants Charged with Terrorist Crimes.

The ongoing prosecution of Zacarias Moussaoui has generated much controversy and has raised a number of thorny legal issues. This section will examine one of these issues: the Sixth Amendment right of Moussaoui, a criminal defendant who is charged with terrorist crimes, to interview and cross-examine a high-ranking Al Qaeda detainee, Ramzi Binalshibh, who is presently in U.S. military custody overseas. Moussaoui argues that the government should not be allowed to prosecute him while at the same time it denies him access to a potentially

favorable witness. The government argues that allowing Moussaoui access to this particular witness would compromise national security as Binalshibh is an alleged ringleader of the September 11 attacks. Moussaoui's defense appears to be that he had no involvement with the planning for the attacks but instead was involved with planning another attack that was to occur much later, and that Binalshibh could confirm this. On March 10, 2003, U.S. District Court Judge Leonie Brinkema ruled that the government had to make Binalshibh available to Moussaoui, subject to certain conditions. *United States v. Moussaoui*, No. CR. 1-455-A, 2003 WL 21263699 (E.D. Va. Mar. 10, 2003).

Judge Brinkema recognized that while the government had a "good faith interest in protecting national security," that interest "does not categorically override a defendant's right to a fair trial," which "includes the Sixth Amendment right to compulsory process for favorable witnesses." *Id.* at *2. Judge Brinkema explained, in a partially redacted opinion, that:

> The Court fully appreciates that the United States has a compelling interest in <<TEXT OMITTED>> captures key al Qaeda operatives <<TEXT OMITTED>>. However, this legitimate Government concern must be balanced against the equally compelling right of a defendant in a capital prosecution to receive the fair trial to which he is entitled under the Constitution and laws of the United States. Because a criminal trial is a quest for the truth, both the defendant and the public will be denied a fair trial if Moussaoui is deprived of the opportunity to present <<TEXT OMITTED>> testimony.

Id. at *5 (citations omitted). The government promptly appealed to the Fourth Circuit, which heard oral argument on June 3, 2003. On June 26, 2003, the three-judge panel issued its decision, which concluded that since Judge Brinkema had not imposed any sanction on the government for failing to comply with the court's order, the appeal was premature. *United States v. Moussaoui*, 333 F.3d 509 (4th Cir. 2003).

The government then requested that the Fourth Circuit rehear this case *en banc*. Of the twelve active-duty judges, only five voted to rehear this case; seven votes (*i.e.*, a majority of the twelve) were needed for that purpose. *United States v. Moussaoui*, 336 F.3d 279 (4th Cir. 2003). Three of the five judges (Widener, Wilkinson, and Luttig) wrote dissenting opinions to explain why they thought the case should be reheard, despite the lack of finality of Judge Brinkema's decision. In doing so, they suggested that the Fourth Circuit's refusal to act would irreparably harm national security. In response, Chief Judge Wilkins, joined by four other judges, explained why the dissenters' concerns were unwarranted and counterproductive:

> Finally, I must address my colleague's claim that the panel decision impairs national security. According to my colleague [Judge Luttig], "*any* decision in a litigation of this sensitivity inescapably" has a "profound effect . . . upon the delicate psychological balance that can determine victory or defeat as much as can combat itself." . . . Thus, my colleague implies, we must exercise jurisdiction here so that we do not tip the "psychological balance" in favor of the nation's enemies.
>
> Indeed, according to my colleague, the order of the district court and our determination that the order is presently unreviewable have already affected the manner in which the

> executive branch is exercising its national security function. My colleague's allegations find no support whatsoever in the record. Such speculation can only serve to needlessly alarm the public and appears, regrettably, to be an attempt to divert attention from the legal principles that control our decision.
>
> My colleague apparently would have us simply rule in favor of the government in all cases like this one. From his limited review of the petition for rehearing and suggestion for rehearing en banc, the accuracy of which he assumes, he believes – because the Government asserts national security interests and because he speculates about national security interests the Government does not assert – that it is our duty to exercise jurisdiction without waiting to determine whether any sanction that might be imposed would be acceptable to the Government. Siding with the Government in all cases where national security concerns are asserted would entail surrender of the independence of the judicial branch and abandonment of our sworn commitment to uphold the rule of law.

Moussaoui, 336 F.3d at 281-82.

Judge Brinkema subsequently asked the parties to suggest what sanctions, other than dismissal of the prosecution, might be imposed on the government if it refused to produce Binalshibh. *See* S. Roth, "Terror Case Could Redraw Lines of Power," *Legal Times*, July 21, 2003, at 1, 6; J. Markon, "Judge Seeks Guidance on Sanctioning U.S. in Terror Case," *Washington Post*, July 18, 2003, at A-4. In addition, in late August 2003, Judge Brinkema ordered the government to make two other witnesses, Khalid Sheik Mohammed and Mustafa Ahmed Hawsawi, available to Moussaoui. *See* J. Markon, "Moussaoui Granted Access to Witnesses," *Washington Post*, Aug. 30, 2003, at A-12; J. Markon, "Judge Says Witness May Aid Moussaoui," *Washington Post*, Sept. 4, 2003, at A-16; J. Markon, "Moussaoui Judge Rejects U.S. Offer, *Washington Post*, Sept. 10, 2003, at A-6. The government refused to make these witnesses available to Moussaoui; as a result, Judge Brinkema dismissed the terrorism charges, by ordering that the government could not present any evidence regarding Moussaoui's alleged involvement with the Sept. 11 attacks, and ordered that the government could not seek the death penalty. *United States v. Moussaoui*, 282 F. Supp. 2d 480, 486-87 (E.D. Va. 2003). Judge Brinkema concluded as follows:

> That the United States has deprived Moussaoui of any opportunity to present critical testimony from the detainees at issue in defense of his life requires, as a sanction, the elimination of the death penalty as a possible sentence. The defendant remains exposed to possible sentences of life imprisonment.
>
> Particularly in light of the Government's concessions regarding the nature and scope of the charged conspiracies and the marginal relevance of the allegations concerning the September 11 attacks to the charges against Moussaoui, as an additional sanction, the Government will be foreclosed at trial from making any argument, or offering any evidence, suggesting that the defendant had any involvement in, or knowledge of, the September 11 attacks. It would simply be unfair to require Moussaoui to defend against such prejudicial accusations while being denied the ability to present testimony from witnesses who could assist him in contradicting those accusations.

> With the death penalty removed from this case, and the prosecution prohibited from arguing that Moussaoui had any knowledge of, or involvement in, the planning or execution of the September 11 attacks, the Court is no longer satisfied that testimony from the detainees at issue would be material to the defense. Moussaoui's constitutional right to a fair trial, therefore, is not offended by the Government's refusal to comply with the Court's Orders of January 31 and August 29, 2003.

Id. at 487. Instead of proceeding to trial on the remaining charges and evidence, the government appealed to the Fourth Circuit. *See* J. Markon, "Dismissal of Terror Charges Appealed," *Washington Post*, Oct. 8, 2003, at A-2. In its brief to the Fourth Circuit, the government argued that Moussaoui, even though not part of the September 11 attacks, was a conspirator, and would have been involved in follow-up airplane hijackings. Thus, the government claims, Moussaoui should be subject to the death penalty even when the government has not provided him with access to the witnesses who are in detention. *See* J. Markon, "Moussaoui Liable for Death Penalty, U.S. Argues," *Washington Post*, Nov. 1, 2003, at A-2. A panel of the Fourth Circuit, comprised of Judges Wilkinson, Williams, and Gregory, heard oral argument on December 3, 2003, with part of the session closed to the public. *United States v. Moussaoui*, No. 03-4792.[4]

V. The Crime of Providing Material Support to Proscribed Organizations.

A. The Designation of Groups as "Foreign Terrorist Organizations."

The Secretary of State, through 8 U.S.C. § 1189, has the authority to designate groups as foreign terrorist organizations. Once designated, the groups are blocked from engaging in any activities in the United States, including fundraising and advocacy. Individuals who knowingly provide material support to a designated group can be subjected to harsh criminal penalties. A foreign terrorist organization can challenge its designation by filing a petition for review with the D.C. Circuit. The D.C. Circuit has ruled on four challenges. It has denied three of them and remanded one to the Department of State; a fifth challenge is pending.

People's Mojahedin Org. of Iran v. U.S. Department of State, 182 F.3d 17 (D.C. Cir. 1999). The D.C. Circuit held that the two petitioners – an Iranian dissident group, and the Liberation Tigers of Tamil Eelan, a Sri Lanka dissident group – lacked sufficient contacts with the United States to entitle them to constitutional due process. The court found that the record evidence, including classified evidence not made available to the petitioners, had substantial support for the determination that both groups engaged in terrorist activities.

National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001). The D.C. Circuit held that the two petitioners – both Iranian dissident groups – had sufficient

[4] In two similar cases, German courts recently held that Moroccan defendants Mounir Motassadeq and Abdelghani Mzoudi could not be convicted for terrorism charges arising from the September 11 attacks, because the United States refused to produce Ramzi Binalshibh, whom these defendants had alleged was a key witness in their cases. *See* J. Burgess, "German Court Orders New Trial for 9/11 Suspect," *Washington Post*, Mar. 5, 2004, at A-16.

contacts with the United States through their local office and bank account, so that they were entitled to constitutional protection under the Due Process Clause. Thus, the Secretary of State was required to provide them with advance notice of an impending designation, and an opportunity to present evidence to the Department of State regarding their activities. This case was remanded to the Department of State to allow the two groups to present further evidence about their activities and their contacts with the United States. As discussed below, in 2001 the Department of State rejected the submissions of the People's Mojahedin Organization, an affiliate of the National Council, and in 2003, ordered the closure of the U.S. offices of the National Council.

32 County Sovereignty Committee v. Department of State, 292 F.3d 797 (D.C. Cir. 2002). The D.C. Circuit held that the two petitioners – both Irish dissident groups – did not have sufficient contacts with the United States, notwithstanding their local office and bank account, so that they had no entitlement to due process. As was the case in the court's 1999 decision in *People's Mojahedin*, the classified evidence was found to support a determination that the groups were engaged in terrorist activities.

People's Mojahedin Org. of Iran v. Department of State, 327 F.3d 1238 (D.C. Cir. 2003). The Department of State rejected the petitioner's submissions and redesignated this group in 2001. The D.C. Circuit upheld this designation because the classified evidence supported a determination that this group was engaged in terrorist activities.

National Council of Resistance of Iran v. Department of State, No. 01-1480 (D.C. Cir.). This petition, by the sister group of People's Mojahedin, is to be argued on April 2, 2004. On August 15, 2003, the State Department ordered the closure of this group's U.S. offices. *See* "Iranian Opposition Group's Offices Shut," *Washington Post*, Aug. 17, 2003, at A-12.

In addition to the aforementioned challenges brought by designated groups, a suit was brought in March 1998 by the Center for Constitutional Rights on behalf of the Humanitarian Law Project and other plaintiffs who wished to support the lawful and humanitarian activities of two designated groups, the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelan (LTTE). *Humanitarian Law Project, et al., v. Ashcroft, et al.*, 352 F.3d 382 (9th Cir. 2003) ("*Humanitarian Law Project I*"); *Humanitarian Law Project I,* 205 F.3d 1130 (9th Cir. 2000); *Humanitarian Law Project I*, 2001 U.S. Dist. LEXIS 16729 (C.D. Cal. Oct. 3, 2001); *Humanitarian Law Project I,* 9 F. Supp. 2d 1176 (C.D. Cal. 1998). The plaintiffs asked the court to declare that the material support statute, at 18 U.S.C. §§ 2339A and 2339B, violates the First Amendment insofar as it criminalizes the provision of such support.

On plaintiffs' motion for preliminary injunction, and again on the parties' cross-motions for summary judgment, Judge Audrey Collins rejected plaintiffs' argument that the ban on material support violates the First Amendment insofar as it criminalizes the provision of cash and humanitarian aid that is solely intended to further the lawful purposes of a designated organization. However, Judge Collins agreed with plaintiffs that the law is unconstitutionally vague in that it criminalizes the provision of material support in the form of "personnel" and "training." She found that these provisions "d[id] not . . . appear to allow persons of ordinary intelligence to determine what type of training or provision of personnel is prohibited" and,

furthermore, "appeared to prohibit activity protected by the First Amendment – distributing literature and information and training others to engage in advocacy." She issued narrowly tailored preliminary and permanent injunctions barring the government from prosecuting any of the plaintiffs in the suit or any members of the organizational plaintiffs for providing "personnel" or "training" to the PKK or the LTTE.

Judge Collins' preliminary injunction was affirmed by the Ninth Circuit on March 3, 2000, and the Supreme Court denied the parties' cross-petitions for certiorari review on March 5, 2001. *Humanitarian Law Project I*, 532 U.S. 904 (2001). On December 3, 2003, Judge Collins' permanent injunction was affirmed by the Ninth Circuit. *Humanitarian Law Project I*, 352 F.3d 382 (9th Cir. 2003). The 2003 panel reiterated the earlier panel's holding "that the prohibition of 'personnel' and 'training' in § 2339B is unconstitutionally vague," while holding that those provisions were severable, so that the rest of that statute remains enforceable. *Id.* at 405. Judge Pregerson, joined by Judge Thomas, went on to hold that "to sustain a conviction under [18 U.S.C.] § 2339B, the government must prove beyond a reasonable doubt that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization's unlawful activities that caused it to be so designated." *Id.* at 403. Judge Rawlinson, however, dissented with respect to the imposition of a mens rea requirement. *Id.* at 407-08. *See also* E. Lichtblau, "Appeals Court Cast Doubt on Parts of Key Antiterrorism Law," *N.Y. Times*, Dec. 4, 2003, at A-29; C. Lane, "Court Rules on Aiding Terrorist Groups; Knowledge of Activity Must be Proved for Conviction," *Washington Post*, Dec. 4, 2003, at A-10. In January 2004, the parties cross-petitioned the Ninth Circuit for rehearing *en banc*. [See Section VI, *infra*, for a discussion of a lawsuit filed by the Humanitarian Law Project in August 2003 challenging a USA Patriot Act amendment to the material support statute that makes it a crime to provide "expert advice or assistance" to a designated group.]

In October 2003, the Department of State, in designating various entities as terrorist groups, or as aliases of previously designated entities, designated several web sites. As a result, the provision of funds or other material support to those websites has been criminalized. *See* Department of State, "Amendment of Certain Designations," 68 Fed. Reg. 58,738-58,739 (Oct. 10, 2003). This appears to be the first time that websites have been designated, as opposed to conventional groups.

B. Criminal Prosecutions for Material Support.

If a group has been designated as a foreign terrorist organization, then individuals who knowingly provide material support to such groups can be subject to criminal penalties under 18 U.S.C. §§ 2339A, 2339B (a fine and a sentence of up to 15 years, unless death results, in which case a sentence for any term of years or for life). If there is specific intent to further unlawful ends, then a ten or twenty-year sentence may be imposed under 18 U.S.C. § 2339C. Although several individuals have been indicted on material support counts, and some have pled guilty to material support or to lesser offenses, there have evidently been only three jury convictions under the material support statute. *See generally* E. Lichtblau, "U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling; Broad Steps Anger Critics of Expanded Powers," *N.Y. Times*, Sept. 28, 2003, at A-1, A-21; S. Roth, "Material Support Law: Weapon in War on Terror," *Legal*

Times, May 5, 2003, at 11; E. Lichtblau, "1996 Statute Becomes the Justice Department's Antiterror Weapon of Choice," *N.Y. Times*, Apr. 6, 2003, at B-15; D. Eggen & S. Fainaru, "For Prosecutors, 1996 Law Is Key Part of Anti-Terror Strategy," *Washington Post*, Oct. 15, 2002, at A-2.

The cases are discussed in the following four groupings: (1) Jury Convictions; (2) Plea Bargains; (3) Pending Criminal Prosecutions (which includes several multi-defendant cases in which some but not all defendants have pled guilty); and (4) Appeal Pending. Within each grouping, the cases are arranged alphabetically by the last name of the lead defendant.

Jury Convictions:

United States v. Soliman S. Biheiri, No. 03-CR-365 (E.D. Va.) (Alexandria). Biheiri was indicted on August 7, 2003 for several immigration charges arising from his illegal attempts to obtain his own naturalization. However, the government's Declaration in Support of Pre-Trial Detention (Aug. 14, 2003), avers that Biheiri, who had established an investment firm, was involved with investing funds provided by several Muslim charities, including the International Islamic Relief Organization and the Muslim World League, and allegedly engaged in transactions with designated terrorist financiers, all of which suggests that a superseding indictment based on material support may ensue. *See generally* D. Farah, "U.S. Links Islamic Charities, Terrorist Funding," *Washington Post*, Aug. 20, 2003, at A-2; G.R. Simpson & D.S. Cloud, "Immigration Case May Further Fray Saudi-U.S. Ties," *Wall Street Journal*, Aug. 12, 2003, at A-3, A-6. Subsequently, Judge Ellis denied bail to Biheiri, on the grounds that the prosecutors had presented evidence showing that he had engaged in business with individuals designated as terrorists. *See* J. Markon, "Va. Terror Network Suspect Denied Bail," *Washington Post*, Sept. 12, 2003, at A-16; G. R. Simpson, "U.S. Details an Alleged Terror-Financing Web," *Wall Street Journal*, Sept.1 5, 2003, at A-5. On October 9, 2003, the jury convicted Biheiri on two immigration counts: unlawful procurement of naturalization and false oath in matter relating to naturalization. Ordinarily, this conviction would only result in a sentence of up to six months, but the government asked Judge Ellis to impose a sentence of up to 10 years, based on the allegation that Biheiri's immigration offenses had the purpose of aiding terrorism. *See* J. Markon, "Man Convicted in Islamic Charity Probe," *Washington Post*, Oct. 10, 2003, at A-12; J. Markon, "Sentencing Questioned in Islamic Charity Case," *Washington Post*, Dec. 19, 2003, at A-32. On January 12, 2004, Judge Ellis sentenced Biheiri to only one year in prison on the charge that he lied in an attempt to obtain U.S. citizenship. However, Judge Ellis held that the prosecutors were unable to prove that Biheiri engaged in terrorist conduct or support. *See* J. White, "Va. Terror Suspect Sentenced to 1 Year," *Washington Post*, Jan. 13, 2004, at A-5.

United States v. Abdel-Ilah Elmardoudi, Karim Koubriti, Ahmed Hannan and Farouk Ali-Haimoud, No. 01-CR-80778 (E.D. Mich.) (Detroit). After a nine-week trial in June 2003, the jury convicted two defendants (Elmardoudi and Koubriti) of providing material support to Al Qaeda and engaging in document fraud (government visas), convicted one defendant (Hannan) of conspiracy to engage in document fraud but not of material support, and acquitted one defendant (Ali-Haimoud). Before the trial, the court denied the defendants' motion to suppress evidence obtained from a residential search, *United States v. Koubriti*, 199 F. Supp. 2d 656 (E.D. Mich. 2002), and denied the defendants' motion to adjourn the trial while the Iraqi war was

underway. *United States v. Koubriti*, 252 F. Supp. 2d 437 (E.D. Mich. 2003). The convicted defendants are presently engaged in post-trial motions regarding length and terms of their sentences. On February 25, 2004, Judge Rosen suggested in open court that one defendant (Hannan) could be freed from prison, pending sentencing or retrial, but subjected to electronic monitoring, after his counsel argued that he had already served twice the time he would likely be sentenced to under the federal sentencing guidelines. *See* D. Ashenfelter, "Terror Convict Could Gain Reprieve," *Detroit Free Press*, Feb. 26, 2004.

Judge Rosen had imposed a gag order on the parties on October 23, 2001, in order to prevent or minimize any taint to the jury. Despite this order, Attorney General Ashcroft, only one week later, made public statements about the alleged crimes; then-Assistant Attorney General Michael Chertoff had to apologize to Judge Rosen. In August of 2002, Fox News broadcast an account of the charges against the defendants, which was taken from a superseding indictment that had not yet been filed with the court; Deputy Attorney General Larry Thompson had to inform Ashcroft and other government officials of Judge Rosen's gag order. Despite these two events, Ashcroft, on April 17, 2003, made public statements praising a government informant (Youssef Hmimssa). The defendants moved to hold the Attorney General in contempt for having violated Judge Rosen's order. On September 26, 2003, Judge Rosen held a closed hearing on this motion. *See* D. Shepardson, "Judge Weighs Ashcroft Charge," *Detroit News*, Oct. 3, 2003. On December 16, 2003, Judge Rosen denied the defendants' motion, but did order "that Attorney General John Ashcroft be formally and publicly admonished for violating the Court's October 23, 2001 Order." *United States v. Koubriti*, No. 01-CR-80778, Opinion and Order (Docket No. 455) (Dec. 16, 2003).

Meanwhile, Judge Rosen also initiated an inquiry into the prosecutor's refusal to turn over evidence that undercut their key witness (Hmimssa) and could potentially exonerate the defendants; the Department of Justice removed the prosecutors (Convertino and Corbett), and the new prosecutor (Strauss) belatedly turned over the exculpatory information. The Department of Justice Office of Professional Responsibility is also conducting an ethics investigation into the alleged prosecutorial misconduct by Convertino. The result may lead to a new trial for the defendants. *See* R.E. Pierre, "Judge in Terror Trial Orders Hearing on Prosecutors," *Washington Post*, Dec. 11, 2003, at A-25; R.E. Pierre, "Terrorism Case Thrown into Turmoil; Factors Judge Is Considering Include Evidence Withheld from Defense," *Washington Post*, Dec. 31, 2003, at A-5; D. Ashenfelter, "Note Could Aid 3 Convicted in Terrorism Trial," *Detroit Free Press*, Jan. 13, 2004; D. Ashenfelter, "Details Give Credibility to Notes on Star Witness in Terrorism Case," *Detroit Free Press*, Jan. 15, 2004; D. Ashenfelter, "Terror Case Prosecutor Is Probed on Conduct," *Detroit Free Press*, Jan. 17, 2004. A conference on defendants' motion for acquittal was held on January 12, 2004, and was continued to February 2, 2004. *See also* D. Hakim, "Inquiries Begun Into Handling of Detroit Terror Cases," *N.Y. Times*, Jan. 29, 2004, at A-21; D. Ashenfelter, "Questions Cloud Terror Case," *Detroit Free Press*, Jan. 31, 2004; A. Lengel & D. Eggen, "FBI Investigates Head of Detroit Office; Agent Reassigned as Agency Looks into Handling of Confidential Informants," *Washington Post*, Jan. 31, 2004, at A-3. On February 27, 2004, Attorney General Ashcroft appointed Craig Morford, a federal prosecutor from Ohio, as a "special attorney" to investigate these allegations. *See* D. Eggen, "Handling of Terror Case Probed; 'Special Attorney' Hired to Review Allegations of Misconduct," *Washington Post*, Feb.

28, 2004, at A-2; R.B. Schmitt, "Terrorism Trial Triumph Turns into an Embarrassment," *L.A. Times*, Mar. 7, 2004.

On February 13, 2004, Mr. Convertino, who had served as the lead prosecutor in these cases until his removal, took the highly unusual step of filing a civil lawsuit against the U.S. Department of Justice, Attorney General Ashcroft, three officials with the U.S. Attorneys' Office for the Eastern District of Michigan, and the counsel for the Office of Professional Responsibility, claiming violations of his rights under the Privacy Act and the First Amendment arising from allegedly unauthorized public disclosures of false and misleading information about him. *Convertino v. U.S. Dep't of Justice, et al.*, No. 04-CV-00236 (RCL). *See* D. Eggen, "Terrorism Prosecutor Sues Justice Dept.," *Washington Post*, Feb. 18, 2004, at A-3; T. Schoenberg, "Detroit Terror Prosecutor Fires Back at DOJ," *Legal Times*, Feb. 23, 2004, at 3.

United States v. Hammoud, et al., No. 00-CR-147 (W.D.N.C.) (Charlotte). Twenty-six defendants, all allegedly connected to a smuggling ring that shipped cigarettes from North Carolina to Michigan, were accused of diverting the profits to Hezbollah, a designated terrorist organization in Lebanon. Some of the defendants were dismissed; others pled guilty to charges of smuggling and were sentenced for terms ranging from one to several years, and others have pending cases. On June 21, 2002, a jury convicted Mohammad Hammoud for providing material support to Hezbollah. Mohammad Hammoud and his brother, Chawki Hammoud, were also convicted of cigarette smuggling, money laundering, and racketeering. On February 28, 2003, Mohamad Hammoud was sentenced to 155 years in prison (the length of this sentence is attributable in part to the fact that separate counts were imposed consecutively, not concurrently); he is currently incarcerated with a projected release date of 2135; his brother received a much shorter sentence of several years.

Plea Bargains:

United States v. Enaam Arnaout, No. 02-CR-892 (N.D. Ill.) (Chicago). The district court upheld the indictment of Arnaout, based on alleged conspiracy to provide material support, through the Benevolence International Foundation, to Al Qaeda, Hezb e Islami, and the Sudanese Popular Defense Force. 236 F. Supp. 2d 916 (N.D. Ill. 2003). Subsequently, Arnaout pled guilty to a lesser racketeering conspiracy charge. On July 17, 2003, Judge Conlon concluded that Arnaout did not engage in terrorism-related activities through his fundraising, and thus rejected the government's request to sentence him to 20 years. On August 18, 2003, Judge Conlon sentenced Arnaout to eleven years and four months, an upward departure on the basis of her finding that Arnaout had misled the charity's donors and recipients by diverting funds to purchase military supplies. However, Judge Conlon rejected the government's request for a higher sentence, because there was no evidence that Arnaout actually supported terrorism. *See* J. Mintz, "Head of Muslim Charity Sentenced," *Washington Post*, Aug. 19, 2003, at A-2. Arnaout subsequently appealed the upward departure to the U.S. Court of Appeals for the Seventh Circuit; briefing is scheduled to be completed by March 22, 2004. *United States v. Arnaout*, No. 03-3297 (7th Cir. filed Aug. 28, 2003).

United States v. Jeffrey Battle, Patrice Lumumba Ford, Ahmed Bilal, Muhammad Bilal, Habis al Saoub, October Lewis, and Maher Hawash, No. 02-CR-399 (D. Or.) (Portland). The seven

defendants were indicted on May 2, 2003, for conspiracy to support al Qaeda and the Taliban through attempting to travel to Afghanistan in October 2001, and several were also indicted on money laundering and/or firearms charges. On August 6, 2003, Hawash pled guilty to aiding the Taliban, and agreed to testify against the other defendants in exchange for dropping the remaining charges. Five of the remaining defendants pled innocent, and Habis al Saoub has not yet been arrested. *See* A. Kramer, "Software Engineer Admits Aiding Taliban," *Associated Press* (Aug. 6, 2003). In September 2003, two defendants (A. Bilal and M. Bilal) pled guilty to conspiracy and weapons charges, and another defendant (Lewis) pled guilty to money laundering charges. *See* "2 Ore. Men Plead Guilty to Terror Charges," *Associated Press* (Sept. 18, 2003); "Ore. Woman Pleads Guilty in Terror Case," *Associated Press* (Sept. 26, 2003). On October 16, 2003, the two remaining defendants in custody (Battle and Ford) pled guilty to one count of conspiracy to commit war against the United States; the remaining charges were dropped. *See* "Duo Pleads Guilty to Conspiracy Against U.S.," *Washington Post*, Oct. 17, 2003, at A-3. Lewis was sentenced to three years; Battle and Ford were sentenced to eighteen years on the conspiracy charge. *See* "U.S. Woman Gets 3 Years for Plot to Aid Taliban," *Washington Post*, Dec. 2, 2003, at A-13. On February 9, 2004, the remaining three defendants were sentenced to reduced terms for having cooperated with the prosecution: Hawash to seven years, Ahmed Bilal to ten years, and Muhammad Bilal to eight years. "Final Members of 'Portland Seven' are Sentenced," *Seattle Post-Intelligencer*, Feb. 10, 2004.

United States v. Iyman Faris, No. 03-CR-189 (E.D. Va.) (Alexandria). Faris (aka Mohammad Rauf), an Ohio truck driver who met Osama bin Laden and plotted to destroy the Brooklyn Bridge and attack Washington, D.C., pled guilty on May 1, 2003 to providing material support to al Qaeda. The indictment and plea agreement were not unsealed until June 19, 2003. On October 28, 2003, Judge Brinkema sentenced Faris to the maximum sentence of 20 years imprisonment, having rejected his claims that he lacked mental competency, or that he was trying to fool the FBI and was merely trying to write a book on terrorism. *See* J. Markon, "Ohio Man Gets 20 Years for Al Qaeda Plot," *Washington Post*, Oct. 29, 2003, at A-2; E. Lichtblau, "Trucker Sentenced to 20 Years in Plot Against Brooklyn Bridge," *N.Y. Times*, Oct. 29, 2003, at A-19.

United States v. Yahya Goba, Sahim Alwan, Shafal Mosed, Yaseinn Taher, Faysal Galab and Mukhtar Al-Bakri, Nos. 02-M-107, 02-M-108 (W.D.N.Y.) (Buffalo). The "Lackawanna Six" were alleged to have provided material support to Al Qaeda, through attending the al Farooq training camp in early 2001. The district court upheld their continued detention without bail. 220 F. Supp. 2d 182 (W.D.N.Y. 2002); 240 F. Supp. 2d 242 (W.D.N.Y. 2003). Between January and May 2003, all six defendants pled guilty to the material support charge. The government later unsealed an indictment against a seventh defendant, Jaber Elbaneh, originally an unindicted co-conspirator. *See* M. Powell, "No Choice But Guilty; Lackawanna Case Highlights Legal Tilt," *Washington Post*, July 29, 2003, at A-1, A-8. As part of the plea bargain, the defendants extracted from the government an agreement not to designate them as enemy combatants. According to defense counsel, it was the fear of such a designation that motivated the plea bargain. *See* J. Zremski, "Security at what price? The USA Patriot Act was Passed to Fight Terrorism, But Critics Say Civil Liberties are Being Sacrificed," *Buffalo News*, Sept. 5, 2003, available online at: http://www.buffalonews.com/editorial/20030905/pdf/1046001.pdf. It appears that the government had little evidence that the defendants were actually engaged in

material support, as opposed to weapons charges. *See* M.W. Purdy & L. Bergman, "Unclear Danger: Inside the Lackawanna Terror Case," *N.Y. Times*, Oct. 12, 2003, at A-1, A-23 to A-25. The six defendants were sentenced for seven to ten year terms. *See* D. Staba, "Man Who Trained with Al Qaeda Gets a 10-Year Sentence," *N.Y. Times*, Dec. 4, 2002, at A-29 (al-Bakri, 10 years); D. Staba, "Qaeda Trainee Is Sentenced to 8-Year Term," *N.Y. Times*, Dec. 5, 2003, at A-29 (Taher); D. Staba, "New York Man in Qaeda Case Will Serve 8 Years," *N.Y. Times*, Dec. 10, 2003, at A-25 (Mosed); "Lackawanna 6 Figure Pleads Not Guilty to Money Charges," *Washington Post*, Jan. 13, 2004, at A-18 (remaining defendants); L. Bergman, "Qaeda Trainee Is Reported Seized in Yemen," *N.Y. Times*, Jan. 29, 2004, at A-21 (capture of Jaber Elbaneh, the seventh defendant).

United States v. John Walker Lindh, No. Crim. 02-37-A (E.D. Va.) (Alexandria). The district court upheld the indictment of Lindh, based on alleged conspiracy to provide material support, by joining Al Qaeda and HUM (Harakat ul-Mujahideen), and engaging in various activities, including combat, that furthered the goals of those groups. 212 F. Supp. 2d 541 (E.D. Va. 2002). Subsequently, Lindh pled guilty to lesser charges, and was sentenced on October 4, 2002 to 20 years.

United States v. Hassan Moussa Makki, et al., No. 03-CR-80079 (E.D. Mich.) (Detroit). Makki was one of thirteen defendants indicted as part of an investigation into an alleged cigarette smuggling ring. However, only Makki was indicted under Section 2339B for providing material support to a terrorist organization, Hizbollah. Makki pled guilty on September 18, 2003, and was sentenced on December 16, 2003 to 57 months. *See* D. Ashenfelter, "Man Admits to Funding Terror," *Detroit Free Press*, Sept. 19, 2003; D. Ashenfelter, "Man is Charged in Terror Probe," *Detroit Free Press*, Jan. 16, 2004.

United States v. Bahram Tabatabai, No. 99-CR-225 (C.D. Calif.) (Los Angeles). The defendant was one of fifteen individuals indicted as part of an investigation into alleged immigration fraud. However, only Tabatabai was indicted under Section 2339B for providing material support to the Mujahedin-el Khalq, an Iranian group designated as a foreign terrorist organization. Tabatabai pled guilty to conspiracy and material support charges on October 25, 1999, while the remaining immigration charges were dismissed. Tabatabai was sentenced to 24 months followed by supervised release of three years. Tabatabai subsequently dismissed his attorney and filed an appeal to the Ninth Circuit, which dismissed the appeal because "Tabatabai was sentenced within the terms of his plea agreement and has knowingly and voluntarily waived his right to appeal." *United States v. Tabatabai*, 67 Fed. Appx. 465, 466 (9th Cir. 2003). According to the Bureau of Prisons, Tabatabai was released early, on December 8, 2000.

United States v. James Ujaama, No. 02-CR-00283-BJR (W.D. Wash.) (Seattle). The defendant was indicted for conspiracy to provide material support to the Taliban, and weapons charges. On April 14, 2003, Ujaama pled guilty to the conspiracy charge, and agreed to a 2-year sentence in exchange for providing testimony against Abu Hamza al-Masri, the London iman who was alleged to be a recruiter for Al Qaeda. *See* C. McGann, "Ujaama Case Comes to End," *Seattle Post-Intelligencer*, Feb. 14, 2004.

Pending Criminal Prosecutions:

United States v. Yehuda Abraham, No. 03-7107 (D.N.J.); *United States v. Moinuddeen Ahmed Hameed*, No. 03-7111 (D.N.J.); *United States v. Hemant Lakhani*, No. 03-7106 (D.N.J.). Three defendants were indicted on August 11 and 13, 2003, for their involvement in a scheme to sell a shoulder-fired missile, which could shoot down an airplane, to an FBI informant who claimed to be a Somali terrorist. Lakhani was an arms dealer who was indicted for material support and for illegal transport and transfer of a foreign defense article. The other two defendants were involved in financing this proposed transaction, and were indicted for criminal conspiracy.

United States v. Sami Amin Al-Arian, et al., No. 03-CR-77 (M.D. Fla.) (Tampa). Eight defendants were indicted on February 19, 2003, for material support and racketeering. The four defendants who were arrested (the others evidently remain at large) pled not guilty and are engaged in pretrial litigation. *See also United States v. Al-Arian*, 280 F. Supp. 2d 1345 (M.D. Fla. 2003) (denying bail to two of the four defendants).

United States v. Mohammed Albanna, Ali A. Albanna, and Ali Taher Elbaneh, No. 02-CR-255 (W.D.N.Y.) (Buffalo). The three defendants, also from Lackawanna, were indicted on charges of providing material support to al Qaeda, through money laundering. The parties are currently engaged in pre-trial discovery and briefing. In January 2004, the prosecutors issued a superseding indictment, which alleged that the defendants sent money to Yemen without registering with the U.S. government. *See* "Buffalo Man Indicted Over Money Transfers," *Washington Post*, Jan. 9, 2004, at A-18. The three defendants, one of whom was a spokesman for the aforementioned "Lackawanna 6," pled not guilty. *See* "Lackawanna 6 Figure Pleads Not Guilty to Money Charges," *Washington Post*, Jan. 13, 2004, at A-18.

United States v. Sami Omar Al-Hussayen, No. CR 03-0048-C-EJL (D. Idaho). The defendant, Saudi citizen and a graduate student in computer sciences at the University of Idaho, was originally indicted on immigration charges based on allegations that he improperly conducted business while on a student visa. On January 9, 2004, the prosecutors filed a superseding indictment, which alleged that Al-Hussayen conspired to provide material support, through websites and e-mail groups allegedly intended to recruit and raise funds for terrorist purposes, in violation of 18 U.S.C. §§ 371 and 2339A. Al-Hussayen pled not guilty to the additional charge. *See also* S. Schmidt, "U.S. Indicts Saudi Student; Internet Allegedly Used to Aid Terrorist Groups in Jihad," *Washington Post*, Jan. 10, 2004, at A-10; "Nation in Brief," *Washington Post*, Jan. 13, 2004, at A-18. On March 4, 2004, the prosecutors filed a second superseding indictment, which added a charge based on conspiracy to provide material support to Hamas; trial is currently scheduled for April 13, 2004. *See* "Charge Added for Moscow Terrorism Suspect," *Idaho Statesman*, Mar. 5, 2004.

United States v. Bayan Elashi, Ghassan Elashi, Basman Elashi, Hazim Elashi, Ihsan Elashi, Mousa Abu Marzook, Nadia Elashi, and Infocom Corp., No. 02-CR-00052 (N.D. Texas) (Dallas). The defendants, some associated with the Holy Land Foundation, were indicted for material support through engaging in financial dealings with Hamas (Islamic Resistance Movement) and providing computers to Libya and Syria. The trial, initially set for October 6, 2003, was rescheduled to March 8, 2004 by the consent of all the parties. On September 2, 2003,

the court requested, without explanation, the recusal of Judge Buchmeyer, and the case was reassigned to Judge Lindsay.

United States v. Mahmoud Youssef Kourani, No. 03-CR-80481 (E.D. Mich.) (Detroit). Kourani was initially indicted, on May 14, 2003, with an immigration count, to which he pled guilty in August 2003. In a superseding indictment unsealed on January 15, 2004, Kourani was charged with providing material support to Hezbollah. *United States v. Mahmoud Youssef Kourani,* No. 03-CR-81030 (RHC) (RSW) (E.D. Mich.) (Detroit). *See also* D. Ashenfelter & N. Warikoo, "Man Is Charged in Terror Probe," *Detroit Free Press*, Jan. 16, 2004; "Lebanese Man Accused of Fighting for Hezbollah," *Washington Post*, Jan. 16, 2004, at A-20.

United States v. Sheik Muhammad Ali Hassan al-Mouyad and Muhammad Moshen Yahya Zayed, Nos. 03-MJ-00016, 03-MJ-00043 (E.D.N.Y.) (Brooklyn). The two defendants, from Yemen, were indicted on January 5, 2003; they were arrested in Frankfurt (Germany) and a German court granted the extradition order subject to the U.S. government pledging that the defendants would not be tried before a military tribunal. The defendants appealed the extradition order to Germany's highest court. *See* M. Landler, "Germany: Delay in Extradition Ruling," *N.Y. Times*, July 26, 2003, page A-2. In early November, the German judiciary agreed to their extradition, and Mouyad and Zayed were arraigned and held without bail. *See* D. Eggen, "Cleric Charged with Aiding Al Qaeda," *Washington Post*, Nov. 18, 2003, at A-3; E. Lichtblau, "Two Yemenis Held Abroad Are to Face Trial in a U.S. Court," *N.Y. Times*, Nov. 18, 2003, at A-21. On February 18, 2004, in a related case, a New Jersey man was convicted by a jury for making false statements during the government's investigation of these defendants. *United States v. Numan Maflahi*, No. 03-CR-00412 (NG) (E.D.N.Y); *see also* W. Glaberson, "Trial Traces Terror Aid to Brooklyn; Cleric Raised Money for Qaeda, U.S. Says," *N.Y. Times*, Feb. 12, 2004, at A-30; W. Glaberson, "Man Guilty of Lying to the F.B.I. in Sheik Case, *N.Y. Times*, Feb. 19, 2004, at B-8.

United States v. Uzair Paracha, No. 03-CR-01197-SHS (S.D.N.Y.). The defendant, detained as a material witness for several months, was indicted in August 2003 for allegedly conspiring to smuggle Al Qaeda members or weapons into the United States. On August 12, 2003, Magistrate Judge Andrew Peck denied Paracha's request to be released on bail. *See generally* D. Eggen, "U.S. to File Terrorism Charges Against Pakistani Detainee," *Washington Post*, Aug. 6, 2003, at A-7; "Pakistani to Face Charge of Aiding Terror, His Lawyer Says," *N.Y. Times*, Aug. 6, 2003, at B-3; B. Weiser, "Bail Is Denied for Pakistani Accused of Aiding Al Qaeda," *N.Y. Times*, Aug. 13, 2003, at B-2. On January 5, 2004, the defendant filed a motion to suppress evidence and to allow the defendant access to three witnesses in order to take their depositions. Oral argument on this motion is set for February 26, 2004.

United States v. Randall Todd Royer, Ibrahim Ahmed Al-Hamdi, Masoud Ahmad Khan, Yong Ki Kwon, Mohammed Aatique, Seifullah Chapman, Hammad Abdur-Raheem, Donald Thomas Surratt, Basha Ibn Abdur-Raheem, Khwaja Mahmood Hasan, and Sabri Benkhala, No. 03-CR-296 (E.D. Va.) (Alexandria). The eleven defendants, the so-called "Virginia Jihad Network," were indicted on June 25, 2003 under the Neutrality Act and on weapons counts based on their support of Lashkar-I-Taiba, a designated terrorist group that supports Muslim control of Kashmir. *See* M.B. Sheridan, "More Serious Charges Possible in 'Va. Jihad Network' Case," *Washington Post*, Aug. 2, 2003 at B-2. From August 21 to 25, 2003, three defendants (Hasan,

Kwon, and Surratt) pled guilty to conspiracy and weapons charges, with other charges against them dismissed; Kwon and Hasan were sentenced to 11 years, and Surratt to less than four years. *See* J. Markon, "3 Plead Guilty in Jihad Conspiracy," *Washington Post*, Aug. 26, 2003, at A-1, A-5; J. Markon, "3 Defendants Sentenced in 'Jihad' Case," *Washington Post*, Nov. 8, 2003, at B-1, B-4. In September 2003, another defendant (Aatique) pled guilty to aiding and abetting and weapons charges. *See* J. Markon, "Fourth Man Pleads Guilty in Alleged Va. Jihad Group," *Washington Post*, Sept. 23, 2003, at A-12.

The prosecutors then charged the remaining defendants with a new indictment that included a charge based on providing material support to Al Qaeda and the Taliban. *See* J. Markon & M.B. Sheridan, "Indictment Expands 'Va. Jihad' Charges," *Washington Post*, Sept. 26, 2003, at B-3. Subsequently, three of the remaining seven defendants (Hamdi, Khan, and Royer) pled guilty to aiding and abetting and weapons charges. *See* "Jihad Case Pleas," *Washington Post*, Sept. 30, 2003, at B-2; J. Markon & M.B. Sheridan, "Leading Va. Jihad Member Pleads Guilty," *Washington Post*, Jan. 17, 2004, at B-3.

In late January 2004, the remaining defendants announced that they were seeking a bench trial before Judge Brinkema, in lieu of a jury trial, because of concerns with obtaining an unbiased jury. *See* J. Markon, "4 Va. Jihad Suspects Won't go Before Jury," *Washington Post*, Jan. 28, 2004, at A-2. The bench trial against four of the defendants (Basha Abdur-Raheem, Hammad Abdur-Raheem, Chapman, and Khan) commenced on February 9, 2004. On February 20, 2004, Judge Brinkema dismissed all the charges against Basha Abdur-Raheem, and dismissed some of the charges against the other three defendants. The last defendant (Benkahla) is scheduled for a separate trial in March 2004. *See* J. Markon, "Case Dismissed Against Alleged Jihad Group Member," *Washington Post*, Feb. 21, 2004, at A-4; J. Dao, "Judge Acquits Virginia Man Accused of Tie to Terrorists," *N.Y. Times*, Feb. 21, 2004, at A-9. On March 4, 2004, Judge Brinkema convicted the three defendants of providing material support to Lakshar-e-Taiba, and of several weapons and conspiracy charges, but acquitted Khan of conspiracy to provide material support to Al-Qaeda. *United States v. Khan*, __ F. Supp. 2d ___, 2004 WL 406338 (E.D. Va. Mar. 4, 2004); *see also* M.B. Sheridan, "Judge Convicts Three in 'Va. Jihad' Case," *Washington Post*, Mar. 5, 2004, at A-1, A-10; J. Dao, "3 American Muslims Convicted of Helping Wage Jihad," *N.Y. Times*, Mar. 5, 2004, at A-18.

United States v. Carlos Ali Romero Varela, Uwe Jensen, Elkin Alberto Arroyav Ruiz, and Edgar Fernando Blanco Puerta, No. 02-CR-714 (S.D. Tex.) (Houston). In this drug smuggling case, the four defendants were indicted on November 1, 2002, for conspiring to deliver $25 million in weapons to a Colombian terrorist group in exchange for cocaine. On April 23, 2003, Romero Varela pled guilty and was sentenced; the remaining defendants are engaged in pretrial litigation.

United States v. Ahmed Abdel Sattar, Yassir Al-Sirri, Lynne Stewart, and Mohammed Yousry, No. 02-CR-395 (JGK) (S.D.N.Y.) (New York City). Lynne Stewart, an attorney for convicted terrorist Sheik Abdel Rahman – the spiritual leader of a designated terrorist group in Egypt – stands accused along with two paralegals of crimes relating to her representation of the Sheik. The Sheik is incarcerated under highly restrictive conditions that strictly limit his ability to communicate with the outside world. On July 22, 2003, Judge John Koeltl dismissed the two counts of provision of material support in the form of "communications equipment" and

"personnel" against the defendants, on the grounds that these terms are unconstitutionally vague. *United States v. Sattar,* 272 F. Supp. 2d 348 (S.D.N.Y. 2003). In doing so, Judge Koeltl stated that "the Government fails to explain how a lawyer, acting as an agent of her client, an alleged leader of an FTO, could avoid being subject to criminal prosecution as a 'quasi-employee' allegedly covered by the statute." *Id.* at 359. Relying on the Ninth Circuit's ruling in *Humanitarian Law Project*, 205 F.3d at 1137-38, Judge Koeltl concluded that he was "not authorized to rewrite the law so that it will pass constitutional muster." *Sattar*, 272 F. Supp. 2d at 360. Judge Koeltl denied the defendants' motion to dismiss the indictment in all other respects. *See generally* A. Liptak, "Defending Those Who Defend Terrorists," *N.Y. Times,* July 27, 2003, Section 4, page 4. Subsequently, Michael Tigar, Ms. Stewart's attorney, charged that the FBI had improperly destroyed or mishandled the surveillance records, which include some 85,000 audio recordings, 1,300 faxes, and 10,000 pages of e-mails and attachments. *See* B. Weiser, "F.B.I. Accused of Corrupting Surveillance," *N.Y. Times*, Aug. 20, 2003, at A-21. On September 15, 2003, Judge Koeltl denied the defendants' motion to suppress evidence obtained through FISA search warrants, and granted the government's request that none of the classified evidence be disclosed to the defendants, except for certain redacted documents. *United States v. Sattar*, 2003 WL 22137012 (S.D.N.Y. Sept. 15, 2003). On October 7, 2003, the government withdrew its interlocutory appeal of the dismissal of some charges against Ms. Stewart, thereby allowing the remaining charges to go to trial. *See* M. Hamblett, "Government Backs Off Appeal in Prosecution of NY Lawyer," *N.Y. Lawyer*, Oct. 8, 2003. The government can still appeal the dismissal of those charges after the jury verdict, under 18 U.S.C. § 3731, provided that the dismissed charges do not have the same elements or evidence as for the charges that went to trial. On November 5, 2003, Judge Koeltl denied Stewart's motion to dismiss the indictment, holding that there was no evidence of any nonprosecution agreement or that the Government ever promised that she would not be indicted. *United States v. Sattar*, 2003 WL 22510398 (S.D.N.Y. Nov. 5, 2003). Judge Koeltl also found that the prosecutors' failure to preserve and turn over certain audio files from their telephone surveillance of the defendants' telephone calls was not in bad faith, so no sanctions were warranted. *United States v. Sattar*, 2003 WL 22510435 (S.D.N.Y. Nov. 5, 2003). On November 19, 2003, the government issued a superseding indictment, alleging material support in violation of 18 U.S.C. § 2339A; the defendants assert that the new charges are an impermissible recasting of the previously dismissed conspiracy charge. *See* S. Schmidt, "Lawyer, Two Others Face New Terror Charges," *Washington Post*, Nov. 20, 2003, at A-3; M. Hamblett, "Justice Charges Lawyer Aided Terrorists," *Legal Times*, Nov. 24, 2003, at 8. The trial is currently scheduled for May 17, 2004, after Judge Koeltl rejected the government's demand that the trial should be held in early January 2004. *See* "NY Lawyer Awaits Trial in Terror Case," *N.Y. Lawyer*, Jan. 26, 2004.

United States v. Syed Mustajab Shah, Muhammed Abid Afridi, and Ilyas Ali, No. 02-CR-2912 (S.D. Cal.) (San Diego). The three defendants were indicted on October 30, 2002, for conspiring to smuggle heroin and hashish in exchange for cash and four Stinger anti-aircraft missiles, which were to be sold to Al Qaeda. The defendants were apprehended in March 2003 and pled not guilty to the material support and drug charges. On September 26, 2003, defendant Shah filed a motion to dismiss the indictment on the grounds that 18 U.S.C. § 2339B was unconstitutional. On October 10, 2003, Judge Lorenz denied in part and continued in part this motion, with the hearing scheduled to resume on January 16, 2004.

United States v. Mohamed Abdullah Warsame, No. 04-CR-29 (D. Minn.). The defendant, a Canadian citizen of Somali origin, was indicted on January 20, 2004, under Section 2339B for conspiracy to provide material support to al Qaeda. According to news accounts, he attended al Qaeda training camps at which Osama bin Laden was present. *See* S. Schmidt, "Canadian Held for Alleged Al Qaeda Ties; U.S. Accuses Man of Plotting to Provide Aid to Terrorists," *Washington Post*, Jan. 22, 2004, at A-3.

Appeal Pending:

United States v. Hossein Afshari, Mohammad Omidvar, Hassan Rezaie, Roya Rahmani, Navid Taj, Mustafa Ahmady, and Alireza Mohamad Moradi, No. 01-CR-209 (C.D. Cal.) (Los Angeles). The seven defendants were indicted for material support through their fundraising for the "Mujahedin-e Khalq," an alias for the People's Mojahedin Organization of Iran. Judge Takasugi dismissed the indictments on the grounds that the statute that defines the term "foreign terrorist organization," 8 U.S.C. § 1189, was unconstitutional because it provided no due process and could not be used as the basis for a criminal prosecution. *United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002); *see generally* G. Winter, "Judge Drops Case Against 7 Tied to Group Called Terrorist," *N.Y. Times*, June 24, 2002, at A16. The government appealed this decision to the Ninth Circuit, No. 02-50355, and oral argument occurred on September 9, 2003 before Judges Kleinfeld, Wardlaw and W. Fletcher.

C. Civil Damage Lawsuits Brought by Victims of Terrorism.

Some victims of terrorism have brought civil lawsuits against alleged assailants and their alleged supporters, primarily through common-law claims (*e.g.*, negligence, conspiracy, wrongful death, intentional infliction of emotional distress) and two federal statutes: (1) the Anti-Terrorism Act, 18 U.S.C. § 2331 *et seq.*; and (2) Civil RICO, 18 U.S.C. § 1961 *et seq.* The material support statute is a predicate act for both of these statutes, although it was not incorporated into the Civil RICO statute until October 2001, after the September 11 attacks. Most of this civil litigation has involved lawsuits against foreign governments and their agencies. This section will emphasize several recent lawsuits brought against individuals and organizations, including several Islamic charities in the U.S.A.

In *Boim*, the plaintiffs sued several Islamic charities – including Holy Land Foundation and Quranic Literacy Institute – for allegedly providing material support to Hamas, a designated terrorist organization whose members included two individuals who murdered David Boim, an American student in the West Bank. *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002). The Seventh Circuit upheld the district court's denial of the defendants' motion to dismiss the plaintiffs' claims under the Anti-Terrorism Act. The Seventh Circuit carefully differentiated between several theories of liability. Critically, plaintiffs could not succeed on an allegation that the defendants had merely made donations to an alleged terrorist group, without "knowledge of and intent to further the [recipient's] violent criminal acts." *Id.* at 1011-12. However, if there was such knowledge and intent on the defendant's part, then the plaintiffs could succeed on an "aiding and abetting" claim, so that the Anti-Terrorism Act reaches not only those who directly engage in terrorism, but also those who aid and abet terrorist acts, such as through material support. *Id.* at 1021.

For example, in *Boim*, the plaintiffs had alleged nine detailed and specific facts about the defendants' conduct that directly linked the defendants to the tortious acts, *i.e.*, that the defendants knew about Hamas' illegal operations, and that they provided substantial aid to Hamas, with the intent of facilitating those terrorist activities. *Id.* at 1024. The Seventh Circuit's requirement of knowledge and intent narrows the statute to avoid penalizing constitutionally protected advocacy, since the First Amendment does not protect criminal activity. The parties are now in the district court, conducting depositions and other pre-trial discovery.

A recent decision from the U.S. District Court for the District of Columbia demonstrates the potential for overreaching by plaintiffs in suing defendants remote from the terrorist acts that are the subjects of litigation, for allegedly providing material support to terrorists. In *Ungar*, the plaintiffs (relatives of an American and his Israeli wife killed in Israel by five Palestinians) sued Iran, two Iranian agencies, and three Iranian officers. *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91 (D.D.C. 2002). The plaintiffs' theory was that since Iran was known to have supported Hamas, and Hamas, in turn, engaged in terrorism, Iran must be held liable for the murders of the Ungars. Judge James Robertson, after an evidentiary hearing, held that even where plaintiffs had evidence that Iran had provided financial and training assistance to Hamas, a known terrorist group, plaintiffs could not seek a recovery absent a showing that Iran had provided training, "sole funding," or weapons to the individuals (who considered themselves members of Hamas) who had committed the Ungar murders, or that Iran had "approval authority or total control over" those individuals. *Ungar*, 211 F. Supp. 2d at 99. In *Ungar*, even though "plaintiffs have established that Iran provided extensive support to Hamas . . . their proof does not link that support to the Ungar murders specifically." *Id.* Thus, Judge Robertson dismissed the plaintiffs' lawsuit against the Iranian defendants.

There are currently pending several civil lawsuits brought by victims of the September 11 attacks. Some are class actions, and others are multiple-plaintiff cases against individuals, groups, and countries alleged to have conducted, or to have provided support to those who conducted, these attacks. The two major lawsuits are *Burnett v. Al Baraka Investment & Development Corp.*, No. 02-CV-01616 (JR) (D.D.C.), and *Ashton v. Al Qaeda*, No. 02-CV-6977 (RCC) (S.D.N.Y.). Both lawsuits have several thousand plaintiffs and several hundred defendants, with significant overlap of parties and claims between the suits. The *Burnett* complaint is over 400 pages, and the separate listing of plaintiffs is nearly 600 pages. The *Ashton* complaint is over 250 pages.

The *Burnett* lawsuit seeks recovery through (1) five statutory claims: the Anti-Terrorism Act, Civil RICO, the Alien Tort Claims Act, the Torture Victim Protection Act, and the Foreign Sovereign Immunities Act (the last only against Sudan and several of its agencies); (2) five common-law tort claims: wrongful death, survival, intentional infliction of emotional distress, conspiracy, and aiding and abetting; and (3) two common-law negligence claims: negligence and negligent infliction of emotional distress. The plaintiffs seek damages, including punitive damages, of more than $1 trillion dollars.

The *Ashton* lawsuit seeks recovery through (1) three statutory claims: the Anti-Terrorism Act, the Torture Victim Protection Act, and the Anti-Terrorism and Effective Death Penalty Act

(the last only against Iraq, Iran, and Sudan); and (2) four common-law tort claims: wrongful death, survival, assault and battery, and property damage. The plaintiffs seek damages, including punitive damages, of more than $1 billion dollars.

In the *Burnett* lawsuit, initially before Judge Robertson of the U.S. District Court for the District of Columbia, four defendants completed the briefing on their motions to dismiss by June 2003. Judge Robertson convened a motions hearing on June 24, 2003, and his decision was issued one month later. *Burnett v. Al Baraka Inv. & Devel. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003). Judge Robertson held that the plaintiffs lacked standing to bring their Civil RICO claims, because that statute does not cover losses arising from personal injuries. As for a charity defendant, he granted the motion to dismiss as to the plaintiffs' negligence claims, because a charity owes no duty to the general public, but denied it as to the plaintiffs' remaining tort claims. As for an individual defendant who was briefly associated with another charity, the Judge concluded that the plaintiffs' allegations were too vague, and granted leave for this defendant to file a request for a more definite statement (on August 22, 2003, the plaintiffs instead dismissed that defendant from the lawsuit). As for a Saudi bank defendant, the Judge concluded that it might have a defense based on lack of personal jurisdiction, and granted the plaintiffs an opportunity to conduct discovery limited to that purpose, but only after that defendant had the opportunity to file a request for a more definite statement, upon which the bank renewed its motion to dismiss. Judge Robertson then held a second hearing on the motions to dismiss by Prince Sultan and Prince Turki, two high-ranking members of the Saudi royal family, who argued that they had immunity under the Foreign Sovereign Immunities Act. On November 14, 2003, Judge Robertson granted the motions to dismiss of these two Saudi princes. *Burnett v. Al Baraka Inv. & Devel. Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003); *see also* C.D. Leonnig, "Judge Rejects Saudi Terrorist Link," *Washington Post*, Nov. 15, 2003, at A-16.

The *Ashton* lawsuit is pending before Judge Casey of the U.S. District Court for the Southern District of New York. In addition, several insurance companies that paid out benefits to the injured victims, or the estates of the deceased victims, filed lawsuits in the Southern District of New York, against many of the same defendants; the insurance companies also sought leave to intervene in the *Burnett* and *Ashton* actions. *Federal Insurance Co., et al. v. Al Qaida, et al.*, No. 03-CV-6978 (S.D.N.Y.); *Vigilant Insurance Co., et al. v. Kingdom of Saudi Arabia, et al.*, No. 03-CV-8591 (S.D.N.Y.).

On August 7, 2003, the Saudi Binladin Group, a defendant in several of these lawsuits, filed a motion for transfer and consolidation of all these lawsuits with the Judicial Panel on Multidistrict Litigation. *In re Terrorist Attacks on September 11, 2001*, No. MDL-1570 (J.P.M.L.). The relief requested, under 28 U.S.C. § 1407, was to have these lawsuits consolidated as a single action before Judge Robertson. Of the parties who responded to this motion, nearly all consented in their written submissions to this consolidation, and transfer of the New York lawsuits to the District of Columbia. However, after the written submissions were filed, Judge Robertson issued his ruling in *Burnett, supra* (dismissing the Saudi Princes), upon which the plaintiffs switched sides, instead arguing that the cases should be consolidated before Judge Casey. The Panel thereupon ordered that the cases be transferred and consolidated before Judge Casey. *In re Terrorist Attacks on Sept. 11, 2001*, 295 F. Supp. 2d 1377 (J.P.M.L. 2003).

VI. Affirmative Challenges to USA Patriot Act Provisions.

Six weeks after the September 11 attacks, the USA Patriot Act was passed by an overwhelming margin in both houses of Congress over the vigorous objections of civil liberties groups on both sides of the political spectrum.[5] This complex and far-reaching legislation has become a source of controversy because it vastly expands the government's powers to conduct surveillance, suppress dissent, and detain and deport non-citizens. In the summer of 2003, two separate suits challenging the constitutionality of its provisions were filed. *See* M. Coyle, "Watching the Watchers," *National L.J.*, Aug. 13, 2003.

On January 23, 2004, the first court ruling to declare a USA Patriot Act provision unconstitutional was issued in *Humanitarian Law Project, et al. v. Ashcroft, et al.*, No. CV 03-6107 ABC, 2004 U.S. Dist. LEXIS 926 (C.D. Cal. Jan. 23, 2004) ("*Humanitarian Law Project II*").[6] This suit, filed by the Center for Constitutional Rights in August 2003, raises First and Fifth Amendment challenges to a USA Patriot Act provision that amended a section of the 1996 Anti-Terrorism and Effective Death Penalty Act criminalizing the provision of material support to designated foreign terrorist organizations. As described more fully in Section V, above, it is a crime to provide material support to a designated organization even when that support is directed solely to the organization's lawful and peaceful ends. Section 805(a)(2)(B) of the USA Patriot Act amended the definition of material support to include "expert advice or assistance."

The *Humanitarian Law Project II* plaintiffs are organizations and U.S. citizens who wish to lend their expertise in the fields of law, peace, medicine, information technology, and the cultural arts to promote the political and social activities of two designated organizations, the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The Humanitarian Law Project and its President, Ralph Fertig, would like to offer their legal expertise to the PKK towards the goals of negotiating a peaceful resolution of the Kurds' longstanding conflict with the Turkish government and seeking redress for human rights violations against the Kurds. Plaintiff Dr. Nagalingam Jeyalingam, a Tamil-American physician, would like to provide his expert medical advice on how to improve the delivery of health care in the war-ravaged areas of Sri Lanka that fall under the control of the LTTE. Although the *Humanitarian Law Project II* plaintiffs believe that providing expert advice and assistance towards these laudable goals is protected under the First Amendment, they are afraid that they could be prosecuted and convicted for providing "expert advice or assistance" under the material support law if they were to act on their wishes without prior court approval. The plaintiffs filed a motion for summary judgment on October 10, 2003 seeking a declaration that the term "expert advice or assistance" should be struck because it is unconstitutionally vague and overbroad, that the Act's prohibition on providing "expert advice or assistance" violates the First and Fifth Amendments to the Constitution insofar as it criminalizes pure speech in association with proscribed groups without requiring any showing of intent to incite imminent lawless activity or

[5] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56.

[6] These plaintiffs also serve as plaintiffs in a pending suit that was filed in 1998 to challenge the 1996 material support law on First Amendment grounds. The earlier filed suit, which bears the same short form caption as this suit, is discussed in Section V.A., *supra*.

further the organization's unlawful ends, and that the prohibition violates the First and Fifth Amendments by granting the Secretary of State effectively unreviewable authority to license speech by designating foreign organizations as "terrorist."

The January 23, 2004 opinion, authored by Judge Collins of the U.S. District Court in Los Angeles and amended on January 30, 2004, declared the term "expert advice or assistance" – added to the definition of "material support" by the USA Patriot Act – void for vagueness under the First Amendment. Judge Collins found that this term, like the terms "training" and "personnel," which had been added to the definition of material support in 1996 – was not sufficiently clear as to the activities that it prohibited and could be construed to include advocacy and associational activities protected by the First Amendment. *Id.* at *43-*45. The government is expected to appeal this decision to the Ninth Circuit. *See generally* J. Mintz, "Part of Patriot Act Is Struck Down," *Washington Post*, Jan. 27, 2004, at A-15; J. Bravin, "Judge Deals Blow to the Patriot Act," *Wall Street Journal*, Jan. 27, 2004, at A-6; E. Lichtblau, "Citing Free Speech, Judge Voids Part of Antiterror Act," *N.Y. Times*, Jan. 27, 2004, at A-21.

The second suit that challenges the constitutionality of a USA Patriot Act provision is *Muslim Community Association of Ann Arbor, et al. v. Ashcroft*, No. 03-CV-72913 (E.D. Mich.). This suit was filed by the ACLU in July 2003, on behalf of six organizations that support the needs of Arab Americans and Muslims. The *Muslim Community Association* suit attacks the constitutionality of Section 215 of the USA Patriot Act, a provision amending the Foreign Intelligence Surveillance Act of 1978 (FISA). Section 215 permits the FBI to obtain in total secrecy "any tangible things," including "books, records, papers, documents, and other items," whether they are in a person's home or in the possession of a third party such as a library, hospital, Internet service provider, or political organization, on a simple showing that they are "sought for" an ongoing foreign intelligence, counterintelligence, or international terrorism investigation. Under Section 215, the government need not make the showing of probable cause to believe that the target of its order is engaged in criminal activity. Parties served with a Section 215 order are automatically subject to a "gag order," which bars them from disclosing the existence of the order to the target or anyone else. As a result, individuals do not know whether or not they are targets of a Section 215 order. Moreover, Section 215 orders are more onerous than grand jury subpoenas in that there are no established procedures under which a party served with such an order can file a motion to quash in a court.

The *Muslim Community Association* plaintiffs allege that Section 215 infringes their rights to free speech, privacy, and due process in violation of the First, Fourth, and Fifth Amendments. *See* D. Eggen, "Seizure of Business Records Is Challenged," *Washington Post*, July 31, 2003, at A-2. In October 2003, the Department of Justice filed a motion to dismiss the lawsuit, arguing that the plaintiffs did not have standing to sue and that Section 215 was constitutional. *See* D. Shepardson, "Dismiss Patriot Act Challenge, Feds Urge," *Detroit News*, Oct. 7, 2003. The NAACP submitted an amicus brief in support of the plaintiffs in which it described the chilling effect on membership caused by government requirements to disclose the names of its members. The brief stated that during the 1960's, NAACP members "feared they would lose their jobs and be attacked physically if their membership in the organization was disclosed." Judge Denise Page Hood heard argument on the government's motion on December 3, 2003, and a decision is expected shortly.

On September 18, 2003, Attorney General Ashcroft admitted that the government had never used Section 215. *See* E. Lichtblau, "Government Says It Has Yet to Use New Power to Check Library Records," *N.Y. Times*, Sept. 19, 2003, at A-16. Nevertheless, the Department of Justice takes the position that the government needs the ability to conduct terrorism investigations in secret.

In addition to the two above-described affirmative challenges to the USA Patriot Act provisions, the ACLU litigated a suit under the Freedom of Information Act seeking information on the government's use of the surveillance and investigatory tools authorized by USA Patriot Act Section 206 (non-FISA provision allowing for roving wiretaps), Section 213 (non-FISA provision allowing for "sneak and peek" searches and seizures), Section 214 (FISA provision loosening the restrictions on the use of pen registers and trap and trace devices), and Section 215 (FISA provision allowing the FBI to obtain "tangible things" on showing that they are "sought for" an ongoing foreign intelligence, counterintelligence, or international terrorism investigation). *ACLU v. Dept. of Justice*, 265 F. Supp. 2d 20 (D.D.C. 2003). DOJ turned over only a few of the documents sought by the ACLU, and refused to provide statistical records showing how broadly it has been using its USA Patriot Act powers on the grounds that such information was covered by the FOIA exemption for classified national security documents, 5 U.S.C. § 552(b)(1). In her May 2003 decision, Judge Huvelle of the U.S. District Court for the District of Columbia dismissed the action with prejudice, adopting the government's position that the withheld documents were covered by this exemption. No appeal was filed from this decision, and the time to do so has expired.

VII. Decisions of the Foreign Intelligence Surveillance Courts.

The Foreign Intelligence Surveillance Act establishes a highly secretive Foreign Intelligence Surveillance Court (FISC), which has the authority to issue orders permitting the government to conduct clandestine wiretaps and physical searches based on a one-sided presentation by the DOJ. 50 U.S.C. § 1801 *et seq.* Under FISA, the government need not meet the Fourth Amendment's probable cause requirements. But before the USA Patriot Act was enacted, FISA surveillance orders were available only when the gathering of foreign intelligence information was "the purpose" of the surveillance. With the introduction of Section 218 of the USA Patriot Act, however, FISA orders are available as long as the gathering of foreign intelligence information is "a significant purpose" of the surveillance.

From its inception in 1978 to early 2002, the FISC had granted all of DOJ's requests for FISA orders. However, on May 17, 2002, the FISC made history by issuing an opinion that imposed restrictions on electronic surveillance in an attempt to maintain a wall between the government's intelligence and prosecutorial functions. In August 2002, the FISC again made history by making this decision the first decision to be published in its 24 years of existence. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (Foreign Intel. Surv. Ct. 2002). The opinion was also noteworthy for its disclosure that the government had "confess[ed] error in some 75 FISA applications related to major terrorist attacks directed against the United States, including misstatements and omissions of material facts."

In November 2002, however, the Foreign Intelligence Surveillance Court of Review convened for the first time since FISA was enacted, in order to review the May 2002 FISC decision, which the government had appealed. Since the government has refused to disclose the identity of the subject of the surveillance order, this individual was not a party to the proceeding. However, the Court of Review granted leave to the ACLU and the National Association of Criminal Defense Lawyers to submit *amici* briefs.

In *In re Sealed Case No. 02-001*, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002) (*per curiam*), the Court of Review reversed the lower court decision by interpreting Section 218 of the USA Patriot Act as amending FISA to permit the government to obtain a FISA surveillance order even when the government's primary purpose is criminal investigation, as long as the government "entertains a realistic option of dealing with [the target of investigation] other than through criminal prosecution." *Id.* at 735. This ruling has served to tear down the procedural wall separating law enforcement operations from foreign intelligence operations that, for two decades, had served the vital function of ensuring that the government did not use its intrusive FISA surveillance powers as an end-run around the Fourth Amendment's requirement of probable cause when the government's primary interest in a target of surveillance was prosecution. The ACLU and the Bar Association of San Francisco filed motions for leave to intervene to file a petition for writ of certiorari with the Supreme Court. On March 24, 2003, however, these motions were denied. *ACLU v. United States*, 123 S. Ct. 1615 (2003).

At least one criminal defendant who is under prosecution on terrorism-related charges, Jeffrey Battle, filed a motion on August 30, 2003 to suppress evidence obtained under FISA on the ground that FISA is unconstitutional as it has been amended by Section 218 of the USA Patriot Act.[7] *United States v. Jeffrey Battle, et al.*, No. 02-CR-399 (D. Or.) (Portland). Battle's primary argument in support of his motion to suppress is that permitting FISA surveillance based on a showing that the gathering of foreign intelligence information is a significant – but not the primary – purpose of the surveillance, violates the Fourth Amendment's probable cause requirement. Battle also argued that FISA violates the Fifth and Sixth Amendments by failing to provide targets with the opportunity to bring an adversarial challenge at the point in time when the government applies for a surveillance order. In addition, Battle argued that the government targeted him for surveillance because of his exercise of his First Amendment rights thereby violating the First Amendment. The ACLU was granted permission to file an amicus brief in support of Battle's motion. However, on October 16, 2003, Battle pled guilty to one count of conspiracy to commit war against the U.S., with the remaining counts dropped, so there was no resolution of his pending motion. *See* "Duo Pleads Guilty to Conspiracy Against U.S.," *Washington Post*, Oct. 17, 2003, at A-3. More criminal defendants in other cases are expected to file comparable motions to suppress on these grounds.

VIII. Freezing the Assets of Charities Alleged to Have Supported Terrorism.

Under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*, the Secretary of Treasury has the authority to block the assets of any person or entity who

[7] The criminal case against Battle is described *supra*, in Section V.B.

has been designated as a "Specially Designated Global Terrorist." The consequences of freezing the assets are that the person or entity can no longer engage in any monetary transactions in the U.S.A. IEEPA does not provide any statutory mechanism to challenge this designation. Despite this absence of a judicial review provision, two Islamic charities have challenged their designations and ensuing freezing of their assets: Holy Land Foundation (Texas) and Global Relief Foundation (Illinois). *See generally* David Cole, "The New McCarthyism: Repeating History in the War on Terrorism," 38 *Harv. C.R.-C.L. L. Rev.* 1, 26-28 (2003) (criticizing unfettered discretion of the President in designating entities under IEEPA and in freezing their assets at time when the organization is merely being investigated for potential IEEPA violations).

The Global Relief Foundation (GRF) was designated in December 2001, and filed a lawsuit in the U.S. District Court for the Northern District of Illinois, seeking a preliminary injunction against the extension of its designation, and raising various constitutional claims. Judge Wayne Andersen denied GRF's request. *Global Relief Found. v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002). GRF appealed to the U.S. Court of Appeals for the Seventh Circuit, which affirmed in all respects. *Global Relief Found. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002), *petition for cert. filed*, 72 U.S.L.W. 3113 (July 3, 2003) (No. 03-46). The Seventh Circuit held that GRF was not constitutionally entitled to notice and a pre-seizure hearing, since "postponement is acceptable in emergencies," *id.* at 754, and if the designation turned out to be in error, then GRF could seek recovery through a lawsuit in the Court of Federal Claims. *Id.* The Seventh Circuit also rejected GRF's argument that IEEPA does not cover corporations that are legally registered in the U.S.A., since "the focus must be on how the assets could be controlled and used, not on bare legal ownership. GRF conducts its operations outside the United States; the funds are applied for the benefit of non-citizens and thus are covered by [IEEPA]." *Id.* at 753. On November 10, 2003, the Supreme Court denied GRF's petition for certiorari. *Global Relief Found. v. Snow*, 124 S. Ct. 531 (2003).

The Holy Land Foundation (HLF) was also designated in December 2001, and filed a lawsuit in the U.S. District Court for the District of Columbia, raising constitutional claims under the First, Fourth, and Fifth Amendments, and statutory claims under the Religious Freedom Restoration Act and the Administrative Procedure Act. Judge Kessler granted defendants' motion to dismiss the complaint, except as to their search and seizure claim under the Fourth Amendment. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002). HLF appealed to the U.S. Court of Appeals for the D.C. Circuit, which affirmed in all respects, and directed the grant of summary judgment in favor of the government. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003). The D.C. Circuit held that the government could rely on hearsay evidence in designating HLF, *id.* at 162, and adopted the Seventh Circuit's reasoning in *Global Relief* as being "unassailable." *Id.* at 163. The D.C. Circuit rejected HLF's claims under the Religious Freedom Restoration Act on the grounds that there was "no free exercise right to fund terrorists" and that the evidentiary "record clearly supports a conclusion that HLF did." *Id.* at 167. The D.C. Circuit subsequently denied HLF's petition for rehearing *en banc*. *See* Order (No. 02-5307) (D.C. Cir. Aug. 22, 2003). On March 1, 2004, the Supreme Court denied HLF's petition for certiorari. *Holy Land Foundation for Relief & Dev. v. Ashcroft*, No. 03-775, 2004 WL 368125 (2004); *see also* E. Amon, "Accused Charity's Last Gasp," *National Law Journal*, Mar. 8, 2004, at 1.

Subsequently, HLF learned that the original affidavit used to obtain wiretaps from the FISA Court (discussed *supra*, Part VII), which was prepared by Michael Resnick, an FBI counterterrorism official, had a number of errors. After the FISA Court barred Resnick from appearing before them, the FBI commenced an internal audit of Resnick's other affidavits, and discovered that the HLF affidavit similarly had errors. The FBI then prepared a new affidavit, which was approved by the FISA Court, although it remains to be seen whether evidence obtained under the old affidavit can be used at trial. *See* S. Braun, "Charity's Fate Seen as Test of Wider War on Terror; U.S. Accuses an Islamic Foundation of Ties to Hamas, FBI Errors may Spark a Legal Challenge," *Los Angeles Times*, Sept. 14, 2003.

IX. Secrecy in the Courts.

The government has sought to maintain complete secrecy regarding its detention of an unknown number of Arab and Muslim men in the period following the September 11, 2001 attacks. In at least a few cases, courts took the extraordinary step of sealing the entire court docket on habeas petitions and civil actions brought by detainees.[8]

For example, Mohamed Kamel Bellahouel was a waiter at a restaurant in Delray Beach (Florida) where he coincidentally served several of the Al Qaeda hijackers in the summer of 2001. Bellahouel, an Algerian, overstayed his student visa and was illegally working without obtaining the proper immigration status. Bellahouel was detained after he was turned in by someone who claimed that she saw Bellahouel go into a movie theater with one of the hijackers. Bellahouel was detained for over five months, but was released on an immigration bond in March 2002. While detained, Bellahouel filed a habeas petition with the U.S. District Court for the Southern District of Florida, *Bellahouel v. Wetzel*, No. 02-CV-20034, naming the warden of the federal prison in Miami as the respondent. The entire proceeding before the district court was sealed, as was Bellahouel's subsequent appeal to the U.S. Court of Appeals for the Eleventh Circuit, which issued a sealed decision on March 31, 2003. It was only through a series of clerical errors, in which the court dockets and calendars were briefly posted online, that a reporter for the *Miami Daily Business Review* was able to learn about this case.[9] The federal immigration authorities are still attempting to deport Bellahouel, who is married to an American.

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[8] *See generally* Reporters Committee for Freedom of the Press, "Secret Justice: Secret Dockets" (2003), at http://www.rcfp.org/secretjustice/secretdockets/index.html.

[9] D. Christensen, "Feds File Sealed Response in Secrecy Case," *Miami Daily Bus. Rev.*, Jan. 7, 2004; D. Christensen, "Journalists Ask Courts to End Secret Dockets, *Miami Daily Bus. Rev.*, Dec. 31, 2003; D. Christensen, "Scrutinizing 'Supersealed Cases," *Miami Daily Bus. Rev.*, Dec. 2, 2003; D. Christensen, "Plea for Openness," *Miami Daily Bus. Rev.*, Nov. 5, 2003; D. Christensen, "Secrecy Appealed," *Miami Daily Bus. Rev.*, Sept. 25, 2003, http://www.law.com/jsp/article.jsp?id=1063212087029; D. Christensen, "Federal Court in Florida Hides Cases from Public," *Miami Daily Bus. Rev.*, May 12, 2003, http://www.law.com/jsp/article.jsp?id=1052440717444; D. Christensen, "Secrecy Within," *Miami Daily Bus. Rev.*, Mar. 12, 2003, http://www.law.com/jsp/article.jsp?id=1046833547729; *see also* D. de Vise, "Case Galvanizes Opponents of U.S. Secrecy," *Miami Herald*, Jan. 19, 2004; W. Richey, "Secret 9/11 Case Before High Court," *Christian Science Monitor*, Oct. 30, 2003, http://www.csmonitor.com/2003/1030/p01s02-usju.htm.

On June 27, 2003, Bellahouel filed a petition for writ of certiorari with the U.S. Supreme Court. *M.K.B. v. Warden*, No. 03-6747 (U.S. Jun. 27, 2003). The petition was filed under seal, with a redacted version made public. *See* "Petition for Writ of Certiorari," No. 03-6747, at: http://news.findlaw.com/hdocs/docs/scotus/mkbwarden62703cpet.pdf. Bellahouel argues that the sealing of the record by the U.S. District Court for the Southern District of Florida and the U.S. Court of Appeals for the Eleventh Circuit is contrary to Supreme Court precedents under both the common-law and the First Amendment governing the right of public access to court filings and judicial proceedings. Critically, the lower courts could have allowed partial redactions limited to factual matters as opposed to legal arguments. According to the Supreme Court's online docket, the respondents, who are represented by the Solicitor General, initially waived their right to file a response to the petition for certiorari. However, on November 4, 2003, the Supreme Court ordered the Administration to file a response to Bellahouel's petition for certiorari. *See* C. Lane, "White House Told to Justify Secrecy," *Washington Post*, Nov. 5, 2003, at A-6. The Reporters Committee for Freedom of the Press, on behalf of numerous other media organizations filed its *amicus* brief in support of the petition for certiorari. *See* Amicus Brief, http://www.rcfp.org/news/documents/20031103-mkbvwarden.pdf (Nov. 3, 2003); Motion to Intervene, http://www.rcfp.org/news/documents/20040102-mkbvwarden.pdf (Jan. 5, 2004) *see also* L. Greenhouse, "News Groups Seek to Open Secret Case," *N.Y. Times*, Jan. 5, 2004, at A-12. Notably, when the government filed its opposition to Bellahouel's petition for certiorari, its entire submission was filed under seal. *See* "U.S. Requests Secrecy in 9/11 Detainee's Case," *Washington Post*, Jan. 6, 2004, at A-10. On February 23, 2004, the Supreme Court denied certiorari, and denied the motion to intervene. *M.K.B. v. Warden*, No. 03-6747, 2004 WL 324470 (2004); *see also* C. Lane, "Court Denies Review of Post-9/11 Secrecy," *Washington Post*, Feb. 24, 2004, at A-6; D. Christensen, "Still a Secret," *Miami Daily Business Review*, Feb. 24, 2004; D. Christensen, "Feds Defend Secret Docketing of Post-9/11 Detainee's Case, *Miami Daily Business Review*, Mar. 5, 2004.

X. Government Interference with Public Protest.

The United States' announcement of its plans in 2002 to invade Iraq, and its subsequent preemptive invasion of Iraq in March 2003, touched off a wave of mass anti-war rallies and demonstrations all across this nation. Unfortunately, many police departments met peaceful protesters with hostility and force. Moreover, according to a leaked confidential memorandum, the FBI has been investigating these protesters in the guise of investigating terrorism. Although the FBI recognized the existence of "traditional demonstration tactics," the FBI believed that "activists" and "extremist elements" might "engage in more aggressive tactics," and concluded that "[l]aw enforcement agencies should be alert to these possible indicators of protest activity and report any potentially illegal acts to the nearest FBI Joint Terrorism Task Force." *See* FBI Intelligence Bulletin No. 89, "Tactics Used During Protests and Demonstrations" (Oct. 15, 2003) (online at: http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=14452&c=207). Civil libertarians have expressed concern that the FBI has selectively targeted protesters based on the content of their message, in violation of the First Amendment and the procedures that were put in place in the 1970s to halt the types of intelligence abuses that occurred under the FBI's

Cointelpro investigations. *See* E. Lichtblau, "F.B.I. Scrutinizes Antiwar Rallies," *N.Y. Times*, Nov. 23, 2003, at A-1, A-18.

The District of Columbia, as the seat of the government and home to many international institutions, including the World Bank and the International Monetary Fund (IMF), has hosted a disproportionate number of these protests. A number of lawsuits have been filed by protesters who have challenged the conduct of the police who arrested or otherwise restricted their protest activities. One set of lawsuits filed in the U.S. District Court for the District of Columbia arose from the September 2002 protests that took place in front of the World Bank and the IMF. The plaintiffs in these suits are several hundred protesters who were arrested and detained for between one and two days without being charged. *Raymond Chang, et al. v. United States*, No. 02-CV-2010 (D.D.C.); *Jeffrey Barham, et al. v. Ramsey*, No. 02-CV-2283 (D.D.C.); *Franklin Jones, et al. v. District of Columbia*, No. 02-CV-2310 (D.D.C.); *Julie Abbate, et al. v. Ramsey*, No. 03-CV-767 (D.D.C.). The plaintiffs variously brought First, Fourth, and Fourteenth Amendment claims and common law claims of false arrest and false imprisonment against the District of Columbia. The *Barham* plaintiffs also brought an equal protection challenge to the District's failure to offer the detainees an opportunity to obtain release while preserving their right to go to trial, as the District customarily does for other offenses. Some plaintiffs also asserted conversion of property claims, and others sought injunctive relief against the federal law enforcement agencies who participated in the challenged actions.

On September 12, 2003, Judge Sullivan ordered that the District of Columbia's internal investigative reports of the police actions be publicly released. *Chang v. United States*, 2003 WL 22118347 (D.D.C. Sept. 12, 2003) (http://www.dcd.uscourts.gov/02-2010.pdf); *see also* C. Leonnig, "IMF Arrests Improper, Police Found," *Washington Post*, Sept. 13, 2003, at B-1; C. Leonnig, "D.C. Told to Release Report on Protests," *Washington Post*, Sept. 12, 2003, at B-1.

On September 19, 2003, Judge Sullivan ruled that class certification of these claims was warranted, and that the individual claims would be consolidated. *Chang v. United States*, 203 F.R.D. 262 (D.D.C. 2003) (http://www.dcd.uscourts.gov/02-2010a.pdf); *see also* "Class-Action Case," *Washington Post*, Sept. 25, 2003, at B-2. Subsequently, the District of Columbia settled, for $7,000 to $10,000 each, the claims brought by three students who were bystanders and were merely photographing the protest. Settlement discussions on the other cases (involving those of active protesters) remain pending. *See* C. Leonnig, "District Reaches Settlement over Mass Arrests," *Washington Post*, Jan. 1, 2004, at B-1, B-4; *see also* A. Santana, "Ramsey Defends Surveilling Protesters," *Washington Post*, Dec. 19, 2003, at B-5.

Protesters have filed lawsuits in a number of other cities. On July 24, 2003, ACORN (Association for Community Organizations for Reform Now), and four other plaintiffs, all represented by the ACLU, filed a lawsuit in Philadelphia against the Secret Service, and several local police departments, seeking injunctive relief to prohibit these law enforcement agencies from keeping anti-Bush protesters further away from the President than the supporters of the President. *ACORN, et al. v. City of Philadelphia, et al.*, No. 03-CV-4312 (E.D. Pa.) (Philadelphia). The other two defendants were the Police Department of the City of Philadelphia (subsequently dismissed by consent) and the U.S. Secret Service. The plaintiffs filed an amended complaint on September 23, 2003, and the defendants' response was due by November

24, 2003. *See also* C. Leonnig, "Lawsuit Criticizes Secret Service; Anti-Bush Protesters Are Kept at Bay, Advocacy Groups Say," *Washington Post*, Sept. 24, 2003, at A-27.

In California, at least one lawsuit arose from the actions of the Oakland police in breaking up an anti-war protest on April 7, 2003, which included firing rubber and wooden bullets directly at protesters, and other improper use of lethal force against the protesters. Several months later, misdemeanor charges were filed against 25 demonstrators, notwithstanding the fact that they had not been charged with any offenses at the time they were arrested. On June 26, 2003, the ACLU and the National Lawyers Guild filed a civil class action lawsuit against Oakland on behalf of numerous demonstrators and community groups. *Local 10, Int'l Longshore & Warehouse Union v. City of Oakland*, No. 03-CV-02962 (N.D. Cal.) (San Francisco). The plaintiffs alleged violation of their First Amendment rights to free speech and association, their Fourth Amendment rights to be free of unreasonable seizure and excess force, their Fourteenth Amendment rights to due process and equal protection, and violations of various California constitutional, statutory and common-law rights. On August 18, 2003, this case was referred to Magistrate Judge Larson for settlement purposes.

In early February 2004, a grand jury convened by the U.S. Attorney's Office for the Southern District of Iowa issued subpoenas for records relating to an anti-war gathering that took place at the Drake University School of Law on November 15, 2003. *See In re Ongoing Grand Jury Investigation*, No. M-1-39 (S.D. Iowa); *see also* "University Records on Antiwar Meeting Sought," *Washington Post*, Feb. 8, 2004, at A-10; M. Davey, "An Antiwar Forum in Iowa Brings Federal Subpoenas," *N.Y. Times*, Feb. 10, 2004, at A-12. In the face of strong public opposition, and a motion to quash filed by the National Lawyers Guild – the organization that sponsored the gathering – on the grounds that these subpoenas infringed on the First Amendment rights of the organization and the attendees at this gathering, the subpoenas were withdrawn. The government failed to explain why the grand jury subpoena was so broad in scope; it has simply claimed that it was investigating an alleged incident of trespassing at Camp Dodge, an Iowa National Guard facility, which occurred the day after the Drake University gathering. *See* M. Davey, "Subpoenas on Antiwar Protest are Dropped," *N.Y. Times*, Feb. 11, 2004, at A-16; "Subpoenas Tied to Trespassing Case," *Washington Post*, Feb. 15, 2004, at A-13; L. Post, "A Furor over Iowa Subpoenas," *National Law Journal*, Feb. 16, 2004, at 4.

OVERLOOKING INNOCENCE: REFASHIONING THE MATERIAL WITNESS LAW TO INDEFINITELY DETAIN MUSLIMS WITHOUT CHARGES

By Anjana Malhotra*

I. Introduction

One of the most basic rights in international law is the safeguard against arbitrary detention. This protection of the right to liberty has been defined by international tribunals to mean, at a minimum, that the detention of any individual must be in accordance with previously established law and based on objectively reasonable criteria, defined without regard to race, religion, gender, or national origin. The architects of these international legal principles drew from the central tenets in the Magna Carta prohibiting arbitrary detention: the importance of curbing the power of the monarch to jail its subjects with unchecked authority.

A principle drafter and proponent of the international rules prohibiting arbitrary detention, the U.S. since September 11 has joined many countries in abrogating these rules in its counterterrorism investigations, implementing new policies and refashioning existing authority to indiscriminately hold Muslims, Arabs and South Asians without probable cause. Following September 11, FBI agents swept through Muslim communities to pick up suspects often based on leads that, according to the Justice Department, "were often quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant."[1] Under the systematic programs the Justice Department implemented over the past three years, it has detained over 5,000 Muslims since September 11 and registered more than 80,000 immigrants from Muslim communities, though yielding not one conviction of an individual involved in the attacks of September 11.[2]

One key tool the government has used to detain Muslim men without charges is the material witness law. Congress enacted the material witness statute to authorize the government to briefly hold a person who has witnessed a crime when it appears he may flee. Before September 11, this law was only to hold witnesses who were scared to testify, such as witnesses to a mafia or alien smuggling trial. Since September 11, however, the government has used this law to circumvent probable cause requirements to hold Muslim "witnesses" it believes to be suspects, indefinitely without charges.

The Justice Department has succeeded in using the material witnesses law to preventatively detain Muslim men since September 11 because it held witnesses to testify in terrorism-related grand jury proceedings, where the executive branch is given broad authority to investigate a crime. Also, relying on grand jury secrecy rules, the government has held witnesses pursuant to closed detention proceedings without any public accountability. Even on requests from Congress, the Justice Department has refused to disclose the names or number of witnesses it has held, where or for how long witnesses were detained, or the details surrounding material witness arrests. The Justice Department released general statistical information, including that half of the witnesses it has arrested in the September 11 investigation were held for more than 30 days.[3]

Concerned with these secret detentions, the ACLU, with Human Rights Watch, undertook a study this year to document how the government has used the material witness law in its counterterrorism investigation since September 11. Based on interviews with witnesses, their family members, lawyers and

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government officials, we documented the detention of more than 70 material witnesses held in connection with counterterrorism investigations. In documenting these cases, we learned how the government has systematically abused its material witness authority to hold Muslim men in violation of basic international protections against arbitrary detention. We will release the full findings of our research in a forthcoming report in January 2005. In this essay we describe the material witness law and how the government systematically used the law in a manner unauthorized by Congress to detain and investigate suspects and impermissibly used witnesses' race, national origin and religion as a basis for detaining witnesses.

II. The Material Witness Law: Framework

Enacted in its current form in 1984, the material witness statute authorizes the government to arrest and detain individuals to secure their testimony for a criminal proceeding.[4] To arrest a material witness, the government must show (1) that a witness can provide information material to a criminal proceeding, and (2) that it would be impracticable to secure a witness's testimony without a subpoena. The material witness law favors ordering a deposition of a material witness in lieu of his detention, reflecting Congressional concern that witnesses should be detained only in narrow circumstances.[5]

Before September 11, the government generally used the material witness law to arrest individuals who had witnessed a crime and who had a legal reason or had made clear to the government that he or she would not comply with a subpoena to testify at a criminal trial. The former INS made the most material witness arrests, most commonly to hold immigrants who were smuggled into the country in order to obtain their testimony for trials against alien smugglers[6] and courts were careful to release witnesses if they faced continued detention.[7] Before September 11, courts were reluctant to jail a witness absent proof that the witness was a "fugitive" or had resisted government attempts to call witnesses to testify.[8]

Following September 11, however, the government used the material witness law in a manner that reduced judicial oversight protecting these standards for holding a witness, detaining witnesses who had cooperated with the government, demonstrated no risk of flight, and had little or no relevant information to a crime. According to lawyers who represented witnesses since September 11, one reason for this change is that courts have deferred to the governments' arguments that witnesses need be detained because of national security concerns. The Second Circuit's recent decision in *U.S. v. Awadallah*, the only appellate case to resolve the government's post 9/11 use of the material witness law, reflects this deference; the Second Circuit substantially lowered the burden on the government to prove a witness is not likely to comply with a subpoena, holding that the material witness in that case was a flight risk largely because he did not step forward to the FBI to volunteer information that he may have.[9] In crafting this standard, the Second Circuit not only made "several significant inferential leaps"[10] in presuming that an individual has relevant knowledge to the investigation, but also broke with pre-September 11 case law that required the government to prove the witness was a flight risk because she had previously evaded service or was a fugitive from justice.[11]

The second reason the government has been able to detain witnesses without judicial oversight is that it held material witnesses more frequently for grand jury proceedings, where courts are largely restricted in reviewing the Justice Departments' subpoena powers. Unlike a trial, where there is a defendant and a concrete crime, the Justice Department "has exceedingly broad powers of investigation"[12] in grand jury investigations to determine "whether a crime has been committed and whether criminal proceedings should be instituted against any

person."[13] Thus, in *Awadallah*, the Circuit held that the government need only produce a "mere statement" from a government official that a witness has material information to establish that his testimony is necessary for a grand jury investigation.[14]

Arresting material witnesses for grand jury investigations has also allowed the government to hold material witnesses in complete secrecy. Grand jury proceedings and records have long been kept under seal because of the preliminary nature of the investigation.[15] The government has applied these rules to detain grand jury material witnesses in closed proceedings and with sealed records, although some courts reviewing post-9/11 material witness detentions have balanced these rules against the "presumptively public"[16] determination to jail a witness. The secrecy surrounding the post-September 11 grand jury material witness arrests also departed from past practice; for example, the government read the material witness arrest warrant in an open bond proceeding for material witness Terry Lynn Nichols, arrested in connection with the grand jury investigation to the 1996 Oklahoma City bombing.[17]

III. Exceeding Congressionally defined material witness authority to hold suspects without proof of probable cause

Behind the unprecedented secrecy surrounding post-September 11 material witness arrests, our review of material witness detentions indicates that the Justice Department has arrested and detained witnesses in a manner unauthorized by Congress and the U.S. constitution to evade proving probable cause. In the days following September 11, Attorney General John Ashcroft made clear that the material witness law was part of the Justice Department's legal arsenal to hold suspects, declaring that "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting, or delaying new attacks."[18] Material witnesses consistently described to the ACLU and HRW that from the moment of their arrest, the Justice Department treated them as high profile terrorism suspects, arresting witnesses in their homes or in public with armed agents with their guns drawn, shackling witnesses and transferring them to maximum security prisons and holding them in solitary confinement with the lights on 24 hours a day. Many witnesses report being subjected to the same or similar physical and verbal abuse and detention conditions that "high interest detainees" faced at MDC Brooklyn, documented by the Inspector General of the Justice Department.[19]

During interrogations of material witnesses, FBI agents and U.S. attorneys made direct and veiled threats to material witnesses and their families. In a number of cases, the Justice Department made clear that it arrested individuals as witness to his own criminal proceeding, often initiating a criminal proceeding only after arresting the witness, submitting evidence replete with admissions that the witness was a major suspect in a terrorism-related crime, and telling witnesses that they faced long jail sentences or capital punishment. In other cases, the Justice Department roadblocked witnesses efforts for release by seeking continuances to delay witnesses testimony when they were prepared to testify and refusing to grant witnesses immunity in exchange for their testimony.

Almost half of the material witness detained in counterterrorism investigations since September 11 did not testify in any criminal proceeding. This pattern, however, also reflects the costs of the governments end-run around the constitutional requirement of proving that there is probable cause to detain a suspect; in many cases, the government used flawed and unsubstantiated evidence to hold material witnesses who had no information about any crime. Government officials have issued statements acknowledging or apologizing for the

wrongful detention of at least 11 material witnesses, most of whom spent weeks in detention, often in solitary confinement, and Congress, federal courts and the Department of Justice's internal review agencies has initiated investigations into flawed or prolonged material witness arrests.[20]

The May 2004 arrest of Oregon attorney and Islam-convert Brandon Mayfield as a material witness to a grand jury investigation into the March 11 Madrid bombing illustrates the governments' pattern of using the material witness law to hold suspects. In sealed proceedings, the FBI obtained a warrant to arrest Mr. Mayfield, a U.S. citizen and a father of three, on the basis of proof suggesting that Mr. Mayfield was involved with the bombing—that it had made a "100 % positive identification" of Mr. Mayfield's fingerprint with a print found on a bag of detonators found near the Madrid bombing.[21] The FBI further informed the court that it believed that Mr. Mayfield was in Spain even though he did not have a valid passport or records indicating he had left the country in ten years; the government argued that Mr. Mayfield was a flight risk because his fingerprint was found in Spain, making it likely that he "traveled under a false or fictitious name, with false or fictitious documents."[22] In justifying the arrest of Mr. Mayfield, it did not connect him with anyone who was under investigation for the bombing and had not yet convened a grand jury investigation. To the contrary, the Justice Department identified Mr. Mayfield in court filings as a "potential target."[23]

Based on this evidence, armed FBI agents arrested Mr. Mayfield as a material witness at his law office and jailed him in solitary confinement, restricting contact with his family. The FBI searched his law offices, his home and seized his legal files. During his detention, U.S. attorneys suggested that he could face capital punishment if criminally charged and refused to grant him immunity in exchange for his testimony.

After detaining Mr. Mayfield for three weeks in jail and under house arrest, on May 24, 2004 the Justice Department moved to dismiss him as a material witness when Spanish authorities apprehended an Algerian man who had a real match to the Madrid print. The FBI subsequently admitted that it mismatched Mr. Mayfield's print and issued an "apolog[y] to Mr. Mayfield and his family for the hardships that this matter has caused."[24] The Department of Justice's Office of Inspector General and Office of Professional Responsibility is currently investigating the conduct of the U.S. Attorneys and the FBI in this case.

IV. International Legal Prohibitions against Arbitrary Detention

By using its material witness authority to hold suspects like Mr. Mayfield without probable cause, the U.S. government has violated the basic guarantee that detention must be previously authorized by legislation. Article 9(1) of the International Covenant on Civil and Political Rights guarantees that "no one shall be deprived of his liberty on such grounds .. as are established by law." The U.N. Human Rights Committee defines this right to mean that it is "a violation [of Article 9(1)] if an individual is arrested or detained on grounds which are not clearly established by domestic legislation."[25]

Congress has made clear by the language of the statute that it only authorizes the government to detain witnesses for the purpose of obtaining their testimony and that detention of witnesses is permissible in very limited circumstances.[26] There is no other legislatively authorized purpose for using the material witness law within the text of the statute, or within the legislative history, that suggests that the government may hold a material witness for any purpose other than securing his testimony.[27] To the contrary, when Congress enacted the current version of the material witness law, it emphasized that a witness should be deposed in

order to limit the prolonged detention of a witness.[28]

Courts have also underscored that "it would be improper for the government to use § 3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established."[29]

As illustrated by arrest and detention of Brandon Mayfield, the government has arrested "material witnesses" in a manner unsanctioned by Congress. In doing so, it has held such witnesses without previously established authority, in violation of ICCPR Art. 9(1) and the guarantee to due process.

V. Impermissible use of race, religion, and national origin to detain material witnesses

The arrest of Mr. Mayfield also demonstrates the governments' pattern of impermissibly using religion to arrest and detain material witnesses. In addition to the fingerprint evidence, the government argued that Mr. Mayfield had links to terrorists based on insinuations tied to his religion. In its affidavit supporting the arrest of Mr. Mayfield, the government detailed how Mr. Mayfield was a Muslim convert who was married to an Egyptian and that agents had observed Mr. Mayfield drive to his mosque on a number of occasions in the weeks before his arrest.[30] The affidavit also pointed to his numerous professional associations with Muslims, including an advertisement he placed for his law firm in a widely used internet directory.[31]

International human rights law forbids states from discriminating based on race, religion and national origin. ICCPR Art. 2(1), to which the US is a signatory, imposes an affirmative duty to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[32] The U.S. has agreed to the same principles under other treaties it has ratified, including the United Nations Charter, the UDHR, and the International Convention on the Elimination of All Forms of Discrimination.[33] These non-discrimination principles are based on promoting peace and security, on the view that discrimination "is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same."[34]

Out of the 70 post-September 11 counter-terrorism material witness arrests that we documented, only one witness was not Muslim, and Brandon Mayfield was among the two material witnesses who were not of Middle Eastern or South Asian descent. Our review of material witness cases indicates that the government consistently used witnesses' race, religion, and national origin in violation of international principles to argue that material witnesses had material information or were flight risks, in violation of these basic protections against international discrimination.

Endnotes

[1] U.S. Department of Justice, Office of the Inspector General (OIG), The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks, April 2003, p 16.

[2] David Cole, "No More Roundups," *Washington Post*, June 16, 2004.

[3] Letter from James E. Brown, Acting Assistant Attorney General, Office of Legislative Affairs, to Rep. F. James Sensenbrenner, Jr., chairman, House Judiciary Committee, May 13, 2003 at 49, http://www.house.gov/judiciary/patriotlet051303.pdf (last visited November 22, 2004).

[4] 18 U.S.C. § 3144.

[5] S. Rep. No. 98-225, 1984 U.S.C.C.A.N. 3182 (Aug. 4, 1983) ("[T]he committee stresses that whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody.").

[6] Bureau of Justice Statistics, U.S. Dep't of Justice, Compendium of Federal Justice Statistics 2000, http://www.ojp.usdoj.gov/bjs/abstract/cfjs00.htm (last visited November 22, 2004).

[7] *See, e.g., Torres-Ruiz v. U.S. Dist. Court for Southern Dist. Of California*, 120 F.3d 933 (9th Cir. 1997).

[8] *See, e.g., Arnsberg v. United States*, 757 F.2d 971, 976 (9th Cir. 1984) (holding government did not establish impracticability where witness informed government he would not attend a grand jury unless personally served because the government could not show Arnsberg was a fugitive or likely to flee the jurisdiction).

[9] *United States v. Awadallah*, 349 F.3d 42, 81 (2d Cir. 2003). The Court reversed the District Court and held that the government sufficiently proved that it would be impracticable to obtain Mr. Awadallah's testimony by a subpoena, even where the FBI agents testified he had been "very, very cooperative" agreed to voluntary interviews before his arrest, and that he lived in the same city as his U.S. citizen father, and three brothers, one of whom was a U.S. citizen because Mr. Awadallah "did not step forward" and go to the FBI offices after September 11 to volunteer information. As of this writing, the Supreme Court is considering whether to grant certiorari in *Awadallah*.

[10] *Awadallah*, 349 F.3d at 104 (Straub, J., concurring).

[11] *See infra, footnote 10. Awadallah* also disregards the post 9/11 context, where Muslim men were detained as witnesses even when they went to the FBI offices to volunteer information. In fact, the government immediately detained material witness Eyad Alrababah after he voluntarily went to the FBI office in Bridgeport, Connecticut on September 29, 2001 to inform authorities that he had recognized four of the alleged hijackers whose pictures were shown on television. U.S. Senate Judiciary Committee Hearing on Reorganizing and Reforming the FBI, May 8, 2002 (Submitting an inquiry to Deputy Attorney General Larry Thompson on the arrest of material witness Eyad Alrababah).

[12] *Bacon v. United States*, 499 F.2d 933, 943 (9th Cir. 1971).

[13] *United States v. Calandra*, 414 U.S. 338, 343-44 (1974).

[14] *Awadallah*, at 70. In *Awadallah*, the Second Circuit also further extended the government's power by authorizing a material witness arrest based on a statement from an FBI agent who has no personal knowledge of the witness. *Id.*

[15] *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979).

[16] *In re Application of United States for Material Witness Warrant*, 214 F.Supp.2d 356, 364 (S.D.N.Y. 2002) (internal case citations omitted) (emphasis added).

[17] Pam Belluck, "Affidavit describes Bomb suspect's warning," *New York Times*, April 27, 1995.

[18] Attorney General Ashcroft Outlines Foreign Terrorist Tracking Task Force," Opening Remarks of John Ashcroft at *1, available at www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_31.htm.

[19] U.S. Department of Justice, Office of the Inspector General (OIG), "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York," June 2003.

[20] *See, e.g.*, Federal Bureau of Investigation, Department of Justice, Statement on Brandon Mayfield case, May 24, 2004, http://www.fbi.gov/pressrel/pressrel04/mayfield052404.htm (last visited November 22, 2004); U.S. Senate Judiciary Committee on the Inspector General's Report on the 9/11 Detainees, June 25, 2003 (Senator Patrick Leahy requesting an investigation on use of material witness law in light of the wrongful detention

of eight material witnesses in Evansville, Indiana); *In re Application of United States for Material Witness Warrant*, 214 F.Supp.2d 356, 364 (S.D.N.Y. 2002) (ordering investigation into false confession and detention of material witness Abdallah Higazy).

[21] Affidavit of Federal Bureau of Investigation officer Richard Werder in support of the U.S. Government's application for a material witness warrant for the Arrest of Brandon Mayfield, *In re Federal Grand Jury 03-01*, No. 04-MC-9071 (D. Or. Filed May 6, 2004).

[22] Affidavit of Federal Bureau of Investigation officer Richard Werder in support of the U.S. Government's application for a material witness warrant for the Arrest of Brandon Mayfield, *In re Federal Grand Jury 03-01*, No. 04-MC-9071 (D. Or. Filed May 6, 2004).

[23] Government's Response to Witness' motions for return of materials seized pursuant to search warrants, for disclosure of search warrant affidavits and for access to seized material, dated May 17, 2003, p 2. No. 04-MC-9071 (D. Or. 2004).

[24] U.S. Justice Department, Federal Bureau of Investigation, Statement on Brandon Mayfield Case, issued May 24, 2001. *Available at* (http://www.fbi.gov/pressrel/pressrel04/mayfield052404.htm) (last visited September 20, 2004). Weeks later, in response to a Congressional inquiry, Attorney General Ashcroft characterized the wrongful arrest of Mr. Mayfield as "an unfortunate situation which I regret." June 8, 2004 Senate Judiciary Committee Hearing held by U.S. Senator Orrin G. on the Federal Government's counterterrorism efforts."

[25] Communication No. 702/1996, *C. McLawrence v. Jamiaca* (Views adopted on 18 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), pp. 230-231, para 5.5. Article 2 of the American Convention on Human Rights similarly provides that "no one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." The Inter-American Court on Human Rights interprets this prohibition to mean that "no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law and, furthermore, subject to the strict adherence to the procedures objectively set forth in that law." *I-A Court HR, Gnagaram Panday Case v. Suriname, judgment of January 21, 1994*, in OAS doc. OAS/Ser.L/V/III.31.

[26] 18 U.S.C. § 3144. Congress also indicates that the § 3144 is intended only to detain witnesses by requiring that a material witness may not be detained if the government can secure the witness's testimony by deposition. *Id.* ("No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.").

[27] *Cf. Ex Parte Endo*, 323 U.S. 283, 300 (1944) (stating "|w|e must assume, when asked to find implied powers in a grand of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen then was clearly and unmistakably indicated by the language they used.").

[28] *See infra, footnote 5.*

[29] *Awadallah*, 349 F.3d at 59.

[30] Affidavit of FBI agent Richard Werder in support of the United State's Application for Material witness order and warrant regarding witness: Brandon Mayfield, P 19, *In re Federal Grand Jury 03-01*, No. 04-MC-9071 (D. Or. filed May 6, 2004).

[31] The government argued that his business listing in the directory was suspect because the directory was registered to a Muslim man who four years ago admitted to the FBI that he knew a convicted terrorist. Affidavit of FBI agent Richard Werder in support of the United State's Application for Material witness order and warrant regarding witness: Brandon Mayfield, P 13-14, *In re Federal Grand Jury 03-01*, No. 04-MC-9071 (D. Or. filed May 6, 2004). The government also described at lengths the beliefs of one of his Muslim clients in a family court case, Jeffrey Leon Battle, Mr. Mayfield to establish probable cause that Mr. Mayfield may have material information to the Madrid bombing. Mr. Mayfield represented Mr. Battle, who pleaded guilty with seven

other Portland-area residents to terrorism charges in 2003, in a wholly unrelated child custody case.

[32] ICCPR Art. 2(1).

[33] U.N. Charter, art. 1, para. 3; Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1984), art. 2.; International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly Dec. 21, 1968, entered into force Jan. 4, 1969, ratified by the United States in 1994 art. 2, 660 U.N.T.S. 195 (1966).

[34] CERD, preamble, para. 5.

CONDUCT UNBECOMING:

Pitfalls in the President's Military Commissions

March 2004

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Pitfalls in the President's Military Commissions

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CONDUCT UNBECOMING:

Pitfalls in the President's Military Commissions

Introduction

More than a year ago, a major American newspaper detailed how a series of policy directives by the Bush administration had effectively created a "parallel" system of justice in America, in which terrorist suspects could "be investigated, jailed, interrogated, tried and punished without legal protections guaranteed by the ordinary system."[1] The ACLU believes that this "parallel" system of justice fails to provide the safeguards necessary to ensure due process.

These White House initiatives include the "enemy combatant" designation for American citizens, the holding of suspected terrorists without charge as material witnesses, the mass detentions at Guantánamo Bay and a system of military tribunals authorized unilaterally by the president.

All of these initiatives share one discouraging trait: an unwillingness by the Bush administration to trust basic checks and balances on government power, like those that the American legal system demands to protect the innocent from false arrest, prosecution, conviction or execution.

Now, with an announcement by the Defense Department that it will begin trying detainees in these newly created military commissions, this inferior legal system seems set to start operating in earnest.

Pursuant to a Military Order signed by the president shortly after the tragic attacks of Sept. 11, 2001, the Department of Defense has formalized the White House plan to try certain non-citizens alleged to be enemy combatants in military commissions, where they will not enjoy the basic due process protections accorded under the Uniform Code of Military Justice or required by international law.

The military, with the president as its commander in chief, will have sole authority to appoint the judges, prosecutors and defense counsels for these commissions. Indeed, the Department of Defense appears to be the only government body that can hear any appeal – civilian courts wouldn't even enter the equation. Attorney-client privilege is weakened; evidence — even evidence of innocence — could be withheld from the proceedings under the vaguely defined guise of "national security" and the courts are so unusual that the basic rules of procedure could be changed midstream during the tribunal.

These military commissions have not been congressionally reviewed or authorized. Thus, the rules governing their use could be changed at the whim of the president. President Bush, with a stroke of his pen, could begin to use the commissions to try non-citizens on American soil for crimes unrelated to 9/11. The president could even decide – as did President Roosevelt in World War II – to subject American citizens to

these proceedings. It is not far-fetched to imagine that U.S. citizens Jose Padilla and Yasser Esam Hamdi, who have already been designated as enemy combatants, could be tried by such commissions.

What is at stake is the integrity of the very notion of due process, the presumption of innocence and the promise of a fair trial. The White House and only the White House created this inferior system of trial and punishment. The military can only be expected to comport itself with the honor and integrity that comes with the uniform. The procedural pitfalls in these commissions, though, are just too numerous to expect that any of those charged with crimes could get a fair trial. Excessive power will inevitably be used excessively. We must provide appropriate bulwarks against abuse.

These and other concerns are elaborated at length in the following report. For more information on the Bush administration's inferior system of justice, please visit www.aclu.org/safeandfree.

Stacking the Deck

On Feb. 24, 2004, the Defense Department announced that it was going forward with military trials for two alleged Al Qaeda leaders who were captured in Afghanistan and are currently being detained at a military base in Guantánamo Bay, Cuba. Unfortunately, the rules that the Defense Department will use for military commissions are seriously flawed, denying basic and fundamental rights to the accused. These rules call into question the fairness of any resulting verdict of military commission trials.

These military commission trials have been long delayed. On Nov. 13, 2001, President Bush issued a Military Order that permitted the indefinite detention and potential trial by military commission of non-citizens suspected of involvement in terrorism.[2] The Military Order produced a firestorm of criticism from across the political spectrum. Conservative columnist William Safire said that the order would establish "Soviet-style" tribunals because it failed to guarantee many basic rights that are protected both under the American Constitution and international law.

When the final rules were approved in July 2003, it became clear that the criticism was justified. According to the rules, the Defense Department chooses the military officers that serve as adjudicator of fact and law, and chooses the military defense counsel as well. The Defense Department chooses the people who will hear any appeal. The government can listen in on the conversations the accused has with his attorney.[3] The prosecution can use secret evidence against the accused, and the accused has no way to compel the government to produce evidence or witnesses showing his innocence. The government has the power to change the rules in the middle of the trial, including the elements of the offense of which he is accused so it would not have to prove things that it could not prove. At the end of the trial, if acquitted, the accused could still be detained indefinitely. If convicted, he could be put to death with no outside review whatsoever.

Under no stretch of the imagination can such proceedings be considered "full and fair trials," as the president promised in his Military Order.[4] No matter how the Defense Department tries to dress them up,[5] these military commissions cannot provide justice in the eyes of the world. Six people have already been designated to face these unfair tribunals in Guantánamo Bay, Cuba, and two have now been charged. Hundreds of other Guantánamo detainees could also face them. They could also be used to try other suspects, including those arrested in the United States.

The commissions violate fundamental fair trial guarantees:

- **Trials will lack independence and there is no appeal outside the chain of command.** Political appointees at the Defense Department will have control over who sits on a military commission and appoint the chief prosecutor and chief defense counsel. Likewise, these appointees will determine who sits on the review panel of military officers that provides the only appeal. The decisions of the review panel are only recommendations and in some cases can be overturned by the secretary of defense or the president. Judicial review appears to be foreclosed, whether by direct appeal or by petition for a writ of habeas corpus.

- **Prosecutors can keep evidence – even evidence of innocence – from the accused.** Secret evidence rules allow the prosecution to submit evidence to the commission without revealing that evidence to the accused. Defense lawyers may be given only a summary of evidence, and, in some cases, the summary may be provided only to the military lawyer. Evidence that is not used at trial – even if it may establish the defendant's innocence – does not have to be shared with the defense at all. Evidence may be kept secret on "national security" grounds even if it does not involve any classified information.

- **Defendants have no right to compel the attendance of witnesses.** Defendants do not have the power to require the commission to subpoena witnesses or documents, even if such evidence is crucial to the defendant's case.

- **Trials can take place in secret and attorneys are barred from speaking to the press without permission.** Any portion of a trial – or all of it – can be closed to the press for "national security" reasons, whether or not any classified information would be disclosed during the session. Defense attorneys are required to submit to Defense Department censorship of any comments to the press about their cases.

- **There are severe limits on the accused's right to an attorney.** Attorney-client communications can be monitored, and defense attorneys can be forced to reveal confidences for "national security" reasons. Defense lawyers are barred from brokering common defense arrangements, which are often critical to trial strategy, among defendants. The chief defense counsel, who oversees military defense lawyers, has no obligation to keep information in the hands of the defense confidential.

- **Trial rules – including the definitions of crimes – can be changed at any time, even during a trial, by military officials.** The rules for the trial, including those for monitoring attorney-client conversations and determining the elements the prosecution must provide to establish guilt for various offenses, are not binding on the commission and can be changed at any time.

- **Defendants have no right to a speedy trial – or even a trial at all – but can be held indefinitely without charge.** There is no time limit for bringing any detainee held as an alleged enemy combatant before a commission to face charges, or before any other military or judicial forum that could resolve factual or legal disputes about whether the detainee has done anything to warrant further imprisonment. Guilty verdicts in all but capital cases can be imposed even if one third of the military officers on the commission believe the defendant is innocent.

- **Defendants can continue to be detained even if acquitted of all charges.** Even an acquittal on all charges does not obligate the government to release a detainee, so long as the "war on terrorism" is ongoing.

- **Commission rules are so broad that they may extend to non-citizens accused of civilian crimes.** While the Defense Department says it is planning to use commissions to try persons detained abroad and held in Guantánamo Bay, Cuba, the rules allow much broader use. Military commissions could be used domestically – as has already been suggested with respect to some defendants currently in civilian terrorism trials. The rules define crimes of terrorism so broadly that military trials could also be used to prosecute non-citizens for isolated acts.

Why the Guantánamo Military Commission Trials Cannot Provide Justice

No independence, no review, and no outside appeal. The procedures outlined for military commissions fail to provide for an impartial and independent tribunal, nor are the military commissions subject to any meaningful outside check on their authority. The military commissions are an entirely closed system, subject to the control of the president or secretary of defense, with no appeal allowed to any civilian court.

The appointing authority, who has now been appointed by the secretary of defense, will have ultimate control over the entire military commission proceeding, including the appointing of commissioners, the review panel and the ultimate disposition of the case.[6] While Secretary Rumsfeld has designated Maj. Gen. John D. Altenburg, Jr., a distinguished retired military lawyer, as the appointing authority, putting this degree of power into the hands of a political appointee simply does not offer any guarantee of impartiality or independence and violates basic principles of American justice and international law. The procedure violates fundamental due process protected by the Fifth Amendment, as well as the specific requirement of the Third Geneva Convention (article 106) that defendants tried in military tribunals must have access to appeals "in the same manner as the members of the Armed Forces of the Detaining Power."[7]

The appointing authority will appoint commissioners "from time to time," meaning that commissioners can be hand-selected to try specific cases. Even more alarming, the procedures outlined could permit direct interference in the conduct of commissions by the appointing authority itself. The order allows for interlocutory appeals (apparently including by the prosecution) to the appointing authority.

The review procedures do not offer a real appeal. The appointing authority controls selection of review panels, which may be appointed for specific cases, and the secretary of defense has the power, in some cases, to set aside the review panel's recommendations."[8] These provisions render illusory the order's guarantee of an appeal, a requirement under American justice and international law. There is no appeal to any body – even an administrative panel – outside the military command structure. The sentence of a military commission becomes final when it is affirmed by the secretary of defense. Punishment – which could include execution – can be carried out with no outside review whatsoever. Judicial review appears to be specifically foreclosed by the rules, whether by direct appeal or by petition for a writ of habeas corpus.

By contrast, courts-martial under the Uniform Code of Military Justice permit a direct appeal to the Court of Appeals for the Armed Forces, a civilian Article I court that is not subject to any control by the Defense Department. Review by the Supreme Court of the United States is available by petition for a writ of certiorari.

Although the court-stripping language of the rules appears to be absolute,[9] government lawyers have said that a federal court would have jurisdiction in a habeas corpus proceeding to consider whether a particular defendant is constitutionally subject to trial by military commission, but only if the trial takes place on United States soil.[10] However, the Defense Department has made clear that it plans to conduct military commissions in Guantánamo Bay, Cuba, and the Justice Department is contending in consolidated cases that will be heard shortly in the Supreme Court that federal courts lack any jurisdiction to consider the habeas challenges of prisoners in Guantánamo.[11]

The military lawyers assigned to the defense by the office charged with administering the commissions have taken the very unusual step of filing a brief amicus curiae with the Supreme Court in a habeas corpus challenge by detainees at the camp in Guantánamo Bay, Cuba. Their brief does not tackle the issue of federal jurisdiction in Guantánamo generally, but does urge civilian review of any trials that take place in Guantánamo, and urges the Supreme Court to preserve such review.

Secret evidence. Again, contrary to public assurances that the Defense Department is committed to ensuring the right of an accused to confront the prosecution's evidence, the military commissions have been carefully crafted to ensure that the accused will see only evidence that the government allows to be seen.

The rules permit evidence to be withheld from the defendant, and from the defendant's civilian lawyer, when necessary to protect against the disclosure of material that has been classified, as well as "classifiable" material – that is, material that is unclassified but that the government later decides meets the standard for classification. While the rules require civilian lawyers to be cleared to see classified material, a cleared lawyer does not have a right to see the material, even if he possesses sufficient clearance to view it. Under the order, even the defendant's military lawyer may not be entitled to view the withheld evidence, but may instead be required to attempt a defense – with no ability to consult with his or her client – on the basis of a heavily redacted summary.

Finally, even if the evidence is neither classified nor "classifiable" – because the government cannot meet its own standards for classification – evidence may still be withheld from the defendant for unspecified "national security" reasons. All of this information is called "protected information" and must be handled according to special procedures.

Evidence could be withheld even if it is potentially exculpatory – that is, even if it could tend to show that the defendant is innocent. The rules do contain a general requirement that the prosecution "shall provide the Defense with access to evidence known to the Prosecution that tends to exculpate the accused,"[12] but this provision is made subordinate to requirements to keep secret "protected information."[13] If the exculpatory "protected information" is in the government's possession, but is not used at trial, the government has no obligation to reveal it, even in summary form, to anyone – not the defendant, not the civilian lawyer and not the military lawyer.

The rules certainly assume that many cases will rely substantially on evidence the defendant will have no ability to confront. The result will be a

serious risk of wrongful convictions. While the evidence may be provided – in whole or in part – to cleared defense counsel, defense counsel will simply not be able, in many cases, to test the veracity of the evidence without consulting with his or her client. Information that intelligence officers may regard as reliable, and which would appear entirely credible on its face, can fall apart when the accused is able to explain that the information is the result of personal bias, mistake or rivalry within a family, clan or religious group. Cleared counsel who cannot discuss the evidence with a defendant are unable to provide this essential check on what is often little more than rumor or innuendo, but which may be given unwarranted credibility as "classified" information.

The rules are dramatically different from those required for trials in either Article III federal courts or courts-martial under the Uniform Code of Military Justice (UCMJ). Ordinary civilian and military trials have special procedures to safeguard classified information from inappropriate disclosure, but they do not allow the withholding of basic information from the defendant. Most importantly, the government may only redact classified information or substitute a summary for classified information where (1) *in a civilian trial*, the court finds that the summary "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information,"[14] or (2) *in a military trial*, the military judge finds that the classified information is "relevant and necessary to an element of the offense or a legally cognizable defense" and that its disclosure is "necessary to afford the accused a fair trial."[15] If the government's summary does not meet the test, the court is required to dismiss the case or impose another appropriate sanction.[16] By contrast, the military commission rules provide no such standard for summaries of classified information, nor do they say that the court must dismiss the case if the government does not meet the standard.

The military commission rules fly in the face of President Bush's campaign promise to end the use of secret evidence against Arabs and Muslims, even in civil immigration hearings. Instead of ending secret evidence, the rules would explicitly permit, for the first time in American history, the use of evidence not revealed to the accused or his civilian lawyer to establish guilt in a criminal proceeding. Secret evidence could be used even if the accused faces the death penalty.

No right to compel attendance of witnesses to aid the defense. The rules specifically grant the chief prosecutor's office the authority to issue subpoenas for witnesses or to produce documents. The chief defense counsel's office is given no right to subpoena witnesses. In both ordinary civilian and military trials, the right to compel attendance of witnesses and production of documents and other evidence to aid the defense is guaranteed and absolutely basic to a fair trial. While the prosecution bears the burden of proof, the defense must still be able to obtain witnesses and documents that cast doubt on the reliability of the prosecution's evidence, as well as to establish elements of an affirmative defense for which the defense bears the burden of proof.

These safeguards are respected in trials in Article III courts. For example, in the case of Zacarias Moussaoui the government is seeking a death sentence for Moussaoui as an alleged conspirator in the Sept. 11 attacks, and has also charged Moussaoui with other terrorism offenses that do not carry the death penalty. The government refuses to allow the defense to call a top Al Qaeda official for questioning who reportedly would testify that Moussaoui was not involved in the Sept. 11 conspiracy. Because Moussaoui faces trial in a court that respects the right of the defense to call adverse witnesses, the judge has dismissed the death penalty charges, allowing the government's

case to go forward without reference to charges about which evidence may exist that could refute the government's case. In a military commission, by contrast, the government could seek to put Moussaoui to death with no ability for the defense to present evidence that is at the heart of its case.

Secret trials; gag orders. The rules allow the government to hold any trial session – or even the entire trial – in secret, without the ability of family members, the press or members of the victims' families to attend or observe the trial proceedings. The sessions may be closed for reasons of "national security" even if no classified information would be revealed. Defense lawyers – including civilian defense lawyers – may speak to the press "regarding cases and other matters related to the military commissions" only with the approval of Defense Department officials.[17]

When military commissions were first announced, opponents often described the commissions as "secret military tribunals," raising the specter of hooded military judges issuing death sentences in the dark of night. Defenders argued that commissions would generally be open to the public. Under the rules, the commissions will only hold open trials when the government chooses to do so, and no one – not even civilian defense lawyers – can discuss what is happening in the commissions without Defense Department approval.

Interference with right to counsel. The chief defense counsel is selected by the appointing authority, who will then select military lawyers as defense counsel.

The chief defense counsel is not bound by rules of confidentiality. Communications between lawyers and clients may be monitored without any finding by the commission (or other quasi-judicial authority) that the communications involve any abuse of the lawyer-client relationship. Defense lawyers are unlikely, to say the least, to develop the trust and confidence necessary to a successful attorney-client relationship when the detainee knows that anything he says to his lawyer may be monitored by the government.

Joint defense agreements are barred. These agreements permit two or more defendants to waive conflicts of interest in order to mount a common defense and are a common tactic in criminal cases.

Defense lawyers are required to agree to report to the government if they learn, in the course of their representation, of information they "reasonably believe is likely to result in . . . significant impairment of national security" – a standard that is overbroad. This standard alters the normal rules of representation, which forbids lawyers from reporting confidential information unless it is necessary to prevent a serious crime.

Military lawyers are the only guaranteed defense counsel for a defendant. While civilian lawyers are allowed, they must be approved by the government and obtain a security clearance. Only United States citizens will be permitted as defense lawyers.

Defendants (or their families) will be required to pay for any civilian counsel and expenses – including the expense of any security investigation required for their lawyers to obtain a security clearance. Defense lawyers who volunteer to assist detainees without compensation will have to defray their own expenses.

Trial rules – including elements of crimes – can be changed at any time. The military commission rules are not statutes approved by Congress or even regulations that have been subject to the normal notice-and-comment procedures. Rather, they are documents drafted by the Defense Department's general counsel's office. Nothing prevents the office from chang-

ing the rules at any time – even during a trial. Indeed, the rules specifically provide that none of the rules "create any right, benefit, privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies and other entities, its officers or employees, or any other person."[18] As a result, even if the government violates its own rules, the defendant is not entitled to a remedy.

For example, the current rules governing monitoring of attorney-client conversations require notice and impose a "firewall" that is supposed to separate such intelligence-gathering from the prosecution. However, if the government violates that rule, by monitoring without notice or by disclosing information to the prosecution team, the defendant has no right to any sanction – such as an order for a new trial or an order excluding certain evidence as tainted by the illegal monitoring – to correct the government's misconduct.

Even the document that defines the elements of crimes specifically provides that it seeks only to "declar[e] existing law."[19] The elements of crimes are drafted broadly, apparently to maximize the discretion of the prosecution. Even these broad elements, however, are not binding on the commission, which determines both the facts and the law – including the law of war. As a result, the rules that require the prosecution to prove its case – including each element of the crime – beyond a reasonable doubt, could be made illusory by a decision that "law of war" does not actually require proof of a particular element that the rules now say must be proven beyond a reasonable doubt.

Indefinite detention, even for those who are acquitted. The rules do not forbid the continued indefinite detention without charge or trial of any kind of non-citizen detainees. Indeed, comments of Department officials interpreting the rules make clear that this problem has been exacerbated, not corrected. The rules not only fail to require any detained persons to be charged within a specific time period – or ever – but officials have also said that they would allow continued detention of those who have been acquitted of all charges by a military commission so long as the "war on terrorism" is ongoing.[20]

Detention without charge is a serious deprivation of liberty and is, in general, simply not allowed under the American Constitution. In addition, Article 9 of the ICCPR expressly forbids indefinite detention without charge. It is not enough that the government suspects that individuals may be dangerous or may engage in criminal activity if released. When permitted at all, civil detention requires at a minimum a special justification and strict procedural safeguards to ensure individualized determinations of dangerousness under a strict burden of proof.[21] The rules provide for a presumption of innocence, but make that presumption a false promise by failing to require a speedy trial or even a trial at all. If a trial is held, continued detention may render a "not guilty" verdict meaningless.

On March 3, 2004, the Defense Department announced a set of draft rules to implement a system of "periodic review" for the Guantánamo detainees. The proposed rules, however, amount to nothing more than a fig leaf of process on what is still a fundamentally lawless policy.[22]

Under these circumstances, indefinite detention frustrates the entire purpose of providing for otherwise "full and fair" trials. Even if every other deficiency in the rules for military commissions were adequately addressed, this deficiency would render the procedure grossly unfair and a basic violation of both American norms of justice and international standards.

Potential for second-class justice system far removed from war crimes trials for Al Qaeda leaders detained in Guantánamo. While the first two detainees to face charges in military commissions are alleged leaders of the Al Qaeda terrorist network accused of war crimes, the commissions could be used in any "international terrorism" case – even against persons arrested in the United States and who are not alleged to have anything to do with Al Qaeda. In so allowing, the rules violate the basic limitations on the use of military tribunals to punish violations of the law of war imposed both by the American Constitution and international law.[23]

Those subject to the military commissions are not limited to persons captured abroad in the course of military operations, now detained at Guantánamo Bay, Cuba, but could include persons arrested either in the United States or abroad by ordinary civilian police. Likewise, rules do not limit trial by military commission to members of specific organizations, such as Al Qaeda, who were involved in the Sept. 11, 2001 attacks on the United States and who are at least arguably within the Congress's authorization of military force resolution, cited as authority by the Military Order establishing the tribunals. Pub. L. No. 107-40.[24]

Finally, the rules explicitly define elements of offenses for "violations of the law of war" and "other offenses triable by military commission." The rules define "other offenses" to include hijacking or putting in danger a vessel or aircraft, terrorism, murder by an "unprivileged belligerent," destruction of property by an "unprivileged belligerent," "aiding the enemy," "spying" and offenses related to the military commissions themselves including perjury and obstruction of justice. These crimes are defined broadly.

While the commission rules do require any offense – including "other offenses" – to have taken place "in the context of and associated with armed conflict," the rules then define armed conflict so broadly as to render this limit on military commissions liable to severe mission creep. Armed conflict is specifically defined not to require "a declaration of war, ongoing mutual hostilities, or a confrontation involving a regular national armed force." Instead, a "single hostile act or attempted act" may be enough, so long as the attack "is tantamount to an attack by an armed force."

Certainly a significant terrorist attack (or attempt), such as the bombing of the federal building in Oklahoma City, would be enough to satisfy the requirements of the rules. The rules could then be used to substitute military commissions – a second-class form of justice, inferior to both regular civilian and regular criminal trials – for any prosecution in the "context" or "associated" with the hostile act. The only safeguard against application of the order to other offenses that ought to be within the criminal justice system is the goodwill of the president and other administration officials. In a society committed to human rights under law, that result is plainly unacceptable.

The government insists it has the power to hold American citizens as "enemy combatants" even though it has limited military commission trials to non-citizens. As a result, American citizens who are held as "enemy combatants" may not receive a trial at all, even under the flawed military commission system. However, expanding the jurisdictional scope of military commissions to include United States citizens would not be an appropriate response to this concern. Rather, the exclusion of American citizens from the scope of the military commissions

casts doubt on whether such commissions are really needed at all.

Indeed, the government's decisions in the case of John Walker Lindh, an American citizen accused of terrorism offenses for his association with Al Qaeda and the Taliban, amply demonstrates that criminal courts remain a viable option for terrorism cases. Instead of amending the president's order to make it applicable to citizens, the government chose to proceed in federal district court. The Lindh case shows that federal district courts can be used to try Al Qaeda and Taliban prisoners, and casts serious doubts on the government's assertions that such courts cannot be used in such cases because of concerns about security or safeguarding classified information.

The deficiencies outlined above make it clear that trials by military commissions will not meet fundamental standards of justice, let alone the additional "super due process" required by the Constitution for decisions to impose the death penalty.

Challenges to the Military Commissions

Career military lawyers appointed by the Department of Defense to represent detainees who face prosecutions before military commissions have added their voices to those who are saying the commissions cannot provide full and fair justice. According to Major Michael D. Mori, who was assigned to defend an Australian detainee who is yet to be charged, "The military commissions will not provide a full and fair trial. The commission process has been created and controlled by those with a vested interest only in convictions."[25] Lt. Col. Philip Sundel, whose Yemini client now faces conspiracy charges, will attempt to challenge the whole process, saying, "it does not have the checks and balances built into it that guarantee a fair, impartial and independent process."[26]

Major Mori and other military counsel assigned to the defense have also filed an unusual brief in a Supreme Court habeas corpus case brought by detainees at Guantánamo Bay. The brief opposes the government's position that the federal courts lack jurisdiction over Guantánamo Bay in all cases and urges civilian review of military commission trials.[27]

The flawed rules governing military commissions have accompanied a process for choosing potential defendants that appears at least as flawed, and clearly subject to political interference. After repeated, lengthy delays, the Defense Department initially announced on July 3, 2003 that President Bush had designed six defendants to face military commission trials. Protests from the United Kingdom – including from Prime Minister Tony Blair – and from the Australian government, led to conditions being placed on the trials of British and Australian defendants – including that the defendants would not face the death penalty and would serve sentences in their home countries.[28] These arrangements certainly make clear that political considerations will have a substantial effect on one's treatment in the military commission system.

Meanwhile, while not directly relevant, the government's case against a Muslim chaplain at Guantánamo Bay, whom the government initially accused of espionage and aiding the enemy, appears to be collapsing. The treatment of this defendant raises disturbing questions about the professionalism of operations at Guantánamo Bay. This defendant, who is an American citizen, faces justice before a regular court-martial,

not a military commission.[29] The collapse of the government's case against this American defendant raises questions about whether the government's case against detainee defendants might similarly collapse if exposed to the scrutiny of a court whose rules are not deliberately slanted in favor of the prosecution.

Conclusion

The rules for military commissions do not meet the president's requirement of providing "full and fair" trials. They do not guarantee fundamental rights protected by the American Constitution and international law. The military commission orders make clear that military tribunals cannot provide a fair, impartial and independent trial, and that instead, regular criminal courts (or, where military jurisdiction is proper, such as for prisoners of war or other non-citizen fighters detained on a traditional battlefield, regularly constituted courts-martial) should be used to prosecute terrorism offenses.

The new rules are not just different from the rules for trials in federal courts, or for courts-martial under the Uniform Code of Military Justice. In every case, the differences tilt the balance of justice towards the prosecution and away from the accused.

There is no precedent for establishing such a second-class system of justice. While the United States has used military commissions to try accused war criminals and others in past wars, these commissions closely followed the procedures for courts-martial of the day. Establishment of an entirely separate, and starkly unequal, system of courts for non-citizens is without any antecedent in American history.

Endnotes

[1] Charles Lane, "In Terror War, 2nd Track for Suspects," *Washington Post*, Dec. 1, 2002.

[2] Military Order of Nov. 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2002).

[3] Modifications to the original attorney-client monitoring rule issued in July 2004 were made early this year. The new rules continue to allow monitoring at the government's discretion but require notice of any monitoring and impose a "firewall" that is supposed to ensure that any information obtained from monitoring is used for intelligence purposes only and is not be shared with the prosecution.

[4] Alberto R. Gonzalez, "Martial Justice, Full and Fair," *New York Times*, Nov. 30, 2001 (op-ed). Judge Gonzalez is counsel to the president.

[5] In response to the criticism that greeted the president's military order, administration officials said a new order setting forth procedures for military trials would clarify the procedures the tribunals would apply and would protect the rights that had not been outlined in the original order. The new order was issued in March 2002 and enumerated, in general terms, a number of rights – such as the presumption of innocence, proof beyond a reasonable doubt and a requirement of unanimous verdicts for the death penalty – that had not been included in the president's original order. While human rights and civil liberties groups welcomed these improvements, they still concluded that the order suffered from fundamental flaws, such as the lack of judicial review or any other independent review procedure. The ACLU analyzed this order and laid out both the improvements from the original plan and the continuing fundamental flaws of the commissions in an interested persons memorandum, available at http://archive.aclu.org/congress/1041602c.html. For the next year, the Defense Department drafted a series of detailed military commission orders. In July 2003, the Department issued final rules for the commissions. Military Commission Order No. 1 (March 2002) and Military Commission Instructions Nos. 1 through 8 (July 2003) have been published together at 68 Fed. Reg. 39,374 (July 1, 2003) and will be codified at 32 C.F.R. pt. 9.

[6] Military Commission Order No. 1, at § 2 and § 4(A)(1).

[7] This requirement applies not only to prisoners of war and but also to any other person accused of "grave breaches" of the Geneva Convention (i.e., those accused of war crimes). See art. 129 (Third Geneva Convention), and art. 146 (Fourth Geneva Convention).

[8] "The review panel is empowered to dismiss charges, order further proceedings, or reduce a sentence in two types of cases. If the review panel decides that a 'material error of law' has occurred, the Appointing Authority must refer the case to a military commission for further proceedings consistent with the review panel's conclusions. If the review panel recommends that a verdict should be disallowed or a sentence reduced, but does not find a 'material error of law,' its recommendations are forwarded to the secretary of defense who may approve or disapprove the review panel's decisions."

[9] Section 7(b)(2) of the Military Order of Nov. 13, 2001 (which governs all subsequent orders) provides: The individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

[10] Alberto R. Gonzalez, "Martial Justice, Full and Fair," *New York Times* (op-ed), Nov. 30, 2001.

[11] The cases, which have been consolidated and will be heard together, are Rasul v. Bush, No. 03-334 and Al Odah v. United States, No. 03-343. Briefs that have been filed in the cases have been made available online by the Jenner & Block law firm at http://www.jenner.com/news/news_item.asp?id=12520724

[12] Military Commission Instruction No. 8, at § 7(B).

[13] All of the subsequent military orders are made subordinate to Military Commission Order No. 1, which contains the requirements for "protected information."

[14] Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3 § 5(c)(1).

[15] Manual of Courts-Martial, Military Rules of Evidence at § 505(i)(4)(B), (E) (2002).

[16] See 18 U.S.C. app. 3 § 5(e); MRE at § 505(i)(4)(E).

[17] Military Commission Instruction No. 4.

[18] Military Commission Instruction No.1, at § 6.

[19] Military Commission Instruction No. 2, at § 3(A).

[20] Katherine Q. Seelye, "Pentagon Says Acquittals May Not Free Detainees," *New York Times,* March 22, 2002.

[21] See Zadvydas v. Davis, 121 S. Ct. 2491, 2498-99 (2001).

[22] If the government wants to describe the Guantánamo detainees as "enemy combatants," as it once again does in these draft rules, then it must treat them as POWs in accordance with the Geneva Conventions. It has not done so in the past and apparently has no intention of doing so in the future. Even more significantly, it must repatriate the detainees when the "war" is over. Instead, the government is substituting a process of periodic review that will enable it to detain any individual whom the government regards as a continuing "threat" for the rest of the detainee's life. There is no precedent for that result in the law of war, or in our notions of due process.

Furthermore, there are serious problems with the periodic review process that the government has proposed, even assuming that the concept has some validity. The burden is on the detainee to prove that he is not a threat, the proceedings are non-adversarial (which presumably means that the government's witnesses are not subject to cross-examination), there is no provision for the detainee to subpoena witnesses or evidence in his behalf (other than a submission from his next of kin), the hearing panel's conclusion is only a recommendation that can be ignored by the political appointee who oversees the process and there is no opportunity for review outside the Defense Department.

[23] Ex Parte Milligan sets forth the basic rule that military tribunals cannot be used against civilians accused of crime, even when characterized as violations of the "law of war," where there is no emergency situation that prevents "the courts [from being] open, and in the proper and unobstructed exercise of their jurisdiction." 71 U.S. at 127. Ex Parte Quirin, 317 U.S. 1 (1942) permitted a military commission to be used also, during a time of declared war, against German soldiers who were out of uniform but were "unlawful belligerents" who were "acting under the direction of the armed forces of the enemy." Id. at 37. Likewise, article 4 of the ICCPR only permits derogation from normal standards of justice in times of "public emergency which threatens the life of the nation and which is officially proclaimed," a standard not met here.

[24] We do not believe that Congress's use of force resolution authorized military tribunals. However, since the president's Military Order relies on that resolution, we must insist that the resolution's limitations be respected.

[25] Neil Lewis, "Lawyer Says Cuba Detainees Face Unfair System," *New York Times,* Jan. 22, 2004.

[26] Neil Lewis, "U.S. Charges Two at Guantánamo With Conspiracy," *New York Times,* Feb. 25, 2004.

[27] Brief of the Military Attorneys Assigned to the Defense in the Office of Military Commissions As Amici Curiae, Odah v. United States, No. 03-343, filed Jan. 14, 2004.

[28] John Mintz, "Deals Reported Afoot for Detainees, but Lawyers Question Pacts for Clients Without Access to Counsel," *Washington Post,* Dec. 6, 2003, p. A6.

[29] John Mintz, "Guantánamo Bay Spy Cases Evaporate; Chaplain, Arabic Translator Now Face Only Lesser Charges," *Washington Post,* Jan. 25, 2004.

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REPORT, AMERICAN CIVIL LIBERTIES UNION, "AMERICA'S DISAPPEARED: SEEKING INTERNATIONAL JUSTICE FOR IMMIGRANTS DETAINED AFTER SEPTEMBER 11, JANUARY 2004

AMERICA'S DISAPPEARED:

Seeking International Justice for Immigrants Detained After September 11

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AMERICAN CIVIL LIBERTIES UNION

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Foreword

More than 65 years ago, using its might and its moral authority in the aftermath of World War II, the United States led a global effort to pass the Universal Declaration of Human Rights.

Today, in the aftermath of the terrorist attacks of September 11, 2001, the government is dangerously eroding civil liberties in America, especially those of immigrants. The roundup and detention of Arab and Muslim men – carried out with unprecedented secrecy – violated both the civil rights guaranteed by our Constitution and the human rights enshrined in the Universal Declaration that the United States helped to create.

To augment the work we have done domestically to protect civil liberties, the ACLU is bringing the case of these immigrants to an international forum: the United Nations Working Group on Arbitrary Detention in Geneva.

Our complaint, filed on January 27, 2004, alleges that the United States government arbitrarily and indiscriminately arrested immigrants unconnected to terrorism or crime. Many languished in jail for weeks and sometimes months, and the government refused to release them *even after* it knew they were innocent. For extended periods that must have seemed endless to those detained, many of these men were not told of the charges against them, were denied access to lawyers and were refused a hearing before a judge.

In other words, these men simply disappeared.

This report and our complaint are efforts to make their stories known and to achieve some measure of justice for the detained men and their families. The full impact of the recent crackdown against Muslim and Arab communities is yet to be told.

By filing this complaint, the ACLU is taking a step to help ensure that our national policies and practices reflect not just U.S. constitutional standards but also accepted international norms regarding liberty and its deprivations.

ANTHONY D. ROMERO
Executive Director
American Civil Liberties Union

AMERICA'S DISAPPEARED:

Seeking International Justice for Immigrants Detained After September 11

"No one shall be subjected to arbitrary arrest, detention or exile."
— Article 9, Universal Declaration of Human Rights

"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."
— Article 10, International Covenant on Civil and Political Rights

Some were startled awake by an early morning knock at the door. For others, it began with an ominous visit at work, a rough interrogation after a routine traffic violation or an order barked from a van to pull over to the side of the road.

In the days, weeks and months following the tragic events of September 11, 2001, hundreds of American immigrants were rounded up and detained, often under harsh or abusive conditions, in the name of keeping America safe. Not because of evidence (or even sound hunches) that they were involved in the terrorist attacks that brutally ended the lives of more than 3,100 people. Not because they were found to have ties to – or even knowledge of – terrorist groups who might threaten American security in the future.

Instead, hundreds of immigrants were *arbitrarily* snared in this dragnet, marked for arrest and thrown (literally, at times) in jail. The exact number is unknown, because the government refuses to release that information. They had one thing in common: Almost all were Arab or South Asian men, and almost all were Muslim. The agents picked them up on the flimsiest of "tips" or as a result of chance encounters. One immigrant interviewed by the ACLU said a hospital co-worker gave the FBI his name because she thought he wore his surgical mask "more than necessary" at work. Another said he was arrested when agents came to his apartment looking for the previous tenant. They settled for him instead.

These sweeps and arrests were accomplished through the arbitrary and haphazard enforcement of minor immigration laws. Indeed, on October 25, 2001, Attorney General John Ashcroft brandished this tactic as a weapon, in a statement that effectively equated immigrants with terrorism: "Let the terrorists among us be warned," he said. "If you overstay your visa – even by one day – we will arrest you..." [1]

Once arrested, many immigrants were labeled "of interest" to the September 11 investigation and thrown into legal limbo – detained for weeks or months in connection with a criminal investigation, but denied the due process rights that they would have been entitled to had they actually been charged with crimes.

[1] Speech given at the U.S. Conference of Mayors. Recounted in the April 2003 report of the Inspector General of the Justice Department, "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks," p. 12.

The Office of the Inspector General Reports

In June 2003, the Office of the Inspector General (OIG) of the Department of Justice issued a 200-page report, titled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." The report was prompted by complaints made by individuals and advocacy groups about the September 11 detentions and about the secrecy surrounding them.

Because the OIG is part of the Department of Justice, it had access to high-level Justice Department officials who had been responsible for the government's immigration and investigative policies after September 11. The OIG report is the most comprehensive report so far issued about the treatment of September 11 detainees.

The June 2003 OIG report confirmed the allegations that the ACLU and other civil rights organizations had been raising since the government first began rounding up Muslim immigrants after September 11. It found that the arrests were "indiscriminate" and "haphazard" and that the INS routinely arrested people who had no connection to criminal activity, let alone terrorism. The report stated:

> Even in the hectic aftermath of the September 11 attacks, we believe the FBI should have taken more care to distinguish between aliens who it actually suspected of having a connection to terrorism as opposed to aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism. (June 2003 OIG Report, 70)

The report also addressed the treatment that immigrants received after arrest. According to the report, immigrants were refused release on bond, denied access to counsel and to consular officials, interrogated about their religious and political views, and held in degrading conditions. In some cases, immigrants were verbally and physically abused. The report stated:

> The evidence indicates a pattern of abuse by some correctional officers against some September 11 detainees, particularly during the first months after the attacks. Most detainees we interviewed at the [Metropolitan Detention Center] alleged that MDC staff physically abused them. Many also told us that MDC staff verbally abused them with such taunts as "Bin Laden Junior" or with threats such as "you will be here for the next 20-25 years like the Cuban people." Although most correctional officers denied such physical or verbal abuse, the OIG's ongoing investigation of complaints of physical abuse

> developed significant evidence that it had occurred, particularly during intake and movement of prisoners. (June 2003 OIG Report, 162)

In December 2003, the OIG issued a second report, titled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York." The report was based in part on videotapes that MDC officials previously claimed had been destroyed. According to the December 2003 OIG Report, "the tapes substantiated many of the detainees' allegations." (Dec. 2003 OIG Report, 7) In particular, the December 2003 OIG report found:

> [There is] evidence that some officers slammed detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished them by keeping them restrained for long periods of time. We determined that the way these MDC officers handled some of the detainees was in many respects unprofessional, inappropriate, and violation of ... policy. (Dec. 2003 OIG Report, 46)

Clearly, these abuses should never have occurred. That the OIG has issued such a comprehensive and well-researched report will help us ensure that they don't occur again.

Those housed at the Metropolitan Detention Center (MDC) in Brooklyn, for example, were put in high-security cells in "lockdown." For weeks they were denied phone calls or visits. Some were in solitary confinement 23 hours a day. Many were assaulted, harassed and humiliated by corrections officers who considered them "terrorists."

At the same time, a series of post-9/11 policies issued by the Justice Department effectively denied immigrants held on these minor charges access to lawyers, as well as information about the charges they faced, the chance to post bond or the opportunity to appear before a judge in open court.

Prolonged detentions were common, in part because of the FBI's byzantine "hold until cleared" policy. The policy – a "guilty until proven innocent" model of justice never put down in writing – ensured that an immigrant otherwise ready for release by the INS had to stay put until the FBI affirmatively determined he had no connection with terrorism.

A June 2003 report issued by the Inspector General of the Justice Department – the first of two scathing OIG reports revealing the arbitrary and harsh treatment of immigrant detainees – put the average number of days from arrest to FBI clearance at 80.[2] For many detainees, it was much longer.

FBI clearance did not open the jail door for immigrants. Benamar Benatta, for example, was arrested in September 2001 on the basis of an overstayed visa. Although the FBI cleared him two months later, he remained in solitary confinement for five more months. He remains in detention to this day.

[2] OIG Report, 46.

It is now apparent that the overwhelming majority of the men who were detained had simply overstayed their visas or committed similar civil immigration infractions that, ordinarily, would not have led to detention at all. "Two years ago, I had hopes. I was okay," Benatta said in an interview given in his 26th month of detention. "Now I lie in my cell and think: 'What has become of me?'" [3]

A Fight for Rights on Two Fronts

Since the early days of the government dragnet, the ACLU has relied on the United States Constitution to fight for the rights of immigrants unfairly detained. (Our efforts – and the disturbing circumstances that prompted them – are detailed later in this report.)

Now we are complementing that domestic work with an international effort: On behalf of more than a dozen immigrants from several countries, we are asking the United Nations Working Group on Arbitrary Detention to rule that the United States government violated international human rights standards by arbitrarily targeting these men and hundreds of others.

The personal stories of many of the people we represent are recounted in detail in profiles throughout this report. The information in these profiles was drawn from ACLU interviews conducted over the past three years.

Today, nations are linked more tightly than ever – through immigration and commerce. They should also, we believe, be encouraged to measure their democratic institutions against an internationally accepted standard of human rights.

Our complaint argues that the roundup of Arab and Muslim immigrants and their prolonged detention violates human rights principles found in two important international instruments:

- The Universal Declaration of Human Rights (which the U.S. helped create after World War II)
- The International Covenant on Civil and Political Rights (whose provisions are similar to our Bill of Rights)

The United States is a signatory to both these documents.

"We want to bring to the United Nations the stories of these individuals and the larger story of what happened to these immigrants in the wake of 9/11," said Jameel Jaffer, an attorney at the ACLU's National Office. "And given the scale of what happened and its impact across borders, there is a need for international institutions to look at this through a human rights lens."

Here's why:

By asking the United Nations to shine a global spotlight on the U.S. government's indiscriminate roundup of immigrants, the ACLU warns the government that it cannot escape justice through secrecy. The United States government has done everything in its power to hide its actions from public view. The government refused to disclose the names of the men it secretly held, and then deported them before they could tell their stories. The government clearly hoped that these immigrants had disappeared forever. But just as the United States is crossing borders abroad in the name of security, we will cross borders in the name of justice to vindicate human rights abuses.

[3] Michael Powell, "A Prisoner of Panic After 9/11," *The Washington Post*, Nov. 29, 2003.

The United Nations Working Group on Arbitrary Detention

The United Nations Working Group on Arbitrary Detention (UNWGAD) was established by the United Nations Commission on Human Rights in 1991, and is based in Geneva. It is comprised of five independent experts – judges and other legal professionals – who meet three times a year, each time for five to eight days. The members of the panel are appointed by the UN Commissioner of Human Rights; they reflect the geographic distribution rules generally followed at the United Nations. (For current members, see Office of the High Commission for Human Rights, Working Group on Arbitrary Detention,www.unhchr.ch/html/menu2/7/b/arb_det/ardintro.htm.)

The Working Group exists in order to investigate allegations of arbitrary detention. It is the only non-treaty based body whose mandate expressly provides for consideration of complaints from individuals. Thus, the Working Group's actions are "based on the right of petition of individuals anywhere in the world." (See Working Group on Arbitrary Detention, Fact Sheet No. 26, Section III.)

In order to determine whether detention is arbitrary, the Working Group looks principally to two documents:

- **Universal Declaration of Human Rights –** In the aftermath of the Second World War, the United States was one of the strongest advocates for the adoption of the Universal Declaration. (Eleanor Roosevelt was the Chair of the Human Rights Commission in the commission's first years.) Thanks in no small part to that advocacy, the General Assembly adopted the Universal Declaration in 1948.

- **International Covenant on Civil and Political Rights –** The covenant recognizes basic civil and political rights, including the right to equality before the law, the right to a presumption of innocence, and the right not to be detained arbitrarily. The covenant entered into force in 1976; the United States ratified it in 1992.

When the Working Group receives a complaint, it forwards it to the government concerned and provides that government with an opportunity to respond. Ordinarily, the government is asked to respond within 90 days. If the government responds, the person or organization that submitted the complaint is given an opportunity to reply.

Ultimately, the Working Group issues an opinion declaring that the detention in question is – or is not, as the case may be – arbitrary.

Khaled Albitar

Khaled Albitar came to the United States from Jordan in April 2001. With few opportunities open to him at home, "I came to work," he said. And he did, landing a job at a gas station in the small town of Stony Point, New York. His life consisted only of going "from my work to my home," he recalled, but he wanted to make money. "I want to get married, have a family. And I was helping my father – he is an old man – sending him $200 every month."

On October 1, 2001 the FBI came to Mr. Albitar's home, which he shared with a roommate, and asked him questions about a Jordanian man the agency had arrested. (Agents had found Mr. Albitar's phone number among the man's belongings.) "They asked, 'Do you know him? Is he a terrorist?'" recalled Mr. Albitar, who told the agents what he knew about his fellow Jordanian. They then asked him about his family, he said. "And about my religion." He showed the agents his tourist visa, which was just days away from expiration. The agents thanked Mr. Albitar for his cooperation and left.

About two weeks later, the FBI returned, accompanied by INS agents, and arrested Mr. Albitar on the basis of his now-expired visa. (Mr. Albitar said that by then he was too frightened to call the INS to try to extend his visa). He was then taken to Federal Plaza in New York City.

The next day, he was taken to Passaic County Jail in Paterson, New Jersey. Within a week or so, the FBI came to interrogate him. "They came with my stuff – without permission from me. From my home. My telephone numbers, my family pictures, my financial papers," Mr. Albitar said. These possessions were never returned. An agent told him the FBI believed he had lived with a terrorist in California in 2000. He denied this, explaining that he was living in Hebron in the year 2000. The agent then told him that he had spoken to Mr. Albitar's lawyer, who said she "didn't mind" if Mr. Albitar took a polygraph test.

"They asked me the same questions like 100 times," he said. "They showed me the photos of the people who did Sept. 11 and asked me a million questions. 'Do you know this one? Do you know him?' And I said, 'no, of course not.'"

He was told he failed the test, and he took another one a few days later – and he was told he failed again. "I told him, I swear to God I didn't hide anything." This time, when the agent returned him to Passaic, Mr. Albitar said, "he spoke to one of the people in the jail and they put me in the hole."

He remained in solitary confinement for 24 days. Each day he would ask to call his lawyer. "They would say 'Okay, tomorrow.' For 24 days, they don't let me talk to my lawyer," Mr. Albitar said. "I was praying and thinking, What did I do to be here?"

After he was removed from solitary confinement, he remained in jail, awaiting FBI clearance. At an immigration hearing, a judge set bail at $1 million, he says, a sum that so shocked him that the judge repeated the amount. "He said, 'One and six zeros,'" Mr. Albitar said, adding that the government appealed the determination anyway.

He was deported on July 10, 2002. In Amman, "it's very hard to find work," he said. He is also suffering, because his everyday experiences trigger fears arising from his nine-month detention. "When I hear the call to prayer, I get scared," he said. "Because of what they did. I didn't do anything. The only thing was because I was Muslim."

Naeem Sheikh

For Naeem Sheikh, it began with a knock at the door at 6:00 a.m. in early March, 2002.

"I was sleeping,'' recalled the 32-year-old former New York City taxi driver, who had finished work just a few hours earlier. Rousing himself, Mr. Naeem, a Pakistani national, heard the people outside identify themselves as FBI agents.

The agents – "like eight, nine people" – searched the apartment he shared with his wife, brother and brother-in-law. "They check my door and clothes, bathroom and kitchen, my fridge and my bed. They touch my mattress," Mr. Naeem said. An agent then told Mr. Naeem to get dressed and come with them.

"I said, 'For what?' and he said, 'No questioning. Come on, do it fast.'"

"I said, 'What happened, officer? Come on, tell me, it's my right.'"

Handcuffed, he was eventually taken to Bergen County Jail on immigration violations. Mr. Naeem had failed to renew his work permit in the mistaken belief that he didn't need this permit to drive a cab. His arrest came amid his efforts to legalize his immigration status.

When he arrived at the jail, an immigration officer told him he would be deported to Pakistan within a week. Mr. Naeem, whose wife was pregnant, protested that he hadn't received a notice of a deportation order.

"I said, 'Ma'am, the United States immigration comes by law. Someone have a deportation – you must send them a letter.'" He added: "I have no criminal record, no parking tickets, no red-light tickets."

A week into his detention, he was interrogated by an FBI agent, who asked if he'd been to Afghanistan and if knew anyone who was "happy" about the terrorist attacks. His answers: No. (Mr. Naeem was driving near the World Trade Center when the attack occurred and remembers the horror of the explosions and of leaving his cab and fleeing on foot to safety.)

"He ask me, 'You know Osama bin Laden? You know any terrorist people?'" The agent also asked him if he knew how to pilot a plane – "I said, 'I just know how to drive a taxi.'" – and

Naeem Sheikh in Lahore, Pakistan.

questioned him about his religion. "He said, 'So, you are Muslim?' I said, 'Yes, of course, I'm Muslim.'"

He was in jail for a month, initially prohibited from praying and denied the special diet required by his religion. Later, he was provided with those meals, though he had to pay for them.

At the airport as he was deported, he was called a "terrorist" by the officials escorting him to the plane.

Khurram Altaf

Khurram Altaf came from Pakistan to the U.S. on a tourist visa in 1985. He was 18 years old. He was a "happy camper," he said, until he was arrested and detained in 2002.

At the time of his arrest, he was a family man with an excellent job at a national trucking company. "I was general manager for one of the locations," he said. "I have 60 people under me, four managers. I was in charge of the whole complex." He was, he later proudly told *The New York Times,* in an interview after his deportation, "the only Pakistani Muslim in the company."

Mr. Altaf settled in South Amboy, New Jersey, with his wife (Alia), two daughters (Fiza and Anza) and a son (Hamza), "all born in America." Anza, the middle child, was born deaf and has a cochlear impact, for which she requires special services.

On the morning of April 30, 2002, Mr. Altaf's wife heard a knock at the door. "I was sleeping," he recalled. "My wife said two people are standing there. When I opened the door they said, 'We are from U.S. immigration, and we want to see Mr. Khurram.' I say 'okay, that's me,' and they say, 'You have your I.D.?'" He showed them his driver's license and a recent Green Card application. The agents said they wanted to interview him for just an hour at the INS's Newark office.

"They took me to Newark and asked me about, you know, if you have any connection to Al Qaeda members or if you have any relatives from Afghanistan or you know anything about 9/11 or anything. I said no. I have no connection." The agents also asked about his religion.

About seven hours later, Mr. Altaf – his hands and legs shackled – was taken to Bergen County Jail in Hackensack, New Jersey. He

Khurram Altaf (left) is displaying pictures of his family. Syed Wasim Abbas, who was also detained, is on the right.

was kept there for two months. He was never told why. For 24 hours after he was taken from his house, his wife frantically tried to learn of his whereabouts.

Mr. Altaf was deported to Pakistan in the summer of 2002, without appearing before a judge. For a year, he did not see his family, who had remained behind to ensure that his daughter would get the treatment she needed. "They cry all the time whenever I talk to them and say, 'Papa Daddy when you coming back home? I miss you. I love you,'" he told *The New York Times* in 2002. "And I do the same thing. Without family, life is nothing. I'm like a dead person."

After a year, his wife and two of his children joined him in Rawalpindi, where he has opened a small grocery store with his in-laws. His daughter Anza lives in New Jersey with his brother and mother. "I talked to a lot of doctors, a lot of surgeons, a lot of specialists, a lot of psychologists and audiologists," he said. "They said they don't have services right now in Pakistan for cochlear implant and special education."

He hopes to bring his daughter to Pakistan "once a year to visit," he said. "Right now this is my plan." His family misses her terribly, he says. "Anytime, we talk to her – with the implant, she hears and speaks – they cry. And she does, too."

Mr. Altaf sorely misses the job he had in the United States. "Sometimes I call, and they say they miss working with me. Especially they miss the food. I would cook at home and take it to work – for Christmas or Thanksgiving."

For many of the immigrants represented, the complaint to the United Nations also represents their first opportunity to tell their stories to the public. They were uprooted from their homes, taken from their families and deprived of their livelihoods. Their lives were irrevocably disrupted by the government's policies.

Many still live under a cloud of suspicion in their home countries. A United Nations ruling will help clear their names of any involvement with terrorism or crime. It will provide some closure to the prolonged nightmare of their arbitrary detention and its aftermath. Noor Hussain Raza, 61, says that since returning to Pakistan he has been unable to work because of his age and heart condition. He is reduced to living in the streets, unwanted by his family and society.

Advocacy before the U.N. also sends a strong message of solidarity to human rights advocates in other countries who have decried the impact of United States policies on the human rights of their citizens. Americans concerned about constitutional rights at home will continue to engage with groups and institutions around the globe to ensure that the United States respects the human rights of all persons, regardless of their nationality, race or religion.

The complaint to the United Nations Working Group on Arbitrary Detention has its roots in earlier advocacy we did at home and abroad on behalf of these immigrants. It draws on interviews conducted in 2001 and 2002 by ACLU lawyers at New York and New Jersey detention centers where the majority of immigrants were held after September 11.

The complaint is also grounded in interviews the ACLU conducted when it traveled to Pakistan in 2002 to meet with detainees who had been deported.

Khaled K. Abu-Shabayek

Khaled K. Abu-Shabayek, a Jordanian national, had lived here for about twelve years prior to his arrest in April, 2002. He and his wife last resided in Cary, North Carolina with their seven children, five of whom were born in the United States and are United States citizens. While living in North Carolina, Mr. Abu-Shabayek owned a car, had a driver's license, paid taxes and rented a home for his family. Mr. Abu-Shabayek supported his family by working in construction and running a side business selling grocery items.

Sometime in 1994, Mr. Abu-Shabayek applied for political asylum in the United States, based on his status as a Palestinian living in Jordan. His asylum request was ultimately denied, but he decided to remain in the United States with his family. He subsequently applied for permanent resident status but no final decision had been made on his application by April 2002.

The police stopped Mr. Abu-Shabayek while he was traveling in the state of Tennessee on business on April 18, 2002. The officer asked for his name and other information, then placed him in handcuffs and took him to the local police station. Upon his arrest, the officer told him that he was "illegally present in the United States."

From the time he was first arrested until he was finally deported to Jordan five months later, he was moved frequently, spending time in facilities located in Tennessee, Louisiana, Oklahoma, Georgia, New York and New Jersey. He was often transported between locations in windowless vans that lacked climate control.

Throughout Mr. Abu-Shabayek's five months in detention, he was never brought before a judge. At his initial arrest, he was shown a piece of paper notifying him that he had a right to a hearing. He requested a hearing numerous times but was repeatedly denied by the officers guarding him. He was also aware of his right to post bond, and requested a bond hearing. This request was also denied without explanation. Finally, he was denied access to speak with a representative of his consulate.

No criminal charges were ever brought against Mr. Abu-Shabayek, but the FBI told him that he was considered a "terrorist" and interrogated him on six or seven separate occasions. At one point during these interrogations, Mr. Abu-Shabayek requested permission to use a bathroom. The FBI refused, telling him "to piss on himself." He says that "Arabs and Muslims were treated more harshly than other prisoners," and that FBI agents frequently "tried to provoke Arab and Muslim detainees."

Mr. Abu-Shabayek was finally deported to Jordan on September 12, 2002. He and his family are now living in Amman. Mr. Abu-Shabayek was unable to find work for fifteen months after arriving in Jordan, and supported his family on savings he had earned in the United States. His children, most of whom were raised exclusively in the United States, have had a very difficult time fitting into their new lives in Jordan.

Noor Husain Raza

Noor Husain Raza, a 63-year-old engineer, left Pakistan in 1979. He first emigrated to the United Arab Emirates, where he worked as an engineer in the Dubai police department for more than a decade. In 1992, he came to the United States on a visitor's visa.

When he arrived, Mr. Raza applied for political asylum based on his trade union activism in Pakistan. His asylum request was denied, and he filed a motion to reopen his asylum case. He worked at many jobs, sending money home to a large number of relatives in Pakistan. "Three families, I support," he said. In 1993, he got a job as a baggage handler for Continental Airlines at Newark International Airport in New Jersey. He worked with customers, too, from time to time. "I used to translate for people who don't know the English, especially the Arab people," he said.

His motion to reopen his asylum case was pending when he was arrested at work on Dec. 19, 2001. He showed the agents his airport ID, his company ID and his driver's license. "They said, 'No, we need immigration ID,'" he said. "They just put me in handcuffs."

Mr. Raza was taken to the INS center in Newark, where agents questioned him. "They said, 'Do you know something for this 11th September?'" I said, 'Man, I am a normal guy. Just a worker.'" He was allowed to make collect calls and tried to get legal help. But his lawyer was not available, and a second lawyer (recommended by the secretary of a public official he managed to reach) was on vacation.

Mr. Raza was then taken to Passaic County Jail, in Paterson, New Jersey. When he arrived, his clothes were forcibly removed and a guard performed a body-cavity search. "I said, 'This is against the humanity.' He said, 'Sir, don't talk. Silence. You have no right to talk.'"

He was placed in a dormitory-style room on the first floor with other new inmates and was present, he said, when guards brought dogs into the dormitory each morning as the detainees were waking up. After a few days of this, Mr. Raza was moved upstairs with the general population of inmates. The jailhouse doctor would not let him see a specialist so he could discuss the medication he needed for his heart condition. The guards refused his repeated requests for halal meals. (He was given a Koran.)

"I'm a 61-years-old guy – they throw me in the bag of steel," Mr. Raza said. "This is not human rights. This is not justice."

After one month in jail, Mr. Raza was handed over to immigration agents who handcuffed him, searched him and brought him a paper to sign. "I said, 'Let me read it.' She said no. She said, 'Sir you have to sign. You have to.' Then I signed."

He was put on a plane that landed in Karachi, where, penniless, he made his way to Lahore, many miles away.

Mr. Raza remains in Lahore. His arrest and deportation have been a "tragedy" for him, he said. "I'm not a terrorist. My record is neat and clean. I protect their security and integrity of the United States for 10 years in the Newark airport."

Asked if he would return to the United States if he could, he says yes. "The guy who doesn't like dictatorship," he said, "he will always ask for freedom."

Still, he asks how this could have happened to him "when the United States – President Bush – says there is justice, peace and human rights protection, and we are just fighting against the terror ... not against the religion of Islam."

Summarizing the case, the complaint argues that "the arrests were often arbitrary and indiscriminate and not connected to criminal activity. Notwithstanding the dearth of evidence, the government jailed these individuals for weeks and in many cases months. While detained, individuals were refused release on bond, denied access to counsel, interrogated about their religious and political views, held in degrading conditions and in some cases physically assaulted by guards."

Specifically, the complaint to the United Nations Working Group on Arbitrary Detention alleges that:

Sadek Awaed

Sadek Awaed, a 31-year-old Egyptian national held on an immigration violation, is still detained after more than 20 months in jail. Mr. Awaed arrived in New York in 1991 on a tourist visa and applied for political asylum in 1993.

His asylum petition was based on his belief that in Egypt he faced danger because of his former affiliation, as an 18-year-old, with the Muslim Brotherhood, a large opposition group whose stated aim is the peaceful creation of an Islamic state. Mr. Awaed says he was recruited to attend Brotherhood meetings but found the group's extremism disturbing. When he left the organization, which has a history of violence and is banned in Egypt, he was tortured. He fears persecution from two sources – the Egyptian government and the Brotherhood.

In the United States, he has worked as a doughnut maker, a used-car salesman and a taxi driver – the job he had at the time of his arrest, in May 2002.

On May 2, 2002, shortly after his last FBI interview, Mr. Awaed was arrested for a traffic violation in Jersey City, New Jersey, where he was living. While at the police station, he was asked by an officer if he was Middle Eastern. When he replied that he was, the officer responded in a hostile fashion ("Got you, motherfucker!"), after the Jersey City Police contacted the INS.

He has been detained ever since, primarily in the Hudson County Correctional Facility in Kearny, New Jersey. For most of his first 15 months there, he was housed with the criminal population. For a full year, he was not aware of the grounds for his detention. He had received a legal document but did not understand that it described an immigration violation – a failure to leave the United States after being ordered deported in absentia in 1998.

Only after attorneys from the Asian American Legal Defense and Education Fund (AALDEF) began to represent him in the spring of 2003 did he learn that five years earlier, he had been charged with overstaying his visa. The notice of that charge had been sent to the wrong address.

At no time during his long detention has Mr. Awaed been brought before a judge. The judge who ordered the deportation has denied a motion to reopen his case. An appeal of that decision was also denied.

If he is deported to Egypt, Mr. Awaed told the Associated Press in a telephone interview from jail, "I may not see the sun again."

• The government arrested many immigrants by virtue of chance encounters rather than any indication of a possible connection to terrorism or crime.
• The government refused to release many immigrants *even after* it knew that they had no connection to terrorism.
• The government's arbitrary detention policies disproportionately impacted Muslim men from Middle Eastern and South Asian countries.
• Government officials intentionally discriminated against some immigrants based on race and religion through physical and verbal abuse.
• The government routinely failed to provide immigrants with notice of the charges against them.
• The government denied many immigrants a prompt hearing; many were not brought before a judge for weeks or even months after their arrest.
• The government categorically denied many immigrants release on bond, with no showing of an individual need for prolonged detention.
• The government denied many immigrants access to counsel for extended periods.
• The government held many immigrants in degrading and inhumane conditions; though detained on immigration rather than criminal charges, many were held in cells for 23 hours a day and required to wear hand and leg shackles when leaving their cells; others were denied visits or even calls with family members.

The complaint asks the Working Group to declare that the detention by the United States of each of the named individuals was arbitrary and thus a violation of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Because the United States has still refused to disclose a complete list of immigrants detained after September 11, the complaint also asks the Working Group to declare – on behalf of all those wrongly detained – that the United States' arbitrary detention policies violate international human rights principles.

Responding to the Roundup

The ACLU's early efforts to respond to the swift and secretive roundup and arrests of immigrants after September 11 involved a frustrating pursuit of basic information.

Like other advocacy organizations, journalists and of course, the frantic families of the men who seemed to vanish into nowhere, we first tried to learn the identities and whereabouts of those detained.

On September 25, 2001, we met with FBI Director Robert Mueller and asked, in vain, for information about the detainees. (Another meeting on October 25 produced the same result.) In October 2001, we wrote a letter to Attorney General Ashcroft asking for information about the identities of those being arrested. He did not respond.

We also joined several other organizations in filing a Freedom of Information Act (FOIA) request to learn the names and whereabouts of detainees. Again, we learned nothing. The attorney general, meanwhile, issued a directive to federal agencies, encouraging them to withhold requested information wherever legally possible.

As news accounts and reports from ACLU affiliates and other advocates started to yield a clearer picture of what was happening, we began to address the other civil liberties issues.

On December 4, 2001, Nadine Strossen, president of the ACLU, submitted testimony to the Senate Judiciary Committee about the "massive, secretive detention and dragnet questioning of people based on national origin in the wake of September 11."

Sarwar Yamen

In April 1989, Sarwar Yamen arrived in the U.S. after escaping with his wife and two young children from an army camp in Zabul, Afghanistan. He had been forced into the Afghan army to fight the Mujahadin, and tortured in prison. He arrived alone in New York, where he sought political asylum.

Mr. Yamen feared that he might be killed if he was forced to return to his native Afghanistan. His father had been taken from his home and was never seen again. Mr. Yamen's asylum application was denied in October 1989, but he was given a short-term visitor's visa. (His wife and children sought refugee status in England and lived there while he was in the United States. His wife was recently granted British citizenship, but his children still have Afghani citizenship.)

For several years, Mr. Yamen lived in Queens, New York where he worked at a fast-food restaurant and as a limousine driver. On October 10, 2001, he arrived home from work to find that FBI and INS agents had entered without permission and searched his home. The officers told him that he was under arrest because he did not have valid immigration papers and because someone opposed to the U.S. had made phone calls from his telephone. Mr. Yamen told the FBI agents that he had not made these calls and knew of no one else who could have made them. He was placed in handcuffs and leg shackles and taken to a detention center in New York City.

The next day he was transferred to Passaic County Jail, in Paterson, New Jersey. At one point he was pulled out of line by a guard, asked what he thought about September 11. Mr. Yamen replied, "I know you're mad, but I'm doubly mad. I'm scared too. Now this country is bad for me too." The guard told Mr. Yamen he couldn't be trusted and kicked him until his legs bled. He was then placed in solitary confinement for 19 days. After spending three months at Passaic County Jail, he was transferred to Middlesex Correctional Center in New Jersey.

On February 11, 2002, after he had spent four months in detention, Mr. Yamen and 75 other detainees at the Middlesex Correctional Center went on a hunger strike. Mr. Yamen did not eat for 13 days. He resumed eating only after officials told him that he could go home in two weeks. When he began to eat again, though, the government did not send him home.

During these months of detention, both the FBI and the INS interviewed Mr. Yamen. Following his hunger strike, in late February 2002, the FBI officially cleared him. Despite FBI clearance, and several requests for hearings about his case, he was not released or deported. He was transferred to Sussex County Jail, New Jersey on May 9, 2002.

Frustrated by the non-responsiveness of the INS officials and his eight months of continued detention, Mr. Yamen, along with others at Sussex County Jail, staged a hunger strike on June 3, 2002. The other detainees broke their strike on June 5, 2002, after INS officers visited. Once again, the INS officers promised Mr. Yamen that he would be deported to Pakistan very soon if he would "just start to eat." Mr. Yamen continued his hunger strike, and was sent to solitary confinement on June 5, 2002. Five days later, he collapsed and was sent to the hospital for a cut on his head, and to see a psychiatrist. After his fall, he was kept at the intake center and monitored every 15 minutes throughout the day and night.

Three days later, on June 13, 2002, Mr. Yamen was transferred to an Immigration Detention Facility in Elizabeth, New Jersey. He had a thorough medical exam, and met with two government officers, who he describes as a "warden" and a "secretary of immigration" who told him that they were familiar with his case and had sent a special report on his behalf to Washington, D.C. They told him, "If you start eating again, you will be released within three weeks."

On June 24, 2002, Mr. Yamen finally ended his hunger strike. On July 14, 2002, he was finally released and sent to Pakistan, where he was reunited with his wife and children.

Her testimony, barely eight weeks into the Justice Department's investigation, has now been virtually echoed by the department's own inspector general in his April 2003 report about the failures of the post-9/11 immigration roundups and arrests.

"The ACLU recognizes the right – indeed the responsibility – of federal law enforcement to gather relevant information in the course of its investigation into the September 11 terrorist attacks,'' she said. "But discriminatory, dragnet profiling is neither an effective investigative technique nor a permissible substitute for the constitutional requirement of individualized suspicion of wrongdoing."

Still unable to learn enough about individual identities, on Dec. 5, 2001, Anthony Romero, executive director of the ACLU, wrote letters to the Consulates of Pakistan, Egypt and almost two dozen other countries.[4] He offered the consulates the ACLU's "Know Your Rights" brochure for immigrants and asked if they had been contacted by individuals arrested or detained.

"We are quite concerned that current efforts to combat terrorism may undermine the basic freedoms and liberties that are the foundation of our democracy," he wrote.

Also in December 2001, the ACLU joined with other organizations to file a FOIA lawsuit in federal court to learn the names of and locations of people being detained. The lawsuit, *Center for National Security Studies v. United States Department of Justice,* was successful at the District Court level, with Judge Gladys Kessler ordering the disclosure of the desired information.

[4] "A Frustrated ACLU Tries to Guide Consulates Through a Thicket," *The New York Times.*

Benamar Benatta

Benamar Benatta arrived from Algeria in December 2000. He was part of a group of Algerian Air Force technicians being trained by Northrop Grumman in Baltimore. When the course ended, Mr. Benatta stayed: He did not want to return to Algeria. He worked as a busboy in New York City, overstaying his six-month visa. Then, on Sept. 5, 2001, he tried to enter Canada to request political asylum. He was detained at the border for having a fake ID.

His fears about returning to Algeria center on the country's violent Islamic fundamentalist movement as well as its military. "I had a problem with the terrorists who wanted to kill me and the military, which was beating and torturing people," he told *The Washington Post* in an interview conducted not long ago.

Six days after Mr. Benatta arrived at Canada's border, the terrorists struck, and Canadian officials handed over Mr. Benatta to United States immigration authorities. He was taken to Niagara Falls, New York, for questioning and detained at the Buffalo Federal Detention Center in Batavia, New York, for four days. He was then taken by plane – shackled at the ankles, waist and arms – to the Metropolitan Detention Center (MDC) in Brooklyn, where he was placed in a solitary confinement cell.

The FBI determined, in November of 2001, that Mr. Benatta had no ties whatsoever to terrorist activity. Yet he still remains in custody today.

"Two years ago, I had hopes. I was okay," Mr. Benatta told *The Washington Post* during his interview at the Buffalo Federal Detention Facility in Batavia, New York "Now I lie in my cell and think: 'What has become of me?'"

Behind the unconscionable delay in releasing him is a trail of trampled rights. Mr. Benatta was denied access to lawyers when he arrived at the MDC, where, he said, guards scrawled "WTC" on the door of his cell and harassed him by banging on the door to interrupt his sleep. For weeks, he could not leave the cell (except for FBI interrogations). He was forced to strip as guards mocked him, he said. He was told not to speak. And he was physically abused while shackled – his head banged against the wall, his waist-chain pulled so tight it was difficult to breathe.

During his stay at MDC, he had several hearings before an immigration judge – these were closed hearings, and Mr. Benatta was not represented. The judge issued a deportation order in December 2001.

Mr. Benatta remained in solitary confinement until April 2002, when he was transferred to the Buffalo facility. There, he finally got legal representation from a court-appointed lawyer, who fought the criminal charge related to the fake ID.

In September 2003, the judge in the case, Federal Magistrate Judge H. Kenneth Schroeder Jr., wrote in a decision that Mr. Benatta's imprisonment was a "charade" and that "the defendant in this case undeniably was deprived of his liberty," and "held in harsh conditions which can be said to be oppressive." The next month, the criminal charges were dropped.

Mr. Benatta, however, remains in the Batavia facility – unable to post a $25,000 bond imposed to keep him detained pending deportation. The original deportation order has now been nullified by the Department of Justice, and Mr. Benatta is being permitted to pursue his asylum claim at an upcoming bond re-determination hearing.

"Secret arrests are a 'concept odious to a democratic society,'" she said in her decision. An appeals court overruled her decision, writing that the disclosure of all the names "would give terrorist organizations a composite picture of the government investigation." The Supreme Court recently declined to review the case, and so many of the men who were arbitrarily detained after 9/11 will never be known to the press and the public.

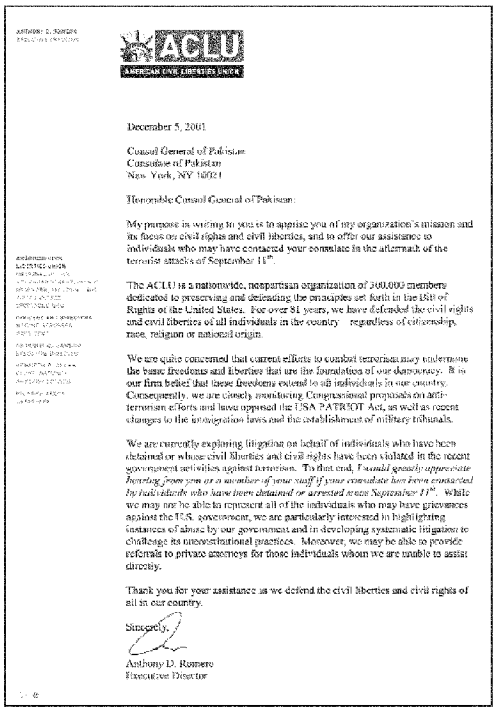
Also in fall 2001, the ACLU and its affiliates began to visit detention facilities in New York and New Jersey to help immigrants get legal counsel or expedite their deportations so they could get out of jail.

Ahilan Arulanantham, a former staff attorney at the ACLU's Immigrants Rights Project, recalls what he saw and heard at the Brooklyn detention center:

"I remember being very struck that the men's wrists were shackled, their legs were shackled at the ankle, their arms were shackled to their waist. There was a guard on each arm and another guard behind and a guard in front."

"The detainees described physical abuse, that they were thrown up against the wall, that lights were on constantly, that it was freezing. They tried to put blankets on themselves, but guards would get angry about that when they had 'counts.' They also said that the pro bono lawyer list was out of date, that they could only have one phone call a week and that busy signals counted. They were frightened and confused and didn't understand why they were in maximum security."

Chris Dunn, the associate legal director of the New York Civil Liberties Union, also noted the many problems the men had contacting lawyers. The facility had a list of lawyers' phone numbers, and "the principal resource on that list was Legal Aid," Dunn said. "But the Legal Aid office was near the World Trade Center and it was closed after the attacks. So when a detainee called the number for Legal Aid, no one answered. And that counted as a call." Revising the list was a major bureau-



ACLU
AMERICAN CIVIL LIBERTIES UNION

December 5, 2001

Consul General of Pakistan
Consulate of Pakistan
New York, NY 10021

Honorable Consul General of Pakistan:

My purpose in writing to you is to apprise you of my organization's mission and its focus on civil rights and civil liberties, and to offer our assistance to individuals who may have contacted your consulate in the aftermath of the terrorist attacks of September 11th.

The ACLU is a nationwide, nonpartisan organization of 300,000 members dedicated to preserving and defending the principles set forth in the Bill of Rights of the United States. For over 81 years, we have defended the civil rights and civil liberties of all individuals in the country regardless of citizenship, race, religion or national origin.

We are quite concerned that current efforts to combat terrorism may undermine the basic freedoms and liberties that are the foundation of our democracy. It is our firm belief that these freedoms extend to all individuals in our country. Consequently, we are closely monitoring Congressional proposals on anti-terrorism efforts and have opposed the USA PATRIOT Act, as well as recent changes to the immigration laws and the establishment of military tribunals.

We are currently explaining litigation on behalf of individuals who have been detained or whose civil liberties and civil rights have been violated in the recent government activities against terrorism. To that end, *I would greatly appreciate hearing from you or a member of your staff if your consulate has been contacted by individuals who have been detained or arrested since September 11th*. While we may not be able to represent all of the individuals who may have grievances against the U.S. government, we are particularly interested in highlighting instances of abuse by our government and in developing systematic litigation to challenge its unconstitutional practices. Moreover, we may be able to provide referrals to private attorneys for those individuals whom we are unable to assist directly.

Thank you for your assistance as we defend the civil liberties and civil rights of all in our country.

Sincerely,

Anthony D. Romero
Executive Director

ACLU executive director Anthony Romero's letter to the Consul General of Pakistan.

Anser Mehmood

Anser Mehmood came to the United States in 1994 with his wife, Uzma, and three sons. A fourth son was born in America in 2000. "I never get arrested for any reason," said the 44-year-old Mr. Mehmood, who operated a trucking company in New Jersey. "I always pay my taxes on time. In other words, I am a very law-abiding person in this country except an overstayed visa."

On the morning of October 3, 2001, Mr. Mehmood was resting in his Bayonne, New Jersey, home when "somebody knocked very hard on my door." Looking out the window, he saw FBI people "with their full uniform." He was "amazed," he said, and wondered "Why they come to my house?" The FBI later claimed that it had received a "tip" from someone at a company that contracted with Mr. Mehmood for trucking services. The tipster reported that Mr. Mehmood had refused to deliver packages to Washington, D.C., on September 11, 2001. However, that tip mischaracterized the events of that day. Mr. Mehmood had been in Philadelphia on the morning of September 11, picking up a load of furniture bound for Washington, D.C. However, at around 10:00, the delivery run was canceled because of the terrorist attacks. Mr. Mehmood went home. Acting on this erroneous tip, the FBI went to his home to question him.

The agents did not have a search warrant. "They just told me, 'We are from FBI and we want to search the house.'" He told them to go ahead. "I don't have any type of fear," he recalled. After searching the premises and questioning the couple for hours, the agents said they wanted to arrest Mr. Mehmood's wife because they suspected her two brothers of credit-card fraud. But because the baby, who was ill, cried when being separated from his mother, an agent agreed to take Mr. Mehmood instead. (The other children were at school). "He says that 'yes, we don't have to take the mother, but we have to take somebody from the house.'"

After a night at a holding facility, Mr. Mehmood was taken – in full-body shackles – to the Metropolitan Detention Center (MDC) in Brooklyn. Upon arrival, he was assaulted by guards while shackled. "They throw me on the wall. My hand was broken at that day. My lip was bleeding. And they terrified me because I was not a criminal. Why they are doing this thing to me? So they repeat the same thing about six or seven times on different walls.''

Mr. Mehmood was then taken to a cell, where a guard told him he was a World Trade Center suspect. "When I heard this thing, I was relaxed," he said. "I said, yeah, they got the wrong guy and they are going to come to know in a couple of hours.'' He said he knew the country was "going through a very difficult situation – those innocent people who burn in those World Trade Center buildings. I feel a lot for those people."

He was detained for six months at the MDC. For about four months, he was (like many immigrant detainees at the facility) kept in a solitary confinement cell for 23 hours a day. "I don't have any idea where I am. Only I can see the Statue of Liberty from my cell.''

For about two weeks, Mr. Mehmood was denied phone contact with lawyers and

Anser Mehmood with his wife and one of his sons in Karachi, Pakistan.

others. When he did call his home, he found the line was disconnected. Because of his arrest, his family – especially his three school-aged children – had received threats and taunts about his being a "terrorist." He was not allowed to meet with his wife for three months. While he was in "the grave" of solitary confinement, Mr. Mehmood said, officials "never served me any paper. They never visit me any time – for four months and six days."

When he was finally allowed to join the prison's general population, he was, for the first time, given halal meals in accordance with his Muslim religion. He was detained for about two months in MDC's general population. Mr. Mehmood said that when he was moved into the general population, he felt he had gone "from hell to heaven," despite his initial fears about being housed with inmates convicted of serious drug and murder charges.

"They feel I am innocent people put in a wrong place," he said, remembering various acts of kindness on the part of these criminal inmates – ordering groceries for him, for example, because he had no money for his prison account. "I tell them that I was in solitary confinement for four months and six days, they cannot believe that."

On March 20, 2002, Mr. Mehmood was charged with – and pled guilty to – working on an invalid Social Security card. He was transferred to Passaic County Jail in Paterson, New Jersey, to await deportation. In May 2002 he was deported to Pakistan. He now lives in Karachi with his family and cannot return to the United States for 10 years.

cratic wrangle, Dunn recalls, because the list could only be revised – quarterly – by Bureau of Prison officials in Washington.

In New Jersey, said Lee Gelernt, a lawyer with the Immigrants Rights Project, the first step to providing help was to meet with the regional director of the INS in Newark to negotiate better access to men detained at Passaic County Jail, Bergen County Jail and other detention facilities under contract with the INS.

Earlier, the ACLU had learned, lawyers had shown up at some facilities – after sending fax requests to see detainees 48 hours in advance, as instructed – only to be denied access to the men on the faxed list because the fax couldn't be found.

"That happened more than once," said Gelernt. "So we tried to attack on two fronts: We used whatever information we had from organizations, news reports or from families trying to see people directly."

Lawyers would also ask to make a "Know Your Rights" presentation and offer detained immigrants free assistance as a way to learn names. "Initially, we had no luck with that," Gelernt said. "The officials said we needed specific names." Eventually, after a few months, ACLU attorneys and others were allowed to conduct "Know Your Rights" presentations.

ACLU attorneys continued to provide assistance to immigrants still in detention throughout 2002. By the end of the year, most of the immigrants detained after September 11 had been deported. But the ACLU continued its advocacy.

Following Anthony Romero's contact with the Pakistani Consulate, the ACLU forged an international tie with Pakistan's Human Rights Commission, a nongovernmental organization. With the help of the commission, the ACLU tracked down many of the Pakistani men who had been deported. In late 2002, the ACLU traveled to Pakistan to interview these men and publicize their plight.[5]

Unable to obtain justice for many while they were in the United States, and armed with information from the deported men and the advocates who had aided them, the ACLU turned to the international legal arena.

Of "Civil Liberties" and "Human Rights"

In our efforts to strengthen and expand the body of U.S. laws protecting civil rights and civil liberties, the ACLU has long recognized international human rights law as an important yet sadly underutilized tool. We have been part of a growing movement to hold the United States accountable to international human rights norms, and to introduce the international human rights framework to domestic rights advocacy.

Today, thanks to globalization and a growing body of law from international tribunals, the movement is gaining new momentum. As Justice O'Connor has said, "No government institution can afford now to ignore the rest of the world." In the past year the ACLU served as a catalyst for the movement by training our lawyers and others in international human rights law and increasing our work in this area.

In October of 2003, the ACLU convened a landmark conference on "Human Rights at Home: International Law in U.S. Courts." Held in Atlanta at the Carter Center, this was the first national conference ever held on using interna-

[5] David Rohde, "U.S.-Deported Pakistanis: Outcasts in 2 Lands," *The New York Times,* Jan. 20, 2003.

tional human rights law in the American justice system. The gathering drew an overflow crowd of lawyers and community activists from 30 states. Workshops featured practicing lawyers, judges and organizers from the U.S., Britain and South Africa.

"Our goal," announced Ann Beeson, associate legal director of the national ACLU and the conference organizer, "is nothing less than to forge a new era of social justice where the principles of the United Nation's Universal Declaration of Human Rights are recognized and enforced in the United States."

Expanding this movement is crucial now to stem the backlash against rights in the name of national security. A global human rights framework holds the U.S. government accountable for its actions abroad as well as at home. For example, in October 2003, the ACLU and other groups filed a Freedom of Information Act request demanding government documents in response to reports that it is intentionally sending detainees to countries known to engage in torture and other illegal interrogation techniques. If successful, this action will help us determine whether the U.S. has violated the Convention Against Torture, one of the few human rights treaties that the U.S. has actually signed and ratified.

A global lens can also illuminate the ripple effect that rights violations in the U.S. have in other countries. The USA PATRIOT Act, now being challenged from across the political spectrum, has already spawned copycat "PATRIOT Acts" throughout the free and not-so-free world that in many cases are even less respectful of human rights than the homegrown law.

In addition, a human rights framework is motivating a new generation of activists because it integrates a wide range of related rights issues – such as poverty, discrimination, immigration and workers' rights – and fosters closer collaboration between lawyers, grassroots organizers and educators.

Finally, putting the "human" back into "human rights" extends protections to every human being. The concept sounds simple but is increasingly ignored by our own government. In the name of "national security," the U.S. has begun to detain a growing number of people in legal limbo in Guantanamo and elsewhere, arguing that they have no rights under our Constitution and no enforceable rights under international humanitarian or human rights laws. Framing rights in terms of human rights stops this legal shell game.

After leading efforts to internationalize protections for human rights, the United States has spent the last several decades exempting itself from a growing body of international human rights conventions. Especially given the current climate for rights protections within the United States, it is vital that civil rights and human rights activists in the U.S. come together to fight this growing exceptionalism. As the nation's premier civil liberties organization, the ACLU is perfectly positioned to take a leading role in this movement.

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REPORT, AMERICAN CIVIL LIBERTIES UNION, "SEEKING TRUTH FROM JUSTICE, PATRIOT PROPAGANDA: THE JUSTICE DEPARTMENT'S CAMPAIGN TO MISLEAD THE PUBLIC ABOUT THE USA PATRIOT ACT," JULY 2003

Seeking Truth From Justice

Volume One

PATRIOT Propaganda:

The Justice Department's Campaign to Mislead
The Public About the USA PATRIOT Act

July 2003

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THE AMERICAN CIVIL LIBERTIES UNION is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.

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Foreword

In April of this year, Maine's *Bangor Daily News* entered the national spotlight when it reported on a small-town librarian's drive to keep the Justice Department from obtaining the borrowing records of her patrons under the increasingly controversial USA PATRIOT Act.

It was a regional human interest story, yet it spurred a high-level spokesman for Attorney General John Ashcroft to call the Bangor paper and claim that a grassroots backlash against parts of the PATRIOT Act amounted to nothing more than a "propaganda campaign," which had consistently got the facts "wrong."

Interestingly, though, when the spokesman, Mark Corallo, berated the paper's editors, *he* misrepresented the scope and impact of the relevant provision in the PATRIOT Act, prompting the editorial board to write a piece complaining that Corallo's characterization "completely overstates the Department's limitations."

The editorial went on to support the librarian's position.

If this was just an isolated incident, it could easily be chalked up to human error or an understandable lapse by a spokesperson at the Justice Department. Unfortunately, the same pattern of behavior – where the Justice Department's critics are answered not with substantive counter arguments, but with often-inaccurate dismissals – is evident in numerous instances, going back almost 20 months.

The following report, titled "Seeking Truth From Justice," is the first volume in a series of ACLU special reports that will catalogue and detail the Justice Department's seeming inability to get its facts straight. This report is part of a series of ACLU special publications examining government policies since September 11. Each of the reports – *The Dangers of Domestic Spying By Federal Law Enforcement* (January 2002), *Insatiable Appetite* (April 2002), *Civil Liberties After 9/11* (September 2002), *Bigger Monster, Weaker Chains* (January 2003), *Freedom Under Fire: Dissent in Post-9/11 America* (May 2003) and *Independence Day 2003: Main Street America Fights the Government's Insatiable Appetite for New Powers* (July 2003) – is available on our website at http://www.aclu.org/safeandfree.

As you will see, the errors documented in this report go beyond mere legal hair splitting; rather, they deal with core constitutional values like due process or Fourth Amendment protections against unreasonable search and seizure. They also raise serious questions about whether our leaders in Washington are intentionally misrepresenting the facts of a debate to deflect public or political criticism.

Take, for instance, the U.S. Attorney for Alaska's testimony in front of a state Senate Committee: "I think, for instance, there is concern that under the PATRIOT Act, federal agents are now able to review library records and books checked out by U.S. citizens," he said. "If you read the Act, that's absolutely not true.... It can't be for U.S. citizens."

In fact, the U.S. Attorney was wrong. Section 215 of the USA PATRIOT Act – reproduced in the first section of this report – makes it clear that "U.S. persons," a term referring to citizens and certain types of non-citizens alike, can have their records seized.

That is but one example of the misleading statements that Justice Department officials and supporters of the USA PATRIOT Act have made in recent months. Our report details others and we plan future reports looking at other ways the government is misleading the American public.

Is the Justice Department telling the truth? You decide.

LAURA W. MURPHY
DIRECTOR, ACLU WASHINGTON
LEGISLATIVE OFFICE

July 9, 2003

Seeking Truth From Justice

PATRIOT Propaganda: The Justice Department's Campaign to Mislead The Public About the USA Patriot Act

In recent months, citizen concern about the USA PATRIOT Act has continued to climb to new highs. More than 130 communities across the country – and state legislatures in Alaska, Hawaii and Vermont have passed resolutions opposing provisions of the PATRIOT Act and other government actions that compromise civil liberties. And librarians have begun taking steps to warn patrons about and protect them from the Act's dangerously overbroad powers.

Unfortunately, the Department of Justice under Attorney General John Ashcroft has responded to this movement by trying to mislead the American people about the Act's new powers. Department spokespersons have consistently made statements to the media and local officials that are either half-truths or are plainly and demonstrably false and which are recognized as false by the Justice Department in its own documents.

Primarily at issue is Section 215 of the PATRIOT Act, the so-called "business records" or "tangible things" provision. Section 215 allows the government to obtain without an ordinary criminal subpoena or search warrant and without probable cause – an order from a court giving them records on clients or customers from libraries, bookstores, doctors, universities, Internet service providers and other public entities and private sector businesses. The Act also imposes a gag order prohibiting an organization forced to turn over records from disclosing the search to their clients, customers or anyone else. The result is vastly expanded government power to rifle through individuals' finances, medical histories, Internet usage, bookstore purchases, library usage, school records, travel patterns or through records of any other activity.

The debate over the PATRIOT Act comes at a time when the Justice Department is not only pushing Congress to remove "sunset" or expiration provisions that apply to some portions of the Act, but is also planning to ask Congress for passage of new legislation – dubbed "PATRIOT II" – that would give federal law enforcement authorities even more expansive powers. In testimony before the House Judiciary Committee on June 5, Attorney General Ashcroft testified that the new powers would include expansions of the offense of "material support" for terrorism, which under overbroad definitions of terrorism in the original PATRIOT Act could be applied to political protesters, and an expansion of presumptive, pre-trial detention even after the Department's own Inspector General found widespread mistreatment of detainees wrongly classified as terror suspects.

It is troubling that in its eagerness to prepare a foundation for new surveillance and other powers, the Justice Department has resorted to spreading falsehoods and half-truths about the powers it already has.

The following report lays out a series of "falsehoods" and "half-truths" that Justice Department officials have consistently made in the media as well as in letters to lawmakers and provides the facts to counter each.

FALSEHOOD: The PATRIOT Act does not apply to Americans.

What the government has been saying:

> "This is limited only to foreign intelligence," said Mark Corallo, a spokesman with the Department of Justice. "U.S. citizens cannot be investigated under this act."
>
> — *Florida Today Sept. 23, 2002*

> Mark Corallo, Justice Department spokesman, said Wednesday that critics of the USA Patriot Act were "completely wrong" and denied that the act targeted Americans. ...
>
> "I don't know why they are misleading the public, but they are," he said of the act's critics Thursday. "The fact is the FBI can't get your records."
>
> – *Bangor [ME] Daily News April 4, 2003*

> "And I have prepared ... this handy chart that takes the actual text of section 215 and explains the requirement for court authorization, the requirement that it not – it is not directed at US Persons, the requirement that it cannot be directed solely at First Amendment activities. ..."
>
> "The public has I think been misled, and this is the myth versus the reality of section 215."
>
> – *Viet Dinh, Assistant Attorney General, primary author of the PATRIOT Act, speaking at the National Press Club, Washington D.C., April 24, 2003*[1]

> "I think, for instance, there is concern that under the PATRIOT Act, federal agents are now able to review library records and books checked out by U.S. citizens. If you read the Act, that's absolutely not true.... It can't be for U.S. citizens."
>
> – *Testimony of Timothy Burgess, U.S. Attorney for Alaska, before the Alaska Senate State Affairs Committee on May 13, 2003*

TRUTH: Section 215 of the PATRIOT Act can be used against American citizens.

Claims that Section 215 of the PATRIOT Act cannot be used against American citizens are simply wrong. According to the text of the Foreign Intelligence Surveillance Act as it was amended by Section 215:

> (a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a *United States person* is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

[1] Video of Dinh's remarks is available online at www.c-span.org. "Viet Dinh & Marc Rotenberg Debate Patriot Act," April 24, 2003.

Nowhere does this statute indicate that United States citizens cannot be targeted. In fact, the statute makes it clear that an "investigation of a United States person" *can* be conducted, so long as it is not based solely on activity protected by the First Amendment. (Of course, even this limit apparently applies only where the *investigation* is of a United States person, not where the investigation is of a foreign national but the records or other tangible things that the government seeks are of United States persons). The statute defines "United States persons" to include both citizens and permanent residents. (See 50 U.S.C. § 1801(i).)

FALSEHOOD: Under the PATRIOT Act, the FBI cannot obtain a person's records unless it has probable cause.

What the government has been saying:

> "I really don't understand what the concerns are with the act," [LaRae] Quy [spokeswoman for the San Francisco FBI office] said. "What it did was primarily streamline existing laws on the books. I know some people feel their privacy rights are being violated, but I think there's some hysteria out there. . . some misunderstanding.
>
> "We still have to show probable cause for any actions we take," she said.
>
> — *San Francisco Chronicle*
> *April 13, 2003*

The Justice Department spokesman, Mark Corallo, says the assertions about the Act are completely wrong because, for the FBI to check on a citizen's reading habits, it must get a search warrant. And to get a warrant, it must convince a judge "there is probable cause that the person you are seeking the information for is a terrorist or a foreign spy."

— *Bangor [ME] Daily News*
April 9, 2003

U.S. Department of Justice spokesman Mark C. Corallo said the FBI must present credible evidence in order to secure a warrant from the so-called spy court, which meets in secret.

"The standard of proof before the court is the same as it's always been," Corallo said. "It's not been lessened."

— *Springfield [MA] Union-News*
January 12, 2003

TRUTH: Section 215 of the PATRIOT Act allows the government to obtain materials like library records <u>without</u> probable cause.

Under the PATRIOT Act, the FBI can obtain records including library circulation records merely by specifying to a court that the records are "sought for" an ongoing investigation. That standard (sometimes called a "relevance" standard) is much lower than the standard required by the Fourth Amendment, which ordinarily prohibits the government from conducting intrusive searches unless it has probable cause to believe that the target of

the investigation is engaged in criminal activity.

Although the Justice Department is assuring the public that it remains constrained by the standard of probable cause and that the standard "is the same as it's always been," the government has been telling a different story to its own attorneys. For example, an October 26, 2001 memo to "All Divisions" from the FBI's Office of General Counsel (and approved by FBI Director Robert S. Mueller III) included a section on "Changes in FISA Business Records Authority":

> The field may continue to request business records orders through FBIIIQ in the established manner. However, such requests may now seek production of any relevant information, and need only contain information establishing such relevance.

Similarly, in a December 2002 letter to Congress responding to questions posed by the Senate Judiciary Committee, Deputy Attorney General Larry D. Thompson wrote:

> Under the old language, the FISA Court would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articuable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The USA PATRIOT Act changed the standard to simple relevance.

Finally, at a hearing before the House Judiciary Committee on June 5, 2003, Attorney General Ashcroft conceded that the PATRIOT Act changed the FISA business records standard, saying the government "used to have [to allege] a reason to believe that the target is an agent of a foreign power" – a standard he agreed was "lower than probable cause." Under the PATRIOT Act, he acknowledged, the standard has changed to allow the government may obtain all "relevant, tangible items" without such a showing [see below].

Ashcroft's testimony and these internal memoranda get the law exactly right. They acknowledge, as they must, that the FBI can now obtain sensitive business records merely by telling a court that the records are sought for an ongoing investigation; that is, the FBI can obtain the records even if they have no reason at all to believe that the person to whom the records pertain is a criminal or foreign spy. The Department's contention that Section 215 can't be used without probable cause misleads the public and ignores the government's own legal analysis.

HALF TRUTH: The government must "convince a judge" to obtain records under Section 215.

The Justice Department's repeated assertion that the authorities must "convince a judge" to win permission for a search also overstates the law's protections. Section 215 states:

> (c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.

This language suggests that the government must only certify to a judge – with no need for evidence or proof – that such a search meets the statute's broad criteria: "upon an application" the judge "shall enter" a surveillance order. Although the statute is not clear and has not yet been tested in court, it appears that the judge may not even have the authority to reject an application, unless the application fails to meet "the requirements of this section." What are those requirements?

FULL TRUTH: Judicial oversight is minimal.

As we have seen, the requirements are minimal. The FBI can obtain sensitive records merely by specifying that the records are "sought for" an on-going investigation. For Justice Department spokespersons to stress the need to "convince a judge" does not do justice to the true weakness of judicial oversight in this law.

FALSEHOOD: Section 215 applies only to terrorists and spies.

What the government has been saying:

> Justice Department spokesman Mark Corallo called [librarians' measures against the PATRIOT Act] "absurd." The legislation "doesn't apply to the average American," he said. "It's only for people who are spying or members of a terrorist organization."
>
> — *Journal News [NY] April 13, 2003*

> Before demanding records from a library or bookstore under the Patriot Act, he [Corallo] said, "one has to convince a judge that the person for whom you're seeking a warrant is a spy or a member of a terrorist organization."
>
> — *San Francisco Chronicle March 10, 2003*

> Corallo pointed out that the law only applies to agents of a foreign power or a member of a terrorist organization.
>
> — *Associated Press March 6, 2003*

> I think there are a lot of misconceptions being offered about what the PATRIOT Act does or doesn't do. …It has to be in regards to an international terrorism investigation after a court approves us seeking those records.
>
> – *Testimony of Timothy Burgess, U.S. Attorney for Alaska before the Alaska Senate State Affairs Committee, May 13, 2003*

TRUTH: Section 215 can be applied to anyone.

Once again, the spokesperson's statements are flat wrong. While some provisions of FISA do require a showing that a target is

an "agent of a foreign power," there is no such requirement in Section 215.

All the government needs to do to conduct a search under Section 215 is "specify" that the records are "sought for" an ongoing terrorism or foreign intelligence investigation. The government need not show that the target of the Section 215 order is engaged in terrorism or criminal activity of any kind.

Attorney General Ashcroft acknowledged as much in testimony before the House Judiciary Committee on June 5, 2003, under questioning by Rep. Tammy Baldwin (D-WI):

> BALDWIN: Prior to the enactment of the USA PATRIOT Act, a FISA order for business records related only to common carriers, accommodations, storage facilities and vehicle rentals. Is that correct?
>
> ASHCROFT: Yes, it is.
>
> BALDWIN: And what was the evidentiary standard for obtaining that court order?
>
> ASHCROFT: I don't think the evidentiary standard has changed. . . . [crosstalk] *OK, maybe it has. It used to have* [to show] *a reason to believe that the target is an agent of a foreign power* [emphasis added]...
>
> ***
>
> BALDWIN: OK. Now, under section 215 of the USA PATRIOT Act, now the government can obtain any relevant, tangible items. Is that correct?
>
> ASHCROFT: I think they are authorized to ask for relevant, tangible items.
>
> BALDWIN: And so that would include things like book purchase records?
>
> ASHCROFT: ... [I]n the narrow arena in which they are authorized to ask, yes.
>
> BALDWIN: A library book or computer records?
>
> ASHCROFT: I think it could include a library book or computer records.
>
> ***
>
> BALDWIN: Education records?
>
> ASHCROFT: I think there are some education records that would be susceptible to demand under the court supervision of FISA, yes.
>
> BALDWIN: Genetic information?
>
> ***
>
> ASHCROFT: . . . I think [we] probably could.
>
> BALDWIN: Under the PATRIOT Act, what is the evidentiary standard for the FISA court order to obtain these sorts of records?

> ASHCROFT: ... [I]f the judge finds that the investigation is for these [counter-intelligence or counter-terrorism] purposes, *he orders the FISA*. [emphasis supplied] ...

Exactly right. Before the USA PATRIOT Act, government agents could get *some* business records under FISA if they had "reason to believe" the person to whom the records related was an agent of a foreign power; now, as the Attorney General makes clear, they can get any record or other "tangible thing" that is allegedly relevant to an investigation regardless of whether the information pertains to an agent of a foreign power.

The implications of Section 215's weak evidentiary standard are frightening. The FBI can now conduct investigations using this power even when it has no particular individual in mind. For example, the FBI could demand the records of every person who has checked out a book on bridges based on no more than its investigation of a vague, unsubstantiated tip. The Department's suggestions that only spies or terrorists need worry about the PATRIOT Act couldn't be farther from the truth.

FALSEHOOD: The American people can trust the authorities not to abuse their powers.

What the government has been saying:

> "We don't have any interest in looking at the book preferences of Americans. We don't care, and it would be an incredible waste of our time," he [Corallo] said.
>
> — *Chicago Tribune*
> *April 4, 2003*

> The Justice Department "goes to great lengths to protect the privacy of every American unless you happen to be a foreign spy or member of a terrorism organization," said spokesman Mark Corallo. "The average American has nothing to fear."
>
> – *Newark Star-Ledger*
> *April 7, 2003*

> "We're not going after the average American," said Mark Corallo, a Justice Department spokesman. "We're only going after the bad guys. We respect the right to privacy. If you're not a terrorist or a spy, you have nothing to worry about."
>
> — *Washington Post*
> *April 10, 2003*

TRUTH: Democratic societies are based on checks and balances, not on blind faith in the good intentions of government officials.

With all due respect to the Justice Department, it is not enough for the government to *assure* us that they "go to great lengths to protect" privacy, "don't have any interest" in spying on innocent people, and are "not going after" the average American. The wisdom of the Founding Fathers, the historical record of abuses by the FBI, and common sense all point to the same conclusion: we can't rely on the FBI or any other federal law enforcement agency to police itself.

In June, for example, the Justice Department's own internal oversight unit released a report highly critical of what it

found to be the wholesale and long-term preventive detention of immigrants swept up in the months following 9/11. According to the report issued by the Justice Department's Inspector General, many immigrants who had no connection to the terrorist attacks of September 11 languished in federal lock-up for months at a time under an official "no bond policy" that effectively prohibited their release. The INS complained that the FBI had given them no evidence to justify their continued detention, yet some immigrants still spent up to eight months waiting for release.

Conclusion: A pattern of deceit

It is time for the Department of Justice to stop misleading the American people. The public cannot make informed decisions about the future of the police powers contained in the PATRIOT Act – whether to let them expire, renew them, or expand them even more with PATRIOT Act II if the government is not truthful about the extent of its current powers.

And the falsehoods are not limited to the PATRIOT Act. In a letter to the City Clerk of Ithaca, the FBI's Keith A. Devincentis, Special Agent in Charge of the Bureau's Albany office, misstates the FBI's powers under the Attorney General guidelines on domestic surveillance. "Contrary to popular television and theatrical portrayals, the FBI initiates cases predicted on facts, not suspicions or guesswork. 'Fishing expeditions' are clearly proscribed by FBI policy, Attorney General Guidelines, and other Federal statutes and regulations," Devincentis wrote.

In fact, in the aftermath of the passage of the USA PATRIOT Act, on May 30, 2002, Attorney General John Ashcroft announced that he had rewritten the guidelines that govern FBI surveillance. The Ashcroft guidelines sever the tie between the start of an investigative activities and evidence of a crime. Ashcroft's guidelines give the FBI a green light to send undercover agents or informants to spy on worship services, political demonstrations and other public gatherings and in the Internet chat rooms without even the slightest evidence that wrongdoing is afoot. Contrary to what Devincentis wrote, the FBI is now very much empowered to conduct investigative "fishing expeditions" on First Amendment protected activities even though there is no indication of criminal activity.

At this moment, the Justice Department has clear political incentives to soft-pedal the nature of the PATRIOT Act. But we can count on the fact that government investigators and prosecutors, when they appear before judges, will be making much bolder claims about what the Act lets them do.

Some Americans might have a hard time believing that a Justice Department spokesperson could be inaccurate about basic matters of law with such flagrancy. The ACLU has certainly found that from time to time it is possible to make occasional errors about matters of law, or to be misunderstood by a reporter when discussing the law. In this case, however, we are witnessing a pattern of inaccuracy spread out over a long period of time, over a wide variety of news outlets, by various staff members, on a central issue in a prominent national debate.

The Department's inaccuracies have to do not with subtle, debatable points of legal interpretation, but clear matters of law that are spelled out in black and white in the text of the PATRIOT Act.

There is no excuse for the Justice Department to get the PATRIOT Act wrong; the Department was behind the legislation from the beginning. The Justice Department drafted the Act (most of the Act's surveillance provisions were part of a longstanding wish list that had previously been sought by the Justice Department but rejected by Congress), and the Department was instrumental in forcing the bill through Congress with minimal discussion or debate in the panicked weeks after 9/11.

Considering the extent to which the USA PATRIOT Act is the Ashcroft Justice Department's "baby," one might expect department officials to be proud parents. Instead, they seem intent on denying the true nature of their creation.

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ARTICLE, NEW YORK TIMES, "JUST SHUT IT DOWN," MAY 27, 2005

New York Times (NY)
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May 27, 2005

Section: A

Just Shut It Down

THOMAS L. **FRIEDMAN**

Thomas L Friedman Op-Ed column says Guantanamo Bay prison should be shut down immediately; says he is convinced that more Americans will die if it is kept open than if it is plowed under; says it has become worse than an embarrassment for United States; cites scathing remarks in newspapers of American allies such as Britain, Australia, Canada and Germany; says if there is case to be made against any of 500 inmates still there, it is time they were put on trial; says rest should be allowed to go home; agrees with Michael Posner of Human Rights First on need for US to be law-abiding and uphold values it wants others to embrace (M)

London Shut it down. Just shut it down.

I am talking about the war-on-terrorism P.O.W. camp at Guantanamo Bay. Just shut it down and then plow it under. It has become worse than an embarrassment. I am convinced that more Americans are dying and will die if we keep the Gitmo prison open than if we shut it down. So, please, Mr. President, just shut it down.

If you want to appreciate how corrosive Guantanamo has become for America's standing abroad, don't read the Arab press. Don't read the Pakistani press. Don't read the Afghan press. Hop over here to London or go online and just read the British press! See what our closest allies are saying about Gitmo. And when you get done with that, read the Australian press and the Canadian press and the German press.

It is all a variation on the theme of a May 8 article in The Observer of London that begins, "An American soldier has revealed shocking new details of abuse and sexual torture of prisoners at Guantanamo Bay in the first high-profile whistle-blowing account to emerge from inside the top-secret base." Google the words "Guantanamo Bay and Australia" and what comes up is an Australian ABC radio report that begins: "New claims have emerged that prisoners at Guantanamo Bay are being tortured by their American captors, and the claims say that Australians David Hicks and Mamdouh Habib are among the victims."

Just another day of the world talking about Guantanamo Bay.

Why care? It's not because I am queasy about the war on terrorism. It is because I want to win the war on terrorism. And it is now obvious from reports in my own paper and others that the abuse at Guantanamo and within the whole U.S. military prison system dealing with terrorism is out of control. Tell me, how is it that over 100 detainees have died in U.S. custody so far? Heart attacks? This is not just deeply immoral, it is strategically dangerous.

I can explain it best by analogy. For several years now I have argued that Israel needed to get out of the West Bank and Gaza, and behind a wall, as fast as possible. Not because the Palestinians are right and Israel wrong. It's because Israel today is surrounded by three large trends. The first is a huge population explosion happening all across the Arab world. The second is an explosion of the worst interpersonal violence between Israelis and Palestinians in the history of the conflict, which has only recently been defused by a cease-fire. And the third is an explosion of Arabic language multimedia outlets -- from the Internet to Al Jazeera.

What was happening around Israel at the height of the intifada was that the Arab multimedia

explosion was taking the images of that intifada explosion and feeding them to the Arab population explosion, melding in the minds of a new generation of Arabs and Muslims that their enemies were J.I.A. -- "Jews, Israel and America." That is an enormously toxic trend, and I hope Israel's withdrawal from Gaza will help deprive it of oxygen.

I believe the stories emerging from Guantanamo are having a similar toxic effect on us -- inflaming sentiments against the U.S. all over the world and providing recruitment energy on the Internet for those who would do us ill.

Husain Haqqani, a thoughtful Pakistani scholar now teaching at Boston University, remarked to me: "When people like myself say American values must be emulated and America is a bastion of freedom, we get Guantanamo Bay thrown in our faces. When we talk about the America of Jefferson and Hamilton, people back home say to us: 'That is not the America we are dealing with. We are dealing with the America of imprisonment without trial.'"

Guantanamo Bay is becoming the anti-Statue of Liberty. If we have a case to be made against any of the 500 or so inmates still in Guantanamo, then it is high time we put them on trial, convict as many possible (which will not be easy because of bungled interrogations) and then simply let the rest go home or to a third country. Sure, a few may come back to haunt us. But at least they won't be able to take advantage of Guantanamo as an engine of recruitment to enlist thousands more. I would rather have a few more bad guys roaming the world than a whole new generation.

"This is not about being for or against the war," said Michael Posner, the executive director of Human Rights First, which is closely following this issue. "It is about doing it right. If we are going to transform the Middle East, we have to be law-abiding and uphold the values we want them to embrace -- otherwise it is not going to work."

ARTICLE, USA TODAY, "BIDEN: U.S. NEEDS TO CLOSE CUBA PRISON," JUNE 6, 2005

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Posted 6/5/2005 1:20 PM Updated 6/5/2005 7:23 PM

Biden: U.S. needs to close Cuba prison

WASHINGTON (AP) — A leading Senate Democrat said Sunday the United States needs to move toward shutting down the military prison camp at Guantanamo Bay, Cuba.

Sen. Joseph Biden, D-Del., recommends shutting down the U.S. prison camp at Guantanamo Bay.

By Tim Dillon, USA TODAY

"This has become the greatest propaganda tool that exists for recruiting of terrorists around the world. And it is unnecessary to be in that position," said Sen. Joseph Biden, D-Del.

A Pentagon report released Friday detailed incidents in which U.S. guards at Guantanamo desecrated the Quran. Last month, Amnesty International called the detention center for alleged terrorists "the gulag of our time," a charge Defense Secretary Donald H. Rumsfeld dismissed as "reprehensible."

The chairman of the Senate Judiciary Committee, GOP Sen. Arlen Specter of Pennsylvania, plans hearings this month on the treatment of foreign terrorism suspects at the prison camp.

Biden, the top Democrat on the Senate Foreign Relations Committee, proposed that an independent commission take a look at Guantanamo and make recommendations.

"But the end result is, I think we should end up shutting it down, moving those prisoners," he told ABC's "This Week."

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"Those that we have reason to keep, keep. And those we don't, let go."

He added, "I think more Americans are in jeopardy as a consequence of the perception that exists worldwide with its existence than if there were no Gitmo."

There are about 540 detainees at Guantanamo Bay. Some have been there more than three years without being charged with a crime. Most were captured on the battlefields of Afghanistan in 2001 and 2002 and were sent to Guantanamo Bay in hope of extracting useful intelligence about the al-Qaeda terrorist network.

William Schulz, director of Amnesty International USA, defended the group's earlier characterization of Guantanamo Bay and other U.S. detention facilities as gulags, but acknowledged that "this is not an exact or a literal analogy."

He said there are differences, particularly in size and scope, between what goes on at U.S. prisons and those run by the former Soviet Union.

"But there are some similarities," he insisted on "Fox News Sunday." "The United States is maintaining an archipelago of prisons around the world, many of them secret prisons into which people are being literally disappeared — held in indefinite incommunicado detention without access to lawyers or a judicial system or to their families. And in some cases, at least, we know that they are being mistreated, abused, tortured and even killed.

"And those are similar at least in character if not in size to what happened in the gulag and in many other prison systems in world history."

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LETTER TO THE HONORABLE ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES

Congress of the United States
Washington, DC 20515

May 12, 2005

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

We are writing to request that you appoint a special counsel to investigate whether high-ranking officials within the Bush Administration violated the War Crimes Act, 18 U.S.C. 2441, or the Anti-Torture Act, 18 U.S.C. 2340 by allowing the use of torture techniques banned by domestic and international law at recognized and secret detention sites in Iraq, Afghanistan Guantanamo Bay and elsewhere.

One year and 10 investigations after we first learned about the atrocities committed at Abu Ghraib, there has yet to be a comprehensive, neutral and objective investigation with prosecutorial authority of who is ultimately responsible for the abuses there and elsewhere. While more than 130 low-ranking officers and enlisted soldiers have been disciplined or face courts-martial for the abuses that occurred, there have been no criminal charges against high-ranking officials. Yet the pattern of abuse across several countries did not result from the acts of individual soldiers who broke the rules. It resulted from decisions made by senior U.S. officials to bend, ignore, or cast rules aside. If the United States is to wipe away the stain of Abu Ghraib, it needs to investigate those at the top who ordered or condoned torture. As a result, it is in our interest to finally show the world that we are taking these matters seriously and resolving them free of political taint.

Some of us previously asked Attorney General Ashcroft to appoint a special counsel to investigate these abuses on May 20, 2004. Unfortunately, we received no answer to our request. The need for a special counsel is now more important than ever as the Administration and military have repeatedly exonerated high-ranking officials, or declined to even investigate their actions, even as other official investigations linked the policy decisions by these officials to the crimes that occurred at Abu Ghraib. The Administration's haphazard and disjointed approach to these investigations appears to have insulated those in command and prevented a full account of the actions and abuses from being determined.

As you know, under Department of Justice regulations, the Attorney General must appoint a special counsel when (1) a "criminal investigation of a person or matter is warranted," (2) the investigation "by a United States Attorney Office or litigating Division of the Department of Justice would present a conflict of interest for the Department," and (3) "it would be in the

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public interest to appoint an outside Special Counsel to assume responsibility for the matter."[1] In the present case, all three requirements have been met.

First, federal criminal laws are clearly implicated. The Anti-Torture Act criminalizes acts of torture — including attempts to commit torture and conspiracy to commit an act of torture — occurring outside the United States' territorial jurisdiction regardless of the citizenship of the perpetrator or victim.[2] The Geneva Conventions generally prohibit "violence to life and persons," "outrages upon personal dignity," and "humiliating and degrading treatment."[3] Violations of the Geneva Conventions also constitute a violation of U.S. federal criminal law under the War Crimes Act.[4] The Administration has acknowledged on several occasions that the United States is bound by the Geneva Conventions with respect to Iraqi[5] and Taliban prisoners,[6] and that a violation of the Conventions would invite prosecution under the War Crimes Act.[7] Numerous investigations have uncovered such violations. The Taguba report found instances of "sadistic, blatant and wanton criminal abuses" of prisoners.[8] The Army's Inspector General's report found 94 incidents of detainee abuse at detention sites in Afghanistan and Iraq.[9] And, the Schlesinger report confirmed five instances in which detainees died as a result of abuse by U.S. personnel during interrogations.[10] The repudiation of the August 2002 memorandum you wrote as White House Counsel in December of 2004 suggests even the Administration realizes its policies contributed to actions which violated federal criminal law.[11]

Therefore, given the Administration's concession that the Geneva Conventions apply to Iraqi and Taliban prisoners, given its concession in the Gonzalez memo that a violation of the

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[1] 28 C.F.R. 600.1. 2002.
[2] 18 U.S.C. § 2340 A (a).
[3] Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention III), Article 3.
[4] The War Crimes Act provides that "[w]hoever...commits a war crime...shall be fined under this title or imprisoned for life for any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death." 18 U.S.C. 2441(a). A "war crime" is defined as, among other things, a "grave breach" of the Geneva Conventions. 18 U.S.C. 2441(c).
[5] Press Gaggle by Scott McClellan Aboard Air Force One En Route Topeka, Kansas, May 17, 2004. http://www.whitehouse.gov/new/releases/2004/05/20040517-7.html.
[6] Statement by the Press Secretary on the Geneva Convention by Ari Fleischer, May 7, 2003. http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html.
[7] Memorandum from Alberto R. Gonzales, White House Consel, to the President of the United States, "Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban," January 25, 2002.
[8] Major General Antonio Taguba, "Article 15-6 Investigation of the 800th Military Police Brigade," April 4, 2004, p. 16.
[9] Report of the Army Inspector General Inspection Report on Detainee Operations, July 23, 2004, Lt. Gen. Paul Mikolashek.
[10] Final Report of the Independent Panel to Review DoD Detention Operations, August 2004, p. 13.
[11] Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, "Re: Legal Standards Applicable Under 18 U.S.C. 2340-2340A

Conventions would also constitute a violation of federal criminal law, and given the flagrant violations of the Conventions in Iraq, Afghanistan, and Guantanamo Bay which have been confirmed by official investigations, it is clear that a prima facie violation of federal criminal law exists. It is also evident that high-ranking Administration officials, including the Defense Secretary, as well as high-ranking military officials, may have authorized these actions and are potentially subject to criminal prosecution as well.

Second, there is an obvious conflict of interest. A special counsel is necessary not only because high-ranking Administration officials, including Cabinet members, are implicated, but also because you personally, and the Department of Justice generally, may have participated in this conspiracy to violate the War Crimes Act. It has been confirmed that the Department of Justice's Office of Legal Counsel, and you yourself as White House Counsel, encouraged the president to withhold Geneva Convention protections from Afghanistan and Guantanamo Bay detainees. If the conflict of interest provisions in your regulations mean anything, it is that when the Attorney General may have contributed to the abuses that were committed, the Department of Justice has no business conducting the investigation and should instead turn to a special counsel.

Finally, there can be no doubt that the public interest will be served by a broad and independent investigation into both the allegations of abuse at U.S. detention sites as well as the role of high-ranking officials in authorizing and allowing these abuses. To date, a number of investigations into allegations of abuse at United States detention sites have been conducted, including ten official investigations. These investigations concluded that the leadership failure of officers such as Lt. Gen. Ricardo Sanchez, formerly the senior commander in Iraq, contributed to the prisoner abuse.

For example, the Army Inspector General and former Defense Secretary James Schlesinger found in separate reports that the policies issued by Lt. Gen. Sanchez and his subsequent actions once the abuses at Abu Ghraib were known contributed to the perpetration of these abuses. The Schlesinger investigation also found that other top military officials were responsible, concluding, "There is both institutional and personal responsibility at higher levels."[12] Similarly, the Kern-Fay-Jones report concluded that the actions of Sanchez and his most senior deputies, such as Maj. Gen. Walter Wojdakowski, "did indirectly contribute" to some abuses.[13] However, these inquiries were not empowered to impose punishments on those it found culpable, and they were not empowered to examine the role of high-ranking officials, including members of the Administration, in the perpetuation of these abuses.[14] And, in spite of these findings, many of the reports refused to hold these high-ranking officials culpable. In fact,

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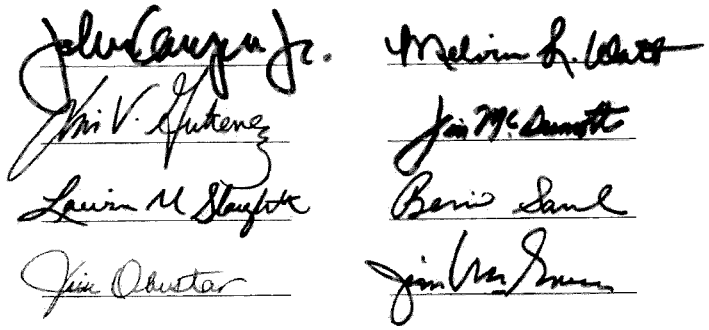
[12] *Id.*, at p. 5.
[13] Kern-Fay-Jones report, from the section entitled "AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th MI Brigade," (LTG Anthony R. Jones), p. 23.
[14] *See e.g.*, Human Rights Watch, "Getting Away With Torture? Command Responsibility for the U.S. Abuse of Detainees," April 2005.

we recently learned the Army absolved four top officers, including Lt. Gen. Sanchez, of wrongdoing. To date, only one high-ranking military officer has been punished as a result of these inquiries, and many view her punishment as a mere slap on the wrist. As a result, it is not yet clear to the world that the United States is taking these abuses seriously.

The public interest demands we determine who is ultimately responsible for these abuses. While Private Lynndie England and other low-ranking officers have pled guilty, those who ordered and authorized their actions appear to have been protected by the military and this Administration. Because so many high level officials, including you, have been implicated in these events, the only way to ensure impartiality is through the appointment of a Special Counsel. Indeed, our nation's integrity is at stake. We must reassure the world that we will fairly and independently pursue legal violations wherever they occur.

We await your response on this important matter. At no point during this Administration has a Special Counsel been appointed.[15] Please contact us through Perry Apelbaum or Ted Kalo of the Judiciary Staff at 2142 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-6504; fax: 202-225-4423) if you have any questions about this request.

Sincerely,



[15] Judiciary Democrats asked for a Special Counsel to investigate the Halliburton Iraqi Oil Contracts in June of 2004, and one was not appointed; Judiciary Democrats asked for a Special Counsel to investigate the CIA name leak in September of 2003, and one was not appointed; and Judiciary Democrats asked for a Special Counsel to investigate Enron in January of 2002, and one was not appointed.

The Honorable Alberto R. Gonzales
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