Liberty and Security: Recommendations for the Next Administration and Congress

November 18, 2008
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FOREWORD

“Liberty and Security: Recommendations for the Next Administration and Congress” reflects the ongoing, collaborative efforts of a coalition of more than twenty leading organizations and over seventy five people in the human rights and liberty and security communities. The recommendations, at the intersection of national security and civil liberties, address a wide variety of issues including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called “enemy combatants,” and discrimination in immigration and charities policy. They demonstrate resoundingly that a restoration of the rule of law strengthens national security.

This coalition indexed and summarized thousands of pages of individual transition and other documents written by organizations, academics, and policy experts, creating practical and straightforward 5-7 page chapters on discrete issue areas. Each of the 20 chapters includes:

• 1-2 paragraph introductions to the problems identified in the issue area;

• Lists of possible solutions, identifying areas of consensus in the community;

• Identification of allies who support the principles for reform described in the chapters, including organizations from across the ideological spectrum1;

• A description of likely counter-arguments to the policy proposals as well as a rebuttal to those counter-arguments;

• The names and contact information of advocates who can provide additional information about the proposals;

• Hyperlinks to specific transition proposals prepared by individual organizations as well as other materials that provide additional information and research in support of the proposals;

• A separate appendix with information about the Congressional committees and Executive branch agencies with jurisdiction over the issues as well as a history of legislative, executive, and judicial action to date.

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1 “Likely allies” sign on to a specific chapter to indicate that they support the general principles expressed in the policy proposals described in that chapter. The allies listed do not necessarily endorse the specific language in every proposal in that chapter, but they do agree that the proposals reflect the general principles that should govern policy in the area. A likely ally signing on to one chapter is only signing on to that chapter and does not necessarily support the principles expressed in other chapters. Furthermore, the decision of a group not to sign on as a likely ally does not necessarily indicate an opposition to the policies proposed.
The index includes the following sections and chapters:

Charities, Foundations and National Security:
   Chapter 1: Eliminate Unnecessary Barriers to Legitimate Charitable Work

Detention, Interrogation, and Trials of Suspected Terrorists
   Chapter 2: Closing Guantanamo Bay
   Chapter 3: End Illegal Detention, Torture, and Rendition
   Chapter 4: Prosecute Terrorist Suspects in Accordance with the Law

Immigration and National Security
   Chapter 5: Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material Support for Terrorism
   Chapter 6: Ending Immigration Enforcement Based on National Origin, Ethnicity and Religion
   Chapter 7: Misuse of Immigration Detention Laws in Counterterrorism Efforts

Secrecy, Surveillance, and Privacy
   Chapter 8: Revising Attorney General Guidelines on FBI Investigations
   Chapter 9: Updating the Law Governing the Privacy of Electronic Communications
   Chapter 10: Fusion Centers and the Expansion of Domestic Intelligence
   Chapter 11: Promoting Government Transparency
   Chapter 12: National Security Letters and Section 215 of the USA PATRIOT Act
   Chapter 13: Reform of the National Security Surveillance Laws and Procedures
   Chapter 14: Preventing Over-Classification and Retroactive Classification, and Promoting Declassification of Government Documents
   Chapter 15: Reforming the State Secrets Privilege
   Chapter 16: Reforming Watch Lists

Separation of Powers and Executive Authority
   Chapter 17: Assertion of Executive Authority in National Security Matters
   Chapter 18: Executive Privilege and Congressional Oversight
   Chapter 19: Signing Statements
   Chapter 20: War Powers Authority

For policy questions, please contact the individuals or organizations identified as allies in each chapter. However, please direct general questions to the Constitution Project, which coordinated this collaborative effort. Contact Daniel Schuman at 202-580-6920.

The catalogue is available online at http://2009transition.org/liberty-security, at www.constitutionproject.org, and at the websites of many of the participating organizations.
EXECUTIVE ACTION

Charities and Foundations

CHAPTER 1: NATIONAL SECURITY AND CHARITIES

A. Direct the Secretary of State to use his/her authority under 18 USC 2339B(j) to waive the material support prohibition for technical advice and assistance, training, and personnel where no violent activity is involved.

B. End the use of the International Emergency Economic Powers Act (IEEPA) to regulate charities, and allow the Department of State to develop a more effective and appropriate framework.
   1. Cease and desist orders to charity from Treasury
   2. Opportunity to cure: 60-90 days to sever a tie, restructure a program, fire employee, etc.
   3. Administrative hearing to challenge designation that includes cross-examination, ability to submit evidence, etc.
   4. Process for releasing funds to beneficiaries via another charity (including a time limit on frozen funds)
   5. Ensure charitable funds frozen by the Treasury Department are ultimately released and used for charitable purposes

C. Withdraw the Treasury Department’s ineffective “Guidelines” and replace with real guidelines that help charities continue to meet critical needs while ensuring their scarce resources are used for legal and charitable purposes.

Detention, Interrogation, and Trials

CHAPTER 2: CLOSING GUANTANAMO

A. Immediately direct the appropriate authorities to compile and review all information in the detainees’ files. Instruct the authorities to determine which detainees should be prosecuted in the United States, repatriated, released, or resettled.

B. Direct the Secretary of Defense to release any detainee who has already completed serving a sentence imposed by military commission. Discontinue pending military commission proceedings at Guantanamo.
C. Transfer detainees charged with terrorism or other criminal offenses under U.S. law to an appropriate facility in the United States pending their prosecution in federal court.

D. Immediately repatriate or resettle detainees in accordance with applicable domestic and international law. Provide sufficient advance notice of any transfer to allow detainees to assert their rights against transfer to torture and/or continued arbitrary detention.

E. Allow the United Nations High Commissioner on Refugees (UNHCR) to conduct refugee status determinations of those detainees who express a fear of repatriation. Instruct all federal agencies to cooperate with humanitarian organizations and detainees’ counsel to find suitable options for resettlement.

F. In order to encourage other countries to agree to accept detainees for resettlement, immediately arrange for a small number of detainees who are known to pose no security risk, such as the Uighurs, to resettle within the United States.

CHAPTER 3: END ILLEGAL DETENTION, TORTURE, AND RENDITION

A. Enforce Prohibitions against Torture and Other Cruel, Inhuman, and Degrading Treatment

1. Denounce torture and reaffirm our commitment to the absolute prohibition of torture in peacetime and in war.

2. Denounce cruel, inhuman, and degrading treatment and reaffirm our commitment to the absolute prohibition of such treatment in peacetime and in war.

3. Issue an Executive Order establishing a set of national standards for interrogation to be used by all Defense Department, intelligence, and law enforcement agencies.

4. Revoke all Executive Orders, policy statements, memoranda, and any other documents or verbal orders authorizing the use of certain techniques on detainees that may be considered cruel, inhuman or degrading treatment, and reaffirm the country’s commitment to compliance with the Geneva Conventions, the ICCPR, and the Convention Against Torture.

5. Review and reform intelligence gathering practices such that no person in U.S. government custody or control is held without charge solely for intelligence-gathering and/or preventive detention purposes.

7. Amend Appendix M of the U.S. Army Field Manual to eliminate the use of isolation, sleep deprivation, and sensory deprivation as interrogation or coercive techniques. Make similar amendments to field manuals of all other branches of the armed forces.

B. Enforce Prohibitions against Transfers to Torture, and End the Rendition Program

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

2. Revoke all prior Executive branch actions authorizing the CIA’s “extraordinary rendition program,” and any other agency’s use of enforced disappearances or secret detentions.

3. Announce the country’s commitment to working with the International Committee of the Red Cross (ICRC) to ensure that every detainee held around the world is listed properly as an internee, is permitted to meet with ICRC representatives, to send correspondence to family members through ICRC channels, and to receive humanitarian aid.

4. Issue an Executive Order prohibiting the acceptance of “diplomatic assurances” or similar bilateral agreements to justify renditions or any other form of involuntary transfer of individuals to countries where there is a risk of torture, other ill-treatment, or detention without charge or trial.

5. Call upon Congress to commence a prompt, thorough, and independent investigation into all allegations involving the torture or abuse of individuals in U.S. custody or effective control during the “war on terror” regardless of where in the world the misconduct has occurred.

6. Issue an Executive Order requiring the State Department to assist detainees eligible for release, who cannot be returned to their countries of origin or habitual residence because they would be at risk of grave human rights abuses, with their efforts to resettle in third countries. Ensure that any transfers to third countries are only made with the informed consent of the individuals concerned and that these persons are not subjected to any pressures or restrictions that may compel them to choose to resettle in a third country.

7. Commit the U.S. to providing prompt and adequate reparations, including restitution, rehabilitation, and fair and adequate financial compensation to released detainees for the period spent unlawfully detained and other violations that they may have suffered.
C. End Enforced Disappearances and Arbitrary Detention, and Abolish Secret Prisons and Hidden CIA Detentions

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

2. Issue an Executive Order banning the use of CIA-run secret detention centers and any other agency or department operations that enable the concealment of detentions.

3. Direct the heads of the CIA, the Defense Department, the Defense Intelligence Agency, and any other agency or department presently or previously involved in secret detentions to account for every single individual who has been detained by each respective agency regardless of the length of the detention, and to publicly release all detainees’ names, the duration and locations of their detention in U.S. custody or in constructive U.S. custody, the asserted bases for their detention, and the dates and circumstances of their releases, transfers, or deaths.

4. Issue an Executive Order requiring the Defense Department to provide the names of all persons in U.S. custody or in constructive U.S. custody in all detention facilities around the world to the ICRC and ensure that the Committee has unfettered access to all such prisoners.

5. Direct all Defense Department, intelligence, and law enforcement agencies to provide the names and locations of all U.S. detention facilities, whether under direct U.S. supervision or constructive U.S. supervision.

6. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to publicly announce the names and locations of all U.S. detention facilities, whether under direct U.S. supervision or constructive U.S. supervision.

7. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that records are kept for every person held in U.S. custody or constructive custody documenting the place, time, and the circumstances of the seizure or arrest, and whether access to their home consulate has been afforded, the location and conditions of confinement, any legal process that has been afforded, and their medical status.

8. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that all detainees held in U.S. custody or in constructive U.S. custody in all detention facilities around the world have regular and ongoing contact with family, counsel, and international inspection agencies.

9. Ensure that all detainees in U.S. custody or in constructive U.S. custody in all detention facilities around the world have the right of access to counsel,
meaningful judicial review of the legality of their detention and, if their detention is deemed unlawful, the right to seek an order of release.

10. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that all Defense Department, intelligence, and law enforcement agency personnel involved in the seizure, arrest, or custody of persons are trained to enforce the above policies.

11. Issue an Executive Order banning the use of CIA-run secret detention centers and any other agency or department operations that enable the concealment of detentions.

12. Direct the heads of the CIA, the Defense Department, the Defense Intelligence Agency and any other agency or department presently or previously involved in secret detentions to account for every single individual who has been detained by each agency regardless of the length of the detention, and to publicly release all detainees’ names; the duration and locations of their detention in U.S. custody or in constructive U.S. custody; the asserted bases for their detention; and the dates and circumstances of their releases, their transfers, or their deaths.

13. Issue an Executive Order requiring the Defense Department to provide the names of all prisoners in U.S. custody or in constructive U.S. custody in all detention facilities around the world to the International Committee of the Red Cross and ensure that the International Committee of the Red Cross has unfettered access to all such prisoners.

14. Direct all Defense Department, intelligence, and law enforcement agencies to provide the names and locations of all U.S. detention facilities, whether under direct U.S. supervision or constructive U.S. supervision, are officially acknowledged and announced to the public.

15. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that records are kept for every person held in U.S. custody, documenting the place, time, and circumstances of the seizure or arrest and whether access to their home consulate has been afforded, the location and conditions of confinement, any legal process that has been afforded, and their medical status.

16. Ensure that all detainees in U.S. custody or in constructive U.S. custody in all detention facilities around the world have regular and ongoing contact with family, counsel, and international inspection agencies.

17. Ensure that all detainees in U.S. custody or in constructive U.S. custody in all detention facilities around the world have the right of access to counsel, meaningful judicial review of the legality of their detention and, if their detention is deemed unlawful, to seek an order of release.
18. Require that all Defense Department, intelligence, and law enforcement agency personnel involved in the seizure, arrest, and/or custody of detainees are trained to enforce the above policies.

CHAPTER 4: PROSECUTE TERRORIST SUSPECTS IN ACCORDANCE WITH THE LAW

A. Oppose all proposals to create National Security Courts.

B. Immediately suspend all military commission proceedings at Guantanamo and terminate the existing Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards.

C. Rescind President Bush’s Order of November 13, 2001 establishing military commissions.

D. Direct the Secretary of Defense to withdraw the March 21, 2002, “Military Commission Order No.1,” establishing procedures for trial by military commission.

E. Direct the Attorney General to withdraw the August 12, 2005 “Proposed Amendments to Military Commission order No. 1,” proposing certain amendments to the Secretary of Defense’s Military Commission Order No. 1.

F. Direct the Secretary of Defense to release and arrange for the immediate repatriation or resettlement of detainees upon either (a) acquittal or (b) completion of their sentences (including those already sentenced by military commission).

G. The appropriate authorities should perform a case-by-case assessment for each detainee at Guantanamo Bay to determine which detainees can and should be charged for violations of U.S. law pursuant to federal criminal jurisdiction. Individuals for whom criminal charges are inappropriate should either be repatriated or, in the even repatriation is not possible, should be resettled in a third country or the United States.

H. For cases subject to prosecution, direct the Attorney General to thoroughly review existing evidence for materiality, reliability and admissibility; canvass the federal criminal code to identify any offenses with which the detainee could be charged; and undertake any additional investigation as warranted.

1. Prosecute complex international terrorism cases in federal courts, relying on CIPA to protect sensitive intelligence sources.

2. Prosecutions should begin on a rolling basis once individual case reviews are completed.
3. The security clearance process for qualified federal and private defenders should be administered concurrently with the case review so as not to cause future delay in prosecution.

Immigration and National Security

CHAPTER 5: FAILING TO PROTECT REFUGEES AND ASYLUM SEEKERS: OVERLY BROAD DEFINITION OF MATERIAL SUPPORT FOR TERRORISM

A. Direct DHS to establish a more effective policy for consideration of waivers in immigration court cases that does not leave the consideration of the waivers until the very end of the process.

B. Ensure that victims of terrorism who were forced against their will to provide goods or services to rebel groups are no longer labeled “terrorists” and thereby barred from refugee protection.

C. Streamline and improve the process for issuing waivers in appropriate cases so that far more deserving asylum applicants have access to protection.

CHAPTER 7: MISUSE OF IMMIGRATION DETENTION LAWS IN COUNTER-TERRORISM EFFORTS

A. Require by regulation that a non-citizen detainee be charged with an immigration violation and served with a charging document within 48 hours of his/her arrest, and that court hearings be scheduled timely.

B. Issue an internal directive not to exercise the Secretary’s discretion to seek an automatic stay and instead pursue any stay as part of filing an appeal of the judge’s decision as per 8 C.F.R. §1003.19(i)(1).

C. Rescind the Creppy Memorandum and prohibit the blanket closure of immigration hearings, with limited, case-by-case exceptions only.

D. Repeal the “automatic stay” regulation, 8 C.F.R. §1003.19(i)(2) (Oct. 17, 2001).

E. Follow legal limits on prolonged detention of non-citizens who have been ordered deported.
Secrecy, Surveillance, and Privacy

CHAPTER 8: REVISING ATTORNEY-GENERAL GUIDELINES ON FBI INVESTIGATIONS TO PREVENT INVESTIGATIONS BASED ON FIRST AMENDMENT ACTIVITIES, OR ON RACE, RELIGION, ETHNICITY, OR NATIONAL ORIGIN

A. Direct the Attorney General to evaluate all FBI investigative activities and end any practices that are illegal, ineffective or prone to abuse.

B. Direct the Attorney General to immediately and thoroughly review the new Guidelines as well as all previous guidelines issued during the past eight years and to amend them to make them consistent with the guiding principles above.

C. Direct the Attorney General to revise the Department of Justice ban on racial profiling in federal law enforcement to close the existing exemption for national security and border integrity.

D. Work with Congress to pass the Ending Racial Profiling Act (HR 4611; S 2481)

E. Work with Congress to establish a statutory investigative charter for the FBI that limits the FBI’s authority to conduct investigations without specific and articulable facts giving reason to believe that an individual or group is or may be engaged in criminal activities, is or may be acting as an agent of a foreign power.

CHAPTER 10: FUSION CENTERS AND THE EXPANSION OF DOMESTIC INTELLIGENCE

A. President should review the National Information Sharing Strategy to ensure that all federal information-sharing programs are carefully bounded to protect the privacy and civil liberties of U.S. persons.

B. Revise federal regulations to ensure that no personally identifiable information can be collected in a criminal intelligence system without reasonable suspicion that the person is or may be involved in criminal activity. Reinstat previous regulatory restrictions on the dissemination of information from criminal intelligence systems contained in 28 CFR Part 23.

C. Issue a new National Information Sharing Strategy that incorporates the following principles:

1. All information collected, analyzed, or shared must comply at a minimum with the Federal Privacy Act, and where stronger state statutes exist the additional privacy protection afforded must apply.
2. Information Fusion Centers must have a single operational definition for their mission and clearly defined scope for their operation.

3. The Department of Homeland Security should fully disclose the location, jurisdiction served, and amount of federal funding provided to each intelligence fusion center operating within the United States.

4. Prohibit no-bid contracting, and require publication of contracts and listing of all private sector data sources used in fusion center data collection and analysis.

5. Require an annual report from the Secretary of Homeland Security to the Congress, on each fusion center, which includes the number of arrests, prosecutions, and convictions by category of offense directly related to fusion center operations.

6. Intelligence Fusion Centers should be subject to federal Privacy Impact Assessment rules.

7. Federal reporting requirements should direct that each information fusion center make public the partnering organizations, businesses and government entities engaged in the effort.

8. Prohibit the U.S. military from participating in domestic intelligence activities.

D. The Department of Justice or Department of Homeland Security Inspector General should launch an investigation of information fusion centers to review their compliance with existing federal laws intended to protect due process, privacy, civil liberty, and civil rights.

CHAPTER 11: PROMOTING TRANSPARENCY IN GOVERNMENT

A  Information Removed from Government Websites and “Need to Know” Culture Reduce Public Trust and Security

1. President should direct the executive branch to operate under the presumption that government information should be made available to the public except under limited and clearly-articulated statutory or regulatory exceptions.

2. President should direct the review of standards and guidelines created and implemented post-September 11th regarding information made publicly-available online.
B. Sensitive But Unclassified/Controlled Unclassified Information Markings Reduce Security by Impeding Disclosure to State, Local and Tribal Authorities, First Responders and to the Public

1. Amend or replace the CUI Memorandum with a memorandum that directs agencies to reduce use of information control markings, prohibits reliance on a control marking as a basis for withholding information requested by the public, and includes a positive statement recognizing that information-sharing and transparency improve security and making clear that the CUI Framework’s uniform system is intended to increase disclosure wherever possible.

2. Ensure that the implementation of any framework includes measures to reduce unnecessary control labels, such as a system of audits, training, discipline, and internal and public challenges.

C. FOIA – National Security Used to Justify Overuse of Exemptions and Limit Public Access

1. Order the Attorney General to issue a memorandum to heads of departments and agencies rescinding the Ashcroft memorandum and reaffirming FOIA’s presumption of disclosure and the Department of Justice’s commitment to government transparency. The new memorandum should set forth the agency’s policy that records should be released unless there is both a legal basis to withhold them and the withholding agency reasonably foresees that disclosure would harm an interest protected by the applicable exemption.

D. Presidential Records – Executive Order Limits Disclosure; Records Policy Puts National Security History at Risk

1. Commit to working with the National Archives and Records Administration and Congress to ensure the necessary oversight and resources for the transfer of the Bush presidential records.

2. Revoke Executive Order 13233.

3. Support legislation to mandate preservation of presidential records.

E. Preemption of State and Local Open Government Laws Promotes Secrecy

1. Issue guidance that instructs all federal agencies to respect state open government and privacy laws and prohibits agencies from using contracts or memoranda of understanding to effectively limit disclosure under state and local public access laws or otherwise infringe on state government management of state record systems.
2. Direct DHS and the DOJ to make public any existing contracts or memoranda that have such effect.

CHAPTER 12: NATIONAL SECURITY LETTERS AND SECTION 215 OF THE USA PATRIOT ACT

A. Direct agency heads to curtail use of National Security Letters (NSLs) to seek sensitive information about Americans.

B. Direct the incoming Attorney General to require the FBI to come up with a plan to minimize the collection and retention of personal information about Americans that is obtained with NSLs and Section 215 orders. That plan should require adoption of minimization procedures that comply with Section 101(h) of the Foreign Intelligence Surveillance Act.

C. Support legislation like the National Security Letters Reform Act (S. 2088 in the 110th Congress) and work with Congress to pass it. The legislation should:

1. Promote uniform practices by allowing only the FBI to issue NSLs;

2. Permit the FBI to obtain only less sensitive information with an NSL, such as information that identifies a person or reveals a person’s home or email address;

3. Permit the FBI to use an NSL to obtain that less sensitive information when it has “specific and articulable facts” that the information sought: (i) pertains to the activities of a suspected agent of a foreign power, and that obtaining the information sought is the least intrusive means that could be used to identify persons involved in such activities; or (ii) pertains to an agent of a foreign power or a person in contact with an agent of a foreign power;

4. Require the government to use other authorities – such as subpoenas in criminal investigations and a judicial order under Section 215 in intelligence investigations – to obtain more sensitive information such as email logs, local and long distance toll billing records, and transactional records from financial institutions;

5. Tighten the standard for issuing an order under Section 215 to require a showing to a judge of specific and articulable facts that the material sought pertains to a suspected agent of a foreign power or a person in contact with or otherwise directly linked to such an agent;

6. Limit to 30 days the period during which the recipient of an NSL or Section 215 order can be gagged, unless the government can prove to a judge that there is reason to believe that a specified harm would come to pass unless the gag is extended;
7. Require adoption of minimization procedures based on FISA Section 101(h);

8. Provide for civil damages, including liquidated damages, to any person aggrieved by a clearly illegal misuse of NSL authorities, and such a provision can be found in H.R. 3189, the House counterpart to S. 2088 in the 110th Congress.

CHAPTER 13: REFORM OF THE NATIONAL SECURITY SURVEILLANCE LAWS AND PROCEDURES

A. President-elect Obama should announce early in the first 100 days of his administration that it is the policy of his administration to:

1. Adhere to FISA’s judicial warrant requirements when engaging in surveillance in the United States;

2. Comply fully with all intelligence surveillance statutes, and specifically with FISA, and to assert no power under Article II of the Constitution to engage in domestic intelligence gathering that does not fully comply with the law;

3. Publicly disclose the government documents, including the opinions of the DOJ Office of Legal Counsel, that provided the legal basis for the NSA’s warrantless surveillance program;

4. Direct the Attorney General to withdraw the government’s motion to dismiss pending privacy litigation brought against telecommunications carriers for assisting with unlawful warrantless surveillance, or seek a stay of those proceedings until such time as the Attorney General, based on review of the Inspectors’ General reports required by the FISA Amendments Act, determines that a grant of immunity is appropriate;

5. Refrain from using the FISA Amendments Act to engage in bulk collection of the Americans’ communications, whether domestic or international; and


B. As President, Mr. Obama should work with Congress to amend FISA in his first year in office to:

1. Ensure that surveillance authorized under FISA does not undermine the Fourth Amendment’s requirement of probable cause of crime and that it complies with all Fourth Amendment standards;

2. Repeal Title II of the FISA Amendments Act;

3. Strengthen FISA’s exclusivity provisions to ensure that telecommunications firms that provide assistance with surveillance in the future are given immunity only
when the surveillance is authorized by the FISA court or is conducted under a specific, articulated statutory exception to the court order requirement;

4. Require that applications for roving intelligence wiretaps specify either the target of surveillance or the telephone or other communications facility to be surveilled;

5. Amend the FISA Amendments Act to require judicial authorization of surveillance and more searching judicial review of such surveillance, and to bar bulk collection of Americans’ international communications;

6. Implement additional civil liberties safeguards, including possibly, civil liberties recommendations that may be contained in the Inspectors General report on the FISA Amendments Act, due in July 2009; and

7. Improve public reporting and transparency so that the effectiveness of FISA surveillance can be evaluated.

CHAPTER 14: PREVENTING OVER-CLASSIFICATION AND RETROACTIVE CLASSIFICATION, AND PROMOTING DECLASSIFICATION, OF GOVERNMENT DOCUMENTS

A. Issue a new executive order on classification, revising Executive Order 12958
   1. Immediately issue a presidential directive rejecting prior abuses of the classification system and pledging accountability in the classification process.
   2. Commit to consulting with the public and an executive branch task force to develop the new executive order on classification.
   3. New order should:
      a. Set forth clear standards and procedures for proper classification;
      b. Reestablish a presumption against classification and ensure consideration of the public interest before information is classified;
      c. Limit the duration of classification and prohibit abuse of classification markings;
      d. Systematize and improve the process for declassification of historical records and institute stricter standards for reclassification;
      e. Create clear and effective processes for sharing classified information among agencies and state and local entities; and
      f. Establish new mechanisms for oversight of the classification system.

B. Task each federal agency that classifies information to conduct a detailed public review of its classification practices with the objective of reducing national security
secrecy to the essential minimum and declassifying all information that has been
classified without a valid national security justification, whose disclosure would no
longer cause any harm to the national security, or of which the continued
classification would be outweighed by the public interest.

C. Direct agency heads to task inspectors general at the agencies to perform oversight of
secrecy and classification.

CHAPTER 15: REFORMING THE STATE SECRETS PRIVILEGE

A. President should declare that it is the policy of his administration never to invoke the
privilege to cover up illegal or unconstitutional governmental conduct.

B. Order the Attorney General to convene an interagency working group to implement
the policy and direct the Department of Justice to report invocations of the state
secrets privilege to Senate and House Committees on the Judiciary

C. Declare that the state secrets privilege will be invoked only by the head of an agency
and only when he/she has determined that there is a reasonable likelihood that public
disclosure of the particular evidence would cause significant harm to national defense
or diplomatic relations.

D. The president should direct the Attorney General that in all litigation in which the
state secrets privilege is asserted, attorneys representing the United States government
shall:

1. Assert the privilege only when the head of the agency possessing the evidence
concludes that there is a reasonable likelihood that public disclosure of the
particular evidence would cause significant harm to the national defense or
diplomatic relations of the United States;

2. Consent to have the judge review in camera and ex parte all evidence claimed to
be protected by the state secrets privilege;

3. Consent to discovery of non-privileged information in cases in which the state
secrets privilege has been invoked;

4. Consent to the appointment of special masters and/or technical experts to assist
with evaluating state secrets privilege claims;

5. Prepare and submit non-privileged substitutes for evidence asserted to be
protected by the state secrets privilege wherever possible; and

6. Decline to seek dismissal of a case on the basis of the state secrets privilege
except where the attorney concludes that it is not possible to create a non-
privileged substitute for the evidence and disclosure of the evidence asserted to be privileged would cause substantial harm to national defense or diplomatic relations.

E. Direct the Attorney General to review within 100 days each case in which the previous administration asserted the state secrets privilege and assess whether assertion of the privilege can be withdrawn with respect to disclosure of particular pieces of evidence, as well as whether the case can move forward with non-privileged information that is substituted for the privileged information.

F. Direct the Attorney General that attorneys representing the United States government shall consent to reinstatement and reconsideration of cases dismissed on the basis of the state secrets privilege if the underlying judgment, order, or proceeding from which party seeks relief was entered within the past six years, and the claim on which the judgment, order or proceeding is based is against the government or arises out of conduct by persons acting in the capacity of a government officer, employee, or agent.

**CHAPTER 16: REFORMING WATCH LISTS**

A. Direct the Department of Homeland Security and all other federal agencies that watch lists shall not be used in employment screening or hiring decisions. Instead, the government should protect its interests by conducting a careful investigation through established security clearance systems. The President should also direct the Department of Homeland Security to abandon its developing plans to screen applicants for employment (in both the public and private sector) through watch lists.

B. Direct the TSC and all other agencies with jurisdiction to nominate persons to the watch lists to establish a series of measures to promote the accuracy of the lists at the “front end,” to improve the efficiency and effectiveness of the lists and provide greater fairness to individuals. These measures should include:

1. Establishing clear written standards that specify the criteria for including a person on the watch lists, the kinds of information to be considered as relevant evidence that the criteria have been met, and the standards of proof required for including individuals on the watch lists.

2. Establishing a rigorous and reliable nominating process (including an oversight process) to make certain that decisions to include persons on watch lists are made objectively and as consistently as possible across agents and across agencies.

3. Establishing programs of internal monitoring so that agencies nominating persons to the TSC consolidated watch list and other watch lists can ensure the completeness, timeliness, accuracy, and effectiveness of error correction. This
should include regular random sampling and analysis of records, annual reporting requirements to Congressional Oversight Committees and to the public.

4. Ensuring that agencies with access to the TSC consolidated watch list and other watch lists establish systems to ensure that the lists are maintained under fully secure conditions, to protect against the risks of both inadvertent tampering and computer hacking.

5. Ensuring that agencies with access to the TSC consolidated watch list and other watch lists establish policies and procedures to safeguard the personal information of individuals submitted to the government as part of the screening process (including as part of Secure Flight and in connection with the redress proceedings and cleared flight programs).

6. Delaying implementation of Secure Flight until the above-described corrections to the watch lists and the privacy safeguards are fully implemented. Once these corrections and privacy safeguards have been made, new final Secure Flight rules should be promulgated and a 180-day test of the system should be undertaken.

7. Directing agencies nominating persons to the watch lists or otherwise utilizing such watch lists to better coordinate actions to ensure that consistent changes are made across all watch lists on a timely basis (including requiring agencies to make clear the originating source or an appropriate designation for the source of the information to make more transparent the propagation of information among watch list creators).

8. Making transparent and publicizing to travelers the information about them that will be shared with the government by aircraft operators as part of the Secure Flight program.

C. Direct the TSC and all other agencies with jurisdiction to nominate names to or maintain watch lists to establish a redress system that will provide a meaningful and fundamentally fair opportunity for individuals to challenge their inclusion on a watch list.

1. The review process should provide for more extensive review and due process rights than that provided by current agency procedures, including the current DHS Travelers Redress Inquiry Program (“TRIP”). In appropriate cases, this should include the opportunity for an oral administrative hearing and judicial review.

2. Individuals should be able to challenge their inclusion either on the basis of mistaken identify or on the grounds that the government lacks an adequate justification for including them.

3. For cases alleging inadequate justification, the government should employ government attorneys with security clearances at a level adequate to ensure that they can review classified material to serve as public advocates.
Separation of Powers

CHAPTER 17: ASSERTION OF EXECUTIVE AUTHORITY IN NATIONAL SECURITY MATTERS

A. President should issue an unambiguous statement that his administration will enforce the laws passed by Congress or advise Congress promptly when he is not doing so and why. He should also clarify that the new administration will not construe the Authorization for Use of Military Force to override existing legislation.

B. Publicly release the legal opinions issued by the Office of Legal Counsel that authorize torture, “enhanced” interrogation techniques, detention without meaningful hearings, extraordinary rendition and warrantless surveillance, among others.

C. Order the Attorney general to initiate a thorough review of all such legal opinions and, as appropriate, to revise or withdraw the opinions.

D. Confine the use of “gang of eight” briefings to the narrow and extraordinary circumstances permitted by law.

CHAPTER 18: EXECUTIVE PRIVILEGE AND CONGRESSIONAL OVERSIGHT

A. At the outset of each Congress, Congress and the executive branch should, on a bi-partisan basis, agree to a protocol for resolving privilege disputes. The protocol would deal with issues such as the steps both sides should take as part of the accommodation process, the alternative means of obtaining certain types of information, the manner in which privilege should be invoked, the officials who should participate in the discussions before the parties resort to litigation, and similar issues.

CHAPTER 19: SIGNING STATEMENTS

A. The President should commit that, when bills are under consideration by Congress, the President will promptly identify any concerns that certain provisions may be unconstitutional and communicate these concerns to Congress so that it can correct the provisions.

B. If the President believes a previously enacted law is unconstitutional, he should commit to provide Congress a report setting forth in full the legal basis for any decision to disregard or decline to enforce all or part of a law, or to interpret a law in a manner inconsistent with the clear intent of Congress.
CHAPTER 20: WAR POWERS AUTHORITY

A. The President should publicly pledge that he will not commit troops abroad without prior congressional authorization, except when force is used for a limited range of defensive purposes.

B. The President should further pledge that he will present complete and accurate information to Congress about any such proposed use of force.
CONGRESSIONAL ACTION

Charities and Foundations

CHAPTER 1: NATIONAL SECURITY AND CHARITIES

A. Amend the “material support” statute to include intent and make it consistent with Red Cross standards for humanitarian aid.

1. Repeal the amendments enacted in Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004 and amend the law to require that the government prove that individuals charged actually intended to further terrorist activity when they provided humanitarian assistance.

2. Expand the exemptions to include medical equipment and services, civilian public health services, food and water, clothing, and shelter to noncombatants.

3. Exempt human rights training and conflict resolution services entirely.

B. Amend 18 U.S.C. § 2339B(a)(1) to clarify impermissibly vague language of “expert advice or assistance.”

C. Amend 18 U.S.C. §§ 2339A(b)1-2339A(b)(3) to clarify vague language, including the insertion of an intent requirement into the definition of the provision of training and expert advice or assistance.

Detention, Interrogation, and Trials

CHAPTER 3: END ILLEGAL DETENTION, TORTURE, AND RENDITION

A. Enforce Prohibitions against Torture and Other Cruel, Inhuman, and Degrading Treatment

1. Pass legislation delineating a single set of human standards governing the interrogation of people held in detention by any U.S. department or agency and providing for severe penalties for violations of these standards. Such legislation might include such items as: requiring the video recording of all civilian intelligence, military, and law enforcement interrogations relating to terrorism investigations and providing for periodic review of such recordings by the Office of the Inspector General of the Justice Department.


B. Enforce Prohibitions against Transfers to Torture, and End the Rendition Program
1. Pass legislation outlawing the use of rendition for any and all purposes. Such a law should:

   a. prohibit the return or transfer of people to places where they are at risk of torture, ill-treatment or detention without charge or trial;
   
   b. ensure that anyone held in U.S. custody in any part of the world can exercise the right to legal representation and to a fair and transparent legal process;
   
   c. require the disclosure of the location and status of all detention centers in operation from October 1, 2001 to the present, the identities and whereabouts of all detainees held in secret facilities and their legal status, and permit the ICRC to have full and regular access to all persons detained by the U.S.;
   
   d. immediately cease the practices of incommunicado and secret detention wherever it is being used;
   
   e. authorize the holding of detainees solely in officially and publicly recognized places of detention with access to family, legal counsel, and the courts;
   
   f. release all detainees held in U.S. custody at undisclosed locations unless they are to be charged with internationally cognizable criminal or military offenses and brought to trial promptly and fairly in accordance with relevant constitutional, military, and/or international standards;
   
   g. prohibit the acceptance of “diplomatic assurances” or similar bilateral or multilateral agreements to justify renditions or any other form of involuntary transfer of individuals to countries where there is a risk of torture, other ill-treatment, or detention without charge or trial;
   
   h. ensure that the U.S. does not render or otherwise transfer to the custody of another state anyone suspected or accused of terrorist activities or national security offenses or other crimes unless the transfer is carried out under judicial supervision and in full observance of domestic and/or international due process requirements;
   
   i. ensure that anyone subject to transfer has the right to challenge its legality before an independent tribunal, access to an independent lawyer, and an effective right of appeal;
   
   j. ensure that the U.S. does not receive into custody anyone suspected or accused of national security offenses or terrorist activities unless the transfer is carried out under judicial supervision and in full observance of domestic and/or international due process requirements;
   
   k. ensure that the personal details of each detainee are promptly supplied to the family and lawyer of the detainee and the ICRC;
   
   l. ensure that all detainees have prompt access to legal counsel and to family members, and that counsel and family members are kept informed of the detainee’s whereabouts;
m. ensure that detainees who are not nationals of the detaining country are provided with access to diplomatic or other representatives of their country of nationality or former habitual residence; and

n. ensure that airports and airspace are not used to support and facilitate rendition flights.

o. Pass legislation creating an independent commission and authorize it to commence a prompt, thorough, and independent investigation into all allegations that the U.S. hosts or has hosted secret detention facilities, has tortured or abused individuals in U.S. custody or effective control, regardless of where the misconduct has occurred, and make public the results of such investigations. Such a law should authorize the independent commission to:

i. operate completely independently from any agency that is the focus of or implicated in any way in the abuse allegations;

ii. have subpoena power and the authority to command the taking of sworn statements;

iii. have adequate resources and staff to be able to conduct a far-reaching investigation into events of such great public concern;

iv. have the authority to investigate any person in the military and civilian command structure;

v. have the authority to examine the relationships among military forces, the military police, and military intelligence units, and between and among military personnel and the personnel of agencies outside the Defense Department; and

vi. have the power to recommend corrective action including the prosecution of individuals who should be held accountable for the abuses committed.

vii. Create an independent oversight body to investigate complaints of torture and abuse and monitor the conditions and treatment of detainees being held in all U.S. jails, prisons, and detention centers.

viii. Adopt legislation that creates an effective legal scheme and enforcement agency to hold all individuals, including government officials, members of the armed forces, intelligence personnel, police, prison guards, medical personnel, and private government contractors who authorized, condoned, or committed torture or cruel, inhuman or degrading treatment or punishment accountable for their actions.

ix. Adopt legislation creating a compensation scheme to ensure that the victims of the U.S. Government’s unlawful conduct and their families receive restitution, compensation, and rehabilitation services.

C. End Enforced Disappearances and Arbitrary Detention, and Abolish Secret Prisons and Hidden CIA Detentions
1. Ratify the Optional Protocol to the Convention against Torture and the ICCPR Optional Protocol.

2. Pass implementing legislation to ensure that the Disappearances Convention and the Optional Protocol to the Convention against Torture create rights that are enforceable by individuals in U.S. courts.

3. Hold hearings in the appropriate House and Senate committees to commence an investigation on the unlawful practices used during the prior Administration, including, among others: enforced disappearances, arbitrary detention, the use of secret prisons, and secret CIA detentions.

CHAPTER 4: PROSECUTE TERRORIST SUSPECTS IN ACCORDANCE WITH THE LAW

A. Oppose all proposals to create National Security Courts.

B. Repeal the Military Commissions Act of 2006 and adopt no further legislation attempting to interfere with independent judicial review of the legality of the Department of Defense’s indefinite detention or treatment of individuals in its custody.

Immigration and National Security

CHAPTER 5: FAILING TO PROTECT REFUGEES AND ASYLUM SEEKERS: OVERLY BROAD DEFINITION OF MATERIAL SUPPORT FOR TERRORISM

A. Pass legislation that would adopt reasonable definitions of terrorist activity and terrorist organization under the INA.

CHAPTER 7: MISUSE OF IMMIGRATION DETENTION LAWS IN COUNTER-TERRORISM EFFORTS

A. Pass legislation addressing these issues, i.e. the Civil Liberties Restoration Act of 2004 (S. 2528).

Secrecy, Surveillance, and Privacy

CHAPTER 8: REVISING ATTORNEY-GENERAL GUIDELINES ON FBI INVESTIGATIONS TO PREVENT INVESTIGATIONS BASED ON FIRST AMENDMENT ACTIVITIES, OR ON RACE, RELIGION, ETHNICITY, OR NATIONAL ORIGIN
A. Pass the Ending Racial Profiling Act (HR 4611, S 2481)

B. Establish a legislative charter for the FBI, limiting the FBI’s investigative authorities by requiring a factual predicate sufficient to establish reasonable suspicion before intrusive investigative techniques may be authorized, and prohibiting investigations based upon the exercise of First Amendment rights.

C. Enact legislation to de-fund any FBI activities that use race, religion, ethnicity or national origin as a criterion for investigation, except where there is a specific subject description.

D. Enact legislation to de-fund any FBI activities that chill the free exercise of First Amendment rights.

CHAPTER 9: UPDATING THE LAW GOVERNING THE PRIVACY OF ELECTRONIC COMMUNICATIONS

A. ECPA should be updated to tighten and clarify the standards for government access to data that is communicated and stored and to take account of new communications technologies:

1. Comprehensive Fourth Amendment standards, including probable cause, should be required for law enforcement access to:
   
a. Location information, regardless of whether it is stored or is collected in real time;
   
b. Email stored with a communications service provider for more than 180 days – the same standard that is imposed for email stored for shorter periods of time – and all email regardless of whether it has been opened by the recipient;
   
c. User-generated content, regardless of whether it is maintained on a desktop or on the Web; and
   
d. Information maintained on a social networking page that is not open to the public.

2. The standard for issuing a pen register or trap and trace order, which can be used by law enforcement to access in real time, for example, a log of who a person telephones and who telephones the person, should be tightened to require at least specific and articulable facts that the information sought is relevant to a pending, full, investigation. The statute should also be clarified to ensure that under no circumstances is communications content to be collected based on such an order.

3. Consistent with current Department of Justice policy and the First Circuit’s en banc decision in U.S. v. Councilman, 418 F.3d 67 (1st Cir. 2005), ECPA should
be further clarified to ensure that any real-time or prospective collection of communications content is an “intercept” requiring an intercept order, regardless of whether that content is acquired while it is in temporary electronic storage incident to transmission.

4. The statutory exclusionary rule, which now applies to the contents of illegally intercepted telephone calls, should be extended to cover the contents of illegally intercepted email and other electronic communications.

CHAPTER 10: FUSION CENTERS AND THE EXPANSION OF DOMESTIC INTELLIGENCE

A. Conduct oversight hearings to examine the threat fusion centers pose to the privacy and civil liberties of U.S. persons.

B. Codify restrictions on the collection of domestic intelligence information, to restrict the collection of personally-identifiable information that is not linked to illegal activity, using previous versions of 28 CFR Part 23 as a guide.

C. Withdraw funding from information sharing programs that do not incorporate effective privacy and civil liberties protections.

CHAPTER 11: PROMOTING TRANSPARENCY IN GOVERNMENT

A. Presidential Records – Executive Order Limits Disclosure; Records Policy Puts National Security History at Risk

B. Commit to working with the National Archives and Records Administration and the Executive to ensure the necessary oversight and resources for the transfer of the Bush presidential records.

C. Secret Intelligence Budget Impedes Oversight
   1. The annual disclosure of the intelligence budget total should cease to be an exception and should become the new norm.
   2. In order to promote an orderly budget process, the intelligence budgets of the component agencies should also be disclosed, as recommended by the 9/11 Commission.

CHAPTER 12: NATIONAL SECURITY LETTERS AND SECTION 215 OF THE USA PATRIOT ACT

A. Pass legislation like the National Security Letters Reform Act (S. 2088 in the 110th Congress) and work with Congress to pass it. The legislation should:
   1. Promote uniform practices by allowing only the FBI to issue NSLs;
2. Permit the FBI to obtain only less sensitive information with an NSL, such as information that identifies a person or reveals a person’s home or email address;

3. Permit the FBI to use an NSL to obtain that less sensitive information when it has “specific and articulable facts” that the information sought: (i) pertains to the activities of a suspected agent of a foreign power, and that obtaining the information sought is the least intrusive means that could be used to identify persons involved in such activities; or (ii) pertains to an agent of a foreign power or a person in contact with an agent of a foreign power;

4. Require the government to use other authorities – such as subpoenas in criminal investigations and a judicial order under Section 215 in intelligence investigations – to obtain more sensitive information such as email logs, local and long distance toll billing records, and transactional records from financial institutions;

5. Tighten the standard for issuing an order under Section 215 to require a showing to a judge of specific and articulable facts that the material sought pertains to a suspected agent of a foreign power or a person in contact with or otherwise directly linked to such an agent;

6. Limit to 30 days the period during which the recipient of an NSL or Section 215 order can be gagged, unless the government can prove to a judge that there is reason to believe that a specified harm would come to pass unless the gag is extended;

7. Require adoption of minimization procedures based on FISA Section 101(h);

8. Provide for civil damages, including liquidated damages, to any person aggrieved by a clearly illegal misuse of NSL authorities, and such a provision can be found in H.R. 3189, the House counterpart to S. 2088 in the 110th Congress.

B. Section 215 of the USA PATRIOT Act and two related provisions will sunset on December 31, 2009 unless Congress acts to reauthorize them. Any reauthorizing legislation should contain these reforms.

CHAPTER 13: REFORM OF THE NATIONAL SECURITY SURVEILLANCE LAWS AND PROCEDURES

A. Congressional leaders should commence a comprehensive investigation of domestic intelligence activities. The investigation should seek to uncover illegal or inappropriate surveillance and prevent it from recurring, and it should include an assessment of the effectiveness of new authorities granted in the USA PATRIOT Act and the FISA Amendments Act. This review should provide the basis for congressional consideration of the USA PATRIOT Act provisions that would otherwise expire on December 31, 2009. The review may also identify other civil liberties issues that warrant changes to FISA.

B. As President, Mr. Obama should work with Congress to amend FISA in his first year in office to:
1. Ensure that surveillance authorized under FISA does not undermine the Fourth Amendment’s requirement of probable cause of crime and that it complies with all Fourth Amendment standards;

2. Repeal Title II of the FISA Amendments Act;

3. Strengthen FISA’s exclusivity provisions to ensure that telecommunications firms that provide assistance with surveillance in the future are given immunity only when the surveillance is authorized by the FISA court or is conducted under a specific, articulated statutory exception to the court order requirement;

4. Require that applications for roving intelligence wiretaps specify either the target of surveillance or the telephone or other communications facility to be surveilled;

5. Amend the FISA Amendments Act to require judicial authorization of surveillance and more searching judicial review of such surveillance, and to bar bulk collection of Americans’ international communications;

6. Implement additional civil liberties safeguards, including possibly, civil liberties recommendations that may be contained in the Inspectors General report on the FISA Amendments Act, due in July 2009; and

7. Improve public reporting and transparency so that the effectiveness of FISA surveillance can be evaluated.

CHAPTER 14: PREVENTING OVER-CLASSIFICATION AND RETROACTIVE CLASSIFICATION, AND PROMOTING DECLASSIFICATION, OF GOVERNMENT DOCUMENTS

A. Exercise authority to obtain classified materials concerning controversial and unauthorized intelligence programs and use its power to declassify such materials in order to conduct oversight over the executive branch and restore accountability to intelligence programs.

B. Pass legislation designed to reduce over-classification.

1. Require original classifiers to identify or describe the damage to national security that could result from the unauthorized disclosure of the information and to balance that with the damage to national security that could occur from classifying the information;

2. Require original classifiers to consider the public interest prior to classifying information; mandate that classifiers use the lowest appropriate classification level and the shortest appropriate duration for classification;

3. Establish oversight mechanisms at each agency, including independent classification and declassification advisory boards, systems to track classification decisions, training, regular auditing by the inspectors general and reporting to Congress about classification policies and compliance, and internal remedies for improper classification;
4. Require that agencies provide for internal challenges to classification decisions without retribution, reward employees who identify improper classification, and develop remedies for improper classification decisions by agency employees.

C. Pass an omnibus Historical Records Act (HRA).

1. Establish a National Declassification Center
2. Institute a very strict standard for reclassification
3. Reform the procedure for reviewing records older than 25 years

CHAPTER 15: REFORMING THE STATE SECRETS PRIVILEGE

A. Pass legislation reforming the state secrets privilege, which shall, at a minimum:

1. Require that the court conduct a hearing to assess the validity of any assertion of the state secrets privilege, and that the government make available to the court for review in camera and ex parte all of the evidence it claims is protected by the state secrets privilege;
2. Provide that in conducting a review of voluminous evidence claimed to be privileged, the court may review a reasonable sampling of the evidence to make its independent assessment as to whether the privilege applies;
3. Provide that the state secrets privilege applies only when the judge has determined that there is a reasonable likelihood that public disclosure of the particular evidence would cause significant harm to the national defense or diplomatic relations of the United States;
4. Require that the judge weigh testimony from government experts in the same manner as it does, and along with, any other expert testimony;
5. Provide that the judge shall make an independent assessment as to whether the state secrets privilege applies, and that the judge should not accord “utmost deference,” “substantial weight,” or any other special deference to the assertions of any party;
6. Prohibit dismissal of cases or granting motions for summary judgment based on the state secrets privilege unless and until the private party has had a full opportunity to complete discovery of non-privileged evidence and to litigate the issue or claim to which the privileged evidence is relevant without regard to that privileged information;
7. Require that if the court determines that the privilege applies but it is possible to produce a non-privileged substitute for the evidence that would provide the parties a substantially equivalent opportunity to litigate the case, then the court shall order the government to produce that substitute;
8. Specifically authorize the use of special masters and/or technical experts to assist the court in evaluating state secrets privilege claims; and

9. Require the Attorney General to report to Congress within seven days each instance in which the state secrets privilege is invoked for the first time in a particular civil action.

**Separation of Powers**

**CHAPTER 17: ASSERTION OF EXECUTIVE AUTHORITY IN NATIONAL SECURITY MATTERS**

A. Enact legislation, such as the proposed OLC Reporting Act of 2008, requiring that the Attorney General report to Congress when the Department of Justice issues a legal opinion concluding that the executive branch is not bound by a federal statute.

B. Exercise existing oversight responsibilities, including oversight of intelligence and national security activities.

C. Confine the use of “gang of eight” briefings to the narrow and extraordinary circumstances permitted by law.

**CHAPTER 18: EXECUTIVE PRIVILEGE AND CONGRESSIONAL OVERSIGHT**

A. Enact legislation that allows the House or the Senate to ask a court to appoint a special prosecutor to investigate and prosecute criminal contempt charges when the executive branch has refused to comply with a congressional subpoena and the Justice Department refuses to present the case to a grand jury.

B. Enact a civil contempt statute that applies to subpoenas issued to federal officials, whereby either House can civilly enforce its subpoenas in federal district court.

C. At the outset of each Congress, Congress and the executive branch should, on a bipartisan basis, agree to a protocol for resolving privilege disputes. The protocol would deal with issues such as the steps both sides should take as part of the accommodation process, the alternative means of obtaining certain types of information, the manner in which privilege should be invoked, the officials who should participate in the discussions before the parties resort to litigation, and similar issues.
CHAPTER 19: SIGNING STATEMENTS

A. Enact legislation requiring the President to notify Congress if he intends to disregard or decline to enforce all or part of a law, and to provide a report setting forth in full the reasons and legal basis for any such decision.

B. Enact legislation to enable the President, Congress, or other entities to seek judicial review of any signing statement that states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret a law in a manner inconsistent with the clear intent of Congress. Such legislation would seek to confer on Congress as an institution or its agents (either its own Members or interested private parties as in qui tam actions) standing in such actions.

CHAPTER 20: WAR POWERS AUTHORITY

A. Exercise constitutional authority to reach a deliberate and transparent collective judgment about whether and when the United States should deploy our forces abroad, except when force is used for a limited range of defensive purposes.

B. Use its own investigatory tools to determine the reliability and completeness of the information on which it bases its collective judgment.
"Liberty and Security: Recommendations for the Next Administration and Congress” is the result of the collective efforts of a coalition of more than twenty leading organizations and over seventy-five people in the human rights and liberty and security communities. Participants contributed to the report in many different ways, including by drafting and editing text, identifying consensus and distilling policy proposals, contributing source materials, and providing administrative support.

“Liberty and Security” draws upon their shared knowledge and experience, and we thank them for their assistance. Although participants do not necessarily support the specific language in any or all of the proposals, we gratefully acknowledge their contribution to this effort to promote liberty, security, and human rights.

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CHAPTER ONE

Eliminate unnecessary barriers to legitimate charitable work

A. The Problem:

At a time when the humanitarian aid and development programs and conflict resolution and human rights training offered by charities and foundations are needed the most, the combined effect of two U.S. laws has made it far more difficult for nonprofits to provide critical international aid and services. Rather than distributing aid on the basis of where the need and potential for positive impact are greatest, current counterterrorism measures have caused some nonprofits to avoid the very global hotspots that would benefit the most from their work. Indeed, in some cases these measures have damaged charities’ relationships with the communities they serve, damaging the international goodwill and promise for stability that these relationships had helped to create. These laws are the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, amended by the USA PATRIOT Act, which bars material support for terrorism, and the International Emergency Economic Powers Act (IEEPA), which allows the government to designate U.S. charities as supporters of terrorism based on secret evidence and lacks due process protections. Funds of designated charities are frozen indefinitely.¹

AEDPA prohibits any person or organization from knowingly providing, attempting, or conspiring to provide “material support or resources to a foreign terrorist organization,” as designated by the U.S. government, regardless of the character or intent of the support provided. Beginning with Section 805 of the USA PATRIOT Act in 2001, the administration has incrementally expanded the notion of “material support” beyond direct transfers of goods or funds to include legitimate charitable aid to civilian non-combatants that may “otherwise cultivate support” for a designated organization. The Government has extended the notions of “material support,” arguing that even non-monetary legitimate charitable aid is fungible and can support terror by allowing the group to conserve resources. The government has expanded and made vague the prohibition against providing material support to a “terrorist organization” so as to include organizations that are “otherwise associated” with designated terrorist groups; thereby criminalizing aid to any of those groups if the charity “should have known” that the group was associated with a group linked to violent activities.

Under the current statute, “any property, tangible or intangible,” including the most fundamental of aid necessities such as water, sanitation equipment, all forms of shelter, and building materials, can be construed as “material support.” The material support laws lack several crucial distinctions and as such undermine the ability of organizations to undertake legitimate, and necessary, charitable and humanitarian work. The statute makes no distinction between lethal and non-lethal aid, nor does it contain any general

exemption for humanitarian assistance. Furthermore, the prohibition on “material support” is not limited to material objects, but rather includes “training” and “expert advice or assistance.” Teaching medical workers to prevent the spread of disease and local volunteers to build adequate sanitation systems could all fall under this sweeping proscription. In a tragic example, aid organizations were forced to choose between providing desperately needed drinking water and blankets to victims of the tsunami in Sri Lanka, a criminal act because the territory is controlled by a designated terrorist organization, and preserving their organization to support other humanitarian causes in the future. This is in clear violation of fundamental standards of nondiscrimination in humanitarian aid as defined by the Red Cross Code of Conduct.

IEEPA and Executive Order 13224 allow the president to designate terrorist organizations and block transactions and freeze their assets to deal with “unusual and extraordinary” threats originating “in whole or substantial part outside the United States.” IEEPA was meant to be directed at nation states and organizations and individuals designated as terrorists. Using a tool created to freeze the funds of security threats presented by North Korea and the Taliban to regulate charitable organizations prevents law-abiding groups from providing critical humanitarian aid. The lack of due process and clear enforcement standards used against charities are at odds with the State Department’s own Guiding Principles on Non-Governmental Organizations.

The law is administered by the Department of Treasury's Office of Foreign Assets Control (“OFAC”), which deals with embargoes, drug kingpins and money laundering. It has no expertise with the charitable sector. The standard for initiating a Treasury Department investigation is only “reasonable suspicion,” and without deadlines for or, the requirement of, filing charges, nonprofits can be shut down without the chance to say a word in their defense. Moreover, charitable organizations are left without meaningful redress, since the courts will rule only on whether the Treasury Department’s actions were “arbitrary and capricious,” not on the merits of the department’s evidence. The result is a climate of fear in which a host of nonprofit organizations fear that their charitable work will be misconstrued.

B. Proposed Solutions

1. Guiding Principles

The overbroad and discriminatory application of the “material support” laws undermines the ability of humanitarian organizations to provide essential services to those in the most dire straits. The use of designation and asset blocking laws without due process paired with draconian sanctions also impedes operations of grant makers and charities. Reforming the barriers of vague statutes, broad interpretations, and extremely limited redress will allow nonprofit organizations to return to performing their legitimate charitable work.

2. Proposed Measures
a. Executive:

i. **Improve the national security regulation of charities by ending the use of the International Emergency Economic Powers Act (IEEPA) to regulate charities and allowing the Department of State to develop a more effective and appropriate framework.** This framework must include fundamental due process rights, procedures and intermediate sanctions for charities and foundations. Process recommendations include:

1. Cease and desist orders to charity from Treasury
2. Opportunity to cure: 60-90 days to sever a tie, restructure a program, fire employee, etc.
3. Administrative hearing to challenge designation that includes cross examination, ability to submit evidence, etc.
4. Process for releasing funds to beneficiaries via another charity (including a time limit on frozen funds).
5. Ensure charitable funds frozen by the Treasury Department are ultimately released and used for charitable purposes

ii. **Withdraw the Treasury Department’s ineffective “Guidelines” and replace with real guidelines that help charities continue to meet critical needs while ensuring their scarce resources are used for legal and charitable purposes:** Withdraw Treasury’s Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities. These vague and flawed quasi-voluntary guidelines demand burdensome investigation by charities into their partners, but do not serve the purported goal of preventing charities from diverting funds to terrorist or illegal purposes. Rather, the Guidelines prevent charities from delivering critical humanitarian services and provide them with no protection from legal sanction even if the Guidelines are painstakingly followed.

1. The Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors’ Principles of International Charity and the Department of State’s Guiding Principles for Government Treatment of NGOs are good starting points for developing guidelines that provide all charities with equal opportunity and access to good faith charitable giving and complement the extensive due diligence already being performed by grantmaking organizations to ensure that their grant funds are being used for charitable and legal purposes.

iii. **Direct the Secretary of State to use his or her authority under 18 USC 2339B(j) to waive the material support prohibition for technical**
advice and assistance, training and personnel where no violent activity is involved.

b. Legislative

i. Amend the “material support” statute to include intent and make it consistent with Red Cross standards for humanitarian aid: Repeal the amendments enacted in Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, which punishes support to a designated terrorist group regardless of whether the person providing that support intended, or in fact did, further the group’s violent activities, and amend the law to require that the government prove that individuals charged actually intended to further terrorist activity when they provided humanitarian assistance. Further expand the exemptions beyond medicine and religious materials to include medical equipment and services, civilian public health services, food and food, water, clothing and shelter to noncombatants. In addition, human rights training and conflict resolution services should be entirely exempted.

1. Amend 18 U.S.C. § 2339B(a)(1) to clarify impermissibly vague language of “expert advice or assistance”: This overly vague language conflicts with First Amendment rights of speech and association by potentially criminalizing virtually all interaction with designated organizations, including Constitutionally-protected political speech and advocacy.

2. Amend 18 U.S.C. §§ 2339A(b)1-2339A(b)(3) to clarify vague language, including the insertion of an intent requirement into the definition of the provision of training and expert advice or assistance

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

D. Counter-Arguments and Rebuttal

1. Don’t we need these extreme powers because the Department of Treasury says charities are a significant source of terrorist financing and support?

The Bush administration’s has consistently justified its misplaced emphasis on nonprofits in its anti-terrorist financing efforts by claiming the sector is a “significant source of terrorist financing.” But these broad brush accusations have never been

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supported by evidence. Instead OFAC cites "open source media reports" and refers to
general information on its website.  

In the 2006 Annex to its Guidelines Treasury claimed charities and individuals
associated with them account for 15 percent of total Specially Designated Global
Terrorists (SDGTs). This claim was based on 43 designated nonprofits worldwide
and 29 designated individuals allegedly associated with them, totaling 72 nonprofit-
related designations. The seven designated U.S. nonprofits only account for 1.4
percent of this total.

When the dollar value of blocked assets is used as a measure, it is even clearer that
charities are a minor threat in the battle against terrorist financing. According to the
2007 OFAC *Terrorist Assets Report to Congress* designated foreign terrorist
organizations, charities and foundations, both U.S. and foreign, account for only 6.1
percent of total blocked assets. Treasury has blocked $336.2 million of seized assets,
and of that, $20.7 million originated with foreign terrorist organizations, a category
that includes charitable organizations. There is no public information on how much of
this can be attributed to U.S. organizations. The remaining $315.5 million originated
with designated state sponsors of terrorism, such as Iran and North Korea.

The Terrorist Financing Staff Monograph to the 9/11 Commission, said their
investigation "revealed no substantial source of domestic financial support" for the
9/11 attacks. It further warns that "[i]n many cases, we can plainly see that certain
nongovernmental organizations (NGOs) or individuals who raise money for Islamic
causes espouse an extremist ideology and are "linked" to terrorists through common
acquaintances, group affiliations, historic relationships, phone communications, or
other such contacts. Although sufficient to whet the appetite for action, these
suspicious links do not demonstrate that the NGO or individual actually funds
terrorists and thus provide frail support for disruptive action, either in the United
States or abroad."  

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3 U.S. Department of the Treasury, webpage section on terrorism and financial intelligence. See
http://www.treas.gov/offices/enforcement/key-issues/protecting/index.shtml, Anti-terrorist Financing
Guidelines, Annex at 14-16.
4 U.S. Department of the Treasury, “U.S. Department of the Treasury Anti-Terrorist Financing Guidelines:
5 U.S. Department of the Treasury, Office of Foreign Assets Control, “Terrorist Asset Report: Calendar
Year 2007 Sixteenth Annual Report on Assets in the United States of Terrorist Countries and International
Terrorism Program Designees,” available at
6 Terrorist Financing Staff Monograph to the 9/11 Commission National Commission on Terrorist Attacks
7 Ibid, at 9
2. **If terrorist organizations are relieved of the financial burden of providing charitable programs won’t the dollars saved be used for lethal attacks?**

The Bush administration has promoted a widely held but never proven assumption that charity dollars are fully fungible. As a result, the government's policy considers an entire organization tainted if any aspect of its work is associated with terrorism.

This fungibility assumption has never been subjected to factual scrutiny and U.S. organizations have never been consulted about the extent of this problem or possible appropriate solutions. The Bush administration policy has ignored differences between intentional diversion of charitable funds for lethal, terrorist activities and groups that work through a designated organizations to deliver aid when the terrorist organization controls territory and functions as a government in the area in need of assistance or in conflict zones where there are no practical alternatives for getting aid safely through.

The fungibility argument has not been applied to the for-profit sector. For example, on March 14, 2007 Chiquita Brands International was fined $25 million for paying approximately $1.7 million to two U.S.-designated terrorist organizations, the United Self-Defense Forces of Colombia (AUC) and the leftist Revolutionary Armed Forces of Colombia (FARC), for protection in a dangerous region of Colombia between 1997 and 2004.

The primary weakness of the fungibility argument is that it does not take public diplomacy into account. The U.S. reputation has suffered by freezing millions of charitable dollars. But when U.S. charities provide aid there is increased goodwill. For example, surveys in Indonesia two years after the 2004 tsunami found that after more than $13.4 billion in U.S. humanitarian aid went to help victims, 44 percent of respondents reported a favorable view of the U.S., compared to 15 percent before the tsunami. Support for Osama bin Laden was at its lowest level since 9/11. A similar survey after the 2005 earthquake in Pakistan found that 75 percent of Pakistanis had a more favorable opinion of America, and most cited earthquake relief as the reason.

3. **Haven’t the courts upheld all Treasury's actions in shutting down charities?**

In legal challenges to the first wave of designations of U.S. charities took several years the courts consistently deferred to Treasury because of national security concerns. In addition, their scope of review was limited to whether Treasury had acted arbitrarily, and the designated charity was never allowed to present or confront evidence.

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10 [http://www.terrorfreetomorrow.org/articlenav.php?id=5#top](http://www.terrorfreetomorrow.org/articlenav.php?id=5#top)
Recently, that pattern has changed. On October 9, 2008 the U.S. District Court for the Northern District of Ohio issued a temporary restraining order barring Treasury from designating KindHearts for Charitable Humanitarian Development (KindHearts), a U.S. charity, as a supporter of terrorism without affording the organization basic due process.

4. *Doesn’t the Terrorism Risk Insurance Act bar Treasury from transferring frozen funds to legitimate charities?*

No. Section 201(a) of the Terrorism Risk Insurance Act\(^{11}\) allows blocked assets to be used to pay judgments from litigation "against a terrorist party." It does not authorize funds to be held where no lawsuits have been filed or judgments rendered. Holy Land is the only designated U.S. organization involved in litigation under TRIA. Treasury has repeatedly said that allowing transfers for humanitarian and disaster aid is not in the national interest.

**E. **Recommended Documents for Further Information:


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\(^{11}\) 107 P.L. 297, Sec. 201, Reauthorization Act of 2007, signed by President George W. Bush on Dec. 26, 2007

   
APPENDIX TO CHAPTER ONE

Eliminate unnecessary and counterproductive barriers to legitimate charitable work

I. JURISDICTION

A. Legislative Branch

1. House Judiciary Subcommittee on Crime, Terrorism and Homeland Security;

2. Senate Homeland Security and Governmental Affairs Committee;

3. Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security;

4. Senate Finance Committee

B. Executive Branch

1. The President has the authority to amend Executive Order 13224 regarding Treasury rules and regulations regarding financing activities in support of terrorism.

2. The Treasury Department has discretion to revise or withdraw the Treasury Guidelines (the Office of Terrorism and Financial Intelligence within the department of the Treasury oversees implementation of the Treasury Guidelines).

3. The Treasury Department’s Office of Foreign Assets Control (OFAC) has the authority to release funds when a designated charity requests the money be transferred to another charity or entity like the UNHCR. Both of the parts of the federal regulations governing the sanctions that include the freezing of funds, Terrorism Sanctions Regulations, 31 C.F.R. Part 595 and Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. Part 597, refer to the Reporting Procedures and Penalties, 31 C.F.R. Part 501, which provides a process that authorizes otherwise blocked transactions by giving OFAC the power to grant two types of licenses:

a. General license— authorizes otherwise prohibited transactions under appropriate terms and conditions. See 31 CFR 501.801(a).

b. Specific license — authorizes successful applicant to engage in transactions otherwise prohibited and not authorized by a general license. See 31 CFR 501.801(b).
II. STATUS OF ACTION

A. Legislative Branch:

1. **Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)**
   was introduced by Senator Susan M. Collins (R-ME) and had ten co-
   sponsors. The House of Representatives passed the act on December 7,
   2004 with a vote of 336-75; the Senate passed the act the next day with a
   vote of 89-2; and President Bush signed the act into law on December 17,

2. **Hearings on the Material Support Statute/Treasury Guidelines:**
   a. On April 20, 2005, the Senate Judiciary Subcommittee on Terrorism,
      Technology and Homeland Security held a hearing concerning the
      material support statute. The following individuals testified: Daniel
      Meron, Principal Deputy Assistant Attorney General for the Civil
      Division of DOJ; Barry Sabin, Chief of the Counterterrorism Section of
      the Criminal Division of DOJ; and Andrew McCarthy, Senior Fellow at
      the Foundation for the Defense of Democracies.
   b. On May 10, 2005, the House Judiciary Subcommittee on Crime,
      Terrorism and Homeland Security held an Oversight hearing on
      Amendments to the Material Support for Terrorism Laws: Section 805
      of the USA PATRIOT Act and Section 6603 of the IRTPA. The
      following individuals testified: Glenn Fine, Inspector General of DOJ;
      Gregory Katsas, Deputy Attorney General at DOJ; Barry Sabin, Chief of
      the Counterterrorism Section of the Criminal Division of DOJ; and
      Ahilan Arulanantham, a staff attorney for the ACLU and author of “A
      Hungry Child Knows No Politics:’ A Proposal for Reform of the Law
      Governing Humanitarian Relief and ‘Material Support’ of Terrorism.”
   c. On May 10, 2007, the Senate Homeland Security and Governmental
      Affairs Committee (Senator Joseph Lieberman, I-CT, presiding) held a
      hearing which addressed, *inter alia*, the Treasury Department’s outreach
      to the charitable sector and Muslim-American communities. The
      following individuals testified: Chip Poncy, Director of the Office of
      Strategic Policy for Terrorist Financing and Financial Intelligence;
      Jeremy F. Curtin, Coordinator of the Bureau on International
      Information Programs at the State Department; John J. Miller, Assistant
      Director of the Office of Public Affairs at the FBI; and Jeffrey J. Greico,
      Acting Assistant Administrator of the Bureau for Legislative and Public
      Affairs, U.S. Agency for International Development.
d. On April 1, 2008 the Senate Finance Committee held a hearing on anti-terrorism financing. Under Secretary for Terrorism and Financial Intelligence Stuart Levey was the only witness.

B. Executive Branch

1. Executive Order 13224 (September 23, 2001): The Order bars anyone, including charities, from engaging in transactions with terrorists or terrorist organizations, and further authorizes and directs the Secretary of the Treasury “to take all appropriate measures within their authority to carry out the provisions of this order.”

2. Treasury Guidelines (November 2002; revised guidelines issued October 31, 2006): In 2007, the Treasury Department released a companion to the Treasury Guidelines, the Risk Matrix for the Charitable Sector, which purports to set forth criteria for assessing whether disbursing funds for resources to grantees present a low, medium or high risk.

C. Judicial Branch:

1. Several federal district and circuit courts have addressed the whether the “intent” and “expert advice or assistance” aspects of the material support statute, as amended by the IRTPA, are constitutional. These courts have upheld the statute’s intent requirement as constitutional; but have found portions of the “expert advice and assistance” definition of material support as unconstitutionally vague.

*Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007): The Court of Appeals for the Ninth Circuit affirmed that 18 U.S.C. § 2339B(a) does not require specific intent to further the unlawful aims of designated foreign terrorist organizations, and does not violate due process due to the lack of a specific intent requirement. Plaintiffs were six organizations and others who sought to help nonviolent and lawful activities of the Kurdistan Workers Party, a.k.a. Partiya Karkeran Kurdistan (“PKK”) and the Liberation Tigers of Tamil Eelam (“LTTE”), both of which have been designated as foreign terrorist organizations. Plaintiffs argued, *inter alia*, that the material support statute violated their due process rights because the statute imposed a criminal penalty for their association with PKK and LTTE without requiring a specific intent that Plaintiffs intended to further PKK’s and LTTE’s unlawful goals. *Id.* at 1127.

After protracted litigation (and after and considering the IRTPA’s amendments to 18 U.S.C. § 2339B(a)), the Ninth Circuit noted that the statute requires intent

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12 In *U.S. v. Al-Arian*, 308 F. Supp. 2d 1322, 1339, reconsideration denied, 329 F. Supp. 2d 1294 (M.D. Fla. 2004), the federal district court held that 18 U.S.C. § 2339B(a)(1) must require specific intent that defendant required to support the unlawful activities of a designated foreign terrorist organization in order to avoid due process problems. That case was decided before the IRTPA’s amendments to 18 U.S.C. § 2339B(a)(1).
that donors know that they are providing “material support or resources” to a designated terrorist organization or with knowledge that the organization is or has engaged in terrorist activities; as such, the statutes “complies with the ‘conventional requirement for criminal conduct-awareness of some wrongdoing,’” and complies with constitutional requirements of “personal guilt.” Id. at 1131 (citation omitted). The court also refused to read a requirement into the statute, that donors specifically intended to further the unlawful activities of the designated terrorist organizations. Id. at 1131-32. Finally, while the court noted that Congress could have - but did not - required that donors act with specific intent to further terrorist activities of designated terrorist organizations, “it is not our role to rewrite a statute, and we decline to do so here.” Id. at 1133.

Plaintiffs also challenged the definition, in 18 U.S.C. § 2339B(a), of “material support or resources” as “training, expert advice or assistance” as unconstitutionally vague. 509 F.3d at 1133. The district court had invalidated that portion of the definition as unconstitutionally vague, but in 2007 the Ninth Circuit disagreed in part. Specifically, the Ninth Circuit considered that the IRTPA defined “expert advice or assistance” as “imparting ‘scientific, technical, or other specialized knowledge.’” Id. at 1135 (quoting 18 U.S.C. § 2339A(b)(3)), and held that the “other specialized knowledge” portion of the definition of “expert advice or assistance” was void for vagueness. However, the Ninth Circuit held that the “scientific and technical” portion of “expert advice or assistance” is not vague. Id.

U.S. v. Taleb-Jedi, 566 F. Supp. 2d 157 (E.D.N.Y. 2008): Defendant Taleb-Jedi was charged with providing material support to the People’s Mojahedin Organization of Iran (the “PMOI”) – a designated terrorist organization. Taleb-Jedi contended the material support statute, 18 U.S.C. § 2339B, should be interpreted to require a showing that she specifically intended to support PMOI’s “terrorist aims,” and if the statute did not require such a specific intent, it violated her constitutional right to due process. Id. at 173. Taleb-Jedi further argued that the statute violates her rights under the First Amendment to freedom of speech and freedom of association. The district court held that 18 U.S.C. § 2339B does not violate defendant’s first amendment or due process rights (on this point, noting that the statute’s requirement for a showing of scienter is sufficient to meet the due process standard of personal guilt). Id. at 177-180.

U.S. v. Warsame, 537 F. Supp. 2d 1005 (D. Minn. 2005): Defendant Mohamed Warsame was charged with providing material support to al Qaeda, and moved to dismiss portions of his indictment on the ground that 18 U.S.C. § 2339B is unconstitutional because it lacks a specific intent requirement. Id. at 1013. The court agreed that with Warsame, that 18 U.S.C. § 2339B does not require a specific intent that Warsame intended to further al Qaeda’s terrorist activities, but the court rejected Warsame’s contention that the statute violated his first amendment or due process rights.
U.S. v. Paracha, 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006): Defendant Uzair Paracha was charged with providing material support and resources to al Qaeda. Paracha was tried by a jury and convicted on all counts in 2005. The court’s decision addresses issues that came up during the trial, including the defendant’s requested jury instruction regarding the intent requirement under 18 U.S.C. § 2339B(a)(1). Paracha contended that the government was required to provide a specific intent that Paracha’s support would further al Qaeda’s unlawful activities. The court rejected that contention and held that the statute’s requirement, that defendant’s knowledge that he had provided material support or resources to a designated foreign terrorist organization, was not unconstitutional.

U.S. v. Marzook, 383 F. Supp. 2d 1056 (N.D. Ill. 2005): Defendant Mousa Marzook was charged with providing material support to Hamas, and moved to dismiss the indictment against him on the ground that the material support statute was unconstitutional because (1) it violated the first amendment; and (2) it violated the due process clause of the fifth amendment because it did not require a showing of specific intent. Id. at 1060. The court rejected the first amendment argument on the ground that the 18 U.S.C. § 2339B does not target speech or associations or mere membership in a group. Even if, however, the statute was overbroad, defendant had filed to demonstrate that the over breadth was substantial given its “legitimate reach” and the government interest in preventing terrorism Id. at 1062-63, 1067-68. The court then found that the statute sufficiently required intent by requiring that Marzook knowingly provided support to a designated foreign terrorist organization.

2. Key cases on the freezing of charitable organization assets include:

KindHearts for Charitable Humanitarian Development v. Paulson, No. 3:08 CV 2400.(N.D. Ohio) On Oct. 9, 2008 the court issued a temporary restraining order barring the Department of the Treasury (Treasury) from designating KindHearts for Charitable Humanitarian Development (KindHearts), a U.S. charity, as a supporter of terrorism without affording the organization basic due process. Treasury shut down the group "pending investigation" in February 2006, but the investigation has never been concluded and the group's assets, including about $1 million, remain frozen.

Islamic American Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34 (D. D.C. 2005), aff’d in pt and remanded in pt as Islamic Relief Agency v. Gonzales, 477 F.3d 728 (D.C. Cir. 2007): IARA-USA challenged the blocking of its assets due to OFAC’s designation of a separate entity, IARA, as a terrorist organization. The district and then the circuit court reviewed OFAC’s actions under the “extremely deferential” “arbitrary and capricious” standard and upheld OFAC’s actions –in the face of unclassified evidence that the court found was “not overwhelming,” and substantial classified evidence to which
IARA-USA had no access. 477 F.3d at 734. The circuit court also rejected IARA-USA’s claim that the blocking of its assets violated its constitutional rights (concluding, *inter alia*, that OFAC had blocked IARA-USA’s assets “based on OFAC’s funding that IARA-USA is a branch” of a terrorist organization).

*Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57 (D. D.C. 2002), aff’d, 333 F.3d 156 (D.C. Cir. 2003): The HLF challenged its designation as a terrorist organization and the blocking of its assets. The district court held, and the circuit court affirmed, that the treasury department’s actions would be held only to the highly deferential “arbitrary and capricious” standard, and since it had met that standard the department did not violate HLF’s substantive due process rights or rights under the Administrative Procedure Act (“APA”). The courts further held that the government had not violated HLF’s rights by failing to provide notice and a hearing first – even though the Holy Land Foundation had no right to “confront and cross-examine witnesses” and did not have access to classified information that was presented to the district court. *Id.* at 164.

In its opinion the district court recognized that the seizure of Holy Land’s property "[did] raise significant Fourth Amendment [search and seizure] concerns" but held that freezing assets is not a seizure but a "temporary deprivation" of property. It did suggest that, "Plaintiff may…some day have a credible argument that the long-term blocking order has ripened into vesting of property in the United States." However, current law does not define when this "vesting" takes place. Holy Land's funds have been frozen since 2001.

*Global Relief Foundation, Inc. v. O’Neill*, 207 F.Supp.2d 779, aff’d, 315 F.3d 748 (7th Cir. 2002): GRF challenged its designation as a terrorist organization the blocking of its assets. GRF first argued that the IEEPA does not apply to it as a U.S. corporation, since the statute applies to “property in which any foreign country or a national thereof has a foreign interest.” The circuit court rejected that argument, finding that the word “interest” means a beneficial interest (i.e., “the funds are applied for the benefit of non-citizens”). 315 F.3d at 753-54. The court also rejected GRF’s challenges that the district court was authorized to review classified evidence, to which GRF did not have access, and that there was no pre-seizure hearing. *Id.* at 754.

*Benevolence Int’l Foundation, Inc. v. Ashcroft*, 200 F. Supp. 2d 935 (N.D. Ill. 2002): In December 2001, the Treasury Department blocked BIF’s assets, and the FBI searched the offices of BIF and the home of its chief executive officer, Enaam Arnaout. BIF challenged the FBI’s searches and the blocking of its assets; thereafter, the government filed criminal charges against BIF and Arnaout. The court stayed BIF’s civil action against Ashcroft et al. pending resolution of the criminal charges. [Thereafter, charges against BIF were
dismissed, and Arnaout pled guilty to a lesser charge of fraud. BIF did not have funds at that point to file another action to challenge the blocking of its assets.]
CHAPTER TWO

Closing Guantanamo

I. The Problem

Guantanamo has become an oft-cited symbol of injustice. Many of the United States’ allies--whose cooperation is crucial to our counterterrorism efforts--have harshly criticized America’s policies and called for the closure of the Guantanamo detention facility. Prominent members of both political parties have echoed these views. At the same time, detention policies at Guantanamo have produced neither substantial reliable intelligence, nor effective prosecution of terrorist suspects.

Detention policies at Guantanamo Bay have been the subject of several successful legal challenges, and the U.S. Supreme Court has rejected these policies each time it has examined them. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006) (holding that Common Article 3 of the Geneva Conventions applies to all detainees). The Court has ruled that detainees have the right to habeas corpus and accordingly declined to adopt the position that Guantanamo is a law-free zone. See Boumediene v. Bush, 128 S.Ct. 2229, 2262 (2008) (holding that detainees are “entitled to the privilege of habeas corpus to challenge the legality of their detention.”). These and other recent legal decisions indicate that current procedures at Guantanamo, if not properly reformed, will result in unnecessary legal battles that are likely to continue well past the end of the next administration’s term, and may ultimately be lost.

Detaining individuals at Guantanamo has become increasingly counterproductive to our national security objectives as it has fueled terrorist recruitment, and discouraged international cooperation that could improve our intelligence-gathering efforts. It also compromises American values and undermine the integrity of our existing legal system. Our national interests are best served by treating detainees humanely, closing Guantanamo, and demonstrating America’s renewed commitment to the rule of law.

II. Proposed Solutions

A. Guiding Principles

1. Immediately upon taking the oath of office, President Obama should announce a clear plan and establish a firm timeline for Guantanamo’s closure. Those detainees suspected of involvement of terrorism should be prosecuted in existing federal courts, and the others should be repatriated, released, or resettled.

2. No detainee at Guantanamo shall be denied a meaningful opportunity to seek judicial review and obtain relief from unlawful detention without charge via habeas corpus proceedings.
3. Detainees at Guantanamo must be treated humanely at all times. At a minimum, detainees must be guaranteed the protections of all applicable domestic and international law prohibiting torture, and cruel, inhuman, or degrading treatment.\(^1\)

4. To protect our credibility as a nation committed to justice and the rule of law, the detention facility at Guantanamo must be closed.

B. Proposed Measures

1. Immediately direct the appropriate authorities to compile and review all information in the detainees’ files. Instruct the authorities to determine which detainees should be prosecuted in the United States, repatriated, released, or resettled.

2. Direct the Secretary of Defense to release any detainee who has already completed serving a sentence imposed by military commission. Discontinue pending military commission proceedings at Guantanamo.\(^2\)

3. Transfer detainees charged with terrorism or other criminal offenses under U.S. law to an appropriate facility in the United States pending their prosecution in federal court.\(^3\)

4. Immediately repatriate or resettle detainees in accordance with applicable domestic and international law. Provide sufficient advance notice of any transfer to allow detainees to assert their rights against transfer to torture and/or continued arbitrary detention.\(^4\)

5. Allow the United Nations High Commissioner on Refugees (UNHCR) to conduct refugee status determinations of those detainees who express a fear of repatriation. Instruct all federal agencies to cooperate with humanitarian organizations and detainees’ counsel to find suitable options for resettlement.

6. In order to encourage other countries to agree to accept detainees for resettlement, immediately arrange for a small number of detainees who are known to pose no security risk, such as the Uighurs, to resettle within the United States.

III. Allies*

**Amnesty International USA**

Counter Terror with Justice Campaign: [http://www.amnestyusa.org/war-on-terror/page.do?id=10113](http://www.amnestyusa.org/war-on-terror/page.do?id=10113)

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

Chip Pitts, President

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\(^1\) See also Chapter Three: End Illegal Rendition and Torture  
\(^2\) See also Chapter Four: Effectively Prosecute Terrorist Suspects in Accordance with Law  
\(^3\) Id.  
\(^4\) See also Chapter Three: End Illegal Rendition and Torture
Common Cause
Sarah Dufendach, Vice President for Legislative Affairs
www.commoncause.org
202-736-5709

Council on American-Islamic Relations (CAIR)
Corey Saylor, National Legislative Director
csaylor@cair.com
202-384-8857 (c)
202-488-8787 (w)

Defending Dissent Foundation
Sue Udry, Director
Sue.udry@defendingdissent.org
202-549-4225
www.defendingdissent.org

Essential Information
John Richard or Robert Weissman
202-387-8034

Government Accountability Project
Jesselyn Radack, Homeland Security Director
JesselynR@whistleblower.org
202-408-0034 (ext. 107)

Tina Monshipour Foster, Executive Director,
tina.foster@IJNetwork.org
917-442-9580

Liberty Coalition
Michael D. Ostrokon, Co-Founder/National Director
www.libertycoalition.net
mostrokon@libertycoalition.net
301-717-0599

National Association of Criminal Defense Lawyers (NACDL)**
Michael W. Price
michael@nacdl.org
202-872-8600 (ext. 258)
** NACDL strongly opposes national security courts and wants to see Guantanamo closed. Indeed, NACDL’s board has adopted the position that individuals accused of involvement with terrorist activity should be prosecuted in
the federal criminal justice system; however, NACDL’s position differs from the proposed solutions included here in that it requires that individuals accused of violating the Laws of War as unprivileged belligerents be charged and prosecuted under the Uniform Code of Military Justice, consistent with the Geneva Conventions.

National Institute for Military Justice (NIMJ)
Michelle Lindo McCluer, Director
202-895-4534
mmccluer@wcl.american.edu

National Litigation Project of the Lowenstein International Human Rights Clinic, Yale Law School
Hope Metcalf
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Ramzi Kassem
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203-432-4800

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

South Asian Americans Leading Together
Priya Murthy
priya@saalt.org
301-270-1855

Stanford Law School - Mills International Human Rights Clinic
Barbara J. Olshansky, Leah Kaplan Visiting Professor and Clinic Director
Kathleen Kelly, Clinical Teaching Fellow
bj.olshansky@gmail.com
650-736-2312

U.S. Bill of Rights Foundation
Dane vonBreichenruardt, President
usbor@aol.com
202-546-7079

* The allies listed above support the closure of the detention facility at Guantanamo according to the Guiding Principles discussed above, but do not necessarily support every Proposed Measure. Many of them have provided more detailed blueprints for closing Guantanamo. Please contact the individuals and organizations listed in this section for further information.
IV. Counterarguments and Rebuttals

A. Aren't there some people at Guantanamo who we can't prosecute, but are too dangerous to release?

Closing Guantanamo would not require the release of dangerous people. Most of the detainees that remain at Guantanamo do not pose any real security risk and weren’t captured by U.S. or allied forces but were turned over for bounties from unreliable sources. In the small number of cases in which there is credible evidence of involvement with terrorism or other criminal activity, the detainee should be tried in U.S. courts or repatriated. If the detainee is convicted, the U.S. would have the option of seeking to repatriate the detainee to serve out the remainder of his sentence pursuant to diplomatic arrangements, or retain custody of the detainee and incarcerate him in an appropriate U.S. facility. Even if a detainee is prosecuted in federal court and ultimately acquitted, he need not remain in the United States and can still be repatriated to his country of origin or resettled.

B. But what about enemy fighters, like the Taliban, who might return to the battlefield?

Contrary to popular misconceptions, the small number of detainees who were actually captured by U.S. or allied forces will not necessarily be released if they continue to pose a threat to ongoing military operations. In the seven years since our initial invasion of Afghanistan, the Taliban has fallen and we are no longer at war with the government of Afghanistan. Rather, the recognized government of Afghanistan is our closest and most important ally in the ongoing conflict there. The United States government has already paid for and begun utilizing a prison in Afghanistan built for the express purpose of transferring Guantanamo detainees to Afghan custody.

V. Recommended Documents for Further Information


Contact: Devon Chaffee, Human Rights First Advocacy Counsel, (202) 547-5692, ChaffeeD@HumanRightsFirst.org


Contact: Jennifer Daskal, Senior Counterterrorism Counsel, 202-612-4349, daskalj@hrw.org


F. Fighting Terrorism Fairly and Effectively: Recommendations for President-Elect Barack Obama http://hrw.org/reports/2008/us1108/

APPENDIX

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

Authors: Stanford International Human Rights Clinic

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

I. EXECUTIVE ACTIONS

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

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

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

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

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

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

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

In July 2004, the Defense Department issued regulations to implement the President’s Order of November 13, 2001. These regulations established the Combatant Status Review Tribunals (CSRTs) and the Administrative Review Boards (ARBs) for foreign nationals held as “enemy combatants” at Guantánamo.

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2 66 Federal Register 57833 (November 16, 2001); available at [http://www.fas.org/irp/offdocs/eo/mo-111301.htm](http://www.fas.org/irp/offdocs/eo/mo-111301.htm).
In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court held that the military commission trial system established pursuant to the November 13 Military Order violated U.S. military law and international humanitarian law. Congress subsequently passed the Military Commissions Act of 2006, Pub. L. 109-366, to remedy these deficiencies.

** Classified Executive Order, Authorizing Worldwide Al Qaeda Raids (spring 2004)**

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

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

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

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

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

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

B. PRESIDENTIAL DIRECTIVES

National Security Presidential Directives (NSPD)

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

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

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

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

9 According to a White House press release dated April 1, 2004, this classified document was the first major
substantive national security decision directive issued by the current administration.
approved by the National Security Council into specific guidance and resource allocations for the Intelligence Community.¹¹

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

*Homeland Security Presidential Directives (HSPD)*

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

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

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

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

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

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

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

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

C. SIGNING STATEMENTS

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

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

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

\textsuperscript{15} http://www.fas.org/irp/offdocs/nspd/hspd-11.html.
\textsuperscript{17} 38 WCPD 1779 (October 21, 2002); http://www.whitehouse.gov/news/releases/2002/10/20021016-11.html.
President Bush’s Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Pub. L. 109-148 (December 30, 2005)\(^{19}\)

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

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

II. MEMORANDA

A. September 25, 2001 Memorandum

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

B. December 28, 2001 Memorandum

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

C. January 9, 2002 Memorandum

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

D. January 19, 2002 Memorandum

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

E. January 22, 2002 Memorandum

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

F. January 25, 2002 Memorandum

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

G. January 26, 2002 Memorandum

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

H. February 1, 2002 Memorandum

1. Re: Justice Department’s position on why the Geneva Conventions do not apply to al Qaeda and Taliban detainees
i. To: President Bush

ii. From: John Ashcroft, Attorney General of the U.S.

I. February 2, 2002 Memorandum

1. Re: Comments on Your Paper on the Geneva Convention

i. To: Counsel to the President

ii. From: William H. Taft IV, Legal Advisor, U.S. Department of State

J. February 7, 2002 Memorandum

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

i. To: The Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to the President, Director of CIA, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff

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

K. February 7, 2002 Memorandum

1. Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949

i. To: Alberto R. Gonzales, Counsel to the President

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

L. February 26, 2002 Memorandum

1. Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan

i. William J. Hanyes II, General Counsel, Department of Defense

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

M. August 1, 2002 Memorandum

1. Re: Standards of Conduct for Interrogations under 18 U.S.C. § 2340-2340A

i. To: Alberto R. Gonzales, Counsel to the President
ii. From Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice

N. August 1, 2002 Memorandum

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

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

O. October 25, 2002 Memorandum

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

P. October 11, 2002 Memorandum

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

Q. October 11, 2002 Memorandum

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

R. October 11, 2002 Memorandum

1. Re: Request for Approval of Counter-Resistance Strategies
   i. To: General James T. Hill, Commander, Joint Task Force 170
ii. From: Jerald Phifer, Director, J2, Department of Defense, JTF 170, Guantanamo Bay, Cuba

S. October 11, 2002 Memorandum

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

T. November 27, 2002 Memorandum

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

U. January 15, 2003 Memorandum

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

V. January 15, 2003 Memorandum

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

W. January 17, 2003 Memorandum

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

X. March 6, 2003 Memorandum

1. Draft Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations
April 4, 2003 Memorandum

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

April 16, 2003 Memorandum

Re: Counter-Resistance Techniques in the War on Terrorism

March 19, 2004 Memorandum

Re: Draft opinion concerning the meaning of Article 49 of the Fourth Geneva Convention as it applies in occupied Iraq

March 22, 2005 Memorandum

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

March 31, 2005 Memorandum

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

June 9, 2005 Memorandum

III. LEGISLATIVE ACTIONS

A. EXISTING LEGISLATION

1. War Crimes Act of 1996 ("WCA"), Public Law No. 104-92

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

2. Authorization for the Use of Military Force ("AUMF"), Public Law No. 107-40

   i. Signed into law: September 18, 2001

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

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

   i. Signed into law: October 26, 2001

ii. Description: The Act increases the ability of law enforcement agencies to search telephone, e-mail communications, medical, financial and other records; eases restrictions on foreign intelligence gathering within the United States; expands the Secretary of the Treasury’s authority to regulate financial transactions, particularly those involving foreign individuals and entities; and enhances the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts. The act also expands the definition of terrorism to include domestic terrorism, thus enlarging the number of activities to which the Act’s expanded law enforcement powers can be applied.

   i. Signed into law: December 30, 2005

   ii. Description: The Detainee Treatment Act of 2005 is part of the Department of Defense Appropriations Act of 2006 (Title X, H.R. 2863). It prohibits the “cruel, inhuman, or degrading treatment or punishment” of detainees and provides for “uniform standards” for interrogation. The Act also stripped the federal courts of jurisdiction over detainees’ habeas petitions filed to challenge the legality of their detention, stating that “no court, justice or judge shall have jurisdiction to hear or consider” applications on behalf of Guantanamo detainees.

   i. Signed into law: October 17, 2006

   ii. Description: Drafted in the wake of the Supreme Court’s decisions in *Hamdan v. Rumsfeld*, the Military Commissions Act’s (“MCA”) stated purpose was “[t]o authorize trial by military commission for violations of the law of war, and for other purposes.” This legislation gives the president authorization to set up military commissions to try enemy combatants, and sets limits for their interrogation and prosecution based on Common Article 3 of the Geneva Conventions. Defendants may not invoke the Geneva Conventions as a source of rights and cannot prevent the use of hearsay evidence from entering the court.

   i. Signed into law: April 26, 2006

   ii. This Act reauthorizes expiring provisions of the USA PATRIOT Act, adds dozens of additional safeguards to protect Americans’ privacy and civil liberties, and strengthens port security.

i. Signed into law: January 28, 2008

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

IV. JUDICIAL ACTIONS

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

A. CASES RELEVANT TO THE INCIDENCES OF DETENTION & TORTURE


   i. In Brown v. Mississippi, the United States Supreme Court ruled unanimously that a defendant's confession(s) that is extracted through police violence (including torture) could not be used as evidence and violates the Due Process Clause.

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

   i. Watts was arrested on suspicion of assault and murder. The police him in a bare room with no furniture and questioned him on and off for six straight days. Eventually he confessed, and was later found guilty of, murder. In Watts v. Indiana, the United States Supreme Court found that the confession was inadmissible because it was not voluntary. Noting that the American legal system is an accusatorial system, rather than an
inquisitorial system, the Court found that the Due Process Clause of the 14th Amendment bars police procedure that "violates our basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure."


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

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

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

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

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

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

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


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


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


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


i. *Rasul v. Bush* established that the U.S. court system had the authority to decide whether foreign nationals held in Guantánamo Bay were wrongfully imprisoned under the federal habeas statute, 28 U.S.C. §2241. The 6-3 ruling reversed the courts below which had held that the
Judiciary had no jurisdiction to handle wrongful imprisonment cases involving foreign nationals held in Guantánamo Bay.


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


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


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


   i. Alien detainees alleging torture by United States military personnel sued military and civilian supervisors, seeking monetary damages. The District Court held that: (1) detainees lacked Fifth Amendment right to be free of torture; (2) detainees lacked any Eighth Amendment rights; (3) there was no *Bivens* right of action; (4) defendants had qualified immunity; (5) Government would be substituted for individual defendants under the Westfall Act; (6) neither the Alien Tort Statute nor the Geneva Convention Relative to the Protection of Civilian Persons in
Time of War (Geneva Convention IV) provided a basis for the suit; (7) claims against United States, as the party substituted in for personnel allegedly performing torture, would be dismissed due to failure to exhaust administrative remedies; (8) there was no private right of action under Geneva IV; and (9) court would not enter declaratory judgment.


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


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


i. In this consolidated case testing the Government’s authority under the Military Commissions Act of 2006 to deny “enemy combatants” the right to habeas corpus, the Supreme Court ruled that foreign nationals held at Guantanamo Bay have a right to pursue habeas challenges to their detention. The Court, split 5-4 with Justice Kennedy writing the majority opinion, ruled that Congress had not validly taken away habeas
rights because it must do so only as the Constitution allows—when the country faces internal rebellion or invasion. The Court also declared that detainees do not have to go through the special review process Congress created in the Detainee Treatment Act of 2005 and later amended by the MCA because that process did not constitute an “adequate and effective substitute” for the constitutional right to habeas corpus. The Court refused to accept the Bush Administration’s argument that the review process included sufficient legal protection to make it an adequate replacement. Congress, the Court concluded, unconstitutionally suspended the writ in enacting section 7 of the MCA.


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

End Illegal Detention, Torture, and Rendition

I. THE PROBLEM

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

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

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

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

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

² 542 U.S. 466 (2004). Anticipating the litigation culminating in Rasul v. Bush, in December 2001, the Department of Defense asked the Department of Justice for advice concerning the question of whether federal courts would have jurisdiction to hear habeas petitions from aliens held at Guantánamo. See Memorandum from Patrick F. Philbin, Deputy Assistant Attorney General, DOJ, and John Yoo, Deputy Assistant Attorney General, DOJ, to William J. Haynes II, General Counsel, Department of Defense re: Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba, (Dec. 28, 2001), in The Torture
Judge Kollar-Kotelly ruled that counsel could meet with their clients in Guantánamo. Since that time, attorneys from a wide range of practices, including private firms, universities, and NGOs, have obtained security clearances and traveled to Guantánamo to meet with their clients. During those meetings, habeas counsel learned not only of facts strongly suggesting that the vast majority of the detentions were unlawful, but also disturbing information about the conditions under which prisoners were confined and the treatment to which they were subjected. These attorneys have spoken with the men who have been called the “worst of the worst.” Yet, they are all now firmly are convinced that their clients are being held unlawfully and have been subject to treatment that amounts to torture. Indeed, the U.S. military has acknowledged that many of the men at Guantánamo do not belong there. In October, 2004, Brigadier General Martin Lucenti, then-deputy commander of the military task force that runs the detention center at Guantánamo, stated: “[o]f the 550 [detainees] that we have, I would say most of them, the majority of them, will either be released or transferred to their own countries. . . . Most of these guys weren’t fighting. They were running.” The Government subsequently sought to downplay General Lucenti’s statement, but his comments have been echoed by an active duty interrogator at Guantánamo, who reportedly stated that “the United States is holding dozens of prisoners at the U.S. Navy Base at Guantánamo who have no meaningful connection to al-Qaida or the Taliban and is denying them access to legal representation. . . . There are a large number of people at Guantánamo who shouldn’t be there.”

**B. The Imprisonment of Innocent Men**

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

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4. For a selection of statements by U.S. officials made in early 2002 about the prisoners in Guantánamo, see David Rose, _Guantánamo: The War on Human Rights_ 8 (2004) (quoting Vice-President Dick Cheney: “These are the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans, innocent Americans, if they can, and they are perfectly prepared to die in the effort”); Cheney’s remarks were made on Fox News Sunday, Jan. 27, 2002. An excerpt from the transcript of this show is available at [http://www.foxnews.com/story/0,2933,44082,00.html](http://www.foxnews.com/story/0,2933,44082,00.html) (last visited Feb. 9, 2006).
7. Samara Kalk Derby, _How Expert Gets Detainees to Talk_, Capital Times, Aug. 16, 2004, at 1A; see also Eric Saar with Viveca Novak, _Inside the Wire: A Military Intelligence Soldier’s Eyewitness Account of Life at Guantánamo_ 149 (2005) (“from what I was seeing in the files…detainees with valuable information weren’t the norm. I was amazed that some of the files I was looking at were so thin – sometimes just a mug shot, an ID number from Bagram, and a summary of the detainee’s initial interrogation, which might say that he had maintained he was a farmer, that he denied any connection to terrorism, and claimed to be picked up by the Northern Alliance or the Pakistanis”).
Rasul and Asif Iqbal, along with another friend from Tipton, Ruhel Ahmed, consistently and vehemently denied any involvement in any terrorist activity. However, under extreme duress caused by hundreds of hours of interrogation, long periods of isolation, and physical and psychological abuse, Shafiq, Asif, and Ruhel confessed to having been in a terrorist training camp in Afghanistan, and to have appeared in a videotape with Osama bin Laden in August 2000. Shafiq explained that he had been held in complete isolation for two long periods—many months—when an interrogator showed him the video of bin Laden, and he agreed that he was one of the people in it. "I could not bear another day of isolation, let alone the prospect of another year," he said. The British intelligence agency MI5 undertook an investigation to determine the veracity of the men’s Guantanamo confessions. It took the agency less than 24 hours to determine definitively that "the men had been in England when the video was shot, and during the time they were supposed to have been in Al Qaeda training camps." In March 2002, the Associated Press reported that Afghan intelligence officers began offering rewards for the capture of Al Qaeda fighters the day after they participated in a five-hour meeting with U.S. Special Forces. That day, according to news reports and interviews with a local human rights leader, loudspeaker announcements from buildings and helicopters were made over the Afghan mountains promising “the big prize” to people who turned in Al Qaeda fighters to the military. One such leaflet stated:

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

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

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9 *Id.*
11 *Id.*; telephone conversation with Najeeb al-Nauimi, former Qatar Justice Minister, and human rights activist.
C. The Use of Torture and Other Abusive Measures during Interrogation

Both present and former prisoners have made consistent allegations of systematic prisoner abuse at the hands of U.S. military personnel in Guantánamo, allegations which have now been corroborated by public, unclassified sources, including government documents. Specifically, prisoners’ allegations of abuse correspond with descriptions of abuse recorded in government documents released through a Freedom of Information Act. Sergeant Eric Saar, a former Guantánamo military intelligence linguist, provides support for the allegations in his book *Inside the Wire: A Military Intelligence Soldier’s Eyewitness Account of Life at Guantánamo*, and corroboration can also be found in the account *For God and Country: Faith and Patriotism Under Fire* by James Yee, a former Muslim chaplain at Guantánamo who was falsely accused of spying for Al Qaeda.

The Government has tried to dismiss prisoner accounts of mistreatment by claiming that they are hardened terrorists, trained to allege torture as part of their indoctrination by Al Qaeda, but these claims have been belied by the continually mounting evidence.

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

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

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17 The excerpt from the Al Qaeda training manual posted on the DOJ website does call for torture to be brought to attention of the court if a “brother” is on trial. However, it does not instruct members to make up allegations of torture but appears to assume that torture will occur as a matter of course, perhaps because at the time the manual was written, terrorism suspects were likely to be handed over to Muslim countries where they would be tortured. See Lesson Eighteen, *Al Qaeda Training Manual*, available at [www.fas.org/irp/world/para/manualpart1.html](http://www.fas.org/irp/world/para/manualpart1.html) (last visited Feb. 8, 2006).
employed at Guantanamo.\textsuperscript{20} FBI agents reported, among other incidents: (1) a female interrogator grabbing the genitals of a detainee and bending his thumbs back; (2) a detainee gagged with his head wrapped with duct tape; (3) the use of dogs to intimidate detainees; (4) a detainee left in isolation for three months in a cell constantly flooded with bright light who afterward showed signs of “extreme psychological trauma”; (5) detainees left chained “hand and foot in a fetal position to the floor, with no chair, food, or water,” for periods of 24 hours or more, with the result that the detainees had “urinated or defecated on themselves”; (6) a detainee left in an unventilated interrogation room with no air conditioning with the temperature “probably well over 100 degrees” and the detainee “almost unconscious on the floor, with a pile of hair next to him” because “[h]e had apparently been literally pulling his own hair out throughout the night”; and (7) a detainee left in an interrogation room where “the temperature [was] unbearably hot” and “extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.”\textsuperscript{21}

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

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

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

\textsuperscript{21} See also Neil A. Lewis, Broad Use of Harsh Tactics is Described at Cuba Base, N.Y. TIMES, Oct. 17, 2004.


\textsuperscript{24} See, e.g., International Covenant on Civil and Political Rights, art. 9, Nov. 22, 1966, 999 U.N.T.S. 171.

\textsuperscript{25} O.A.S. Res. XXX, arts. XXV-XXVI, reprinted in 43 Am. J. Int’l L. Supp. 133 (1949) (expressing the obligations of members of the Organization of American States, including the U.S.)
for war crimes such as improperly trying a person unlawfully denied prisoner-of-war status; 2) represents a radical departure from the standards that have guided U.S. military operations for decades and places U.S. service members and civilians detained by enemy forces at greater risk of mistreatment in future armed conflicts; and 3) sends a message to the world that the Geneva Conventions are not binding law, but rather merely policies that can be changed according to each successive government’s whim. The idea that the fundamental human rights principles embodied in the Geneva Conventions can be cavalierly disregarded will have a profound impact on future armed conflicts and all people affected by them, including Americans.

D. The CIA’s Extraordinary Rendition Program

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

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

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

26 Rajiv Chandrasekaran and Peter Finn, U.S. Behind Secret Transfer of Terror Suspects, WASH. POST, March 11, 2002; see also, Scores of Al-Qa’ida Arab Prisoners Reportedly Flown to Egypt, Jordan, BBC, citing text of a report carried in a Jordanian Newspaper, Al-Majid on April 1, 2002.
much in control” and that they will often “feed questions to their investigators.”

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

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

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

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31 Dana Priest and Barton Gellman, U.S. Decries Abuse But Defends Interrogations, WASH. POST, Dec. 26, 2002 (quoting senior United States official as stating that after an individual is rendered, the CIA is “still very much in control” and that it often “feed[s] questions to their investigators”).
33 Id.
aircraft fleet to accomplish these ends. According to published reports, the top secret presidential order even empowered the CIA to hunt down and kill designated persons around the world. This authorization, like the rest of the covert order, is justified by the Bush administration as acting in self-defense and as tacitly endorsed by Congress in the Authorization for the Use of Military Force passed on September 14, 2001.

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

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

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

34 Id.
techniques results in the provision of false and misleading information, the loss of critical intelligence, and that they ultimately constitute a waste of valuable and frequently scarce resources.

II. PROPOSED SOLUTIONS

A. Guiding Principles

1. Complete, consistent, and transparent compliance with U.S. domestic law and international human rights and humanitarian law norms is wholly consistent with our fundamental democratic values and national security objectives. There is no clash between these sets of principles; they work together. By rejecting the use of techniques that provide fodder for our enemies and deter cooperation from our allies, we strengthen our strategic position in the short term, and lay the foundation for the country’s renewed commitment to maintaining human dignity and a reinvigorated role in the vanguard of those nations dedicated to ensuring world-wide acceptance of these principles.

2. The U.S. government should teach and demand strict compliance with the absolute ban on torture and other cruel, inhuman, and degrading treatment and enforce one unyielding standard of humane treatment for all detainees in U.S. custody. The standard should incorporate the “Golden Rule”, which has long been embraced by the U.S. military: that we will not authorize or use any methods of interrogation that we would find unacceptable if used against American civilians or soldiers.

B. Proposed Solutions

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

   a. The Executive branch

      i. Denounce torture and reaffirm our commitment to the absolute prohibition of torture in peacetime and in war.

      ii. Denounce cruel, inhuman, and degrading treatment and reaffirm our commitment to the absolute prohibition of such treatment in peacetime and in war.

      iii. Issue an Executive Order establishing a set of national standards for interrogation to be used by all Defense Department, intelligence, and law enforcement agencies. An Executive Order would be highly compelling evidence that the new President and his Administration has

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unequivocally repudiated the recent unlawful policies on detainee treatment.

iv. Revoke all Executive Orders, policy statements, memoranda, and any other documents or verbal orders authorizing the use of certain techniques on detainees that may be considered cruel, inhuman or degrading treatment, and reaffirm the country’s commitment to compliance with the Geneva Conventions, the ICCPR, and the Convention Against Torture.

v. Review and reform intelligence gathering practices such that no person in U.S. government custody or control is held without charge solely for intelligence-gathering and/or preventive detention purposes.

vi. Support congressional efforts to prevent torture and cruel, inhuman, and degrading treatment.

vii. Amend Appendix M of the U.S. Army Field Manual to eliminate the use of isolation, sleep deprivation, and sensory deprivation as interrogation or coercive techniques. Make similar amendments to field manuals of all other branches of the armed forces

b. The Legislative branch

i. Pass legislation delineating a single set of standards governing the interrogation of people held in detention by any U.S. department or agency and providing for severe penalties for violations of these standards. Such legislation might include such items as: requiring the video recording of all civilian intelligence, military, and law enforcement interrogations relating to terrorism investigations and providing for periodic review of such recordings by the Office of the Inspector General of the Justice Department.

ii. Repeal the Military Commissions Act of 2006 which allows introduction of evidence obtained by coercive interrogation techniques and limits the accountability of individuals responsible for using illegal techniques during interrogation.

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

a. The Executive branch

i. Denounce and repudiate all Executive branch policies, orders, memoranda, and statements authorizing or condoning the use of interstate transfers to facilitate the interrogation of people seized by any U.S. agency, held at the request of any U.S. agency, and/or detained by any U.S. agency.
ii. Revoke all prior Executive branch actions authorizing the CIA’s “extraordinary rendition program”, and any other agency’s use of enforced disappearances or secret detentions.

iii. Announce the country’s commitment to working with the International Committee of the Red Cross (ICRC) to ensure that every detainee held around the world is listed properly as an internee, is permitted to meet with ICRC representatives, to send correspondence to family members through ICRC channels, and to receive humanitarian aid.

iv. Issue an Executive Order prohibiting the acceptance of “diplomatic assurances” or similar bilateral or multi-lateral agreements to justify renditions or any other form of involuntary transfer of individuals to countries where there is a risk of torture, other ill-treatment, or detention without charge or trial.

v. Call upon Congress to commence a prompt, thorough, and independent investigation into all allegations involving the torture or abuse of individuals in U.S. custody or effective control during the “war on terror” regardless of where the misconduct has occurred.

vi. Issue an Executive Order requiring the State Department to assist all detainees eligible for release who cannot be returned to their countries of origin or habitual residence because they would be at risk of grave human rights abuses, with their efforts to resettle in third countries. Ensure that any transfers to third countries are made only with the informed consent of the individuals concerned, and that detainees being transferred are not subjected to any pressures or restrictions that may compel them to choose to resettle in any particular third country.

vii. Commit the U.S. to providing prompt and adequate reparations, including restitution, rehabilitation, and fair and adequate financial compensation to released “war on terror” detainees for the period spent unlawfully detained and other constitutional and human rights violations that they may have suffered.

b. The Legislative branch

i. Pass legislation outlawing the use of rendition for any and all purposes. Such a law should:

1. prohibit the return or transfer of people to places where they are at risk of torture, ill-treatment or detention without charge or trial;
2. ensure that anyone held in U.S. custody in any part of the world can exercise the right to legal representation and to a fair and transparent legal process;
3. require the disclosure of the location and status of all detention centers in operation from October 1, 2001 to the present, the identities and whereabouts of all detainees held in secret facilities
and their legal status, and permit the ICRC to have full and regular access to all persons detained by the U.S.;

4. immediately cease the practices of incommunicado and secret detention wherever it is being used;

5. authorize the holding of detainees solely in officially and publicly recognized places of detention with access to family, legal counsel, and the courts;

6. release all detainees held in U.S. custody at undisclosed locations unless they are to be charged with internationally cognizable criminal or military offenses and brought to trial promptly and fairly in accordance with relevant constitutional, military, and/or international standards;

7. prohibit the acceptance of “diplomatic assurances” or similar bilateral or multilateral agreements to justify renditions or any other form of involuntary transfer of individuals to countries where there is a risk of torture, other ill-treatment, or detention without charge or trial;

8. ensure that the U.S. does not render or otherwise transfer to the custody of another state anyone suspected or accused of terrorist activities or national security offenses or other crimes unless the transfer is carried out under judicial supervision and in full observance of domestic and/or international due process requirements;

9. ensure that anyone subject to transfer has the right to challenge its legality before an independent tribunal, access to an independent lawyer, and an effective right of appeal;

10. ensure that the U.S. does not receive into custody anyone suspected or accused of national security offenses or terrorist activities unless the transfer is carried out under judicial supervision and in full observance of domestic and/or international due process requirements;

11. ensure that the personal details of each detainee are promptly supplied to the family and lawyer of the detainee and the ICRC;

12. ensure that all detainees have prompt access to legal counsel and to family members, and that counsel and family members are kept informed of the detainee’s whereabouts;

13. ensure that detainees who are not nationals of the detaining country are provided with access to diplomatic or other representatives of their country of nationality or former habitual residence; and

14. ensure that airports and airspace are not used to support and facilitate rendition flights.
ii. Pass legislation creating an independent commission and authorize it to commence a prompt, thorough, and independent investigation into all allegations that the U.S. hosts or has hosted secret detention facilities, has tortured or abused individuals in U.S. custody or effective control, regardless of where the misconduct has occurred, and make public the results of such investigations. Such a law should authorize the independent commission to:

1. operate completely independently from any agency that is the focus of or implicated in any way in the abuse allegations;
2. have subpoena power and the authority to command the taking of sworn statements;
3. have adequate resources and staff to be able to conduct a far-reaching investigation into events of such great public concern;
4. have the authority to investigate any person in the military and civilian command structure;
5. have the authority to examine the relationships among military forces, the military police, and military intelligence units, and between and among military personnel and the personnel of agencies outside the Defense Department; and
6. have the power to recommend corrective action including the prosecution of individuals who should be held accountable for the abuses committed.

iii. Create an independent oversight body to investigate complaints of torture and abuse and monitor the conditions and treatment of detainees being held in all U.S. jails, prisons, and detention centers.

iv. Adopt legislation that creates an effective legal scheme and enforcement agency to hold all individuals, including government officials, members of the armed forces, intelligence personnel, police, prison guards, medical personnel, and private government contractors who authorized, condoned, or committed torture or cruel, inhuman or degrading treatment or punishment accountable for their actions.

v. Adopt legislation creating a compensation scheme to ensure that the victims of the U.S. Government’s unlawful conduct and their families receive restitution, compensation, and rehabilitation services.

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

a. The Executive branch

i. Repudiate and revoke any and all orders authorizing or providing legal justification for secret detentions.
ii. Issue an Executive Order banning the use of CIA-run secret detention centers and any other agency or department operations that enable the concealment of detentions.

iii. Direct the heads of the CIA, the Defense Department, the Defense Intelligence Agency, and any other agency or department presently or previously involved in secret detentions to account for every single individual who has been detained by each respective agency regardless of the length of the detention, and to publicly release all detainees’ names, the duration and locations of their detention in U.S. custody or in constructive U.S. custody, the asserted bases for their detention, and the dates and circumstances of their releases, transfers, or deaths.

iv. Issue an Executive Order requiring the Defense Department to provide the names of all persons in U.S. custody or in constructive U.S. custody in all detention facilities around the world to the ICRC and ensure that the Committee has unfettered access to all such prisoners.

v. Direct all Defense Department, intelligence, and law enforcement agencies to provide the names and locations of all U.S. detention facilities, whether under direct U.S. supervision or constructive U.S. supervision.

vi. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to publicly announce the names and locations of all U.S. detention facilities, whether under direct U.S. supervision or constructive U.S. supervision;

vii. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that records are kept for every person held in U.S. custody or constructive custody documenting the place, time, and the circumstances of the seizure or arrest, and whether access to their home consulate has been afforded, the location and conditions of confinement, any legal process that has been afforded, and their medical status;

viii. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that all detainees held in U.S. custody or in constructive U.S. custody in all detention facilities around the world have regular and ongoing contact with family, counsel, and international inspection agencies;

ix. Ensure that all detainees in U.S. custody or in constructive U.S. custody in all detention facilities around the world have the right of access to counsel, meaningful judicial review of the legality of their detention and, if their detention is deemed unlawful, the right to seek an order of release;

x. Direct the heads of all Defense Department, intelligence, and law enforcement agencies to ensure that all Defense Department, intelligence, and law enforcement agency personnel involved in the
seizure, arrest, or custody of persons are trained to enforce the above policies. 38

b. The Legislative branch

i. Sign and ratify the Optional Protocol to the Convention against Torture, 39 and the ICCPR Optional Protocol.

ii. Pass implementing legislation to ensure that the Disappearances Convention and the Optional Protocol to the Convention against Torture create rights that are enforceable by individuals in U.S. courts.

iii. Hold hearings in the appropriate House and Senate committees to commence an investigation into the unlawful practices used during the Bush Administration, including, among others: enforced disappearances, arbitrary detention, the use of secret prisons, and secret CIA detentions

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39 See www2.ohchr.org/English/bodies/ratification/9_b.htm, and www2.ohchr.org/English/bodies/ratification/16.htm.
www.defendingdissent.org

Essential Information
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IV. COUNTER-ARGUMENTS AND REBUTTAL

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

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

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

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

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

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

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

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

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

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


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APPENDIX

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

Authors: Stanford International Human Rights Clinic

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

I. EXECUTIVE ACTIONS

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

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

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

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

Executive Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism (November 13, 2001)

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

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

In July 2004, the Defense Department issued regulations to implement the President’s Order of November 13, 2001. These regulations established the Combatant Status Review Tribunals (CSRTs) and the Administrative Review Boards (ARBs) for foreign nationals held as “enemy combatants” at Guantánamo.

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

**Classified Executive Order, Authorizing Worldwide Al Qaeda Raids (spring 2004)**

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

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

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

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

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

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

B. PRESIDENTIAL DIRECTIVES

National Security Presidential Directives (NSPD)

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

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

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

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

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approved by the National Security Council into specific guidance and resource allocations for the Intelligence Community.\textsuperscript{11}

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

*Homeland Security Presidential Directives (HSPD)*

**HSPD-2 on Combating Terrorism through Immigration Policies (October 29, 2001)**\textsuperscript{13}

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

**HSPD-6 on the Integration and Use of Screening Information to Protect Against Terrorism (September, 16 2003)**\textsuperscript{14}

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

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

\textsuperscript{11} George Tenet, *Written Statement for the Record of the Director of Central Intelligence before the National Commission on Terrorist Attacks Upon the United States* (March 24, 2004), \url{http://www.au.af.mil/au/awc/awcgate/cia/tenet_testimony_03242004.htm}.
\textsuperscript{12} Unclassified briefing from Brigadier General Mark O. Schissler, USAF, Deputy Director for the War on Terrorism, The Joint Staff; \url{http://www.dtic.mil/ndia/2006psa_psts/schiss.pdf}.
\textsuperscript{13} \url{http://www.fas.org/irp/ofddocs/nspd/hspd-2.htm}.
\textsuperscript{14} \url{http://www.fas.org/irp/ofddocs/nspd/hspd-6.html}.
HSPD-11 on Comprehensive Terrorist-Related Screening Procedures (August 27, 2004)\textsuperscript{15}

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

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

C. SIGNING STATEMENTS

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

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

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

\textsuperscript{15} http://www.fas.org/irp/offdocs/nspd/hspd-11.html.
\textsuperscript{17} 38 WCPD 1779 (October 21, 2002); http://www.whitehouse.gov/news/releases/2002/10/20021016-11.html.
President Bush’s Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Pub. L. 109-148 (December 30, 2005) 19

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

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

II. MEMORANDA

A. September 25, 2001 Memorandum

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

B. December 28, 2001 Memorandum

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

C. January 9, 2002 Memorandum

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

D. January 19, 2002 Memorandum

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

E. January 22, 2002 Memorandum

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

F. January 25, 2002 Memorandum

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

G. January 26, 2002 Memorandum

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

H. February 1, 2002 Memorandum

1. Re: Justice Department’s position on why the Geneva Conventions do not apply to al Qaeda and Taliban detainees
i. To: President Bush

ii. From: John Ashcroft, Attorney General of the U.S.

I. February 2, 2002 Memorandum

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

J. February 7, 2002 Memorandum

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

K. February 7, 2002 Memorandum

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

L. February 26, 2002 Memorandum

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

M. August 1, 2002 Memorandum

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

N. August 1, 2002 Memorandum

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

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

O. October 25, 2002 Memorandum

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

P. October 11, 2002 Memorandum

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

Q. October 11, 2002 Memorandum

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

R. October 11, 2002 Memorandum

1. Re: Request for Approval of Counter-Resistance Strategies
   i. To: General James T. Hill, Commander, Joint Task Force 170
ii. From: Jerald Phifer, Director, J2, Department of Defense, JTF 170, Guantanamo Bay, Cuba

S. October 11, 2002 Memorandum

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

T. November 27, 2002 Memorandum

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

U. January 15, 2003 Memorandum

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

V. January 15, 2003 Memorandum

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

W. January 17, 2003 Memorandum

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

X. March 6, 2003 Memorandum

1. Draft Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations
Y. April 4, 2003 Memorandum

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

   i. Classified by: Donald Rumsfeld, Secretary of Defense

Z. April 16, 2003 Memorandum

1. Re: Counter-Resistance Techniques in the War on Terrorism

   i. To: James T. Hill, Commander U.S. Southern Command

   ii. From: Donald Rumsfeld, Secretary of Defense

AA. March 19, 2004 Memorandum

1. Re: Draft opinion concerning the meaning of Article 49 of the Fourth Geneva Convention as it applies in occupied Iraq

   i. To: William H. Taft IV, General Counsel, Department of State, William J. Haynes II, General Counsel, Department of Defense; John Bellinger, Legal Adviser for National Security; Scott Muller, General Counsel, Central Intelligence Agency

   ii. Distributed to: Alberto R. Gonzales, Counsel to the President

   iii. From: Jack Goldsmith III, Assistant Attorney General, Department of Justice, Office of Legal Counsel

BB. March 22, 2005 Memorandum

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

CC. March 31, 2005 Memorandum

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

DD. June 9, 2005 Memorandum

III. LEGISLATIVE ACTIONS

A. EXISTING LEGISLATION


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


   i. Signed into law: September 18, 2001

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

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

   i. Signed into law: October 26, 2001

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ii. Description: The Act increases the ability of law enforcement agencies to search telephone, e-mail communications, medical, financial and other records; eases restrictions on foreign intelligence gathering within the United States; expands the Secretary of the Treasury’s authority to regulate financial transactions, particularly those involving foreign individuals and entities; and enhances the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts. The act also expands the definition of terrorism to include domestic terrorism, thus enlarging the number of activities to which the Act’s expanded law enforcement powers can be applied.

   i. Signed into law: December 30, 2005
   
   ii. Description: The Detainee Treatment Act of 2005 is part of the Department of Defense Appropriations Act of 2006 (Title X, H.R. 2863). It prohibits the “cruel, inhuman, or degrading treatment or punishment” of detainees and provides for “uniform standards” for interrogation. The Act also stripped the federal courts of jurisdiction over detainees’ habeas petitions filed to challenge the legality of their detention, stating that “no court, justice or judge shall have jurisdiction to hear or consider” applications on behalf of Guantanamo detainees.

   i. Signed into law: October 17, 2006
   
   ii. Description: Drafted in the wake of the Supreme Court’s decisions in *Hamdan v. Rumsfeld*, the Military Commissions Act’s (“MCA”) stated purpose was “[t]o authorize trial by military commission for violations of the law of war, and for other purposes.” This legislation gives the president authorization to set up military commissions to try enemy combatants, and sets limits for their interrogation and prosecution based on Common Article 3 of the Geneva Conventions. Defendants may not invoke the Geneva Conventions as a source of rights and cannot prevent the use of hearsay evidence from entering the court.

   i. Signed into law: April 26, 2006
   
   ii. This Act reauthorizes expiring provisions of the USA PATRIOT Act, adds dozens of additional safeguards to protect Americans’ privacy and civil liberties, and strengthens port security.

i. Signed into law: January 28, 2008

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

IV. JUDICIAL ACTIONS

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

A. CASES RELEVANT TO THE INCIDENCES OF DETENTION & TORTURE


i. In Brown v. Mississippi, the United States Supreme Court ruled unanimously that a defendant's confession(s) that is extracted through police violence (including torture) could not be used as evidence and violates the Due Process Clause.

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

i. Watts was arrested on suspicion of assault and murder. The police him in a bare room with no furniture and questioned him on and off for six straight days. Eventually he confessed, and was later found guilty of, murder. In Watts v. Indiana, the United States Supreme Court found that the confession was inadmissible because it was not voluntary. Noting that the American legal system is an accusatorial system, rather than an
inquisitorial system, the Court found that the Due Process Clause of the 14th Amendment bars police procedure that "violates our basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure."

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

4. **Wright v. McMann, 387 F.2d 519 (2nd Cir. 1967)**
   
i. The Second Circuit Court of Appeals held that allegations, that the prisoner was denuded and exposed to bitter cold in solitary confinement cell for substantial period of time, that he was deprived of basic elements of hygiene such as soap and toilet paper, and that his cell was filthy, without adequate heat, and virtually barren would, if established, constitute cruel and unusual punishment in violation of Eighth Amendment.

5. **Ketch v. Gillman, 488 F.2d 1136 (8th Cir. 1973)**
   
i. Mental institution inmates brought an action to enjoin the forcible injection of drugs. The United States District Court for the Southern District of Iowa, Central Division, William C. Stuart, J., dismissed the complaint, and the inmates appealed. The Court of Appeals held that the administration of a drug to induce vomiting to non-consenting mental institution inmates on the basis of alleged violations of behavioral rules constituted cruel and unusual punishment.

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


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

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

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


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


   i. *Rasul v. Bush* established that the U.S. court system had the authority to decide whether foreign nationals held in Guantánamo Bay were wrongfully imprisoned under the federal habeas statute, 28 U.S.C. §2241. The 6-3 ruling reversed the courts below which had held that the
Judiciary had no jurisdiction to handle wrongful imprisonment cases involving foreign nationals held in Guantánamo Bay.


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


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


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


i. Alien detainees alleging torture by United States military personnel sued military and civilian supervisors, seeking monetary damages. The District Court held that: (1) detainees lacked Fifth Amendment right to be free of torture; (2) detainees lacked any Eighth Amendment rights; (3) there was no Bivens right of action; (4) defendants had qualified immunity; (5) Government would be substituted for individual defendants under the Westfall Act; (6) neither the Alien Tort Statute nor the Geneva Convention Relative to the Protection of Civilian Persons in
Time of War (Geneva Convention IV) provided a basis for the suit; (7) claims against United States, as the party substituted in for personnel allegedly performing torture, would be dismissed due to failure to exhaust administrative remedies; (8) there was no private right of action under Geneva IV; and (9) court would not enter declaratory judgment.


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

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

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


   i. In this consolidated case testing the Government’s authority under the Military Commissions Act of 2006 to deny “enemy combatants” the right to habeas corpus, the Supreme Court ruled that foreign nationals held at Guantánamo Bay have a right to pursue habeas challenges to their detention. The Court, split 5-4 with Justice Kennedy writing the majority opinion, ruled that Congress had not validly taken away habeas
rights because it must do so only as the Constitution allows—when the country faces internal rebellion or invasion. The Court also declared that detainees do not have to go through the special review process Congress created in the Detainee Treatment Act of 2005 and later amended by the MCA because that process did not constitute an “adequate and effective substitute” for the constitutional right to habeas corpus. The Court refused to accept the Bush Administration’s argument that the review process included sufficient legal protection to make it an adequate replacement. Congress, the Court concluded, unconstitutionally suspended the writ in enacting section 7 of the MCA.


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

Effectively Prosecute Terrorist Suspects in Accordance with Law

I. The Problem

On November 14, 2001, President Bush rebuked existing Article III tribunals and signed a military order establishing extra-judicial military commissions for detainees accused of terrorist acts. This attempt to circumvent existing Article III courts resulted in a string of yet unresolved court challenges and has undermined America’s ability to effectively prosecute terrorist suspects. Prosecutions for terrorism offenses can and should be tried in existing U.S. courts pursuant to Article III of the United States Constitution.\(^1\)

President Obama and Congress should not repeat the mistakes of the past administration by attempting to create an entirely new system of preventive detention or National Security Courts. Federal courts are more than capable of prosecuting terrorists in our custody or those that are captured in the future. Moreover, after six years of legal battles over the failed attempts to prosecute a handful of terrorism suspects that now remain at Guantanamo Bay, the Obama administration should avoid the temptation to adopt seemingly “quick fixes” that will only exacerbate the problem. The only way to both obtain convictions of terrorism suspects and avoid the excessive confusion and legal challenges that would be inevitable in the creation of a new system is to prosecute detainees in federal courts. We should not lose sight of the important tools that we already have at our disposal, nor should we forget the costs and risks of departing from established institutions and practices.

II. Proposed Solutions

A. Oppose all proposals to create National Security Courts.

B. Immediately suspend all military commission proceedings at Guantanamo and terminate the existing Combatant Status Review Tribunals (“CSRTs”) and Administrative Review Boards. The military commissions established at Guantanamo lack necessary safeguards to ensure accuracy and fairness, are unconstitutional, and should no longer be used to try terrorism suspects.

C. Repeal the MCA, rescind orders establishing military commissions, and adopt no future legislation attempting to interfere with independent judicial review of the

\(^1\) Furthermore, in future armed conflicts, enemy combatants captured on the battlefield who are subject to traditional military jurisdiction can be tried under the laws of war in properly constituted military courts. It is imprudent and unnecessary to create specialized courts or commissions for this purpose.
legality of the Department of Defense’s indefinite detention or treatment of individuals in its custody.

1. Rescind President Bush’s Order of November 13, 2001 establishing military commissions.


4. Repeal the Military Commissions Act.

D. The appropriate authorities should perform a case-by-case assessment for each detainee at Guantanamo Bay to determine which detainees can and should be charged for violations of U.S. law pursuant to federal criminal jurisdiction. Individuals for whom criminal charges are inappropriate should be either repatriated or, in the event repatriation is not possible, should be resettled in a third country or the United States.

E. For cases subject to prosecution, direct the Attorney General to thoroughly review existing evidence for materiality, reliability and admissibility; canvass the federal criminal code to identify any offenses with which the detainee could be charged; and undertake any additional investigation as warranted.

1. Prosecute complex international terrorism cases in federal courts, relying on CIPA to protect sensitive intelligence sources.

2. Prosecutions should begin on a rolling basis once individual case reviews are completed.

3. The security clearance process for qualified federal and private defenders should be administered concurrently with the case review so as not to cause future delay in prosecution.

F. Direct the Secretary of Defense to release and arrange for the immediate repatriation or resettlement of detainees upon either (a) acquittal or (b) completion of their sentences (including those already sentenced by military commission).

III. Allies*

Amnesty International USA
Counter Terror with Justice Campaign: http://www.amnestyusa.org/war-on-terror/page.do?id=10113

Bill of Rights Defense Committee (BORDC)
Chip Pitts, President
Common Cause
   Sarah Dufendach, Vice President for Legislative Affairs
   www.commoncause.org
   202-736-5709

The Constitution Project
   Sharon Bradford Franklin
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   202-580-6920

Council on American-Islamic Relations (CAIR)
   Corey Saylor, National Legislative Director
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   202-488-8787 (w)

Defending Dissent Foundation
   Sue Udry, Director
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   202-549-4225
   www.defendingdissent.org

Essential Information
   John Richard or Robert Weissman
   202-387-8034

Government Accountability Project
   Jesselyn Radack, Homeland Security Director
   JesselynR@whistleblower.org
   202-408-0034 (ext. 107)

   Tina Monshipour Foster, Executive Director,
   tina.foster@IJNetwork.org
   917-442-9580

Liberty Coalition
   Michael D. Ostrolenk, Co-Founder/National Director
   www.libertycoalition.net
   mostrolenk@libertycoalition.net
National Association of Criminal Defense Lawyers (NACDL)**
Michael W. Price
michael@nacdl.org
202-872-8600 (ext. 258)
** NACDL strongly opposes national security courts and wants to see Guantanamo closed. Indeed, NACDL’s board has adopted the position that individuals accused of involvement with terrorist activity should be prosecuted in the federal criminal justice system; however, NACDL’s position differs from the proposed solutions included here in that it requires that individuals accused of violating the Laws of War as unprivileged belligerents be charged and prosecuted under the Uniform Code of Military Justice, consistent with the Geneva Conventions.

National Institute for Military Justice (NIMJ)
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South Asian Americans Leading Together
Priya Murthy
priya@saalt.org
301-270-1855

Stanford Law School - Mills International Human Rights Clinic
Barbara J. Olshansky, Leah Kaplan Visiting Professor and Clinic Director
* These groups and individuals support the general principles expressed in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposal, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

IV. Counter-Arguments and Rebuttal:

A. *Military commissions strengthen our ability to handle to complex terrorism cases, streamline adjudication, and fight the threat of international terrorism.*

The Military Commissions Act essentially replicates the Bush Administration’s approach to adjudicating terrorism charges, which the Supreme Court overturned in 2006. Riddled with procedures that significantly limit important rights of the accused, this separate system fails to meet minimum standards of due process or universal norms of criminal justice. Resting on tenuous legal footing and drawing nonstop criticism from the global community, the military commissions system undermines our national reputation where we should be the strongest, given our long tradition of dispensing justice even to our enemies.

B. *The criminal justice system is not capable of trying complex international terrorism cases or protecting sensitive national security information.*

Article III federal courts are time-tested institutions that have proven their ability to try terrorist and enemy combatant cases, respectively, in a manner consistent with constitutional strictures. Federal courts offer finality, transparency, legitimacy, and due process. Specially tailored federal anti-terrorism laws and other generally applicable federal criminal statutes (e.g., Foreign Intelligence Surveillance Act (FISA) and the Classified Information Procedure Act (CIPA)) provide an adequate basis to detain and monitor suspects and offer a broader spectrum of prosecutable conduct than the military commissions. Military commissions may exercise jurisdiction only over persons properly subject to jurisdiction under the laws of war and only for crimes traditionally recognized by the laws of war. Thus, the tools
required for successful prosecution of terror suspects currently exist and are already at our disposal.\(^2\)

C. **National security courts represent a hybrid approach between criminal justice and military law that is fair, efficient, and reflective of core American values.**

1. Specialized terrorism courts would create an unequal system of justice for individuals accused of terrorism, presupposing their guilt by placing them in a specialized system designed to try individuals believed to be terrorists. Thus, national security courts would perpetuate the current flawed system of ad hoc justice created by the Bush administration to prosecute terrorism.

2. The administrative cost of creating this new and separate system of justice would only lead to further delay and confusion. Just as current “enemy combatants” have challenged their status in habeas proceedings before regular Article III courts, any prosecution in specialized courts would be vulnerable to jurisdictional attacks that challenge the initial classification of a suspect. These line-drawing questions could take years of litigation to resolve, a result that serves neither the accused nor the U.S. need for swift and credible justice.

3. Any new system would be at odds with fundamental American values of liberty, equality, due process, and impartial justice. Those shortcomings—whether real or perceived—would have significant costs to our national security. A “separate but less equal” approach to terrorism prosecutions would also be counterproductive in combating terrorism because it threatens to alienate communities, undermines the work of domestic law enforcement; and weakens our ability to promote rule of law abroad by alienating our allies.

V. **Recommended Documents for Further Information**


B. Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*


\(^2\) Human Rights First, *How to Close Guantanamo Blueprint for the Next U.S. Administration,* August 2008; Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts,* Human Rights First, May 2008 (demonstrating that existing federal courts have skillfully adjudicated over 120 international terrorism cases in the past fifteen years without sacrificing either national security or due process for the accused).


available at, 

See also John C. Coughenour, Op-Ed., The Right Place to Try Terrorism Cases, WASH. POST, July 27, 2008, Page B7, available at:  
http://www.washingtonpost.com/wp-dyn/content/article/2008/07/25/AR2008072502759.html

http://frontpagemag.com/Articles/Read.aspx?GUID=6BAD87FA-837B-4B77-A43E-482BE3727172

E. Ramzi Kassem, Testimony, Senate Committee on the Judiciary, July 16, 2008

F. Harold Hongju Koh, Testimony, Senate Subcommittee on the Constitution, Committee on the Judiciary, September 16, 2008

www.csis.org/media/csis/pubs/080905_mendelson_guantanamo_web.pdf


feingold.senate.gov/ruleoflaw/testimony/scholars.pdf

http://www.humanrightsfirst.org/us_law/prosecute/

http://brokenlives.info

M. Fighting Terrorism Fairly and Effectively: Recommendations for President-Elect Barack Obama  
http://hrw.org/reports/2008/us1108/

N. Testimony of Jesselyn A. Radack, Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 132-35 (June 4, 2008) available at  
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:43658.pdf

APPENDIX

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

Authors: Stanford International Human Rights Clinic

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

I. EXECUTIVE ACTIONS

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

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

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

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

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

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

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

In July 2004, the Defense Department issued regulations to implement the President’s Order of November 13, 2001. These regulations established the Combatant Status Review Tribunals (CSRTs) and the Administrative Review Boards (ARBs) for foreign nationals held as “enemy combatants” at Guantánamo.
In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court held that the military commission trial system established pursuant to the November 13 Military Order violated U.S. military law and international humanitarian law. Congress subsequently passed the Military Commissions Act of 2006, Pub. L. 109-366, to remedy these deficiencies.

**Classified Executive Order, Authorizing Worldwide Al Qaeda Raids (spring 2004)**

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

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

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

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


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

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

B. PRESIDENTIAL DIRECTIVES

National Security Presidential Directives (NSPD)

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

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

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

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

\(8\) 72 FR 40707 (July 24, 2007); \(\text{http://edocket.access.gpo.gov/2007/pdf/07-3656.pdf}\).
\(9\) According to a White House press release dated April 1, 2004, this classified document was the first major substantive national security decision directive issued by the current administration. \(\text{http://www.whitehouse.gov/news/releases/2004/04/20040401-4.html#16}\).
\(10\) \(\text{http://www.fas.org/irp/congress/2004_hr/rumsfeld_statement.pdf}\).
approved by the National Security Council into specific guidance and resource allocations for the Intelligence Community.\textsuperscript{11}

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

**Homeland Security Presidential Directives (HSPD)**

**HSPD-2 on Combating Terrorism through Immigration Policies (October 29, 2001)**\textsuperscript{13}

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

**HSPD-6 on the Integration and Use of Screening Information to Protect Against Terrorism (September, 16 2003)**\textsuperscript{14}

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

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

\textsuperscript{11} George Tenet, Written Statement for the Record of the Director of Central Intelligence before the National Commission on Terrorist Attacks Upon the United States (March 24, 2004), \url{http://www.au.af.mil/au/awc/awcgate/cia/tenet_testimony_03242004.htm}.
\textsuperscript{12} Unclassified briefing from Brigadier General Mark O. Schissler, USAF, Deputy Director for the War on Terrorism, The Joint Staff; \url{http://www.dtic.mil/ndia/2006psa_psts/schiss.pdf}.
\textsuperscript{13} \url{http://www.fas.org/irp/offdocs/nspd/hspd-2.htm}.
\textsuperscript{14} \url{http://www.fas.org/irp/offdocs/nspd/hspd-6.html}.
HSPD-11 on Comprehensive Terrorist-Related Screening Procedures (August 27, 2004)\textsuperscript{15}

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

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

C. SIGNING STATEMENTS

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

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

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

\begin{itemize}
  \item \textsuperscript{15} \url{http://www.fas.org/irp/offdocs/nspd/hspd-11.html}.
  \item \textsuperscript{16} \url{http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html}.
  \item \textsuperscript{17} \url{http://www.whitehouse.gov/news/releases/2002/10/20021016-11.html}.
  \item \textsuperscript{18} \url{http://www.whitehouse.gov/news/releases/2004/12/20041217-15.html}.
\end{itemize}
This signing statement addressed, in part, the Detainee Treatment Act (DTA) of 2005, Pub. L. 109-48. The President stated that “[t]he executive branch shall construe … the [DTA] … in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power.”

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

**II. MEMORANDA**

**A. September 25, 2001 Memorandum**

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

**B. December 28, 2001 Memorandum**

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

**C. January 9, 2002 Memorandum**

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

D. January 19, 2002 Memorandum

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

E. January 22, 2002 Memorandum

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

F. January 25, 2002 Memorandum

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

G. January 26, 2002 Memorandum

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

H. February 1, 2002 Memorandum

1. Re: Justice Department’s position on why the Geneva Conventions do not apply to al Qaeda and Taliban detainees
i. To: President Bush

ii. From: John Ashcroft, Attorney General of the U.S.

I. February 2, 2002 Memorandum

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

J. February 7, 2002 Memorandum

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

K. February 7, 2002 Memorandum

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

L. February 26, 2002 Memorandum

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

M. August 1, 2002 Memorandum

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

N. August 1, 2002 Memorandum

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

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

O. October 25, 2002 Memorandum

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

P. October 11, 2002 Memorandum

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

Q. October 11, 2002 Memorandum

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

R. October 11, 2002 Memorandum

1. Re: Request for Approval of Counter-Resistance Strategies
   
i. To: General James T. Hill, Commander, Joint Task Force 170
ii. From: Jerald Phifer, Director, J2, Department of Defense, JTF 170, Guantanamo Bay, Cuba

S. October 11, 2002 Memorandum

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

T. November 27, 2002 Memorandum

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

U. January 15, 2003 Memorandum

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

V. January 15, 2003 Memorandum

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

W. January 17, 2003 Memorandum

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

X. March 6, 2003 Memorandum

1. Draft Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations
Y. April 4, 2003 Memorandum

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

   i. Classified by: Donald Rumsfeld, Secretary of Defense

Z. April 16, 2003 Memorandum

1. Re: Counter-Resistance Techniques in the War on Terrorism

   i. To: James T. Hill, Commander U.S. Southern Command

   ii. From: Donald Rumsfeld, Secretary of Defense

AA. March 19, 2004 Memorandum

1. Re: Draft opinion concerning the meaning of Article 49 of the Fourth Geneva Convention as it applies in occupied Iraq

   i. To: William H. Taft IV, General Counsel, Department of State, William J. Haynes II, General Counsel, Department of Defense; John Bellinger, Legal Adviser for National Security; Scott Muller, General Counsel, Central Intelligence Agency

   ii. Distributed to: Alberto R. Gonzales, Counsel to the President

   iii. From: Jack Goldsmith III, Assistant Attorney General, Department of Justice, Office of Legal Counsel

BB. March 22, 2005 Memorandum

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

CC. March 31, 2005 Memorandum

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

DD. June 9, 2005 Memorandum

III. LEGISLATIVE ACTIONS

A. EXISTING LEGISLATION


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

2. Authorization for the Use of Military Force ("AUMF"), Public Law No. 107-40

   i. Signed into law: September 18, 2001

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

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

   i. Signed into law: October 26, 2001

ii. Description: The Act increases the ability of law enforcement agencies to search telephone, e-mail communications, medical, financial and other records; eases restrictions on foreign intelligence gathering within the United States; expands the Secretary of the Treasury’s authority to regulate financial transactions, particularly those involving foreign individuals and entities; and enhances the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts. The act also expands the definition of terrorism to include domestic terrorism, thus enlarging the number of activities to which the Act’s expanded law enforcement powers can be applied.

   i. Signed into law: December 30, 2005
   ii. Description: The Detainee Treatment Act of 2005 is part of the Department of Defense Appropriations Act of 2006 (Title X, H.R. 2863). It prohibits the “cruel, inhuman, or degrading treatment or punishment” of detainees and provides for “uniform standards” for interrogation. The Act also stripped the federal courts of jurisdiction over detainees’ habeas petitions filed to challenge the legality of their detention, stating that “no court, justice or judge shall have jurisdiction to hear or consider” applications on behalf of Guantanamo detainees.

   i. Signed into law: October 17, 2006
   ii. Description: Drafted in the wake of the Supreme Court’s decisions in Hamdan v. Rumsfeld, the Military Commissions Act’s (“MCA”) stated purpose was “[t]o authorize trial by military commission for violations of the law of war, and for other purposes.” This legislation gives the president authorization to set up military commissions to try enemy combatants, and sets limits for their interrogation and prosecution based on Common Article 3 of the Geneva Conventions. Defendants may not invoke the Geneva Conventions as a source of rights and cannot prevent the use of hearsay evidence from entering the court.

   i. Signed into law: April 26, 2006
   ii. This Act reauthorizes expiring provisions of the USA PATRIOT Act, adds dozens of additional safeguards to protect Americans’ privacy and civil liberties, and strengthens port security.

i. Signed into law: January 28, 2008

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

IV. JUDICIAL ACTIONS

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

A. CASES RELEVANT TO THE INCIDENCES OF DETENTION & TORTURE


i. In Brown v. Mississippi, the United States Supreme Court ruled unanimously that a defendant's confession(s) that is extracted through police violence (including torture) could not be used as evidence and violates the Due Process Clause.

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

i. Watts was arrested on suspicion of assault and murder. The police him in a bare room with no furniture and questioned him on and off for six straight days. Eventually he confessed, and was later found guilty of, murder. In Watts v. Indiana, the United States Supreme Court found that the confession was inadmissible because it was not voluntary. Noting that the American legal system is an accusatorial system, rather than an
inquisitorial system, the Court found that the Due Process Clause of the 14th Amendment bars police procedure that "violates our basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure."

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

4. **Wright v. McMann, 387 F.2d 519 (2nd Cir. 1967)**
   
i. The Second Circuit Court of Appeals held that allegations, that the prisoner was denuded and exposed to bitter cold in solitary confinement cell for substantial period of time, that he was deprived of basic elements of hygiene such as soap and toilet paper, and that his cell was filthy, without adequate heat, and virtually barren would, if established, constitute cruel and unusual punishment in violation of Eighth Amendment.

5. **Ketch v. Gillman, 488 F.2d 1136 (8th Cir. 1973)**
   
i. Mental institution inmates brought an action to enjoin the forcible injection of drugs. The United States District Court for the Southern District of Iowa, Central Division, William C. Stuart, J., dismissed the complaint, and the inmates appealed. The Court of Appeals held that the administration of a drug to induce vomiting to non-consenting mental institution inmates on the basis of alleged violations of behavioral rules constituted cruel and unusual punishment.

6. **O'Brien v. Moriarity, 489 F.2d 941 (1st Cir. 1974)**
   
i. Inmates of a prison's isolated maximum-security facility brought suit seeking a restoration of the facility’s open cell policy—which was discontinued following a prison disturbance. The Court of Appeals held that (1) the District Court was not at liberty, after holding an evidentiary hearing, to dispose of the case on the pleadings alone, (2) conditions of confinement of plaintiffs were not so severe as to be per se impermissible, where plaintiffs apparently received the same food as others, had no complaint as to heat, sanitation, lighting or bedding, were allowed out of their cells for an hour daily, and where one of them admitted to having television and some visitation privileges and (3) decision of prison authorities, made at a time of extreme unrest and supported by other considerations, not to permit the fifteen inmates, who occupied individual cells in the prison's isolated maximum security facility, to roam around at once could not be said to be so unreasonable.
as to be impermissible, notwithstanding the fact that the disturbance which precipitated the change in the open cell policy did not involve those fifteen inmates.


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


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


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


i. *Rasul v. Bush* established that the U.S. court system had the authority to decide whether foreign nationals held in Guantánamo Bay were wrongfully imprisoned under the federal habeas statute, 28 U.S.C. §2241. The 6-3 ruling reversed the courts below which had held that the
Judiciary had no jurisdiction to handle wrongful imprisonment cases involving foreign nationals held in Guantánamo Bay.


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


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


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


i. Alien detainees alleging torture by United States military personnel sued military and civilian supervisors, seeking monetary damages. The District Court held that: (1) detainees lacked Fifth Amendment right to be free of torture; (2) detainees lacked any Eighth Amendment rights; (3) there was no Bivens right of action; (4) defendants had qualified immunity; (5) Government would be substituted for individual defendants under the Westfall Act; (6) neither the Alien Tort Statute nor the Geneva Convention Relative to the Protection of Civilian Persons in
Time of War (Geneva Convention IV) provided a basis for the suit; (7) claims against United States, as the party substituted in for personnel allegedly performing torture, would be dismissed due to failure to exhaust administrative remedies; (8) there was no private right of action under Geneva IV; and (9) court would not enter declaratory judgment.


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


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


i. In this consolidated case testing the Government’s authority under the Military Commissions Act of 2006 to deny “enemy combatants” the right to habeas corpus, the Supreme Court ruled that foreign nationals held at Guantánamo Bay have a right to pursue habeas challenges to their detention. The Court, split 5-4 with Justice Kennedy writing the majority opinion, ruled that Congress had not validly taken away habeas
rights because it must do so only as the Constitution allows—when the country faces internal rebellion or invasion. The Court also declared that detainees do not have to go through the special review process Congress created in the Detainee Treatment Act of 2005 and later amended by the MCA because that process did not constitute an “adequate and effective substitute” for the constitutional right to habeas corpus. The Court refused to accept the Bush Administration’s argument that the review process included sufficient legal protection to make it an adequate replacement. Congress, the Court concluded, unconstitutionally suspended the writ in enacting section 7 of the MCA.


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

Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material Support for Terrorism

I. The Problem

Changes made by the PATRIOT Act of 2001 and the REAL ID Act of 2005 to the Immigration and Nationality Act (INA) have blocked access to refugee protection in the United States for bona fide refugees and asylum seekers who pose no risk to national security or danger to American communities. These laws contain definitions of “terrorist activity” and “terrorist organization” that are so broad that they strain any common sense understanding of the concept. Rape victims who were forced into domestic servitude by armed rebels have been barred from protection for providing “material support” to terrorists, as have refugees who were forced to pay money or provide food or medical care to armed militants. Afghans who fought against the Soviet Union in the 1980’s and Iraqis who banded together to fight Saddam Hussein have been defined as members of “terrorist organizations” and similarly turned away. These sweeping definitions of terrorist activity and terrorist organization and the misguided interpretation adopted by the current administration extend far beyond any legitimate purpose and thwart the United States’ longstanding humanitarian commitment to refugee protection.

In an effort to avoid punishing refugees and asylum seekers in the name of counter-terrorism, Congress enacted legislation in late 2007[^1] that expanded the discretionary authority of the executive branch to waive the terrorism bars in appropriate cases, ensuring that deserving cases would not be statutorily barred because of an overly broad definition of terrorist activity and terrorist organization. Unfortunately, the new legislation did not modify these sweeping definitions, and the potential for the expanded use of waivers to make a dent in the problem has not been realized. To date, DHS has issued only a handful of waivers in asylum cases and the process for issuing exemptions in removal proceedings, which was only announced in late October 2008, leaves asylum seekers in a precarious situation by requiring full adjudication of all elements of the case before an exemption is considered. Thousands of deserving asylum seekers and individuals previously granted asylum who are applying for permanent legal status have been told that their cases are on permanent hold.

II. Proposed Solutions

The new administration should work with Congress to pass legislation to fix the overly broad definitions of terrorism in the INA. In the interim, the administration

should make full use of the waiver process to address the protection needs of refugees. The new administration should:

A. Streamline and improve the process for issuing waivers in appropriate cases so that far more deserving asylum applicants have access to protection

B. Direct DHS to establish a more effective policy for consideration of waivers in immigration court cases that does not leave the consideration of the waivers until the very end of the process.

C. Ensure that victims of terrorism who were forced against their will to provide goods or services to rebel groups are no longer labeled “terrorists” and thereby barred from refugee protection

D. Work with Congress to pass legislation that would adopt reasonable definitions of terrorist activity and terrorist organization under the INA

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IV. Counterarguments and Rebuttal

A. If we adopt these changes, will the asylum program and the refugee resettlement program be vulnerable to fraud and abuse by “terrorists”?

Such assertions are made without engaging in a serious debate about whether the terrorism definitions sweep too broadly and actually serve the purpose they claim to serve. Barring rape victims from asylum or refugee resettlement because they were forced to provide domestic services to the armed rebels who captured them not only serves no legitimate purpose, counter-terrorism or otherwise, but also flies in the face of sensible refugee protection policy. The asylum process has numerous background checks and gathers substantial amounts of information on applicants and their activities. The U.S. government can ensure appropriate screening of applicants while carrying out the refugee and asylum programs, which advance U.S. interests as a global leader on humanitarian issues.

V. Recommended Documents for Further Information

A. Fighting Terrorism Fairly and Effectively: Recommendations for President-Elect Barack Obama http://hrw.org/reports/2008/us1108/

APPENDIX

Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material Support for Terrorism

I. Jurisdiction

A. Legislative Branch

The Congress has jurisdiction to pass legislation amending terrorism definitions under immigration law and the waiver of the related bars. The Congress most recently exercised this jurisdiction through the Congressional Appropriations Act of 2008.

B. Executive Branch

Pursuant to the INA, the Secretaries of State and Homeland Security, in consultation with each other and the Attorney General, may issue waivers to terrorism bars to immigration.

The Secretary of Homeland Security has authorized the U.S. Citizenship & Immigration Services agency within Homeland Security to exempt certain individuals from the terrorism-related bars to immigration. In 2007 USCIS issued guidance on the granting of waivers.

II. Status of Actions in Legislative, Executive, and Judicial Branches:

A. Legislative Branch:

The Consolidated Appropriations Act of 2008, Pub. L. 110-161 (H.R. 2764), was sponsored by Representative Nita Lowey (D-NY) on June 18, 2007, passed the House of Representatives on June 22, 2007, passed the Senate on September 6, 2007, and was finalized (with amendments) on December 19, 2007 before being signed by the President on December 26, 2007.

The Consolidated Appropriations Act (in relevant part) grants discretionary authority, to waive terrorism grounds as bars to asylum, to the Secretary of State in consultation with the Secretary of Homeland Security and Attorney General, and to the Secretary of Homeland Security in consultation with the Secretary of State and the Attorney General (at § 212(d)(3)(B)(i) of the INA). The Act also (1) provides that certain groups will no longer be considered terrorist organizations for purposes of immigrants seeking asylum based on any act or event occurring before the Consolidations Appropriations Act was enacted; and (2) designates the Taliban as a “Tier I” terrorist organization for purposes of
immigrants seeking asylum, meaning that it is posted as a terrorist organization by the State Department.

There have been several congressional hearings on the material support bar for immigrants. On September 19, 2007, the Senate Judiciary Committee, Subcommittee on Human Rights and the Law, held a hearing and the following individuals testified: Anwen Hughes, Senior Counsel in the Refugee Protection Program at Human Rights First; Paul Rosenzweig, Deputy Assistant Secretary for Policy for the Department of Homeland Security; Bishop Thomas G. Wenski, Chairman of the International Policy Committee of the United States Conference of Catholic Bishops; and a refugee from Colombia.

The same subcommittee of the Senate Judiciary Committee held another hearing on material support issues on April 24, 2007. Anwen Hughes testified, as did Ishmael Beah, a former child soldier; Kenneth Roth, executive director of Human Rights Watch; and Joseph Mettimano, Director of public policy and advocacy at World Vision.

**B. Executive Branch**

CHAPTER SIX

Ending Immigration Enforcement Based on National Origin, Ethnicity or Religion

I. The Problem

The National Security Entry and Exit Registration System (NSEERS), launched in 2002, required non-citizens from “countries of interest” (a list comprised almost exclusively of Middle Eastern and North African nations or those with a majority-Muslim populations) to register with the then-INS. Thousands complied but others were too afraid to come forward, even if they were lawfully present and had no reason to fear suspicion. Many people affected by NSEERS have U.S. citizen family members, long employment histories in the United States, or pending immigration applications.

II. Proposed Solutions

A. The Administration should:
   1. Rescind the NSEERS regulations and terminate the program.
   2. Prohibit registration programs or other similar schemes based on criteria that can be used as a proxy for targeting individuals on the basis of race, religion, national origin, or ethnicity.
   3. Ensure that those who did not register or did not register properly under NSEERS are not denied the opportunity to apply for immigration status or relief from deportation if otherwise eligible.

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IV. Counterarguments and Rebuttal:

A. Isn’t NSEERS is an important counter-terrorism tool? Why should we allow those who did not register for NSEERS to pursue immigration relief?

Tracking schemes such as NSEERS have not proven effective as counter-terrorism measures. Experts working with the Migration Policy Institute, an independent, non-partisan think tank, affirmed that NSEERS was not meant to identify terrorists. They concluded that NSEERS was poorly planned and implemented and that the program has not achieved its objectives (See Migration Policy Institute, America’s Challenge: Domestic Security, Civil Liberties, and National Unity after September 11 at pp. 15-17 and 155, available at http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf) The NSEERS program generated fear and distrust in Arab and Muslim communities, which hinders effective law enforcement. DHS itself has scaled back the program, suspending certain requirements, although others remain in force. NSEERS was poorly conceived and implemented and should not be a barrier to immigration relief in cases where a person is otherwise eligible.
APPENDIX

Immigration Enforcement Based on Ethnicity and Religion

I. Jurisdiction:

The NSEERS program falls under the jurisdiction of the House of Representatives’ Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary. The Senate Committees on the Judiciary and Homeland Security also have jurisdiction. The Department of Homeland Security has in the past suspended portions of the NSEERS program.

II. Status of Actions in Legislative, Executive, and Judicial Branches:

A. Judicial Branch:

As of November 5, 2008, every circuit court of appeals (First, Second, Third, Fourth, Fifth, Seventh, and Eleventh) which had considered the issue of whether the NSEERS program violated Equal Protection guarantees under the United States Constitution concluded that NSEERS’ special registration of individuals based on national origin did not violate Equal Protection. See Rajah v. Mukasey, 2008 WL 4350021 (C.A.2); Kandamar v. Gonzales, 464 F.3d 65 73-73 (1st Cir. 2006); Ali v. Gonzalez, 440 F.3d 678, 681 n. 4 (5th Cir. 2006); Zafar v. U.S. Att’y Gen., 461 F.3d 1357, 1367 (11th Cir. 2006); Shaybob v. Att’y Gen., 189 Fed.Appx. 127, 129-30 (3d Cir. 2006); Hadayat v. Gonzales, 458 F.3d 659 (7th Cir. 2006) (finding that the court had no jurisdiction to review the claim); Malik v. Gonzales, 213 Fed.Appx. 173 (4th Cir. 2007).

B. Legislative Branch:

In response to criticism of the NSEERS program, on December 2, 2003, the Department of Homeland Security suspended the requirement that all individuals previously registered with NSEERS re-register within 30 days and 1 year in the United States. However, a call-in program, through which the Department of Homeland Security may, in its discretion, notify individual nonimmigrant aliens subject to NSEERS registration to appear for one or more additional continuing registration interviews in particular cases, is still in effect. As late as 2004, the Iranian-America Bar Association documented “deplorable” conditions in NSEERS registration centers.¹

In a June 30, 2005 Hearing before the Subcommittee on Immigration, Border Security and Claims of the Committee on the Judiciary,\(^2\) the NSEERS program was criticized by members of Congress for not helping effectuate its goal of assisting the U.S. government’s counterterrorism efforts. One main concern is that the NSEERS program does not deal with issue of non-immigrant aliens who do not show up to register, and who may in fact be the biggest national security risk.

\(^2\) Id.
CHAPTER SEVEN

Misuse of Immigration Detention Laws in Counter-Terrorism Efforts

I. The Problem

In the aftermath of the 9-11 attacks, the Justice Department used the immigration laws to do an end run around basic rights protections for non-citizens, questioning and detaining primarily Arab and Muslim non-citizens often with little or no basis to suspect them of any connection to terrorism. The new administration should not repeat the mistakes that were detailed in a highly critical 2003 Inspector General Report on the treatment of these “special interest” detainees.\[1\] As it carries out its responsibilities to enforce the immigration laws, the executive branch should restore and uphold guarantees of due process and fair treatment for non-citizens.

The misuse of immigration law and procedure after 9-11 resulted in five principal abuses: prolonged detention without charge (in some cases up to four months); interference with the right to counsel; overriding judicial decisions to release a non-citizen on bond after a hearing; prolonged detention well after a person was ordered deported while awaiting the FBI to “clear” the person of any links to terrorism but without any pending criminal charge; and excessively harsh conditions of confinement, including some cases of physical and verbal abuse. The IG also criticized the “indiscriminate and haphazard” way in which many detainees were placed in the category of special interest detainees, concluding that the government made little attempt to distinguish between those who were the subject of a lead in the investigation and those who had no connection to terrorism.\[2\] Although not addressed in the IG report, the Justice Department also refused to release the names of or charges against these detainees and instituted a controversial policy of secret immigration hearings that were closed even to the press and family members.

None of the 762 special interest immigrants detained after 9-11 was charged with involvement in the 9-11 attacks. While this abuse of immigration laws was highly ineffective in finding terrorist suspects, it had a tremendous impact on families and communities, alienating many in the Arab, Muslim and South Asian communities.

The Bush Administration halted some practices and took some partial corrective action on others, but in many cases the authorities remain on the books for use another day.


\[2\] DOJ OIG (2003), p. 70.
II. Proposed Solutions:

A. *Ensure prompt filing of charges and bond hearings for persons detained* – The Administration should require by regulation that a non-citizen detainee be charged with an immigration violation and served with a charging document within 48 hours of his or her arrest or detention. It should also require that *charging documents be filed with the immigration court within 48 hours of detention and court hearings be timely scheduled*. (This time period should be tolled in selective cases, for example for those eligible for relief under the Violence Against Women Act).

B. *Revoke the regulation that permits DOJ to litigate bond determinations, lose, and then override the judicial decision to release the individual on bond* – The Administration should repeal the “automatic stay” regulation, 8 C.F.R. §1003.19(i)(2) (Oct. 17, 2001), which authorized DOJ to stay automatically a judicial decision to release a detainee on bond after a bond hearing in immigration court. In the interim, the administration should issue an internal directive not to exercise the Secretary’s discretion to seek an automatic stay under the rule and instead pursue any stay as part of filing an appeal of the judge’s decision as per 8 C.F.R. §1003.19(i)(1).

C. *Rescind the Creppy Memorandum and prohibit the blanket closure of immigration hearings, with limited, case-by-case exceptions only* – The Administration should rescind the memo issued by Chief Immigration Judge Michael Creppy entitled “Cases Requiring Special Procedures” (Oct. 21, 2001) and adopt a clear policy stating that immigration proceedings are presumptively open to the public and the news media, allowing limited exceptions only for discrete portions of hearings and only upon a case-by-case showing of necessity.

D. *Follow legal limits on prolonged detention of non-citizens who have been ordered deported* – U.S. Supreme Court decisions in 2001 and 2005 require that immigrants who have been ordered removed be detained no longer than reasonably necessary to effectuate their deportation, typically no longer than 180 days. The new administration should adopt a policy that ensures that it strictly complies with the law in this area. The policy should specifically prohibit the continued detention of persons ordered removed beyond a reasonable period to effectuate their removal for purposes of investigation on criminal or other grounds. If the government has probable cause to believe that a non-citizen ordered removed has been involved in terrorist acts, then it should bring criminal charges against the person.

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**IV. Counterarguments and Rebuttal:**

A. Won’t these changes make it harder for the government to find and detain terrorist suspects? Won’t they result in releasing dangerous terrorists? Shouldn’t we use all available tools in dealing with terrorism?
The IG report provides the best response to such dubious criticism. The policy decision to use immigration law to question and detain non-citizens in the aftermath of 9-11 resulted in a highly critical 200-page Inspector General report that contained 21 specific recommendations for corrective action. A new administration should take all necessary steps to ensure it does not repeat the serious mistakes that were made.

The post 9-11 immigration round-ups proved highly ineffective in finding terrorists, and the policy came at the cost of alienating U.S. immigrant communities and tarnishing the U.S. image abroad, especially in the Arab and Muslim world. As to the specific reforms recommended in this document, DHS modified the charging rules, partially but not fully addressing the problem of prolonged detention without charge. The changes recommended here would ensure that the problem is fully remedied and that officers have clear rules to follow so that abuses do not occur. Such clarity is also critical to preventing prolonged detention after a person is ordered deported. Moreover, traditional rules that permit the government to seek a stay of a release order on appeal are sufficient to address concerns about release decisions; allowing the government to litigate and then overrule the judge undermines the integrity of the process. Rescinding the Creppy memo authorizing blanket closure of immigration hearings should be non-controversial. Little was gained through the closed hearings and the Bush Administration backed off its position in the face of legal challenges.
APPENDIX

Misuse of Immigration Detention Laws in Counter-Terrorism Efforts

I. Jurisdiction:

A. Legislative Branch


B. Executive Branch

The DOJ and DHS have the authority to rewrite the procedures that the DOJ and INS implemented in the wake of the September 11 attacks. Similarly, the memorandum issued by then-Chief Immigration Judge Creppy providing for blanket closure of immigration hearings can also be rescinded administratively.

The rule enabling the Government to nullify a judge’s order to release an individual on bond after finding that he is neither a flight risk nor a danger to the community, a rule established by the DOJ in October 2001, can be rewritten by the DOJ.

Likewise, the regulation providing the INS the authority to subject aliens to prolonged detention without charge was instituted by the INS, and can be amended by DHS, which took over responsibilities of the INS under the Homeland Security Act of 2002.

II. Status of Actions in Legislative, Executive, and Judicial Branches:

A. Legislative Branch:

In 2005, legislation was proposed but not passed that sought to address the issues discussed above. The Civil Liberties Restoration Act sought to “make certain that our Government is given both adequate resources and the authority to protect the well-being of the American people, and clear legal standards and oversight [to] protect their civil liberties.” Immigration Removal Procedures Implemented in the Aftermath of the September 11, 2001 Attacks: Hearing on H.R. 1502 before the
B. Executive Branch

The April 2003 Inspector General Report recommended that “DHS document when the charging determination is made, in order to determine compliance with the “48-hour rule” and also that “DHS convert the 72-hour NTA serve objective to a formal requirement.” It further recommended that “DHS specify the ‘extraordinary circumstances’ and the ‘reasonable period of time’ when circumstances prevent the charging determination within 48 hours,” and that “DHS provide, on a case-by-case basis, written justification for imposing the ‘extraordinary circumstances’ exception and place a copy of this justification in the detainee’s A-File.” Report of the Office of the Inspector General: 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) at 189.

The same report recommended that the Office of General Counsel establish processes for identifying “legal issues of concern,” such as the “‘hold until cleared’ policy and immigration laws and regulations.” Id. at 192.

In response to the Inspector General report, DHS issued internal guidance with regard to the "48-hour rule." While this guidance moves in the direction of clearer rules for timely charging determinations and timely service of immigration charges on persons in detention, the guidance contains a broad emergency exception that could swallow the rule.5 The November 21, 2003 Memorandum also addressed the recommendation for formal processes to address issues of legal concern. Specifically, it advised that DHS was working with DOJ to create policies to identify key senior positions within each Department to resolve these types of issues. Id. at 7-8.

With regard to the recommendation that DHS examine the limits on its legal authority to detain individuals after they have received final orders of removal or voluntary departure orders, the November 21, 2003 Memorandum pledged to "ensure that post-order custody reviews are conducted consistently and effectively, and ... will issue new guidance to ICE field offices to guarantee that these reviews are completed." However, DHS also advised that the opinion of the DOJ Office of Legal Counsel would govern DHS policies and practices in this area. Id. at 8-9

C. Judicial Branch

Two Courts of Appeals have addressed the constitutionality of the procedures set forth in the Creppy memorandum. In *New Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), the Third Circuit rejected the notion that the public has a First Amendment right of access to immigration court proceedings. The Sixth Circuit disagreed in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), holding that such a First Amendment right does exist and that the INS directive requiring closure of “special interest” deportation cases infringed on the newspapers’ First Amendment rights.

The Supreme Court declined to resolve the issue. Although it denied the plaintiff’s petition for *certiorari* in the Third Circuit case, it did so only after the government represented to the Court that immigration proceedings for virtually all of the special interest detainees had already been completed and as a result any decision would have very little practical impact on the government. (Brief for Respondents in Opp. to Petition for a Writ of Certiorari, filed Apr. 2003, available at http://www.usdoj.gov/osg/briefs/2002/0responses/2002-1289.resp.pdf.) The government confirmed that it was reviewing and would likely revise the procedures and regulations at issue in the Third and Sixth Circuit cases. (Id., at p. 14.) The Creppy Memorandum, however, has not been rescinded.
CHAPTER EIGHT
Revising Attorney General Guidelines on FBI Investigations

I. The Problem

In the last months of the Bush Administration the Department of Justice rewrote the Attorney General Guidelines (the “Guidelines”) for FBI investigations, removing important restrictions on the FBI’s investigative authorities and opening the door to racial profiling. The new Guidelines consolidated existing Guidelines governing FBI criminal investigations, national security investigations, and foreign intelligence collection operations, which the Bush Administration had already loosened considerably in 2002, 2003, and 2006, respectively. But the new Guidelines go much further by overturning longstanding limitations on FBI investigations of public demonstrations, and authorizing the FBI to conduct invasive “assessments” without having a factual predicate to justify an investigation of any kind.

Assessments require only an “authorized purpose,” meaning that whenever the FBI claims it is acting to protect against criminal or national security threats, or simply to collect foreign intelligence, *FBI agents may investigate people or organizations they have no factual basis for suspecting of wrongdoing*. No supervisory approval is required before an agent may initiate an assessment, and there are no reporting requirements. The Guidelines allow the FBI to utilize a number of intrusive investigative techniques during assessments including unlimited physical surveillance, searching commercial databases, tasking informants to attend meetings under false pretenses and engage in other surveillance activities, and engaging in “pretext” interviews in which FBI agents misrepresent their identities in order to elicit information. These “assessments” could even be conducted against an individual simply to determine if he or she would be suitable as an FBI informant. Nothing in the new Guidelines protects entirely innocent Americans from being thoroughly investigated by the FBI. The new Guidelines explicitly authorize the surveillance and infiltration of peaceful advocacy groups in advance of demonstrations, thus threatening First Amendment activities, and they do not clearly prohibit using race, religion, or national origin as factors in initiating assessments.

The new Guidelines incorporate the 2003 Department of Justice ban on racial profiling in federal law enforcement, but that ban specifically exempts national security investigations. By removing the distinction between criminal and national security investigations, the new Guidelines seem to allow using race, religion, ethnicity and national origin as factors in determining who will be subjected to assessments or investigations. In testimony regarding the new Guidelines, FBI officials have confirmed that race, religion, ethnicity and national origin can be used as “a” factor in determining whether a person is subject to investigation, though not the “sole” factor.
The FBI has not had such unfettered authority since Attorney General Edward Levi wrote the first Attorney General Guidelines in 1976, after revelations that the FBI had widely abused its investigative powers in targeting political opponents and civil rights activists for investigation. The Levi Guidelines were adopted to forestall legislative efforts to write a statutory charter limiting the FBI’s investigative authority. Subsequent Attorneys General have revised or written new Guidelines several times over the years, often in response to new allegations of abuse, creating a constantly changing set of authorities that govern FBI investigative activities.

II. Proposed Solutions

A. Guiding Principles

1. Racial and ethnic profiling is unconstitutional, ineffective and counterproductive as an investigative technique, and it should be banned in all instances.

2. The FBI should be prohibited from initiating any intrusive investigative activity regarding a U.S. person absent information or an allegation that such person is engaged or may engage in criminal activity, or is or may be acting as an agent of a foreign power. A preliminary investigation opened upon such information or allegation should be strictly limited in scope and duration, and should be directed toward quickly determining whether a full investigation, based on facts establishing reasonable suspicion, may be warranted.

3. In each investigation, the FBI should be required to employ the least intrusive means necessary to accomplish its investigative objectives. The FBI should consider the nature of the alleged activity and the strength of the evidence in determining what investigative techniques should be utilized. Intrusive techniques such as recruiting and tasking sources, law enforcement undercover activities, and investigative activities requiring court approval should only be authorized in full investigations, and only when less intrusive techniques would not accomplish the investigative objectives.

4. The FBI should be prohibited 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 authorized criminal or national security investigation, and there are reasonable grounds to suspect the subject of the information is or may be involved in the conduct under investigation.

5. All investigative activities conducted by the FBI should be properly documented in a manner that can be audited by internal inspectors and the Department of Justice Inspector General as well as to facilitate congressional oversight. The FBI should regularly report raw numbers regarding the
number and type of investigations (including assessments) opened and closed each quarter, the number of individuals under investigation, the number of U.S. persons under investigation, and the number of times specific investigative techniques were implemented.

6. Supervisory approval should be required for any level of investigation other than searches of public records and public websites, searches of FBI records, requests for information from other federal, state, local, or tribal law enforcement records, and questioning (but not tasking) previously developed sources.

B. Proposed Measures

1. Executive
   a. The new President should direct the Attorney General to evaluate all FBI investigative activities and end any practices that are illegal, ineffective, or prone to abuse.

   b. The incoming President should direct the Attorney General to immediately and thoroughly review the new Guidelines as well as all previous guidelines issued during the past eight years and to amend them to make them consistent with the guiding principles above.

   c. The new President should direct the Attorney General to revise the Department of Justice ban on racial profiling in federal law enforcement to close the existing exemption for national security and border integrity.

   d. The new President should work with Congress to pass the Ending Racial Profiling Act (HR 4611; S 2481).

   e. The new President should work with Congress to establish a statutory investigative charter for the FBI that limits the FBI’s authority to conduct investigations without specific and articulable facts giving reason to believe that an individual or group is or may be engaged in criminal activities, is or may be acting as an agent of a foreign power.

2. Legislative Changes
   a. Pass the Ending Racial Profiling Act (HR 4611; S 2481).

   b. Establish a legislative charter for the FBI, limiting the FBI’s investigative authorities by requiring a factual predicate sufficient to establish reasonable suspicion before intrusive investigative techniques may be authorized, and prohibiting investigations based upon the exercise of First Amendment rights.
3. Legislative Appropriations (Solutions w/Funding Requests)
   a. Enact legislation to de-fund any FBI activities that use race, religion,
   ethnicity or national origin as a criterion for investigation, except where
   there is a specific subject description.
   b. Enact legislation to de-fund any FBI activities that chill the free exercise
   of First Amendment rights.

III. Allies*

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   The ALA Policy Manual: The Rights of Library Users and the USA
   Patriot Act (52.4.5) available at
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   1_3.pdf

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

IV. Counter-Arguments and Rebuttal

Proponents of the new guidelines will likely maintain that these changes help transform the FBI into a domestic intelligence agency. The fact that the new Guidelines will only take effect less than two months before the end of the Administration casts doubt on the contention that the new Guidelines are necessary to enable the FBI to carry out its responsibilities. A new administration that will have to implement these guidelines should carefully review them, rather than accepting a policy choice made by an outgoing administration in its waning days. Moreover, even as the FBI plays an important role in national security matters, it still must maintain its longstanding and vital role in investigating crime. The recent financial crisis and the dearth of agents to investigate corporate fraud and other financial crimes presents a compelling example of the critical role played by the FBI in many areas that profoundly affect the lives of Americans and the well-being of the United States.
Proponents of the new guidelines also favor one set of rules for all types of FBI activities. They maintain that a single set of guidelines is more sensible and facilitates better compliance by agents. It is noteworthy that they advance this argument even as the new guidelines reduce significantly the requirements for supervisory approvals and other internal checks on investigative powers. Nonetheless, the principal benefits of a single set of guidelines can be maintained whileremedying the serious substantive failings of the current guidelines.

V. Recommended Documents for Further Information

a. Letter from ACLU to Judiciary Leadership regarding inquiry into the use of racial profiling by the FBI (July 9, 2008), available at http://www.aclu.org/racialjustice/racialprofiling/35920leg20080709.html


c. EPIC Attorney General Guidelines Page: http://epic.org/privacy/fbi/


h. Why the Supreme Court Got It Wrong When It Rejected a Government Whistleblower’s First Amendment Claim, FINDLAW (June 7, 2006) available at http://writ.news.findlaw.com/commentary/20060607_radack.html
APPENDIX
Revising Attorney General Guidelines on FBI Investigations

I. Jurisdiction

A. Executive Branch: The Attorney General has the discretion to re-write the FBI investigative guidelines pursuant to Executive Order 12333, and 28 U.S.C. §§ 509, 510, 533 and 534.

The President has authority to amend Executive Order 12333 and/or to issue a new Executive Order and restate the goals, direction and/or responsibilities of the FBI with respect to its investigative efforts. (President Bush last amended Executive Order 12333 on July 30, 2008.)

The Attorney General has the discretion to revise the June 2003 Guidance Regarding the use of Race by Law Enforcement Agencies, to close the existing exemption for national security and border integrity.

B. Legislative Branch: The Senate and House Judiciary and Intelligence Committees have jurisdiction to create a legislative charter for FBI investigations, and/or can limit the use of specific investigative techniques through statute.

Congress has the authority to deny requested funds and/or to defund FBI activities. Appropriations are handled principally through the Commerce, Justice, Science and Related Agencies, with appropriations bills considered for markup by subcommittees of the same name in both chambers’ full Appropriations Committees. Similarly, Congress can provide resources and authority to the General Accounting Office and the DOJ Inspector General to collect and analyze information on implementation of the Guidelines and to report on same.

The Senate and House Judiciary Committees have jurisdiction to review the Ending Racial Profiling Act (currently HR 4611, S 2481) and to send the proposed legislation to the House and Senate floors for a vote.

II. Status of Actions

A. Executive Branch: Attorney General Edward Levi created the first FBI Domestic Security Guidelines in 1976. As noted, these Guidelines were created to forestall the creation of a statutory charter after revelations of widespread FBI surveillance of civil rights and activists through its counterintelligence programs. The Levy Guidelines were successful in forestalling the creation of a statutory charter in part because Congress understood that the Guidelines and any changes thereto would be subject to Congressional review and oversight. When later Attorney Generals amended the Levy Guidelines (prior to 2002), they did so each time with such consultation and oversight.
On May 30, 2002, Attorney General John Ashcroft issued revised Guidelines, but this time without Congressional consultation or oversight. The 2002 Ashcroft Guidelines greatly expanded the FBI’s data collection authority and loosened parameters for investigations. Attorney General Ashcroft revised the Guidelines again in 2003, and the Guidelines were further revised in 2006.

Attorney General Mukasey proposed the current Guidelines in August 2008, and issued them on September 29, 2008. The Guidelines will become effective on December 1, 2008.

B. Legislative Branch

Guidelines: The House Judiciary Committee held a hearing on the Guidelines on September 16, 2008 and the Senate Judiciary Committee heard testimony on the proposed Guidelines on September 17, 2008. On September 23, 2008, Senators Dick Durbin (D-IL), Edward Kennedy (D-MA) and Russ Feingold (D-WI) wrote to Attorney General Mukasey expressing concern regarding the Guidelines. The Senators asked the Attorney General to revise the Guidelines (1) to prohibit profiling on the basis of race, religion, ethnicity, national origin and religion; and (2) to require a factual predicate for the basis for initiating assessments. The Senators also asked the Attorney General to include protections in the Guidelines for United States persons about whom information is collected, retained and shared. (That same day the Senate Intelligence Committee held a hearing on the Guidelines, with John D. Rockefeller IV (D-W VA) presiding.)

The Guidelines, as issued on September 29, 2008, do not contain the modifications requested by Senators Durbin, Kennedy and Feingold.

On October 3, 2008, John Conyers (D-MI) (Chairman of the House Judiciary Committee), Robert C. “Bobby” Scott (D-VA) (Chairman of the House Crime, Terrorism and Homeland Security Subcommittee) and Jerold Nadler (D-NY) (Chairman of the House Constitution, Civil Rights and Civil Liberties Subcommittee) called on the Department of Justice to postpone the effective date of the Guidelines until the new Administration had the opportunity to review and approve them.

Statutory Charter: There has not been recent activity regarding a statutory charter for the FBI. In 2002, Senator Patrick Leahy (D-VT) introduced the FBI Reform Act, which would have at least strengthened Congressional (and also Department of Justice) oversight of the FBI, but this bill did not reach the full Senate for a vote despite passing the Senate Judiciary Committee by a unanimous vote.

Ending Racial Profiling Act: Senator Russ Feingold (D-WI) and House Judiciary Chairman John Conyers (D-MI) introduced the Ending Racial Profiling Act in the Senate (S 2481) and House (HR 4611), respectively. S2481 has been
referred to the Senate Judiciary Committee, but the Committee has not taken action on the bill. Likewise, JR 4611 has been referred to the House Judiciary Committee, but the Committee has not taken action on that bill.

C. Judicial Branch: As of October 29, 2008, there is no pending litigation and there are no court decisions regarding the new Guidelines.

In promoting the Guidelines, Attorney General Mukasey indicated that the FBI would abide by the Department of Justice’s June 2003 “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies” ("DOJ Guidance"), which addresses past judicial decisions by recognizing the United States Supreme Court’s well-settled position that “all racial classifications by a government actor are subject to the ‘strictest judicial scrutiny’” (quoting Adarand Constructors Inc. v. Peña, 515 U.S. 200, 224-25 (1995)). The DOJ Guidance goes on to state that “the legality of particular, race-sensitive actions taken by federal law enforcement officials in the context of national security and border integrity will depend to a large extent on the circumstances at hand. In absolutely no event, however, may federal officials assert a national security or border integrity rationale as a mere pretext for invidious discrimination.” DOJ Guidance. The DOJ Guidance emphasizes that “[i]n investigating or preventing threats to national security . . . Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and the laws of the United States.” DOJ Guidance (emphasis added). In this regard, while the Supreme Court has recognized that race may be a potential factor considered (but not the sole factor) in government action in the national security context, Grutter v. Bollinger, 539 U.S. 306, 317 (2003), the Court likewise strongly cautioned that that the “use of race to advance that objective must be narrowly tailored.” 539 U.S. at 352. The use of race as a factor, even a small factor, is never permissible when not narrowly tailored. For example, in Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007), the Court struck down the use of race when used as a “tie-breaker” to determine which students would fill open slots at oversubscribed Seattle schools. In light of the potential threat to individual civil liberties brought about by the changes in the new Guidelines, the DOJ must take care to ensure it does not overstep the bounds of the Constitution.
CHAPTER NINE

Updating the Law Governing the Privacy of Electronic Communications

I. The Problem

The Electronic Communications Privacy Act (ECPA) of 1986 established workable standards for government surveillance of email and stored communications in criminal cases. However, ECPA has been outpaced by technological developments and privacy safeguards have not yet been established for information related to new electronic services. For example, cell phone service providers now routinely store information about the location of their customers while their cell phones are turned on, but ECPA does not specify a standard for law enforcement access to location information. Moreover, the emergence of “cloud computing,” which enables storage on remote computers of business records and information such as personal calendars, photos, and address books, raises new privacy issues that require clear standards for custodians of this information who receive government requests for access to it. Currently, this information is on a weaker privacy footing than the same information when it resides in the user’s computer. A patchwork of confusing standards and conflicting judicial decisions has arisen, and it has confounded service providers and created uncertainty for law enforcement officials.

Strong statutory standards, coupled with increased clarity, would be good for business, good for privacy, and good for law enforcement.

II. Proposed Solutions

A. Guiding Principles

Fourth Amendment standards, including probable cause, should govern law enforcement access to communications contents and to location information, which many consumers regard as the most sensitive non-content information available to the government. Surveillance statutes should be updated to account for the ways Americans communicate today. The level of the privacy afforded to communications should be made technology neutral so that information stored in a remote computer enjoys the same level of Fourth Amendment protection it would enjoy if stored on the user’s desktop computer.

B. Proposed Measures

ECPA should be updated to tighten and clarify the standards for government access to data that is that is communicated and stored and to take account of new communications technologies:

1. Comprehensive Fourth Amendment standards, including probable cause, should be required for law enforcement access to:
i. Location information, regardless of whether it is stored or is collected in real time;

ii. Email stored with a communications service provider for more than 180 days – the same standard that is imposed for email stored for shorter periods of time – and all email regardless of whether it has been opened by the recipient;

iii. User-generated content, regardless of whether it is maintained on a desktop or on the Web; and

iv. Information maintained on a social networking page that is not open to the public.

2. The standard for issuing a pen register or trap and trace order, which can be used by law enforcement to access in real time, for example, a log of who a person telephones and who telephones the person, should be tightened to require at least specific and articulable facts that the information sought is relevant to a pending, full, investigation. The statute should also be clarified to ensure that under no circumstances is communications content to be collected based on such an order.

3. Consistent with current Department of Justice policy and the First Circuit’s en banc decision in U.S. v. Councilman, 418 F.3d 67 (1st Cir. 2005), ECPA should be further clarified to ensure that any real-time or prospective collection of communications content is an “intercept” requiring an intercept order, regardless of whether that content is acquired while it is in temporary electronic storage incident to transmission.

4. The statutory exclusionary rule, which now applies to the contents of illegally intercepted telephone calls, should be extended to cover the contents of illegally intercepted email and other electronic communications.

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IV. Counter-Arguments and Rebuttal

Agencies of the federal government engaged in electronic surveillance, such as the FBI/Department of Justice, and some state law enforcement agencies, will be hesitant to support measures to require more judicial oversight of their surveillance activities. However, DOJ representatives have often argued for the need to update surveillance laws to keep pace with technology. Law enforcement will benefit from the increased clarity in surveillance standards that an update to the law would provide. It would help agents better understand the facts that would need to be shown in order to secure a surveillance order, and it would facilitate cooperation with those orders from providers of communications services.

In addition, the Department of Justice has argued that the Fourth Amendment does not cover business records, and it even argues that communications content maintained
by a service provider, has no Fourth Amendment protection. This is all the more reason for Congress to step in and clarify the level of protection that will be afforded these communications.

V. Recommended Documents for Further Reading:

a. Center for Democracy & Technology Report on Digital Search and Seizure: 

b. Electronic Frontier Foundation on cell phone tracking: 
   http://www.eff.org/issues/cell-tracking

c. Electronic Frontier Foundation on pen registers and trap and trace devices: 
   http://www.eff.org/issues/pen-trap

d. Electronic Privacy Information Center wiretapping page: 
   http://epic.org/privacy/wiretap/

   http://commdocs.house.gov/committees/judiciary/hju67343.000/hju67343_0.HTM


g. Patricia L. Bellia & Susan Freiwald, Fourth Amendment Protection for Stored E-mail (Notre Dame Law School, Legal Studies Research Paper No. 08-19; 5/9/08 Draft – do not cite or quote without permission)


i. The Electronic Communications Privacy Act (ECPA)
   i. 18 U.S.C. §§ 2510-2522 – Wire and Electronic Communications Interceptions and Interception of Oral Communications
   ii. 18 U.S.C. §§ 2701-2712 – Stored Wire and Electronic Communications and Transactional Records Access
   iii. 18 U.S.C. §§ 3121-3127 – Pen Registers and Trap and Trace Devices
APPENDIX

LEGISLATIVE, EXECUTIVE, AND JUDICIAL ACTION on THE ELECTRONIC COMMUNICATIONS PRIVACY ACT

I. Jurisdiction

A. **Congress:** Congress has the authority to enact legislation necessary to update ECPA. The Judiciary committees in both the House and Senate have authority over any such legislation.

B. **Executive Branch:** The Department of Justice, and within DOJ, the FBI, are the executive branch agencies that would be most effected by changes in ECPA.

II. Status of Actions in Legislative, Executive and Judicial Branches

A. **Legislative:**

1. The Electronic Communications Privacy Act was signed into law on Oct. 21, 1986 as Title III of the Omnibus Crime Control and Safe Streets Act (P.L. 99-508). ECPA has been amended several times. Most recently, ECPA was amended, and its privacy protections weakened, by the USA PATRIOT Act (P.L. 107-56), enacted on Oct. 26, 2001. It was again amended by the USA PATRIOT Act Improvement and Reauthorization Act of 2005 (P.L. 109-177), which was enacted on March 9, 2006. Finally, it was again amended by the FISA Amendments Act of 2008 (P.L. 110-261), which was enacted on July 10, 2008.

2. A number of bills have been introduced to update ECPA to set or to adjust standards for location information, stored email, and pen registers and trap and trace devices. The leading bills, both from the 106th Congress, were:

   a. Electronic Communications Privacy Act of 2000 (H.R. 5018, 106th Congress) – Introduced by Rep. Charles Canady (R-FL); Referred to House Committee on the Judiciary where it passed 20-1 on Oct. 4, 2000; no action on House floor

   b. Electronic Rights for the 21st Century Act (S. 854, 106th Congress) – Introduced by Sen. Patrick Leahy (D-VT); Referred to Senate Committee on the Judiciary; no action

3. In addition, the E-mail Privacy Act of 2005 (S. 936, 109th Congress) was introduced in response to the *U.S. v. Councilman* litigation to clarify the definition of "intercept" to mean the aural or other acquisition of the contents
of any wire, electronic, or oral communication contemporaneous with transit, or on an ongoing basis during transit, through the use of any electronic, mechanical, or other device or process, notwithstanding that the communication may simultaneously be in electronic storage (thus covering e-mail communications) – Introduced by Sens. Patrick Leahy (D-VT) and John Sununu (R-NH); Referred to Senate Committee on the Judiciary; no action.

B. Executive

The Department of Justice published a 2002 manual on seizing computers and obtaining electronic evidence of crime:
DOJ is reportedly preparing an update of the manual.

C. Judicial

1. Key location information cases:

   a. Magistrate Judge Smith’s decision, In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth., 396 F. Supp. 2d 747 (S.D. Tex., 2005) (supporting use of probable cause standard)

   b. Judge Lenihan’s decision, In re the Application of the United States of America for an Order Directing a Provider of Electronic Commc’n Serv. to Disclose Records to the Gov’t, 534 F. Supp. 2d 585 (W.D. Pa., 2008) (most recent published federal case supporting MJ Smith’s decision and use of probable cause standard)

2. Key stored e-mail cases:

   a. Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2004) (holding that e-mail messages are in storage for purposes of the Stored Communications Act even if they have already been delivered to the account holder)

   b. Warshak v. U.S., 490 F.3d 455 (6th Cir. 2006) (upholding district court’s decision that reasonable expectation of privacy triggered probable cause requirement; later vacated on ripeness grounds, 532 F.3d 521 (6th Cir. 2008)

      See also Electronic Frontier Foundation amicus brief in Warshak v. U.S. (Nov. 22, 2006)
CHAPTER TEN

Fusion centers and the expansion of domestic intelligence

I. The Problem

The Bush Administration’s 2007 National Information Sharing Strategy established state and local fusion centers as the federal government’s primary mechanism for collecting and disseminating domestic intelligence. The federal government has fueled the growth of these state and local intelligence centers, and has organized them into a national network that feeds information gathered at the local level into the Director of National Intelligence’s Information Sharing Environment (ISE), where it becomes accessible to all participating law enforcement agencies as well as the larger intelligence community. While efficiently sharing legally gathered criminal intelligence information among law enforcement agencies is a laudable goal, the federal government has encouraged these entities to broaden their collection efforts “beyond criminal intelligence, to include federal intelligence as well as public and private sector data.” This expansion of intelligence collection at the state and local level raises profound privacy and civil liberties concerns for all Americans, particularly because these fusion centers often incorporate non-law enforcement participants, including private sector companies and the U.S. military, in their intelligence operations.

The police power to investigate combined with the secrecy necessary to protect legitimate law enforcement operations provide ample opportunity for error and abuse. In May 2008, the San Diego Union-Tribune revealed a scandal involving the Los Angeles County Terrorism Early Warning Center (LACTEW). A group of military reservists and law enforcement officers led by the co-founder of the LACTEW engaged in a years-long conspiracy to steal highly classified intelligence files and secret surveillance reports. (see Rick Rogers, Records Detail Security Failure in Base File Theft, San Diego Union-Tribune, May 22, 2008)

Yet the federal government is rapidly moving forward to create what amounts to a national domestic intelligence system, without proper guidelines to regulate these activities and without appropriate congressional and public oversight. In January 2008 the Director of National Intelligence published “functional standards” for “suspicious activity reporting,” to encourage state and local police to collect and report non-criminal “suspicious” behavior to the fusion centers and the ISE. In August 2008 the Departments of Justice and Homeland Security endorsed a Los Angeles Police Department suspicious activity reporting program that defines innocuous First Amendment protected activities like taking photographs or videos, taking notes, and espousing extreme beliefs as “suspicious” behavior that could indicate terrorist related activity. In July 2008, the Department of Justice proposed a rule to amend the primary federal regulation governing criminal intelligence databases (28 CFR Part 23) to expand both what information can be collected by law enforcement agencies, and with whom it may be shared. (see 73 Fed.
Reg. 44673). This regulation (28 CFR Part 23) was part of a series of law enforcement reforms initiated in the 1970s to curb widespread abuses of police investigative authorities for political purposes, particularly by police intelligence units. Encouraging the collection of information not reasonably linked to criminal activity while weakening the regulations governing intelligence systems will likely lead to similar abuses.

II. Proposed Solutions

A. Executive Action

1. The President should review the National Information Sharing Strategy to ensure that all federal information sharing programs are carefully bounded to protect the privacy and civil liberties of U.S. persons.

2. Federal regulations should be revised to ensure that no personally identifiable information can be collected in a criminal intelligence system without reasonable suspicion that the person is or may be involved in criminal activity. Previous regulatory restrictions on the dissemination of information from criminal intelligence systems contained in 28 CFR Part 23 should be reinstated.

3. The President should issue a new National Information Sharing Strategy that incorporates the following principles:

4. All information collected, analyzed, or shared must comply at a minimum with the Federal Privacy Act, and where stronger state statutes exist the additional privacy protection afforded must apply.

5. Information Fusion Centers must have a single operational definition for their mission and clearly defined scope for their operation.

6. The Department of Homeland Security should fully disclose the location, jurisdiction served, and amount of federal funding provided to each intelligence fusion center operating within the United States.

7. Prohibit no-bid contracting, and require publication of contracts and listing of all private sector data sources used in fusion center data collection and analysis.

8. Require an annual report from the Secretary of Homeland Security to the Congress, on each fusion center, which includes the number of arrests, prosecutions, and convictions by category of offense directly related to fusion center operations.

9. Intelligence Fusion Centers should be subject to federal Privacy Impact Assessment rules.
10. The Department of Justice or Department of Homeland Security Inspector General should launch an investigation of information fusion centers to review their compliance with existing federal laws intended to protect due process, privacy, civil liberty, and civil rights.

11. Federal reporting requirements should direct that each information fusion center make public the partnering organizations, businesses and government entities engaged in the effort.

12. The U.S. military should be strictly prohibited from participating in domestic intelligence activities.

B. Legislative Changes

1. Congress should conduct oversight hearings to examine the threat fusion centers pose to the privacy and civil liberties of U.S. persons.

2. Congress should codify restrictions on the collection of domestic intelligence information, to restrict the collection of personally-identifiable information that is not linked to illegal activity, using previous versions of 28 CFR Part 23 as a guide.

C. Legislative Appropriations (Solutions w/ Funding Requests)

1. Congress should withdraw funding from information sharing programs that do not incorporate effective privacy and civil liberties protections.

III. Allies*

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listed do not necessarily endorse the specific language in every proposed solution, but
they do agree that the proposals reflect the general principles that should govern policy in
this area. Please contact the individuals and organizations listed in this section for more
information.

IV. Counter-Arguments and Rebuttal

A. Fusion centers are needed to implement the Information Sharing Environment
(ISE) as part of an effective counterterrorism strategy. Sharing of information
among federal, state, and local officials, and broad investigative powers are
necessary to combat the new threats posed in our post-9/11 world.
The 9/11 Commission recommended that federal, state, and municipal
governments enhance terrorism-related information sharing. DHS argues that: 1)
state-based fusion centers implement this recommendation; and 2) the fusion
centers cannot be effective if they are subject to 51 different sets of privacy and
transparency laws. Federal intelligence entities argue that limits on state privacy
and transparency laws are necessary to harmonize the rules governing information sharing, and increase the amount of data shared by federal intelligence sources.

The 9/11 Commission Report also said information sharing programs must be accompanied by safeguards for "the privacy of individuals about whom information is shared," which the DHS has failed to establish. In the absence of a stronger federal standard, state privacy and transparency laws uphold the privacy and oversight requirements set out by the 9/11 Commission. Moreover, these laws strengthen federalism and reflect the commitment of the White House's National Strategy for Information Sharing to "comply with all applicable privacy laws." Finally, there is no evidence that state laws hinder anti-terrorism information sharing. Indeed, recent studies show that the primary challenge is an insufficient amount of anti-terrorism work. The vast majority of fusion centers have abandoned the exclusively anti-terrorism mission and now focus on an "all crimes" approach, which underscores the need to leave state privacy and open government laws intact.

V. Recommended Documents for Further Information

A. ACLU Fusion Center Report and Update: www.aclu.org/fusion

B. EPIC Fusion Center webpage: http://epic.org/privacy/fusion/

C. EPIC website Virginia Fusion Center: http://epic.org/privacy/virginia_fusion/

D. Proposed changes to 28 CFR Part 23: http://frwebgate1.access.gpo.gov/cgi-bin(TEXTgate.cgi?WAISdocID=114340201613+18+1+0&WAISaction=retrieve

E. Comments to proposed changes to 28 CFR Part 23:


G. Brennan Center: http://brennan.3cdn.net/fcaf421405af856c3e_63m6y9nwb.pdf
APPENDIX

“Fusion Centers and the Expansion of Domestic Intelligence”
Recent Legislative and Judicial Activity

I. Jurisdiction

A. Executive Branch
   Office of the Director of National Intelligence
   Department of Justice
   Department of Homeland Security

B. Legislative Branch
   Senate Homeland Security and Government Reform Committee;
   House Homeland Security Committee;
   House Government Reform Committee;
   Senate and House Judiciary and Intelligence Committees

II. Background/Status of Actions in Legislative, Executive, and Judicial Branches

On July 31, 2008, The Department of Justice and Department of Homeland Security issued proposed rules amending 28 CFR Part 23, the primary federal regulation governing criminal intelligence databases. During the comment period, which ended September 2, 2008, both law enforcement and privacy rights organizations submitted comments expressing concerns about the proposed regulatory changes. The proposed rule amending 28 CFR Part 23 has not been finalized as yet.
CHAPTER ELEVEN

Promoting Government Transparency

The Problem

Since September 11th, massive amounts of government information—documents, databases, reports, etc.—have been removed from agency websites, and unknown quantities of information that would have once been publicly disseminated are kept out of the public’s view and reach and disseminated only on a “legitimate” need to know basis. 1 Administration officials issued memoranda placed off-limits information that agencies previously had discretion to release though the Freedom of Information Act, and authorized new, unrestrained forms of secrecy. This has resulted in at least six categories of problems which are discussed below:

I. Information Removed from Government Websites and “Need to Know” Culture Reduce Public Trust and Security

II. Sensitive But Unclassified/Controlled Unclassified Information Markings Reduce Security by Impeding Disclosure to State, Local and Tribal Authorities, First Responders and to the Public

III. FOIA – National Security Used to Justify Overuse of Exemptions and Limit Public Access

IV. Presidential Records – Executive Order Limits Disclosure; Records Policy Puts National Security History at Risk

V. Secret Intelligence Budget Impedes Oversight

VI. Preemption of State and Local Open Government Laws Promotes Secrecy

Guiding Principles

Our democratic form of government is based on an informed public. Our laws provide structures to guarantee the public's right to know what its government is doing and keep it accountable. Over the last eight years, public access to information has been framed as a blueprint for terrorism and, as a result, keeping information secret has become the default position throughout much of the federal government. By restoring openness in our federal government, the next president and the next Congress will be doing the right thing for our country and something the public overwhelmingly wants. The public does not now trust its government. The new president and Congress will have

1 A partial listing of what was removed from certain agency websites is available at http://www.ombwatch.org/article/articleview/213/1/1/#agency.
to work to restore that trust.²

We agree that certain information needs to be protected from general disclosure, at least for a period of time during which it might be considered critical. The dramatic loss in the availability of information in the wake of the tragedy of September 11th, however, created the false appearance of tension between openness and security. Secrecy does not make for a more secure society. Such restrictions actually reduce security by, in part, preventing the public from learning what we need to know to protect ourselves and our communities and to keep our country safe and secure. Secrecy thus sometimes results in a more vulnerable society and always results in a less accountable government. The next Administration needs to lift restrictions on public access to government information in order to promote the sharing of information that is needed to inform the public of what measures are truly necessary to protect against threats to public safety.

**Recommended Documents for Further Review**


7. Statement of Peter M. Shane, Jacob E. Davis and Jacob E. Davis II Chair in Law Ohio State University Moritz College of Law, to the Constitution Subcommittee

² For instance, the March 2008 Sunshine Week poll found that 3/4 of American adults view the federal government as secretive, and nearly 9 in 10 say it’s important to know presidential and congressional candidates’ positions on open government when deciding for whom to vote. See [http://www.sunshineweek.org/sunshineweek/secrecypoll08](http://www.sunshineweek.org/sunshineweek/secrecypoll08).
of the U.S. Senate Committee on the Judiciary on Restoring the Rule of Law (September 16, 2008) http://feingold.senate.gov/ruleoflaw/testimony/shane.pdf

I. Information Removed from Government Websites and “Need to Know” Culture Reduce Public Trust and Security

A. The Problem

After the attacks on September 11, 2001, vast amounts of information were removed from public accessibility on government Web sites. Any information that could conceivably relate to a terrorism or homeland security topic was scrubbed. There was no way to tally what was removed and no way to learn what criteria agencies used for the removal of information or the guidance under which they have been operating since that time.

Over the last eight years, the executive branch has been transformed into a government that withholds information unless members of the public demonstrate a “legitimate” need to know. This is not only a dangerous mindset in an open society, but it stands in the way of a safer and more secure homeland.

B. Proposed Measures

1. The President should direct the executive branch to operate under the presumption that government information should be made available to the public except under limited and clearly-articulated statutory or regulatory exceptions. 3

2. The president should direct the review of standards and guidelines created and implemented post-September 11th regarding information made publicly-available online. 4

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

D. Counter-Arguments, and Rebuttal

1. The disclosure of information removed would create a “road map” for terrorists.

   The public has a right to information that is not properly classified or properly withheld under a FOIA Exemption. Agencies, sometimes under White House direction, acted out of fear and bureaucratic risk-aversion in the aftermath of Sept. 11th. This is not what the laws and policies of the government direct. It is not likely that with White House leadership there would be significant executive branch opposition. No congressional opposition known.

E. Recommended Documents for Further Review


II. Sensitive But Unclassified/Controlled Unclassified Information Markings Reduce Security by Impeding Disclosure to State, Local and Tribal Authorities, First Responders and to the Public

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A. The Problem

On March 19, 2002, the Bush Administration resurrected a concept from the 1980s, “sensitive but unclassified” information, and, through joint Memoranda from White House Chief of Staff Andrew Card and the Department of Justice, directed agencies to review government information regarding weapons of mass destruction, as well as other information “that could be misused to harm the security of our nation or threaten public safety.”

Although the Administration’s rhetoric was about proper handling and particular sensitivity of information, the result has been that agencies have placed more than 107 unique markings on “sensitive but unclassified” information, eighty-one percent of which are based not on statute or approved regulations, but are the product of department and agency policies. Further, there are more than 131 different labeling or handling processes and procedures. Agencies have also treated these markings as de facto exemptions from public disclosure (both under FOIA and also affirmative disclosure of information that the public needs for its safety and security). Overall, the widespread use of labels to control information deemed sensitive but unclassified has impeded interagency and inter-governmental information-sharing and has threatened the public’s ability to have access to government information it needs to ensure public safety.

On May 9, 2008, the president issued a Memorandum for the Heads of Executive Departments and Agencies on the Sharing of Controlled Unclassified Information that establishes a framework to standardize control markings and handling procedures across the “information sharing environment.” Although the memorandum ostensibly seeks to enact standards across agencies for the designation of information as CUI, it does nothing to decrease the use of these markings. In fact, the memo allows agency’s to continue to make control determinations as a matter of department policy, outside of the usual public notice and comment system. The memo also indicates that a CUI label may be a criterion for release decisions; this policy risks undermining the Freedom of Information Act (FOIA) and disclosure of information to Congress. Further, under the President’s proposed framework, control designations could easily be treated as simply another level of classification, further reducing the public’s access to critical information.

B. Proposed Measures

1. The president should amend or replace the CUI Memorandum with a memorandum that directs agencies to reduce use of information control markings, prohibits reliance on a control marking as a basis for withholding information requested by the public, and includes a positive statement recognizing that information-sharing and transparency improve security and

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making clear that the CUI Framework’s uniform system is intended to increase disclosure wherever possible.\textsuperscript{10}

2. The new administration should also ensure that the implementation of any framework includes measures to reduce unnecessary control labels, such as a system of audits, training, discipline, and internal and public challenges.\textsuperscript{11}

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\textsuperscript{10} See 21\textsuperscript{st} Century Right to Know Report, at 37-38, 86. Legislation directed at achieving these goals has already passed in the House of Representatives: H.R. 4806 (passed House July 30, 2008); H.R. 6575 (passed House Sept. 9, 2008); H.R. 6576 (passed House July 30, 2008); H.R. 6193 (passed House July 30, 2008); see Further Reading at page 12-13.

\textsuperscript{11} *Id.* (all prior references).
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D. Counter-Arguments, and Rebuttal

The problem of sharing information about vulnerabilities, threats and risks across governments and with some affected industries is real. Officials in DHS, intelligence community, some in business communities and in state and local governments argue that these control markings make that sharing possible without resorting to classification and the problems with getting clearances. It took a very long time for the White House Memo to be finalized, apparently because of opposition in some agencies to instituting control. It is not clear who congressional opposition might be.

The widespread use of labels to control information deemed sensitive but unclassified has impeded interagency and inter-governmental information-sharing
and has threatened the public’s ability to have access to government information it needs to ensure public safety. Any new framework has to rein in the creation of these control markings or the problem will persist and worsen. Reps. Thompson, Harman passed legislation in the House codifying the WH Framework with modifications to promote more openness. Senators Lieberman and Collins introduced legislation to codify the Framework government-wide, with some of the modifications in the Harman bill. Rep. Waxman passed legislation in the House that takes a government-wide approach of limiting and controlling the use of control markings.

E. Recommended Documents for Further Review


III. FOIA – National Security Used to Justify Overuse of Exemptions and Limit Public Access

A. The Problem

In the wake of September 11, 2001, the government issued memoranda that are often regarded as having reversed the presumption of disclosure embodied in FOIA. First, on October 12, 2001, Attorney General Ashcroft issued a memo emphasizing FOIA’s exemptions and stating that the Department of Justice would defend agency withholdings of records unless they lacked a sound legal basis in law.\footnote{This memorandum is available at [http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm](http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm).} The Ashcroft memo replaced a memo by Janet Reno that had emphasized discretionary disclosure and required agencies to identify the specific harm that would result from disclosure before withholding documents.\footnote{[http://www.fas.org/sgp/clinton/reno.html](http://www.fas.org/sgp/clinton/reno.html) (“Yet while the Act's exemptions are designed to guard against harm to governmental and private interests, I firmly believe that these exemptions are best applied with specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure in any particular case.”)}
Five months later, Memoranda issued by White House Chief of Staff Andrew Card and the Department of Justice directed agencies to review government information regarding weapons of mass destruction, as well as other information “that could be misused to harm the security of our nation or threaten public safety.” Agencies were told that they should “process any Freedom of Information Act request for records containing such information in accordance with the Attorney General's FOIA Memorandum of October 12, 2001, by giving full and careful consideration to all applicable FOIA exemptions.”

Due to the very broad mandate in the Card-Department of Justice Memoranda, the years since the issuance of the Ashcroft and Card Memoranda have seen a decrease in the government’s reliance on FOIA Exemption 1, the exemption relating specifically to national security, and a staggering increase in the use of many of FOIA’s other exemptions. In some of these cases, agencies have tried to shoehorn national-security-related arguments into exemptions that were not designed to protect national security by claiming that records were exempt because their release would harm national security—even though the records could not properly be classified and withheld under Exemption One. Overall, the memoranda, issued at a time of great fear for national security, contributed to a culture of secrecy that has led to the withholding of many records unrelated to national security concerns.

In particular, according to a study of 25 agencies conducted by the Coalition of Journalists for Open Government, reliance on Exemptions 6 and 7(c), FOIA’s personal privacy exemptions, increased 148% and 176% respectively between 1998 and 2007; reliance on Exemption 5, which includes records covered by the deliberative process privilege, and which was specifically referenced in the Ashcroft memo, increased 95%; and reliance on Exemption 2, which applies to records related solely to the internal personnel rules and practices of an agency, and which was specifically mentioned in the Card memo, increased 389%.

B. Proposed Measures

1. The new President should order the Attorney General to issue a memorandum to heads of departments and agencies rescinding the Ashcroft memorandum and reaffirming FOIA’s presumption of disclosure and the Department of Justice’s commitment to government transparency.

2. The new memorandum should set forth the agency’s policy that records should be released unless there is both a legal basis to withhold them and the

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withholding agency reasonably foresees that disclosure would harm an interest protected by the applicable exemption.\textsuperscript{16}

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D. Counter-Arguments, and Rebuttal

Not likely that with White House leadership there would be executive branch opposition. No known organizational opposition. No congressional opposition known to this being done by a new administration, although there was strong resistance in 110th, when the Republicans controlled the Congress, to revoking the Ashcroft Memo.

E. Recommended Documents for Further Review

IV. Presidential Records – Executive Order Limits Disclosure; Records Policy Puts National Security History at Risk

A. The Problem

Presidential records are the most crucial records for documenting the nation's national security decision-making. For instance, in most of the controversial debates regarding recent national security policies, including warrantless domestic surveillance, rendition and detention policies, interrogation policies, the records at the center of the decision-making are presidential in nature or are being shielded as presidential. Thus, it is critical that presidential records be subject to preservation and disclosure requirements. The Bush Administration has flouted existing requirements by destroying records -- including e-mail during the critical period when the President decided to go to war against Iraq -- and has used an executive order to override congressional efforts to ensure that an accounting of those presidential decisions will eventually be released.

According to a September 2008 GAO report, the National Archives and Records Administration (NARA) has indicated a risk that it will not have the capability to process the Bush administration’s presidential records at the time of the January 2009 presidential transition and has not yet developed a plan to mitigate this significant risk. NARA’s proposed schedule for developing a plan will leave it little time to prepare for and implement the plan, “decreasing the assurance that it will be adequately prepared to meet the requirements of the Congress, the incoming President, and the courts for information contained in the previous administration’s records.”

B. Proposed Measures

1. The new administration should, immediately following the elections, commit to working with the National Archives and Records Administration and Congress to ensure the necessary oversight and resources for the transfer of the Bush presidential records.

2. The new administration should revoke Executive Order 13233, which created new privileges and led to excessive delay in the processing of presidential records for release to the public.  

3. The new administration should support legislation to mandate preservation of presidential records in order to ensure that the most critical records of the American role in the world are not forever lost.


19 Id. Legislation to amend the Presidential Records Act was introduced in the 110th Congress. See H.R. 1255 (sponsored by H. Waxman (CA-30) (Related Senate bill is S. 886, sponsored by Sen. Bingaman.
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(N.M.; Senate Homeland Security and Governmental Affairs)). We believe, however, that this legislation  
should be strengthened.
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D. Counter-Arguments and Rebuttal

Conservative scholars (like the Heritage Foundation) oppose broad legislation, especially reversing an E.O., because they see it as a violation of the separation of powers.\(^20\)

A president working with Congress can overcome separation-of-powers issues. A president can revoke an E.O. with no separation-of-powers issues concerns arising. PRA legislation was introduced in 110\(^{th}\).  

E. Recommended Documents for Further Review


V. Secret Intelligence Budget Impedes Oversight

A. The Problem

Tens of billions of dollars are allocated for intelligence each year, yet for most of the past half century the size of the intelligence budget has been treated as classified information and withheld from public disclosure. This extreme form of secrecy has impeded legitimate public oversight of intelligence, and may even have damaged the intelligence community itself by concealing the diversion of authorized intelligence funds into other non-intelligence programs.

The 9/11 Commission concluded that it was time to end this practice and recommended that “the overall amounts of money being appropriated for national intelligence and to its component agencies should no longer be kept secret.” By act of Congress, disclosure of the total budget for the National Intelligence Program was mandated in 2007 and 2008. No adverse effects on national security have followed the disclosure of the intelligence budget. Accordingly, it should be continued into the future.

B. Proposed Measures

1. The annual disclosure of the intelligence budget total should cease to be an exception and should become the new norm.

2. In order to promote an orderly budget process, the intelligence budgets of the component agencies should also be disclosed, as recommended by the 9/11 Commission.

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allies listed do not necessarily endorse the specific language in every proposed solution, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

D. Counter-Arguments and Rebuttal

Intelligence officials have argued that disclosing even overall budgets year after year could allow adversaries to detect trends in intelligence spending, particularly in periods of rapid budget increases, like the one since the Sept. 11 attacks. Opposition to routine intelligence budget disclosure has been expressed by a congressional minority.

The basis for their opposition has been evaluated and rejected by the 9/11 Commission, which endorsed routine disclosure, and by the full Congress, which mandated disclosure on a trial basis in 2007 and 2008. Other opposition is mostly institutional in the executive branch. No adverse effects on national security have followed the disclosure of the intelligence budget.

F. Recommended Documents for Further Review


VI. Preemption of State and Local Open Government Laws Promotes Secrecy

A. The Problem

The federal government is establishing new state-based databases for law enforcement and homeland security. Information held by state and local governments is subject to state open government and privacy laws. However, “homeland security” has been invoked to reduce transparency and limit privacy rights through: 1) secret agreements imposed by the federal government on state government; and 2) federal pressure to roll back state sunshine and privacy laws.

B. Proposed Measures

1. The next administration should issue guidance that instructs the all federal agencies to respect state open government and privacy laws and prohibits agencies from using contracts or memoranda of understanding to effectively

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limit disclosure under state and local public access laws or otherwise infringe on state government management of state record systems.

2. The President should also direct DHS and the DOJ to make public any existing contracts or memoranda that have such effect.\textsuperscript{23}

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D. Counter-Arguments and Rebuttal

The 9/11 Commission recommended that federal, state, and municipal governments enhance terrorism-related information sharing. DHS argues that: 1) state-based intelligence databases implement this recommendation; and 2) the databases cannot be effective if they are subject to 51 different sets of privacy and transparency laws. Federal intelligence entities argue that limits on state privacy and transparency laws are necessary to harmonize the rules governing information sharing, and increase the amount of data shared by federal intelligence sources.

The 9/11 Commission Report also said information sharing programs must be accompanied by safeguards for "the privacy of individuals about whom information is shared," which the DHS has failed to establish. In the absence of a stronger federal standard, state privacy and transparency laws uphold the privacy and oversight requirements set out by the 9/11 Commission. Moreover, these laws
strengthen federalism and reflect the commitment of the White House's National Strategy for Information Sharing to "comply with all applicable privacy laws."

Finally, there is no evidence that state laws hinder anti-terrorism information sharing. Indeed, recent studies show that the primary challenge is an insufficient amount of anti-terrorism work. The vast majority of state-based intelligence databases have abandoned the exclusively anti-terrorism mission and now focus on an "all crimes" approach, which underscores the need to leave state privacy and open government laws intact.
CHAPTER TWELVE
National Security Letters and Section 215 of the USA PATRIOT Act

I. The Problem

National Security Letters are simple form documents signed by officials of the FBI and other agencies, with no prior judicial approval, compelling disclosure of sensitive information held by banks, credit companies, telephone carriers and Internet Service Providers, among others. Recipients of NSLs are usually gagged from disclosing the fact or nature of a request.

The PATRIOT Act eliminated any effective standard for issuing NSLs. It wiped away the requirement that the information being sought “pertain to” a foreign power or the agent of a foreign power. This requirement used to protect information about Americans because few are agents of a foreign government, a foreign terrorist organization, or another foreign power. Instead, today it is sufficient for the FBI merely to assert that the records are “relevant to” an investigation to protect against international terrorism or foreign espionage. The PATRIOT Act also eliminated the statutory requirement that agents have any factual basis for seeking records. In 2003, Congress dramatically expanded the types of “financial institutions” on which an NSL can be served to include travel agencies, real estate agents, jewelers, the Postal Service, insurance companies, casinos, car dealers, and other businesses not normally considered “financial institutions.”

In addition, advances in technology have made more “digital footprints” more readily available to the government through its NSL authority. For example, the government reportedly used its NSL authority to seek casino and hotel records about hundreds of thousands of travelers who stayed in Las Vegas on a recent New Years Eve – a data dump difficult to do and difficult to sort through without recent advances in technology.

DOJ Inspector General reports in 2007 and 2008 revealed widespread abuses and misuses by the FBI of its NSL authorities. The IG found that the FBI:

• Issued NSLs when it had not even opened the investigation that is a predicate for issuing an NSL;
• Used “exigent letters” not authorized by law to quickly obtain information without ever issuing the NSL that it promised to issue to cover the request;
• Used NSLs to obtain personal information about people two or three steps removed from the subject of the investigation;
• Has used a single NSL to obtain records about thousands of individuals; and
• Retains almost indefinitely the information it obtains with an NSL, even after it determines that the subject of the NSL is not suspected of any crime
and is not of any continuing intelligence interest, and it makes the information widely available to thousands of people in law enforcement and intelligence agencies.

These abuses primarily affect Americans. The IG reports showed that a clear majority of the records obtained with the tens of thousands of NSLs issued annually now pertain to Americans instead of to non-citizens – a reversal brought about by the PATRIOT Act.

Section 215 of the USA PATRIOT Act (the “library records” provision) also expanded the FBI’s power to obtain material from businesses for counterterrorism and anti-espionage purposes. It eliminated the prior requirement that the information sought pertain to an agent of a foreign power and it expanded the kind of material that could be sought and the entities that could be required to provide it. Now, the government can, with a minimal showing to a judge, obtain an order under Section 215 requiring any person or entity to turn over any document or object and can effectively bar the recipient from disclosing that it has done so. For the most part, all the government has to do is prove that the information or object sought is relevant to an investigation to protect against international terrorism or espionage. While a judicial order is required under Section 215, the minimal showing that must be made combined with the broad scope of records that can be obtained makes this power ripe for abuse.

II. Proposed Solutions

A. Guiding Principles

Information obtained with National Security Letters and Section 215 orders can be valuable to counterterrorism and counter espionage investigations. However, more sensitive information warrants stronger due process protections. Thus, for more sensitive information, the government should have to get a court order and should have to prove a closer tie between the person to whom the material pertains and a foreign terrorist organization or foreign government. The President can take immediate steps to implement some reforms; others require legislation.

B. Proposed Measures

1. The next President should direct agency heads to sharply curtail use of NSLs to seek sensitive information about Americans. He should direct the incoming Attorney General to require the FBI to come up with a plan to minimize the collection and retention of personal information about Americans that is obtained with NSLs and Section 215 orders. That plan should require adoption of minimization procedures that comply with Section 101(h) of the Foreign Intelligence Surveillance Act.

2. The next President should also support legislation like the National Security Letters Reform Act (S. 2088 in the 110th Congress) and work with Congress to pass it. The legislation should:
a. Promote uniform practices by allowing only the FBI to issue NSLs;
b. Permit the FBI to obtain only less sensitive information with an NSL, such as information that identifies a person or reveals a person’s home or email address;
c. Permit the FBI to use an NSL to obtain that less sensitive information when it has “specific and articulable facts” that the information sought: (i) pertains to the activities of a suspected agent of a foreign power, and that obtaining the information sought is the least intrusive means that could be used to identify persons involved in such activities; or (ii) pertains to an agent of a foreign power or a person in contact with an agent of a foreign power;
d. Require the government to use other authorities – such as subpoenas in criminal investigations and a judicial order under Section 215 in intelligence investigations – to obtain more sensitive information such as email logs, local and long distance toll billing records, and transactional records from financial institutions;
e. Tighten the standard for issuing an order under Section 215 to require a showing to a judge of specific and articulable facts that the material sought pertains to a suspected agent of a foreign power or a person in contact with or otherwise directly linked to such an agent;
f. Limit to 30 days the period during which the recipient of an NSL or Section 215 order can be gagged, unless the government can prove to a judge that there is reason to believe that a specified harm would come to pass unless the gag is extended;
g. Require adoption of minimization procedures based on FISA Section 101(h);
h. Provide for civil damages, including liquidated damages, to any person aggrieved by a clearly illegal misuse of NSL authorities, and such a provision can be found in H.R. 3189, the House counterpart to S. 2088 in the 110th Congress.

Section 215 of the USA PATRIOT Act and two related provisions will sunset on December 31, 2009 unless Congress acts to reauthorize them. Any reauthorizing legislation should contain these reforms.

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The ALA Policy Manual: The Rights of Library Users and the USA Patriot Act (52.4.5) available at
http://www.ala.org/ala/aboutala/governance/policymanual/policymanual.31_3.pdf

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

IV. Counter-Arguments and Rebuttal:

A. **NSLs are the equivalent in an intelligence investigation to subpoenas in criminal investigations because both are issued without prior judicial review.**  
   This argument fails to recognize that intelligence investigations are more dangerous to liberty than are criminal investigations and therefore require more civil liberties protections. Intelligence investigations are broader and are not limited by the criminal code. They can investigate legal activity including First Amendment activity, so long as it is not the sole focus of the investigation. They are more secretive and less subject to the after-the-fact scrutiny that a prosecutor faces when criminal charges are brought. Unlike a defendant in a criminal case, the target of an intelligence investigation usually never learns that he or she was investigated. And, businesses that receive NSLs are effectively barred from complaining and are perpetually blocked from notifying their customers that their
records have been turned over to the government. Since intelligence investigations are broader, more secretive and subject to less probing after-the-fact scrutiny, protections must be built in at the front end, when sensitive information is being sought.

B. *Increasing the standards for governmental access to information obtained with NSLs or Section 215 orders will inhibit agents’ ability to obtain information necessary to an intelligence investigation early in the investigation.*

This argument fails to appreciate the sensitivity of the records that can be obtained with NSLs and Section 215 orders. A log of a person’s email activity is sensitive information. It should be made available to the government only when a judge finds that there is strong evidence of wrongdoing or of association with a foreign power, such as a foreign terrorist organization or foreign government.

C. *The FBI has put in place internal guidance to address the abuses of NSLs identified in the Inspector General reports.*

While bureaucratic reforms can address some of the abuses of NSLs identified in the IG reports, there is no substitute for reestablishing traditional checks and balances, under which a judge must approve governmental access to sensitive information. And, some of the problems identified simply cannot be remedied by bureaucratic reforms. For example, in one report, DOJ’s IG indicated that he thought that lead attorneys in FBI field offices were reluctant to provide an independent review of NSLs for fear of antagonizing the head of the field office, who supervises the lead attorney. That review is central to the reforms outlined in the FBI guidance. But this institutional shortcoming can only be remedied by independent judicial review.

V. **Recommended Documents for Further Information:**

a. Testimony containing reform proposals:

b. The National Security Letter (NSL) statutes in effect include:
   i. 12 U.S.C. § 3414(a)(5) – Section 1114(a)(5) of the Right to Financial Privacy Act
   ii. 15 U.S.C. § 1681u – Section 626 of the Fair Credit Reporting Act
iii. 15 U.S.C. § 1681v – Section 627 of the Fair Credit Reporting Act
iv. 18 U.S.C. § 2709 – Section of the Electronic Communications Privacy Act
v. 50 U.S.C. § 436 – Section 802 of the National Security Act
vi. 18 U.S.C. § 1510 – Criminalizing violations
vii. P.L. 109-177, Sec. 118
viii. P.L. 109-119, Sec. 119
ix. 18 U.S.C. § 3511

c. Section 215 of the PATRIOT Act:

d. Congressional Research Service Reports on National Security Letters:

e. Relevant Executive Branch materials:
   i. FBI Guidance on National Security Letters (June 1, 2007)
   ii. E.O. 13462 – President’s Intelligence Advisory Board and Intelligence Oversight Board (Feb. 29, 2008) available at http://www.whitehouse.gov/news/releases/2008/02/print/20080229-5.html

f. Department of Justice Inspector General Reports, 2007-08, on NSLs and Section 215:
APPENDIX
LEGISLATIVE, EXECUTIVE, AND JUDICIAL ACTION
on
NATIONAL SECURITY LETTERS and SECTION 215

I. Jurisdiction

A. Congress. Congress has the authority to enact the legislation necessary to correct the problems with National Security Letters. The intelligence and judiciary committees in both the House and Senate share authority over any such legislation.

B. Executive Branch. Even without Congressional action, the President can order the FBI and other elements of the Intelligence Community to adopt reforms. For example, the President could order all agency heads to direct any requests for NSLs through the FBI, which would then determine whether an NSL could be issued, and he could direct the FBI to adopt the minimization procedures outlined above.

II. Status of Actions in Legislative, Executive and Judicial Branches:

A. Legislative: Unless reauthorized by December 31, 2009, Section 215 authority will sunset pursuant to the PATRIOT Reauthorization Act. The NSL statutes, and the changes that were made to them after September 11, 2001, do not sunset. The PATRIOT Reauthorization Act (P.L. 109-177), altered the gag provisions in the NSL statutes and Section 215. Specifically, the legislation allowed an NSL or Section 215 recipient to talk with an attorney “to obtain legal advice or legal assistance with respect to his request,” and it added procedures for judicial review of nondisclosure conditions imposed on the recipient. The bill also made other changes to the statutes, but they were largely cosmetic and did not significantly change the standard for issuing an NSL or applying for a Section 215 order. A number of bills have been introduced that would work more significant changes.

1. Bills introduced in the 110th Congress:
   • National Security Letter Reform Act (S. 2088) – This legislation would raise the standards for issuing NSLs and seeking orders under Section 215, and it would time limit the gag that accompanies such orders and letters. – Introduced by Senator Russell Feingold (D-WI); Referred to Senate Committee on the Judiciary where hearings were held; no additional action taken. This is the leading reform bill in the Senate. Companion bill is H.R. 3189.
   • National Security Letters Reform Act (H.R. 3189) – This legislation would also raise the standards for issuing NSLs and seeking orders under Section 215, and it would time limit the gag that accompanies such letters and orders.
2. Bills introduced in the 109th Congress

- **National Security Letter Judicial and Congressional Oversight Act (H.R. 1739)** – This legislation would require the approval of a Foreign Intelligence Surveillance Court judge or designated United States Magistrate Judge for the issuance of a national security letter – Introduced by Rep. Jane Harman (D-CA); Referred to the House Committees on the Judiciary, Intelligence, and Financial Services; no action.

- **National Security Letter Reform Act (S. 1680)** – This legislation would establish judicial review procedures for National Security Letters – Introduced by Sen. John Cornyn (R-TX); Referred to Senate Committee on the Judiciary; no action taken.

- **S. 2369** – This legislation would sunset the National Security Letters statutes on Dec. 31, 2009 – Introduced by Sen. Arlen Specter (R-PA); referred to the Senate Committee on the Judiciary; no action taken.

- **Stop Self-Authorized Secret Searches Act (H.R. 2715)** – This legislation would establish procedural protections for the use of National Security Letters – Introduced by Rep. Jerrold Nadler (D-NY) and Jeff Flake (R-AZ); Referred to House Committees on the Judiciary and Financial Services; no action taken.

- **SAFE Act of 2005 (S. 737)** – This legislation would establish procedural protections for the use of National Security Letters and orders under Section 215 - Introduced by Sens. Larry Craig (R-ID) and Dick Durbin (D-IL); referred to Senate Committee on the Judiciary; no committee action. This bill was the leading legislation to address the civil liberties problems in the PATRIOT Act in connection with re-authorization of the expiring provisions. House companion bill H.R. 2715.

- **Electronic Communications Privacy Judicial Review and Improvement Act of 2005 (S. 693)** – This legislation would provide for judicial review of national security letters issued to wire and electronic communications service providers – Introduced by Sen. John Cornyn (R-TX); referred to Senate Committee on the Judiciary; no action taken.

3. Bills introduced in the 108th Congress:

- Proposals to exempt libraries from the reach of National Security Letters
o SAFE Act of 2003 (HR. 3352) – Introduced by Rep. Butch Otter (R-ID); referred to the House Committees on Judiciary and Intelligence; no action taken.

o Library and Bookseller Protection Act (S. 1158) – Introduced by Sen. Barbara Boxer (D-CA); referred to the Senate Committee on the Judiciary; no action taken.

o Library, Bookseller, and Personal Records Privacy Act (S. 1507) - Introduced by Sen. Russell Feingold (D-WI); referred to the Senate Committee on the Judiciary; no action taken.

o Protecting the Rights of Individuals Act (S. 1552) – Introduced by Sen. Lisa Murkowski (R-AK) and Ron Wyden (D-OR); referred to the Senate Committee on the Judiciary; no action taken.

o SAFE Act of 2003 (S. 1709) – Introduced by Sens. Larry Craig (R-ID) and Richard Durbin (D-IL); referred to the Senate Committee on the Judiciary; no action taken.

• Proposals to increase Congressional oversight over the use of National Security Letter authority
  o Domestic Surveillance Oversight Act (S. 436) – Introduced by Sens. Patrick Leahy (D-VT), Chuck Grassley (R-IA), and Arlen Specter (R-PA); referred to the Senate Committee on the Judiciary; no action taken.

• Unlike many of the other surveillance provisions of the PATRIOT Act, NSL authorities did not sunset. Bill were introduced to sunset the NSL sections:
  o Benjamin Franklin True Patriot Act (H.R. 3171) – Introduced by Rep. Dennis Kucinich (D-OH) and Ron Paul (R-TX); Referred to the House Committees on the Judiciary, Education and Workforce, Transportation and Infrastructure, Intelligence, and Government Reform; no action taken
  o SAFE Act of 2003 (HR. 3352) – Introduced by Rep. Butch Otter (R-ID); referred to the House Committees on Judiciary and Intelligence; no action taken
  o Patriot Oversight Restoration Act (S. 1695) – Introduced by Sens. Patrick Leahy (D-VT) and Larry Craig (R-ID); Referred to the Senate Committee on the Judiciary; no action taken.
  o SAFE Act of 2003 (S. 1709) – Introduced by Sens. Larry Craig (R-ID) and Richard Durbin (D-IL); referred to the Senate Committee on the Judiciary; no action taken.

4. Hearings in the 110th Congress
  • “National Security Letters: The Need for Greater Accountability and Oversight”: Hearing Before the S. Comm. on the Judiciary (April 23,
2008) available at
http://judiciary.senate.gov/hearings/hearing.cfm?id=3255

- National Security Letters: Closed Hearing of the S. Select Comm. on Intelligence (June 7, 2007) (no transcript available)
- National Security Letters: Hearing Before the Permanent Select Comm. on Intelligence (March 28, 2007) (Transcript not available)

B. Executive: The FBI issued a handful of guidances on NSLs. Helpfully, they were superseded by the FBI Guidance on National Security Letters issued on June 1, 2007.

C. Judicial: The most relevant judicial work on National Security Letters has emerged from the Second Circuit. Prior to the PATRIOT Act reauthorization, two District Court opinions were issued finding 18 U.S.C. § 2709 (the NSL provision that covers records maintained by telephone companies and ISPs) unconstitutional. The first case, Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (Doe I) found that § 2709 “violates the Fourth Amendment because . . . it effectively bars or substantially deters any judicial challenge to the propriety of an NSL request.” Id. at 475. The court also found that § 2709 constituted a prior restraint and content-based limit on speech which was not “narrowly tailored to promote a compelling government interest,” therefore violating the First Amendment. Id. at 511. The second case, Doe v. Gonzales, 386 F. Supp. 2d 66 (D. Conn. 2005) (Doe II), reached essentially the same conclusion on the First Amendment question, but did not reach the Fourth Amendment issue.

Soon after these decisions, Congress passed reauthorizing legislation for the Patriot Act (P.L. 109-177), which significantly altered 18 U.S.C. § 2709 in an attempt to address the First Amendment concerns raised in Doe I and Doe II. Specifically, the legislation allowed an NSL recipient to talk with an attorney “to obtain legal advice or legal assistance with respect to his request,” and it added procedures for judicial review of nondisclosure conditions imposed on the recipient of a NSL. After passage of this legislation, the 2nd Circuit vacated the portion of Doe I dealing with the Fourth Amendment because Doe I decided to no longer press that claim. Doe v. Gonzales, 449 F.3d 415, 419 (2d Cir. 2006). It then remanded the case for reconsideration of the First Amendment argument in light of the new statutory framework. Id. The Court dismissed Doe II as moot because the Government decided to allow Doe II to reveal his identity, so the case was moot.
On remand from *Doe I*, the U.S. District Court for the Southern District of New York reconsidered the new § 2709, and found that the new statutory provisions still violated the First Amendment. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007). Again, the court held that the nondisclosure features of § 2709 violated the First Amendment as both a prior restraint and content-based restriction on speech not narrowly tailored to a compelling government interest. *Id.* at 386. No additional action on the case has been noted.

CHAPTER THIRTEEN
Reform of the National Security Surveillance Laws and Procedures

I. The Problem

The Foreign Intelligence Surveillance Act (FISA) as enacted in 1978 permitted targeted surveillance to collect foreign intelligence information and protect national security. The PATRIOT Act upset the balance established in FISA and permitted surveillance to be conducted in criminal investigations without a showing of criminal probable cause to a judge. The PATRIOT Act also permitted roving FISA wiretaps that violate the specificity and nexus requirements of the Fourth Amendment. Roving FISA wiretap orders are not required to specify the target or the communications facility (such as a telephone) to be surveilled. The FISA Amendments Act of 2008 further diminished FISA safeguards. The FAA permits the interception in the U.S. of communications that Americans have with non-citizens who are abroad without adequate judicial supervision of such surveillance. The FAA also permits that surveillance to occur on a massive scale: if resources permit, the FISA Amendments Act allows the NSA to collect in bulk the international communications that Americans have with non-citizens abroad.

Moreover, even with the significant revisions to the FISA, President Bush asserted virtually unlimited authority under Article II of the Constitution, and secretly authorized the NSA to engage in a warrantless wiretapping program that violated FISA and the Constitution. Telecommunications carriers that assisted in that surveillance program were granted immunity from civil liability, thus leaving those whose rights were violated without any legal remedy against the carriers and inviting them to assist with unlawful surveillance in the future.

Further, in the post-9/11 era, federal agencies turned from the traditional Title III authority to conduct electronic surveillance in the United States and made increasing use of FISA to obtain personal information in the possession of third parties. As a consequence, there was less scrutiny and less accountability of the searches undertaken by the government of US citizens.

Strong statutory provisions, including judicial review, clear standards for lawful surveillance, limitations on the scope and duration of surveillance, formal reporting requirements, as well congressional oversight, and a commitment by the President to follow the law are critical to protect the rights of Americans and ensure that the intelligence agencies are acting effectively and within the law. In the absence of meaningful and enforceable Fourth Amendment standards, government intelligence surveillance activity is subject to abuse.

II. Proposed Solutions

A. Guiding Principles
The Fourth Amendment standards articulated in FISA and related federal wiretap laws, such as ECPA, should govern intelligence surveillance conducted in the United States. The President is bound by FISA, and a court order based on probable cause should be required when surveillance is conducted in the U.S. for intelligence purposes. Telecommunications carriers must be expected to comply with statutory standards to prevent misuse of wiretap authority. They can provide a backstop for illegal surveillance because surveillance usually cannot be conducted without their help.

B. Proposed Measures

1. Congressional leaders should commence a comprehensive investigation of domestic intelligence activities. The investigation should seek to uncover illegal or inappropriate surveillance and prevent it from recurring, and it should include an assessment of the effectiveness of new authorities granted in the USA PATRIOT Act and the FISA Amendments Act. This review should provide the basis for congressional consideration of the USA PATRIOT Act provisions that would otherwise expire on December 31, 2009. The review may also identify other civil liberties issues that warrant changes to FISA.

2. President-elect Obama should announce early in the first 100 days of his administration that it is the policy of his administration to:

   i. Adhere to FISA’s judicial warrant requirements when engaging in surveillance in the United States;
   ii. Comply fully with all intelligence surveillance statutes, and specifically with FISA, and to assert no power under Article II of the Constitution to engage in domestic intelligence gathering that does not fully comply with the law;
   iii. Publicly disclose the government documents, including the opinions of the DOJ Office of Legal Counsel, that provided the legal basis for the NSA’s warrantless surveillance program;
   iv. Direct the Attorney General to withdraw the government’s motion to dismiss pending privacy litigation brought against telecommunications carriers for assisting with unlawful warrantless surveillance, or seek a stay of those proceedings until such time as the Attorney General, based on review of the Inspectors’ General reports required by the FISA Amendments Act, determines that a grant of immunity is appropriate;
   v. Refrain from using the FISA Amendments Act to engage in bulk collection of Americans’ communications, whether domestic or international; and
   vi. Cooperate fully with any investigation of post 9-11 warrantless surveillance.
3. As President, Mr. Obama should work with Congress to amend FISA in his first year in office to:

i. Ensure that surveillance authorized under FISA does not undermine the Fourth Amendment’s requirement of probable cause of crime and that it complies with all Fourth Amendment standards;
ii. Repeal Title II of the FISA Amendments Act:
iii. Strengthen FISA’s exclusivity provisions to ensure that telecommunications firms that provide assistance with surveillance in the future are given immunity only when the surveillance is authorized by the FISA court or is conducted under a specific, articulated statutory exception to the court order requirement;
iv. Require that applications for roving intelligence wiretaps specify either the target of surveillance or the telephone or other communications facility to be surveilled;
v. Amend the FISA Amendments Act to require judicial authorization of surveillance and more searching judicial review of such surveillance, and to bar bulk collection of Americans’ international communications;
vi. Implement additional civil liberties safeguards, including possibly, civil liberties recommendations that may be contained in the Inspectors General report on the FISA Amendments Act, due in July 2009; and
vii. Improve public reporting and transparency so that the effectiveness of FISA surveillance can be evaluated.

4. President Obama should support inclusion of many of these reforms in any legislation that is proposed to reauthorize the FISA provisions that expire at the end of 2009.

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   A Privacy Agenda for the New Administration, available at http://www.eff.org/deeplinks/2008/11/privacy-agenda

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

IV. Counter-Arguments and Rebuttal:

Agencies of the federal government engaged in intelligence surveillance, such as the FBI/Department of Justice, the National Security Agency, and the Office of the Director of National Intelligence will likely oppose measures to require more judicial
oversight of their surveillance activities. However, history has shown that in many cases, judicial oversight is the measure most likely to prevent abuse of surveillance powers.

Telecommunications providers will oppose the repeal of the immunity provisions of the FISA Amendments Act because they could be subjected to substantial civil liability. They will argue that they responded to a call from the President at a time of great national concerns and should not be punished for their patriotism. But the purpose of FISA, and other similar privacy laws, is precisely to make clear the circumstances under which private sector entities may disclose customer information to the government. FISA even anticipated the declaration of war and made special allowances. But the President and the telephone companies disregarded this provision and others when they went forward with the warrantless surveillance program. Because national security concerns test the rule of law, it is particularly important that the statutory requirements be observed and the procedures set out by the Congress for surveillance in the United States be followed.

V. Recommended Documents for Further Information:


g. Electronic Frontier Foundation: NSA spying and litigation related to it: [http://www.eff.org/issues/nsa-spying](http://www.eff.org/issues/nsa-spying)

h. The President’s lack of authority under Article II of the Constitution to engage in warrantless surveillance:
   i. Letter from law professors to Congress questioning the legality of the NSA warrantless surveillance program (Jan. 9, 2006)
ii. DOJ Memorandum in support of the NSA warrantless surveillance program (Jan. 19, 2006)

iii. Second letter from law professors to Congress responding to and questioning DOJ’s analysis of the legality of NSA warrantless surveillance (Feb. 2, 2006)

i. Documents that President-elect Obama should consider releasing to the public, with classified information redacted:
   i. List of Most Wanted Surveillance Documents compiled by Center for Democracy & Technology (link to http://www.cdt.org/security/20070620wanteddocs.php)


k. Congressional Research Service reports on FISA:

l. Books about executive power that have information about warrantless wiretapping:

   i. 50 U.S.C. § 1801-1811 – Electronic Surveillance
   ii. 50 U.S.C. § 1821-1829 – Physical Searches
   iii. 50 U.S.C. § 1841-1846 – Pen Registers and Trap and Trace Devices for Foreign Intelligence Purposes
   iv. 50 U.S.C. § 1861-1863 – Access to Certain Business Records for Foreign Intelligence Purposes
   v. 50 U.S.C. § 1871 – Reporting Requirement

*These statutory provisions are current as of Jan. 2, 2006, the latest published volume of the U.S. Code. The provisions were amended in the 110th Congress by the FISA Amendments Act of 2008 (H.R. 6304, Pub. L. 110-261), signed into law on July 10, 2008.
APPENDIX

LEGISLATIVE, EXECUTIVE, AND JUDICIAL ACTION

on

REFORM OF NATIONAL SECURITY SURVEILLANCE

LAWS AND PROCEDURES

I. Jurisdiction:

A. Congress. Congress has the authority to enact the legislation necessary to reform FISA. The intelligence and judiciary committees in both the House and Senate share authority over any such legislation.

B. Executive Branch. Even without Congressional action, the President can take a substantial step by simply declaring that he will refrain from exercising any power he might have under Article II of the Constitution to engage in domestic intelligence surveillance outside the standards set by Congress. The Department of Justice and other elements of the Intelligence Community such as the NSA and the Director of National Intelligence would be involved in consideration of the reforms outlined above.

II. Status of Actions in Legislative, Executive and Judicial Branches:

A. Legislative: The Foreign Intelligence Surveillance Act (FISA) was enacted into law on October 25, 1978 as P.L. 95-511. It has been amended on a number of occasions over the years.

In the 110th Congress, on August 5, 2007, Congress passed and the President signed the Protect America Act (S. 1927, Pub. L. 110-55), which construed the term “electronic surveillance” under FISA not to include surveillance directed at a person reasonably believed to be located outside the U.S. regardless of the extent to which that person communicated with people in the U.S. It provided for warrantless surveillance of such persons if certain requirements were met. The bill was scheduled to sunset on February 1, 2008. In the face of that sunset, Congress passed and the President signed H.R. 5104, Pub. L. 110-182, which extended the Protect America Act by 15 days. On February 17, 2008, Congress allowed the Protect America Act to expire, but PAA surveillance continued under year-long orders did not begin to expire until August 2008.

Many of the provisions of the Protect America Act were incorporated into the FISA Amendments Act of 2008 (H.R. 6304, Pub. L. 110-261), signed into law on July 10, 2008. Initially, on November 15, 2007, the House passed the Responsible Electronic Surveillance That is Overseen, Reviewed, and Effective (RESTORE) Act (H.R. 3773). On February 12, 2008, the Senate passed its own version of the bill, S. 2248, in the nature of a substitute to H.R. 3773. The House then passed its own amendments to the Senate bill on March 14, 2008.
Ultimately, after extensive negotiations, a compromise bill was passed as H.R. 6304, which became law as the FISA Amendments Act of 2008 on July 10, 2008. Unlike the PAA, the FISA Amendments Act did not exclude surveillance targeting people reasonably believed to be abroad from FISA by construing the term “electronic surveillance” to omit it. However, the bill did permit the executive branch, as opposed to the judicial branch, to authorize such surveillance even though it was conducted in the U.S., and to conduct the surveillance with fewer safeguards than FISA requires for surveillance targeting people in the U.S. It also provided immunity to telecommunications carriers that assisted with unlawful warrantless surveillance.

The following are a list and summary of the amendments to FISA that were enacted from 1994 to 2006 provided by the Congressional Research Service:


The most extensive post-1993 changes to FISA were made in the Counterintelligence and Security Enhancements Act of 1994, which extended FISA to physical searches, in the USA PATRIOT Act and in the FISA Amendments Act.

Bills that would require that roving intelligence surveillance orders specify either the target of surveillance or the facility to be surveilled:
1. SAFE Act of 2005 (S. 737, 109th Congress) – Introduced by Sens. Larry Craig (R-ID) and Dick Durbin (D-IL); referred to Committee on the Judiciary; no committee action; House companion bill H.R. 2715

2. Protecting the Rights of Individuals Act of 2003 (S. 1552, 108th Congress) – Introduced by Sen. Lisa Murkowski (R-AK); referred to Committee on the Judiciary; no committee action; House companion bill H.R. 3352

In addition, a number of other FISA bills were introduced in the 110th and a partial list of them follows:

1. NSA Oversight Act of 2007 (H.R. 11; 110th Congress) – reiterates that FISA the exclusive means of conducting domestic electronic surveillance, among other provisions – Introduced by Rep. Adam Schiff (D-CA); referred to Committee on the Judiciary; no action taken

2. Foreign Intelligence Surveillance Improvement and Enhancement Act of 2007 (S. 1114, 110th Congress) - A bill to reiterate the exclusivity of the Foreign Intelligence Surveillance Act of 1978 as the sole authority to permit the conduct of electronic surveillance, to modernize surveillance authorities, and for other purposes – Introduced by Sen. Dianne Feinstein (D-CA); referred to Senate Committee on the Judiciary; no action

3. H.R. 3138, 110th Congress - Amends FISA to redefine "electronic surveillance" as: (1) the installation or use of an electronic, mechanical, or other surveillance device for acquiring information by intentionally directing surveillance at a particular person believed to be in the United States when that person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes; or (2) the intentional acquisition of the contents of any communication when that person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, if both the sender and all intended recipients are believed to be in the United States. – Introduced by Rep. Heather Wilson (D-NM); Referred to House Committee on the Judiciary and Select Committee on Intelligence; no action

4. Foreign Intelligence Surveillance Modernization Act (H.R. 3782, 110th Congress), which would require a judge to authorized emergency FISA surveillance and physical searches – Introduced by Rep. Rush Holt (D-NJ); referred to House Committee on the Judiciary; no committee action

Hearings in the 110th Congress:


3. “Strengthening FISA: Does the Protect America Act Protect Americans' Civil Liberties and Enhance Security?”: Hearing Before the S. Comm. on the
4. Administration Views of FISA Authorities: Hearing Before the Permanent Select Committee on Intelligence (Sept. 20, 2007)

5. Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans’ Privacy Rights (Part II): Hearing Before the House Committee on the Judiciary (Sept. 18, 2007)

6. FISA for the Future: Balancing Security and Liberty: Hearing Before the Permanent Select Committee on Intelligence (Sept. 18, 2007)

7. Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans’ Privacy Rights (Part I): Hearing Before the House Committee on the Judiciary (Sept. 6, 2007)


B. Executive

The main executive order governing “United States Intelligence Activities,” including FISA, is E.O. 12333:


Several other Executive Orders impact implementation of the legislation as well:

1. E.O. 12139 (enacted May 23, 1979) – Exercise of Certain Authority Respecting Electronic Surveillance
2. E.O. 12949 (enacted Feb. 9, 1995) – Foreign Intelligence Physical Searches
3. E.O. 13383 (enacted July 15, 2005) - Amending Executive Orders 12139 and 12949 in Light of the Establishment of the Office of Director of National Intelligence

C. Judicial

FISA orders are issued by the U.S. Foreign Intelligence Surveillance Court (FISC). Decisions of the FISC are reviewable in the U.S. Foreign Intelligence Court of Review (Court of Review). The following published rules apply to these court proceedings:

1. Rules of the U.S. Foreign Intelligence Surveillance Court (as of Feb. 17, 2006)
2. FISA Court Procedures for Review of Section 501(f) Petitions (as of May 5, 2006)
3. Draft FISA Court Procedures for Review of Section 105B(h) Petitions (Oct. 2007)

The FISA Court of Review spoke approvingly of the PATRIOT Act “significant purpose” test in dicta in In re Sealed Case No. 02-001 (Decided Nov. 18, 2002). A federal district court subsequently struck down the “significant purpose” test in Mayfield v. U.S., 504 F. Supp. 2d 1023 (D. Or. 2007) (holding that §§ 1804 and 1823 of FISA, as amended by Patriot Act are unconstitutional for violating the Fourth Amendment)

- See also Case and Law Review citations to Mayfield (from Westlaw)

In Hepting v. AT&T, No. C-06-0672-JCS (Complaint, N.D. Cal., filed Feb. 22, 2006) plaintiffs sued AT&T for assisting with illegal warrantless surveillance. This case was later consolidated with other cases making similar allegations against telecommunications carriers, and they are the subject of on-going court proceedings in which the immunity provisions of the FISA Amendments Act are being considered.
CHAPTER FOURTEEN
Preventing the over-classification and retroactive classification, and promoting de-classification of, government documents

I. The Problem

During the last 8 years unchecked secrecy has repeatedly corrupted the decision making process by allowing poor or inadequate analysis to prevail. Critically important governmental actions have been shrouded from scrutiny under the mantle of national security, with overclassification, selective and limited declassification, and improper reclassification of previously released information used to avoid oversight and accountability. Often, a claim of national security secrecy ends any public inquiry into allegations of misconduct and selective release of national security information allows the government to control public opinion and avoid embarrassment.

Classification of national security information under Executive Order 12958, as amended, is a critical tool at the disposal of the government to protect our nation, but rampant overclassification undermines the integrity of the very system we depend upon to ensure our safety and security. Security classification has surged dramatically since September 11, 2001, reaching an all-time high of 23 million classification decisions in 2007, nearly triple the number in 2001. The cost to protect classified information has skyrocketed from $4.7 billion in 2001 to $8.65 billion in 2007. Officials from throughout the military and intelligence sectors have admitted that 50 percent or more of classification decisions are unnecessary or improper.

The declassification process has been plagued by excessive secrecy, delay, obstruction, and avoidance. The direction of significant funds and attention towards unneeded secrecy has left the National Archives and Records Administration (NARA)—tasked with processing declassified documents for release—with insufficient resources to do its job. And largely unchecked power to create and hold secrets in the federal government is concentrated in a small group of executive branch agencies that often fail to consider significant public interest’s in release of certain classified records or the damage to government operations and national security created by barriers to information sharing. Those agencies have reclassified publicly released records with abandon and fought efforts to declassify non-sensitive records.

II. Proposed Solutions

A. Guiding Principles

To facilitate sound decisions, it is critical that secrecy be applied only when necessary for national security purposes and that unnecessary constraints on coordination and consultation not be imposed for bureaucratic or political reasons. Government activities in the national security arena are of tremendous interest to the public, both because transparency ensures our actual security and because the
records that chronicle the actions of government officials provide the accountability necessary for a healthy and vital democracy. When classification is limited to real secrets, the people who have access to those secrets will have greater respect for the system, there will be fewer leaks of sensitive information, and our safety and security will be protected. Reforming the declassification process will allow for effective information sharing and swift release of classified information that no longer requires protection and will prevent improper reclassification of previously released information.

B. Proposed Measures

1. **New executive order on classification.** The new president should immediately issue a presidential directive rejecting prior abuses of the classification system and pledging accountability in the classification process. In the directive, the administration should commit to consulting with the public and an executive branch task force to develop a new executive order on classification. The new executive order, revising Executive Order 12958, as amended, should establish a new framework for designating information that limits classification only to information that must be protected to avoid harm to national security. The new executive order should:
   a. Set forth clear standards and procedures for proper classification;
   b. Reestablish a presumption against classification and ensure consideration of the public interest before information is classified;
   c. Limit the duration of classification and prohibit abuse of classification markings;
   d. Systematize and improve the process for declassification of historical records and institute stricter standards for reclassification;
   e. Create clear and effective processes for sharing classified information among agencies and state and local entities; and
   f. Establish new mechanisms for oversight of the classification system.  

2. **Review and oversight of classification practices.** Once a new executive order is issued, the president should task each federal agency that classifies information to conduct a detailed public review of its classification practices with the objective of reducing national security secrecy to the essential minimum and declassifying all information that has been classified without a valid national security justification, whose disclosure would no longer cause any harm to the national security, or of which the continued classification would be outweighed by the public interest.  

In addition, the president should direct agency heads to task inspectors

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general at the agencies to perform oversight of secrecy and classification. The inspectors general, who are already in place at each agency, should perform periodic audits of classification and declassification activity to ensure that classification is properly applied and limited to the essential minimum.  

3. **Increased congressional scrutiny of classification.** Congress should exercise its authority to obtain classified materials concerning controversial and unauthorized intelligence programs and use its power to declassify such materials in order to conduct oversight over the executive branch and restore accountability to intelligence programs. Limiting classification abuses and overclassification is only part of what is necessary to reduce excessive secrecy in the executive branch. All too often, Congress accepts a simple assertion by the executive that information is classified without first ensuring that the information has been subjected to the executive’s own standards and procedures.

4. **Legislation to Reduce Overclassification.** The President should work with Congress to ensure passage of legislation designed to reduce overclassification, which shall at a minimum require original classifiers to identify or describe the damage to national security that could result from the unauthorized disclosure of the information and to balance that with the damage to national security that could occur from classifying the information; requiring original classifiers to consider the public interest prior to classifying information; mandate that classifiers use the lowest appropriate classification level and the shortest appropriate duration for classification; establish oversight mechanisms at each agency, including independent classification and declassification advisory boards, systems to track classification decisions, training, regular auditing by the inspectors general and reporting to Congress about classification policies and compliance, and internal remedies for improper classification; and require that agencies provide for internal challenges to classification decisions without retribution, reward employees who identify improper classification, and develop remedies for improper classification decisions by agency employees.

5. **Historical Records Act.** The president should work with Congress to accelerate declassification of historical records through passage of an omnibus Historical Records Act (HRA). An omnibus Historical Records Act should be enacted in order to facilitate the declassification of historically significant information in a timely manner, bring greater consistency and efficiency to the declassification process, consider the significant public interest in the declassification of historical records, and reduce the burden and delay inherent in the current declassification process. The HRA should establish a National Declassification Center to speed review and release of critical historical

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3 See OMB Watch, 37.
materials, institute a very strict standard for reclassification, and reform the procedure for reviewing records older than 25 years.  

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

IV. Counter-Arguments and Rebuttal:

A. Intelligence agencies and other executive branch agencies with classification authority have routinely opposed systematic classification reform out of fear that they may lose the ability to protect information.
Officials from throughout the intelligence and military agencies have acknowledged that overclassification endangers our security; it interferes with information sharing, harms the integrity of the classification system; and interferes with effective oversight. Reform of the classification system does not mean that sensitive secrets will be released. What it should accomplish is better protection of genuinely sensitive information, more appropriate use of resources, improved communication between the branches of government, improved information sharing, and greater public disclosure on matters of public interest.

V. **Recommended Documents for Further Information:**

a. OMB Watch, “*The 21st Century Right to Know Project*” (September 2008).


h. Statement of Patrice McDermott, OpenTheGovernment.org, Hearing on Restoring the Rule of Law Before the Subcomm. on the Constitution of the S. Comm. on the


l. H.R. 6575, “Over-Classification Reduction Act” (passed by the House, Sept. 9, 2008).


CHAPTER FIFTEEN
Reforming the State Secrets Privilege

I. The Problem

Since the terrorist attacks of September 11, 2001, the executive branch has repeatedly asserted the state secrets privilege in cases challenging the government’s national security policies. A number of courts have treated the executive’s claims as absolute without independently evaluating whether disclosure of evidence would endanger national security. Further, rather than applying the doctrine simply to prohibit the disclosure of particular pieces of evidence, more recent court decisions have dismissed cases at the pleadings stage, and foreclosed any litigation of cases in which the state secrets privilege is asserted.

For example, in El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), Mr. El-Masri sued the government on the ground that he was an innocent victim of the United States’ policy of extraordinary rendition. According to his sworn declaration, he was mistakenly held in U.S. custody for almost five months, during which time he was beaten, drugged, repeatedly interrogated, and held in solitary confinement at a CIA-run “black site” in Afghanistan. The government asserted the state secrets privilege and the court dismissed the case at the pleadings stage, before any discovery had occurred. There was no effort to explore whether unclassified sources of evidence — such as public statements by U.S. officials and investigations ongoing in Europe — might be available to permit the case to proceed. In the fall of 2007, the United States Supreme Court declined to review this case, foreclosing Mr. El-Masri’s right to litigate his claim in court.

Unless state secrets claims are subjected to independent judicial scrutiny, the executive branch is at liberty to violate legal and constitutional rights with impunity and without the public scrutiny that ensures that the government is accountable for its actions. By accepting these claims as valid on their face, courts undermine the principle of judicial independence, the adversary process, fairness in the courtroom, and our constitutional system of checks and balances. Furthermore, there is too great a temptation for the executive branch to assert the privilege for illegitimate reasons, and not to protect information whose disclosure would harm national security.

II. Proposed Solutions

A. Guiding Principles

The President, either acting alone or with Congress, must take steps to reform the state secrets privilege to provide critical safeguards that are needed to ensure a proper balance of the interests of private parties, constitutional liberties, and national security. While there is a proper role for the state secrets privilege to protect actual national security secrets from public disclosure, the executive branch should not be able to hide behind this privilege on the basis of its own unchecked authority. The state secrets privilege must both enable the executive branch to protect national security
secrets and also permit litigation challenging government programs to proceed where possible. The judiciary can and should provide an independent check on executive discretion to ensure proper application of the privilege. Judges are fully competent to review evidence purportedly subject to the state secrets privilege and make appropriate decisions as to whether public disclosure of such information is likely to harm our national security.

B. Proposed Measures

1. The president should direct the Attorney General to review within 100 days each case in which the previous administration asserted the state secrets privilege and assess whether assertion of the privilege can be withdrawn with respect to disclosure of particular pieces of evidence, as well as whether the case can move forward with non-privileged information that is substituted for the privileged information. He should declare that going forward, the state secrets privilege will be invoked only by the head of an agency and only when he or she has determined that there is a reasonable likelihood that public disclosure of the particular evidence would cause significant harm to national defense or diplomatic relations. The president should declare that it is the policy of his administration never to invoke the privilege to cover up illegal or unconstitutional governmental conduct. He should order the Attorney General to convene an interagency working group to implement the policy and direct the Department of Justice to report invocations of the state secrets privilege to Senate and House Committees on the Judiciary.

2. The president should direct the Attorney General that in all litigation in which the state secrets privilege is asserted, attorneys representing the United States government shall:
   i. Assert the privilege only when the head of the agency possessing the evidence concludes that there is a reasonable likelihood that public disclosure of the particular evidence would cause significant harm to the national defense or diplomatic relations of the United States;
   ii. Consent to have the judge review in camera and ex parte all evidence claimed to be protected by the state secrets privilege;
   iii. Consent to discovery of non-privileged information in cases in which the state secrets privilege has been invoked;
   iv. Consent to the appointment of special masters and/or technical experts to assist with evaluating state secrets privilege claims;
   v. Prepare and submit non-privileged substitutes for evidence asserted to be protected by the state secrets privilege wherever possible; and
   vi. Decline to seek dismissal of a case on the basis of the state secrets privilege except where the attorney concludes that it is not possible to create a non-privileged substitute for the evidence and disclosure of the evidence asserted to be privileged would cause substantial harm to national defense or diplomatic relations.
3. The president should work with Congress to ensure passage of legislation reforming the state secrets privilege, which shall, at a minimum:
   i. Require that the court conduct a hearing to assess the validity of any assertion of the state secrets privilege, and that the government make available to the court for review in camera and ex parte all of the evidence it claims is protected by the state secrets privilege;
   ii. Provide that in conducting a review of voluminous evidence claimed to be privileged, the court may review a reasonable sampling of the evidence to make its independent assessment as to whether the privilege applies;
   iii. Provide that the state secrets privilege applies only when the judge has determined that there is a reasonable likelihood that public disclosure of the particular evidence would cause significant harm to the national defense or diplomatic relations of the United States;
   iv. Require that the judge weigh testimony from government experts in the same manner as it does, and along with, any other expert testimony;
   v. Provide that the judge shall make an independent assessment as to whether the state secrets privilege applies, and that the judge should not accord “utmost deference,” “substantial weight,” or any other special deference to the assertions of any party;
   vi. Prohibit dismissal of cases or granting motions for summary judgment based on the state secrets privilege unless and until the private party has had a full opportunity to complete discovery of non-privileged evidence and to litigate the issue or claim to which the privileged evidence is relevant without regard to that privileged information;
   vii. Require that if the court determines that the privilege applies but it is possible to produce a non-privileged substitute for the evidence that would provide the parties a substantially equivalent opportunity to litigate the case, then the court shall order the government to produce that substitute;
   viii. Specifically authorize the use of special masters and/or technical experts to assist the court in evaluating state secrets privilege claims; and
   ix. Require the Attorney General to report to Congress within seven days each instance in which the state secrets privilege is invoked for the first time in a particular civil action.

4. The president should direct the Attorney General that attorneys representing the United States government shall consent to reinstatement and reconsideration of cases dismissed on the basis of the state secrets privilege if the underlying judgment, order, or proceeding from which party seeks relief was entered within the past six years, and the claim on which the judgment, order or proceeding is based is against the government or arises out of conduct by persons acting in the capacity of a government officer, employee, or agent. The legislation described in solution #3 above should include an application
provision permitting reinstatement of such cases decided within the past six years. [Note: six years is the statute of limitations period for filing civil actions against the government (28 U.S.C. § 2401).]

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The ALA Policy Manual: The Rights of Library Users and the USA Patriot Act (52.4.5) available at [http://www.ala.org/ala/aboutala/governance/policymanual/policymanual.31_3.pdf](http://www.ala.org/ala/aboutala/governance/policymanual/policymanual.31_3.pdf)

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* These groups and individuals support the general principles expressed and the general policy thrust and judgments in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposed solution, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.
IV. Counter-Arguments, and Rebuttal

Based upon the Congressional hearings held to date on the State Secrets Protection Act bills introduced in the House and the Senate in 2008, the opposition to state secrets reform focuses on two principal arguments: (1) That courts lack the expertise in national security matters to make appropriate decisions about which disclosures will harm national security; and, relatedly, (2) That any judicial review of state secrets claims should accord “utmost deference” to the testimony of executive branch officials asserting the privilege. The principal source of such opposition has come from members and veterans of the George W. Bush administration. Both of these arguments have been addressed and countered by other witnesses, including William Webster and William S. Sessions, both of whom are former federal judges who have also served as Director of the FBI – and in the case of Judge Webster, also as former Director of the CIA. Both have submitted statements attesting to the competence of federal judges to make such determinations, the experience judges have in making such determinations in other contexts, such as in FOIA cases and cases involving the Classified Information Procedures Act, and to the need for a true independent review by judges of executive branch claims.

V. Recommended Documents for Further Reading


APPENDIX
“Reforming the State Secrets Privilege”
Recent Legislative and Judicial Action

I. Jurisdiction

A. Judicial

The state secrets privilege was first recognized by the U.S. Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953), a case brought by three widows of civilian contractors against the government for negligence in a military plane crash that killed their husbands. The widows sought, and were denied, production of the Air Force accident report. More recently, rather than applying the doctrine simply to prohibit the disclosure of particular pieces of evidence, courts have dismissed cases at the pleadings stage, and foreclosed any litigation of cases in which the state secrets privilege is asserted. Since September 11, 2001, various federal courts of appeals have consistently credited the executive branch’s invocation of the state secrets privilege in cases relating to national security issues, without independently evaluating whether disclosure of evidence, in fact, would endanger national security. *See*, e.g., *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (dismissing case alleging that El-Masri is innocent victim of U.S. extraordinary rendition program); *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007) (state secrets privilege prevented plaintiffs from establishing standing to challenge NSA surveillance program). Although some courts have rejected claims that the very subject matter of a lawsuit challenging national security policy is a state secret, *see*, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007) (NSA surveillance program has been publicly disclosed and program itself is not a state secret), even in such cases courts have shown extreme deference to executive assertions.

Since this is a judicially created doctrine, the Supreme Court would have had jurisdiction to reexamine and clarify the scope of the privilege, and this issue was squarely presented in the *El Masri* case. However, with the Supreme Court’s denial of the petition for writ of certiorari from the Fourth Circuit’s decision in *El-Masri* in the fall of 2007, legislative reform and changes in executive practice are now the most viable options.

B. Executive

The Executive branch has jurisdiction to determine whether and when it will assert the state secrets privilege in litigation. It can also fully control which evidence is claimed to be privileged and can consent to independent judicial review to assess privilege claims.

C. Legislative
Congress has jurisdiction to enact reforms to the state secrets privilege. The Constitution specifically grants Congress the power to enact “Regulations” regarding the jurisdiction of federal courts. U.S. Const. Art. III, Sec. 2. This includes the power to legislate reforms to the state secrets privilege. Congress should establish new rules that will simultaneously protect individual rights and national security, and preserve access to the courts and our constitutional system of checks and balances. The House and Senate Judiciary Committees have jurisdiction to consider such legislation.

II. Status of Actions in Legislative and Executive Branches

A. Executive Branch

The Bush administration has broadly and frequently asserted the state secrets privilege as outlined above.

B. Legislative Branch

Legislation was introduced in both the House and the Senate in the 109th Congress to reform the state secrets privilege and modify the executive branch’s blanket invocations of the state secrets privilege in national security cases. The State Secrets Protection Act (H.R. 5607, S. 2533) is designed to allow the executive branch properly to assert the privilege where necessary, while allowing litigation that would not jeopardize national security interests to proceed. The proposed legislation would enact many of the reform measures identified above, including (1) allowing non-privileged discovery to proceed in the litigation, (2) requiring the government to make available for the court’s in camera and ex parte review the supposedly privileged evidence; and (3) authorizing the court to employ special masters to assist in its review of the evidence as to which the government has asserted the state secrets privilege.

Congressional Hearings:

January 29, 2008: Oversight hearing by the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee

February 13, 2008: Legislative hearing by the Senate Judiciary Committee on the State Secrets Protection Act S. 2533

April 24, 2008: Senate Judiciary Committee passed State Secrets Protection Act S. 2533 out of committee by an 11-to-8 vote.

September 18, 2008: The Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee voted 6-3 to order the State Secrets Protection Act H.R. 5607 reported favorably.
CHAPTER SIXTEEN
Reforming Watch Lists

I. The Problem

Since September 11, 2001, federal law enforcement and intelligence agencies have vastly expanded the scope of, and their reliance upon, watch lists. In late 2003, the government created a consolidated watch list, which is maintained by the Terrorist Screening Center (“TSC”). Watch lists are used in a variety of security-screening related situations including airline passenger screening through the “No fly” and “Selectee” lists of the Transportation Security Administration (“TSA”), visa decisions by consular officers at the Department of State, and even in consumer transactions by private businesses using the Office of Foreign Assets Control’s public watch list. In July 2004, the 9/11 Commission published its report making recommendations on the use of watch list and selectee lists by the Transportation Security Administration. According to a TSC representative, as of September 2008, the TSC consolidated watch list contained approximately 1,000,000 records covering approximately 400,000 persons (of approximately 3% whom were believed to be U.S. persons).1

Although watch lists can play an important role in identifying threats to national security, they have grown to be inaccurate, unreliable and too widely used. For example, a report of the Inspector General of the Department of Justice described deficiencies in the TSC consolidated watch list, including flawed methodologies used by the FBI to nominate persons to the TSC consolidated watch list and inclusion of records that should not have been included—and equally harmful, the Inspector General noted that the procedures used by the FBI were “unable to ensure that consistent, accurate, and complete terrorist information is disseminated to frontline screening agents in a timely manner.”2 Further, the watch lists also threaten privacy in direct conflict with the strong privacy protections afforded by the Privacy Act’s requirements of accuracy, access, and accountability.

The harms caused by the inefficiencies and inaccuracies are extensive. Thousands of innocent people have erroneously been added to watch lists, are unable to clear their records, and are wrongly being detained when attempting to travel or being denied employment and other benefits.3 Government screeners are so overwhelmed by

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1 Statement of Rick Kopel, Principal Deputy Director, Terrorist Screening Center, Before the House of Representatives Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection, September 9, 2008.


3 The GAO has noted that TSC “data indicate that about half of the tens of thousands of potential matches sent to the center between December 2003 and January 2006 for further research turned out to be misidentifications.” U.S. General Accountability Office, “Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public,” GAO-06-1031, September 2006.
questioning innocent travelers on the lists that they are unable to devote adequate time and resources to identifying and investigating people who are genuine terrorist threats. Furthermore, if these errors are not addressed, they have the potential to continue to violate our civil liberties and harm innocent civilians.

II. Proposed Solutions

A. Guiding Principles

1. Certain situations, such as those in which a decision must be made quickly and inaction might have potentially dire consequences – for example, in determining whether to admit non-resident aliens into the United States at ports of entry – merit the use of watch lists. However, watch lists should not be used as “blacklists” in any context relating to employment or the application for licenses or contracts. In these cases, the government has sufficient time to protect its interests through a thorough background check.

2. Clearly defined and consistently applied criteria and processes for determining when persons should be added to or removed from watch lists, as well as a consistent oversight process, should be adopted.

3. Reforms should be adopted to improve the accuracy and fairness of watch lists and to establish a system that will allow individuals a meaningful opportunity and due process procedures to challenge their erroneous inclusion on a watch list.

4. Government must be accountable for inaccurate identifications of travelers.

B. Proposed Measures

1. The President should direct the Department of Homeland Security and all other federal agencies that watch lists shall not be used in employment screening or hiring decisions. Instead, the government should protect its interests by conducting a careful investigation through established security clearance systems. The President should also direct the Department of Homeland Security to abandon its developing plans to screen applicants for employment (in both the public and private sector) through watch lists.

2. The President should direct the TSC and all other agencies with jurisdiction to nominate persons to the watch lists to establish a series of measures to promote the accuracy of the lists at the “front end,” to improve the efficiency and effectiveness of the lists and provide greater fairness to individuals. These measures should include:

   a. Establishing clear written standards that specify the criteria for including a person on the watch lists, the kinds of information to be considered as relevant evidence that the criteria have been met, and the standards of proof required for including individuals on the watch lists.
b. Establishing a rigorous and reliable nominating process (including an oversight process) to make certain that decisions to include persons on watch lists are made objectively and as consistently as possible across agents and across agencies.

c. Establishing programs of internal monitoring so that agencies nominating persons to the TSC consolidated watch list and other watch lists can ensure the completeness, timeliness, accuracy, and effectiveness of error correction. This should include regular random sampling and analysis of records, annual reporting requirements to Congressional Oversight Committees and to the public.

d. Ensuring that agencies with access to the TSC consolidated watch list and other watch lists establish systems to ensure that the lists are maintained under fully secure conditions, to protect against the risks of both inadvertent tampering and computer hacking.

e. Ensuring that agencies with access to the TSC consolidated watch list and other watch lists establish policies and procedures to safeguard the personal information of individuals submitted to the government as part of the screening process (including as part of Secure Flight and in connection with the redress proceedings and cleared flight programs).

f. Delaying implementation of Secure Flight until the above-described corrections to the watch lists and the privacy safeguards are fully implemented. Once these corrections and privacy safeguards have been made, new final Secure Flight rules should be promulgated and a 180-day test of the system should be undertaken.

g. Directing agencies nominating persons to the watch lists or otherwise utilizing such watch lists to better coordinate actions to ensure that consistent changes are made across all watch lists on a timely basis (including requiring agencies to make clear the originating source or an appropriate designation for the source of the information to make more transparent the propagation of information among watch list creators).

h. Making transparent and publicizing to travelers the information about them that will be shared with the government by aircraft operators as part of the Secure Flight program.

3. The President should direct the TSC and all other agencies with jurisdiction to nominate names to or maintain watch lists to establish a redress system that will provide a meaningful and fundamentally fair opportunity for individuals to challenge their inclusion on a watch list.

a. The review process should provide for more extensive review and due process rights than that provided by current agency procedures,
including the current DHS Travelers Redress Inquiry Program (“TRIP”). In appropriate cases, this should include the opportunity for an oral administrative hearing and judicial review.

b. Individuals should be able to challenge their inclusion either on the basis of mistaken identify or on the grounds that the government lacks an adequate justification for including them.

c. For cases alleging inadequate justification, the government should employ government attorneys with security clearances at a level adequate to ensure that they can review classified material to serve as public advocates.

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

IV. Counter-Arguments and Rebuttal

Supporters of the use of watch lists in employment screening contend that government agencies and private employers should have all possible tools available in their efforts to keep Americans safe. They assert that watch lists can be valuable tools, and we should not disadvantage our security efforts by denying people the use of these tools. However, it is important to remember that watch lists are simply a shortcut to be used in situations when decisions must be made quickly – such as in decisions regarding access to airline flights or sensitive security sites. In the employment context, by contrast, there is ample time to rely upon the more thorough, accurate, and traditional tool of conducting a security clearance investigation, and there is no urgency to outweigh the substantial risks to individual rights posed by the use of watch lists in this context.

Supporters of the use of watch lists can point to progress cited by DOJ and DHS inspector generals in connection with the nominating process for individuals for inclusion on watch lists, updating and review of information on watch lists and formation of an oversight process. The inspector general reports, however, point to uneven progress in this regard, as well as a lack of communication between agencies with respect to watch lists. Moreover, there is no indication that all governmental agencies with the right to nominate individuals to or maintain the watch lists are, however, using the same processes as described in the DOJ/DHS reports.

Regarding the proposed reforms to improve the accuracy of watch lists and to create a more comprehensive and meaningful redress process, some would argue that these reforms are too costly and unnecessary. First, they would contend that it would take too many hours of employee time to further scrub and improve existing watch lists, and that government agents need flexibility to perform their jobs properly in deciding whom to nominate. For the redress process, they would assert that they have already established the TRIP program, and that any additional procedures would be too costly and time consuming. However, these arguments fail to recognize the substantial costs and diversion of resources required now by inaccurate lists. Improving the accuracy of lists at the front end and creating meaningful redress procedures at the back end will not only improve fairness to individuals, but will also improve government efficiency and permit screeners to focus on actual terrorist suspects.
VI. Recommended Documents for Further Information


m. EPIC Comments on Docket Nos. TSA-2007-28972, TSA-2007-2872


Appendix

I. Jurisdiction

A. Executive Branch

The Executive Branch has jurisdiction over watch lists and terrorist screening activities arising out of its general constitutional power to provide for the national defense. In addition, Congress has delegated to the TSA authority pursuant to 49 U.S.C. § 114(l)(2) to restrict air travel to those persons who “pose a risk to aviation safety.” The foregoing general authority has been supplemented pursuant to the Presidential Directives and agency actions and regulations described below.

On September 16, 2003, the TSC was established pursuant to Homeland Security Presidential Directive 6 (“HSPD-6”). Concurrently therewith, the Secretary of State, Attorney General, the Secretary of Homeland Security and the Director of Central Intelligence executed a memorandum of understanding entitled, “MOU on the Integration and Use of Screening Information to Protect Against Terrorism” delineating certain reporting, information provision and other matters related to the TSC. HSPD-6 increased the watch list focus and expanded the use of watch lists to cover data derived from ongoing terrorism-related criminal and national security investigations. It was out of HSPD-6 that the consolidated TSC watch list was born. HSPD-6 states that the consolidated TSC watch list shall contain information about persons “known or appropriately suspected to be or have engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.” HSPD-6 further states that to the extent permitted by law, the consolidated TSC watch list will be made available to (1) state, local, territorial and tribal law enforcement agencies and other appropriate authorities, (2) private sector entities responsible for managing critical infrastructure or organizers of significant events, and (3) foreign governments with immigration agreements with the U.S. or that are engaged as partners with the U.S. in the global war on terror.

Standards for inclusion of names on watch lists are generally set by the nominating agency. As a general matter, except for the “No Fly” and “Selectee” lists, the other watch lists utilize the “known or appropriately selected” standard set forth in HSPD-6 or some derivation thereof (for example, the FBI generally uses a standard of “reasonableness” or a “reasonable indication” of involvement in terrorism).

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4 In August 2004, the President signed Homeland Security Presidential Directive 11, designed to strengthen HSPD-6. This directive requires the Secretary of Homeland Security (together with other agency heads) to submit reports to the President on the government’s approach to terrorist screening.

5 A report by the Inspector General of the Department of Justice has noted that “to err on the side of caution, individuals with any degree of a terrorism nexus were included on the consolidated watch list, as long as minimum criteria was [sic] met (i.e., the person’s name was partially known plus one other piece of identifying information, such as the date of birth).” In addition, the Inspector General determined that the TSC could not ensure that the information in the database was complete and accurate. We found instances where the consolidated database did not contain names that should have been included on the watch list. In addition, we found inaccurate information related to persons included in the database.” U.S. General Accountability Office, “Secure Flight Development and Testing Under Way, but Risks
specific information on the types of information or the standard of proof required to satisfy the foregoing standards has been made public. As a general matter, the relevant agency is also in charge of updating records on individuals that it has previously submitted for inclusion in the appropriate watch list. Each agency is generally responsible for training its personnel with respect to the appropriate watch list, standards for inclusion of information on the appropriate watch list and the process of nominating and updating information on individuals included in the appropriate watch list.

As described above, DHS is continuing to work on guidelines for private sector screening processes related to terrorism. The consolidated TSC watch list would be utilized (including in connection with employment-related decisions) in industries that “have a substantial bearing on homeland security,” including “agriculture, food, water, public health, emergency services, government, defense industrial base, information and telecommunications, energy, transportation, banking and finance, chemical industry and hazardous materials, postal and shipping, and national monuments and icons.”

In September 2007, the heads of a number of governmental agencies, including the Secretary of State, Attorney General, the Secretary of Homeland Security, the Director of Central Intelligence and the Privacy and Civil Liberties Oversight Board executed a memorandum of understanding entitled, “Memorandum of Understanding on Terrorist Watchlist Redress Procedures.” Redress procedures are currently handed through the agency responsible for submitting the individual’s name to the appropriate watch list. For example, TSA and U.S. Customs and Border Protection have redress offices that work directly with affected individuals. The TSA has established DHS TRIP for persons who “seek resolution regarding difficulties they experienced during their travel screening at transportation hubs.” The TSC does not directly work with affected individuals, but it works with screening agencies to determine whether a person who has initiated a complaint is appropriately included in the consolidated TSC watch list. TSC’s policy in redress proceedings is to neither confirm nor deny whether an individual is listed on the consolidated TSC watch list (on the basis that the underlying information is classified and derived from law enforcement and intelligence information). As a general matter, these redress procedures do not currently permit affected individuals the right to

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review the information against them or clearly contemplate judicial review of their actions.

As part of its remedial steps, TSA has also instituted a process to permit individuals subject to frequent misidentification avoid further misidentification. This process permits frequently misidentified persons to voluntarily provide TSA with additional identifying information, to permit the TSA to decide whether to place the individual on a cleared list. Some affected individuals, however, have complained of continuing problems when traveling. The TSA plan does not appear to contemplate judicial review of decisions by the TSA.

In August 2007, the DHS published a notice entitled, “Privacy Act of 1974; Implementation of Exemptions; Security Flight Record,” (TSA 49 C.F.R. 48397-48400) pursuant to which the DHS stated that it was exempting itself from various disclosure requirements under the Privacy Act of 1974.

Because the foregoing actions and regulations have been taken pursuant to Presidential Directives and agency regulations and actions, the President and/or agency heads under a new administration would have jurisdiction to revise or modify the foregoing Directives, actions and regulations.

B. Legislative Branch

Pursuant to the Aviation and Transportation Security Act, PL 107-71 (codified as 49 U.S.C. 114(h), Congress granted the TSA authority for maintaining the “No Fly” and “Selectee” lists.

Congress has also enacted the Homeland Security Act of 2002, 6 U.S.C. 451 et seq., which provides jurisdiction for the Executive Branch to undertake the actions and regulations described above.

II. Status of Actions in Legislative, Executive and Judicial Branches

A. Executive Branch

See Section I.A of this Appendix.

B. Legislative Branch

Congress has passed a series of bills over the years requiring the Executive Branch to provide additional information regarding watch lists. For example, pursuant to Section 360 of the Intelligence Authorization Act for Fiscal Year 2004, P.L. 108-177, 7

Agency actions have tended to focus on their own administrative procedures, rather than permitting judicial redress, to respond to complaints regarding watch lists. For example, a GAO report describing methods of redress failed to address the relation between agency redress and other possible remedies, such as judicial review. U.S. Government Accountability Office, “Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public,” GAO-06-1031, September 2006.

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Congress required the President to report, among other things, on the operations of the TSC.

Congress has held hearings on the TSC consolidated watch list. For example, the Committee on Homeland Security of the House of Representatives held a televised hearing entitled “The Progress and Pitfalls of the Terrorist Watch List” on November 8, 2007. On September 9, 2008, the Subcommittee on Transportation Security and Infrastructure Protection, Committee on Homeland Security of the House of Representatives held a hearing entitled “Ensuring America’s Security: Cleaning Up the Nation’s Watchlists.”

Bills have been introduced in Congress to modify watch list redress procedures. Senate Bill 3392, introduced July 31, 2008 by Senators Klobuchar, Thune, Leahy, McCaskill and Voinovich to the Committee on Commerce, Science and Transportation, would, among other things, (1) require DHS to establish an Office of Appeals and Redress to hear appeals from persons included on the consolidated TSC watch list, (2) require DHS to establish, maintain and distribute to appropriate agencies within the government a comprehensive cleared list, and (3) require the Secretary of Homeland Security to undertake various protective steps with respect to personally identifying information of individuals. A similar bill, H.R. 4179 was introduced in the House of Representatives on June 19, 2008 to the Committee on Commerce, Science and Transportation.

C. Judicial Branch

To date, courts have generally deferred to Executive Branch assertions regarding the need for privacy with respect to watch lists. For example, in *Gordon v. FBI*, 388 F.Supp.2d 1028 (N.D. Cal. 2005), the plaintiff sought to compel disclosure of information regarding the consolidated TSC watch list and the criteria for adding individuals to the List under the Freedom of Information Act (“FOIA”). Although the court reviewed certain portions of the consolidated TSC watch list in camera, the court declined to order such publication on the basis of an affidavit from the FBI that disclosure of watch list selection criteria and related information would enable potential terrorists to devise a plan to circumvent the watch lists. See also *Gilmore v. Gonzales*, No. CV-02-03444-SI (Jan. 26, 2006 9th Cir.) (rejecting the plaintiff’s claims with respect to the consolidated TSC watch list on lack of standing grounds).

In August 2008, the U.S. Court of Appeals for the Ninth Circuit held that an airline passenger who was detained and prevented from boarding a flight in a U.S. airport can sue the Department of Homeland Security to challenge her inclusion on the “No fly” list maintained by the government’s Terrorist Screening Center. *Ibrahim v. Department of Homeland Security*, 538 F.3rd 125 (9th Cir. 2008). The government has moved for rehearing *en banc* in the case.

In *Rahman v. Chertoff*, No. 05 C 376, 2008 US Dist LEXIS 32356 (N.D. Ill. 2008), the Magistrate Judge, in a discovery dispute, rejected the government’s assertion
that information tending to confirm or deny whether plaintiffs were listed on the TSC consolidated watch list was protected by the state secrets privilege.
CHAPTER SEVENTEEN
ASSERTION OF EXECUTIVE AUTHORITY
IN NATIONAL SECURITY MATTERS

I. The Problem

In the area of national security, the executive branch’s assertion of executive authority, and “Commander-in-Chief authority” in particular, has extended farther than any time in history and in a manner that inappropriately seeks to evade review. The executive has argued that any presidential action taken in the name of national security is necessarily legal, rejecting congressional and judicial checks and undermining the separation of powers. For example, the President has asserted claims of executive authority to disregard laws enacted by Congress and has used the broadly worded Authorization for Use of Military Force (AUMF) of September 2001 to justify overriding existing laws.

The President has not merely advanced a constitutional theory of unfettered executive power, but has also veiled its implementation of the theory in secrecy, thwarting the constitutional system of checks and balances. Congress, the courts and the public cannot curb abuse of executive power of which they are unaware. Under the theory of presidential unilateralism, the Justice Department’s Office of Legal Counsel (“OLC”) has issued poorly reasoned legal opinions licensing torture, extraordinary rendition, indefinite detention and warrantless domestic surveillance, among other activities, notwithstanding statutory and constitutional constraints. Indeed, OLC has essentially opined that there are no constraints when the President acts in the name of national security. These OLC opinions obliterating the administrative, statutory, and constitutional limits on executive power were problematic not only because they flouted the rule of law, but also because the executive hid this usurpation from the public and Congress. The executive branch in essence adopted its own “secret laws,” discovered by the public only when leaked. Then and only then was OLC’s shoddy reasoning exposed to legal scrutiny. Then and only then were the OLC opinions and related national security practices subjected to the Framers’ intended checks and balances. Then and only then was there even a modicum of accountability.

OLC has also advised that because the President may revoke or modify an executive order at any time, he may do so simply by acting in a manner contrary to an executive order. Thus, in OLC’s view, by contravening an existing executive order, the President modifies or revokes, rather violates, that executive order, and he need not issue a new order or even make public his modification or revocation. No notice, no procedural safeguards, and no articulation of legal principles are necessary.

Significantly, despite assertions of expansive presidential authority, Congress has failed to insist on its right to classified national security information and has failed to exercise its oversight authority and responsibilities, especially in matters of national security. Over-classification of intelligence and other information, as well as the expanding use of limited, “gang of eight” briefings has rendered legislative oversight of intelligence and national security activities ineffective, if possible at all. In “gang of eight” briefings, legislatively authorized only for covert actions in “extraordinary
circumstances affecting vital interests of the United States,” only leaders of the House, Senate and of their respective intelligence committees are briefed; no congressional staff, no notes, and no discussions with colleagues are permitted. Without staff or other assistance, legislators as a practical matter cannot examine intelligence activities, determine whether additional information is needed, or assess whether laws are being violated. Beyond the limited situations involving briefings on covert actions, there is no legislative or constitutional basis for permitting the executive to limit briefings to such a small subset of Congress. Nor is there any legal or constitutional basis for the executive choosing which members of Congress may have access to information on national security policies.

The current Administration’s unprecedented assertion of presidential unilateralism (what some have termed the “monarchical prerogative”) and Congress’ failure to exercise its oversight responsibilities not only undermine our constitutional system of checks and balances, but preclude effective national security policy-making by depriving the government of a forum to debate policy and to identify and correct errors.

II. Proposed Solutions

A. Guiding Principles

The President has an overriding obligation to exercise executive authority in conformity with the law. Accordingly, the new President should articulate a reasonable view of executive authority that is grounded in the text and structure of the Constitution, as well as settled judicial precedent. In addition to Congress’ authority to legislate, to appropriate funds, and to confirm presidential appointments, general principles of oversight and accountability underlying the separation of powers require that Congress be fully informed concerning intelligence and national security activities. The new Administration should promote transparency and accountability -- including with respect to OLC opinions upon which the executive relies -- and should limit secrecy and over-classification. Only when the executive shares information with Congress and exposes legal rulings and interpretations to scrutiny is democratic oversight of intelligence and national security activities possible, and only then can the system of checks and balances be restored.

By the same token, Congress must exercise its oversight authority in matters of intelligence and national security, rather than acquiescing to the Administration’s assertion of unfettered executive authority. In doing so, Congress must use its various powers and insist on obtaining information necessary to conduct effective oversight and to preserve the rule of law.

B. Proposed Measures

1. Proposal 1: The new President should issue an unambiguous statement that his administration will enforce the laws passed by Congress or advise Congress promptly when he is not doing so and why. He should also clarify that the new administration will not construe the Authorization for Use of Military Force to override existing legislation.
2. **Proposal 2:** The new administration should publicly release the legal opinions issued by the Office of Legal Counsel that authorize torture, “enhanced” interrogation techniques, detention without meaningful hearings, extraordinary rendition and warrantless surveillance, among others. The President should also order the Attorney general to initiate a thorough review of all such opinions and, as appropriate, to revise or withdraw the opinions.

3. **Proposal 3:** Congress should enact legislation, such as the proposed OLC Reporting Act of 2008, requiring that the Attorney General report to Congress when the Department of Justice issues a legal opinion concluding that the executive branch is not bound by a federal statute.

4. **Proposal 4:** Congress should vigorously exercise its existing oversight responsibilities, including oversight of intelligence and national security activities. Likewise, the executive branch should respect Congress’ oversight role. For example, the new President and Congress should confine the use of “gang of eight” briefings, which create the impression of accountability but preclude effective oversight, to the limited category of situations for which they were legislatively authorized. By federal statute, “gang of eight” briefings are permitted for covert actions in “extraordinary circumstances affecting vital interests of the United States,” but not for other intelligence activities. At minimum, the use of such briefings should be limited to the narrow and extraordinary circumstances permitted by law.

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

IV. Counterarguments and Rebuttal

Essentially, the Bush administration has argued that since we are at war in Iraq and Afghanistan and we are fighting a “war on terror,” the President has broad wartime powers under Article II of the Constitution as the Commander in Chief. They also contend that in this post-9/11 world, the need to safeguard our national security demands that the Executive branch maintain the secrecy of national security information. They assert that the Executive branch has a particular expertise in foreign policy and national security, and that the members of other branches – Congress and the courts – cannot be trusted either to safeguard national security information or to make informed decisions on national security issues.

However, the President’s powers under Article II are limited, and even the Commander-in-Chief power does not authorize the President to ignore the duly enacted laws of Congress. Further, while certain national security information must be protected from general public disclosure, information may still be shared with Members of Congress and/or federal judges in connection with their consideration of national security issues. Unchecked executive discretion promotes abuse, and oversight by Congress and the courts is necessary and constitutionally required.

Finally, as to the specific issue of OLC opinions, the Executive branch argues that the president must be free to receive confidential legal advice from his lawyers. Such confidentiality, however, should not preclude the Executive from complying with the requirements of the proposed OLC Reporting Act, by notifying Congress whenever OLC has concluded that the president is not bound by a particular federal statute. The proposed legislation would not require that the substance of the legal opinion be disclosed.

V. Recommended Documents for Further Information


c. Testimony of Walter Dellinger, United States Senate Committee on the Judiciary, Subcommittee on the Constitution, Hearing on “Restoring the Rule of Law”, September 16, 2008, available at


l. Subpoena Issued by Senate Judiciary Committee Chairman Leahy (D-VT) on October 21, 2008 to Attorney General Michael Mukasey, available at http://judiciary.senate.gov/resources/documents/upload/10-21-08-OLC-Subpoena.pdf (subpoena seeking specific OLC opinions related to interrogation and detention practices, as well as lists, logs or indices of memoranda, opinions or legal advice issued by the OLC since September 11, 2001 concerning the Administration’s national security practices and policies related to terrorism);


APPENDIX

ASSERTION OF EXECUTIVE AUTHORITY IN NATIONAL SECURITY MATTERS

I. Jurisdiction:

A. **Congress:** Proposal 3 would most likely be addressed by the House and Senate Judiciary Committees, the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Proposal 4 would most likely be addressed by various congressional committees, including the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Proposals 1 and 2 do not require legislative action.

B. **Executive Branch:** The President could implement Proposal 1 through a presidential memorandum, without promulgating executive orders or regulations, and without agency involvement. Proposal 2 would be addressed by the White House and the Department of Justice (primarily through the Attorney General and the Office of Legal Counsel). Executive action required by Proposal 3 would initially be signing the legislation into law and thereafter would be addressed by the Department of Justice (primarily through the Attorney General and the Office of Legal Counsel). Proposal 4 would be addressed by the White House (primarily those responsible for briefing Congress on intelligence and national security activities).

II. Status of Actions in Legislative, Executive, and Judicial Branches:

A. **Legislative Branch:**

1. The OLC Reporting Act (S. 3501), co-sponsored by Sens. Russell Feingold (D-WI) and Diane Feinstein (D-CA), was introduced in the Senate on September 16, 2008. The bill would require the Office of Legal Counsel (OLC) to report to Congress when it determines that the Executive Branch is not bound by a statute. The bill was reported out of the Senate Judiciary Committee on September 25, 2008 and placed on the Senate Legislative Calendar under General Orders (Calendar No. 1083) No action has been taken on the Senate floor.

2. Rep. Brad Miller (D-NC) introduced a bill similar to the OLC Reporting Act in the House (H.R. 6929) on September 17, 2008. It has been referred to the House Judiciary Committee, but no action has been taken.

3. As authorized by the Senate Judiciary Committee, Senate Judiciary Committee Chairman Leahy (D-VT) issued on October 21, 2008 a subpoena to Attorney General Michael Mukasey seeking by November 18, 2008 specific OLC opinions related to interrogation and detention practices, as well as lists, logs or indices of memoranda, opinions or legal advice issued by the OLC since September 11, 2001 concerning the Administration’s national security practices and policies related to
terrorism.¹ Senator Leahy and Judiciary Committee Ranking Member Arlen Specter (R-PA) previously had requested such documents from Fred Fielding, Counsel to the President, by letter dated August 19, 2008.²

4. The release of the previously undisclosed OLC opinions regarding torture, detention, and other issues has been the subject of extensive debate and testimony in Congress. Many members of Congress have called upon the Administration to fully release the OLC opinions related to interrogation and detention practices. Recent congressional hearings on this issue include the following: *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 110th Cong. (April 30, 2008); Dept. of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part I): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 97 (2008).* To date, Congress has not passed any laws on this issue.

CHAPTER EIGHTEEN
EXECUTIVE PRIVILEGE & CONGRESSIONAL OVERSIGHT

I. The Problem

When properly invoked, executive privilege is an important tool for protecting Presidential communications and executive branch deliberations. In recent years, however, the President has frequently abused this power by making overbroad privilege assertions and by showing insufficient respect for the interests of Congress. For many years, the Office of Legal Counsel in the Justice Department has recognized that in disputes regarding congressional requests for information, both branches have a constitutional obligation to seek to accommodate the interests of the other insofar as possible. The Administration has scantily honored this obligation in form and has eviscerated it in substance. Among other things, the Administration has claimed, under the cloak of executive privilege, that White House officials have no obligation even to appear in response to properly authorized congressional subpoenas. It has taken the position that Congress has no legitimate interest in investigating Presidential dismissals of his appointees, even if those dismissals are allegedly part of an effort to use criminal law enforcement against political enemies. Still further, when Congress voted these White House officials in criminal contempt for refusing to testify, the Administration has refused to investigate and prosecute the congressional contempt citations, potentially immunizing the executive from appropriate checks on this power. These actions, along with the Administration’s general unwillingness to compromise with Congress and other delaying tactics, have made prompt and effective resolution of these inter-branch disputes illusory. The result has been a weakening of Congress’s ability to fulfill its constitutional oversight responsibilities and a further erosion of our system of checks and balances.

II. Proposed Solutions

A. Guiding Principles

Executive privilege disputes have been and will continue to lie at the intersection of legal, political, and policy concerns. Although the political dynamics of each issue are unique, or at least distinct, it is critical that both the executive and the legislative branches recognize and respect each other’s interests. Thus, both branches should agree on procedural issues – that is, upon a means by which these disputes can be resolved by accommodation in the first instance, and then, as a last resort, by a prompt and fair judicial proceeding if an accommodation is not reached.

B. Proposed Measures

1. Proposal 1: Congress should enact legislation that allows the House or the Senate to ask a court to appoint a special prosecutor to investigate and prosecute criminal contempt charges when the executive branch has refused to
comply with a congressional subpoena and the Justice Department refuses to present the case to a grand jury.

2. **Proposal 2:** Congress should enact a civil contempt statute that applies to subpoenas issued to federal officials, whereby either House can civilly enforce its subpoenas in federal district court.¹

3. **Proposal 3:** At the outset of each Congress, Congress and the executive branch should, on a bi-partisan basis, agree to a protocol for resolving privilege disputes. The protocol would deal with issues such as the steps both sides should take as part of the accommodation process, the alternative means of obtaining certain types of information, the manner in which privilege should be invoked, the officials who should participate in the discussions before the parties resort to litigation, and similar issues.

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Crossing the Line,
http://citizensforethics.org/files/Crossing%20the%20Line.pdf

**Common Cause**

¹ Currently only the Senate has statutory civil contempt power, and it does not apply to federal officials acting in their official capacity. See 28 U.S.C. § 1365.
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* These groups and individuals support the general principles expressed and the general policy thrust and judgments in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposed solution, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

IV. Counterarguments and Rebuttal

Proponents of the Administration’s expansive use of executive privilege have argued that the Administration’s stance is necessary to protect the President’s ability to receive frank and candid advice. This privilege encompasses not only communications among the President and his closest advisors, but also other communications among other executive officials that are undertaken to inform presidential decisionmaking. If such communications are not protected from disclosure, it will have a “chilling effect” on the President’s ability to receive candid advice. Proponents have also frequently argued that Congress has a limited legislative interest in obtaining such information, especially in areas outside of Congress’ direct authority (such as the hiring and firing of U.S. Attorneys or certain national security matters). Finally, under the unitary executive theory, the Administration’s defenders have argued that the Department of Justice cannot prosecute executive officials who fail to comply with congressional subpoenas at the command of the President. This also means that any attempt by Congress to intrude on such prosecutorial decisions would be unconstitutional.

In response, it can be argued that this Administration has gone well beyond traditional understandings of the scope of executive privilege. While some core executive branch communications and deliberations should indeed be protected, the Administration has unjustifiably expanded the privilege to shield itself from legitimate congressional oversight. Moreover, the courts have long recognized that executive
privilege can be overcome in certain circumstances, particularly where there are allegations of serious criminal wrongdoing – as has frequently been the case in recent years. In such cases, Congress may have a legitimate investigatory and legislative interest that outweighs the executive’s concerns about the so-called “chilling effect.” Finally, notwithstanding the substantive merits of the Administration’s privilege assertions, the Administration’s failure to participate in a good faith accommodation process has resulted in unnecessary litigation that does not serve the interests of either branch.

V. Recommended Documents for Further Information


I. Jurisdiction:

A. Congress: Proposals 1 and 2 would most likely be addressed by the House and Senate Judiciary Committees and possibly the House Oversight and Government Reform Committee and the Senate Homeland Security and Governmental Affairs Committee. Proposal 3 would most likely be addressed by the House and Senate leadership of both parties.

B. Executive Branch: Proposals 1 and 2 do not require executive action other than signing the legislation into law. Proposal 3 would be addressed by the White House (primarily through the White House Counsel’s Office) and the Department of Justice (primarily through the Attorney General, the Office of Legal Counsel, and the congressional affairs office).

C. Judicial Branch: The preferred outcome in any inter-branch dispute is to avoid judicial intervention. If intervention is required, under any of these proposals the dispute would typically be litigated in the federal district court of the District of Columbia.

II. Status of Actions in Legislative, Executive, and Judicial Branches:

A. Congress: In regard to Proposal 1, Congressman Brad Miller (D-NC) has introduced this legislation for the House. See Special Criminal Contempt of Congress Procedures Act of 2008, H.R. 6508, 110th Congress (2008). It was referred to the House Judiciary Committee but no action has been taken. In regard to Proposal 2, Congresswoman Sheila Jackson-Lee (D-TX) has introduced this legislation for the House. See Contempt of the House of Representatives Subpoena Authority Act of 2008, H. R. 5230, 110th Congress (2008). It was referred to the House Judiciary Committee but no action has been taken.

B. Executive Branch: N/A

CHAPTER NINETEEN
SIGNING STATEMENTS

I. The Problem

Historically, presidents have used signing statements to provide reasons for signing a bill, to explain their interpretation of legislative language, or even to express objections to portions of the legislation. More recently, however, the President has increasingly used signing statements to repudiate a wide range of laws -- including those designed to protect basic rights and ensure accountability -- and to indicate that while not vetoing the bills, he will decline to enforce them as written. The President has objected to the constitutionality of hundreds of pieces of legislation based on assertions of unilateral power, such as the “power to supervise the unitary executive,” the “exclusive power over foreign affairs,” and the “authority to determine and impose national security classifications and withhold information.” By signing a particular bill into law, but then declaring in a signing statement that he will not give effect to it, the President asserts authority both more robust than the veto -- because it denies Congress an opportunity to override the decision -- and less robust -- because the bill does become law, on the books for future Presidents to enforce and for courts to interpret. Insofar as the President declares an intent not to enforce a portion of the law, and so long as he does not enforce it, he arrogates authority akin to the line item veto that the Supreme Court declared unconstitutional.

Recent signing statements also have been opaque as to the statutory provisions being repudiated and the legal justifications for the repudiation, thwarting Congress’s ability to exercise its legislative and oversight responsibilities and the public’s ability to debate the executive branch’s assertion of power. In June 2007, the Government Accountability Office found that, as of that date, the President’s signing statements included objections to 160 separate provisions in 11 appropriations bills. Reviewing a sample of 19 of those provisions, GAO concluded that the executive branch failed to implement nearly 30% of them. According to a study by Professor Christopher S. Kelley of Miami University, as of October 2008, President Bush had issued 171 signing statements challenging 1,168 provisions of law. See http://www.users.muohio.edu/kelleycs/

The President has also used signing statements to object to laws that require reporting of executive non-compliance with laws, further concealing from Congress and the public the President’s decision to disregard laws.

The misuse of signing statements is particularly troublesome when, as happened recently, the President uses them to declare his own constitutional powers in a manner that avoids judicial review of his position. Contriving to seize the last word on the enforceability of congressional enactments threatens the constitutional system of checks and balances.
II. Proposed Solutions
   A. Guiding Principles

Signing statements must respect the rule of law and the constitutional separation of powers. Such statements are an appropriate vehicle for stating the President’s reasons for signing a bill or for explaining his understanding of ambiguous legislative language. If, however, the President believes that a bill is unconstitutional, the best course in almost all cases is to veto it. Short of a veto, if the President determines that a provision would violate the Constitution and believes that the courts would agree, he should seek to work with Congress to correct the provision. Transparency of the President’s reasoning and actions is key. If the President and Congress cannot agree, they should create an opportunity for judicial resolution of the issue.

B. Proposed Measures

1. Proposal 1. The President should commit that, when bills are under consideration by Congress, the President will promptly identify any concerns that certain provisions may be unconstitutional and communicate these concerns to Congress so that it can correct the provisions.

2. Proposal 2. If the President believes a previously enacted law is unconstitutional, he should commit to provide Congress a report setting forth in full the legal basis for any decision to disregard or decline to enforce all or part of a law, or to interpret a law in a manner inconsistent with the clear intent of Congress.

3. Proposal 3. Congress should enact legislation requiring the President to notify Congress if he intends to disregard or decline to enforce all or part of a law, and to provide a report setting forth in full the reasons and legal basis for any such decision.

4. Proposal 4. Congress should enact legislation to enable the President, Congress, or other entities to seek judicial review of any signing statement that states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret a law in a manner inconsistent with the clear intent of Congress. Such legislation would seek to confer on Congress as an institution or its agents (either its own Members or interested private parties as in *qui tam* actions) standing in such actions.

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

IV. Counterarguments and Rebuttal

The Bush Administration has used signing statements to assert the right to interpret laws “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power.” President Bush has thus asserted a broad and unchecked power of the Executive to enforce the laws as he chooses.

The problem is not signing statements per se, but rather the way in which they have been used. Most scholars and experts who have examined this issue agree that the President is entitled to use signing statements to express his views on a piece of legislation, and to explain his interpretation of ambiguous provisions. However, by signing a bill into law, but then issuing a statement that declares that he will not give effect to it, or to a provision of it, the President is effectively vetoing the law without affording Congress the opportunity to override the veto, as the Constitution requires. Further, the misuse of signing statements creates instability and uncertainty in the legislative process, and weakens the framework of law.

V. Recommended Documents for Further Information


APPENDIX
SIGNING STATEMENTS

I. Jurisdiction

A. Legislative Branch: Proposals 3 and 4 would likely be referred to the House and Senate Judiciary Committees, and possibly to the House Oversight and Government Reform Committee and the Senate Homeland Security and Government Affairs Committee. Proposals 1 and 2 do not require legislative action.

B. Executive Branch: The President could implement proposals 1 and 2 through a presidential memorandum, without promulgating executive orders or regulations, and without agency involvement. Proposals 3 and 4 do not require executive action.

C. Judicial Branch: Proposal 4 would confer jurisdiction to the judicial branch if a court concludes that the case presents a case or controversy and the plaintiff has standing as required under Article III of the Constitution.

II. Status of Actions in Legislative, Executive, and Judicial Branches

A. Legislative Branch: There have been many hearings and proposed bills addressing signing statements.\(^1\) Legislative activities over the past few years include:

- On May 25, 2006, Representative Shelia Jackson-Lee (D-Tx) introduced H.R. 5486, which would prohibit the Executive from using funds to produce, publish or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution. No action was taken on the bill after it was referred to the House Committee on Government Reform.

- On May 25 and June 16, 2006, Representative Barney Frank (D-Ma) introduced H.J. Res. 87 and 89, respectively, both “[r]equiring the President to notify Congress if the President makes a determination at the time of signing a bill into law to ignore a duly enacted provision of such newly enacted law,” and “establishing expedited procedures for the consideration of legislation in the House of Representatives in response to such a determination.” Neither bill advanced after referral to the House.

\(^1\) A list of hearings and proposed legislation on signing statements from May 2006 to July 2008 has been compiled at [http://www.coherentbabble.com/signingstatements/FAQs.htm#A.%20Read%20Widely](http://www.coherentbabble.com/signingstatements/FAQs.htm#A.%20Read%20Widely)
Judiciary Committee and then to the House Rules Committee.

- On June 27, 2006, the Senate Judiciary Committee held hearings on President Bush’s use of signing statements. Following those hearings, on July 26, 2006, Senator Arlen Specter (R-Pa) introduced S. 3731, to “regulate the judicial use of presidential signing statements in the interpretation of Acts of Congress.” In remarks upon introduction of the bill, Sen. Specter explained that the bill (1) “instructs courts not to rely on Presidential signing statements in construing an act;” (2) “permits the Congress to seek a declaratory judgment on the legality of Presidential signing statements that seek to modify--or even nullify--a duly enacted statute;” and (3) “grants Congress the power to intervene in any case in the Supreme Court where the construction or constitutionality of any act of Congress is in question and a Presidential signing statement for that act was issued.” The bill stalled in the Senate Judiciary Committee.

- On January 5, 2007, Representative Shelia Jackson-Lee (D-Tx) introduced H.R. 264. The legislation is nearly identical to H.R. 5486 (introduced May 25, 2006) (described above). The bill has remained dormant since being referred to the House Committee on Government Reform.

- On January 31, 2007, the House Judiciary Committee conducted an oversight hearing on “Presidential Signing Statements under the Bush Administration.” John Elwood, Deputy Assistant Attorney General, Office of Legal Counsel; Mickey Edwards, former Member of Congress from the State of Oklahoma; Karen Mathis, President of the ABA; Nicholas Rosenkranz, Professor of Law at Georgetown University Law Center; and Charles Ogletree, Professor of Law at Harvard Law School, provided oral and written testimony, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:32844.pdf.

- On July 3, 2007, Senator Arlen Specter (R-Pa) introduced S. 1747, which would (1) instruct courts not to rely on Presidential signing statements in construing an act; and (2) give Congress the power to intervene in any case in any court (including the Supreme Court) where a presidential signing statement for that act was issued. The Judiciary Committee has taken no action on the bill. On July 16, 2007, Representative Carol Shea-Porter (D-NH) introduced a companion bill, H.R. 3045. The bill was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee, which has taken no action.

- On August 3, 2007, Senator Russ Feingold (D-WI) introduced S. Res. 303, to censure the President and Attorney General. The bill contains proposed findings concerning signing statements. The Senate Judiciary Committee has taken no action on the bill. On August 4, 2007, Representative Maurice Hinchey (D-NY) introduced a companion resolution, H.R. 626. No action was taken on the bill after it was referred to the Subcommittee.
on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee.

- On October 15, 2007, Senator Ron Paul (R-TX) introduced H.R. 3835, which states that the “House of Representatives and Senate collectively shall enjoy standing to file a declaratory judgment action in an appropriate Federal district court to challenge the constitutionality of a presidential signing statement that declares the President’s intent to disregard provisions of a bill he has signed into law because he believes they are unconstitutional.” The Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee has taken no action on the bill.

- On May 8, 2008, Representative Walter B. Jones (R-NC) introduced H.R. 5993, the Presidential Signing Statements Act, which would require that (1) the President to transmit copies of signing statements to congressional leadership within three days of issuance; (2) signing statements be published in the Federal Register; (3) executive staff testify on the meaning of presidential signing statements at the request of the House or Senate Judiciary Committee; and (4) no funds be authorized or expended to implement any law accompanied by a signing statement if any provision of the act is violated. The bill was referred to the House Committee on the Judiciary.

- On July 25, 2008, the House Judiciary Committee held an oversight hearing on “Executive Power and Its Constitutional Limitations.” Signing statements were among the issues addressed during the hearing, available at http://judiciary.house.gov/hearings/hear_072508.html.


B. Executive Branch: Several OLC opinions have addressed the subject of signing statements:

- Memorandum from Walter Dellinger, Assistant Attorney General, to Bernard N. Nussbaum, Counsel to the President, The Legal Significance
C. Judicial Branch: Relevant decisions include:

- **Myers v. United States**, 272 U.S. 52, 176-77 (1926) (sustaining the President’s view that a statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute).

- **Youngstown Sheet & Tube Co. v. Sawyer**, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (recognizing existence of President’s authority to act contrary to a statutory command).

- **Freytag v. Commissioner**, 501 U.S. 868, 906 (1991) (four Justices addressing the issue agree that the President has “the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional”).

- **INS v. Chadha**, 462 U.S. 919, 942 n.13 (1983) (“it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds”).


- In his Dissent in **Hamdan v. Rumsfeld** (2006), Justice Scalia cited a signing statement by President Bush. In **Hamdan**, before striking down the military commission system established by President Bush’s November 2001 order, the Supreme Court first concluded that the Detainee Treatment Act of 2005 had not stripped habeas jurisdiction for cases that had been filed prior to passage of the act. As part of his Dissent, Justice Scalia wrote that “Of course in its discussion of legislative history the court wholly ignores the president's signing statement, which explicitly set forth his understanding that the [Detainee Treatment Act] ousted jurisdiction over pending cases.” Generally, however, courts do not rely upon signing statements as part of the legislative history, since presidents merely sign or veto laws and are not involved in drafting them. Most legal scholars agree that signing statements should not be considered as part of a legislative history analysis.
CHAPTER TWENTY
WAR POWERS AUTHORITY

I. The Problem

The system of checks and balances on Constitutional war powers authority has eroded. The evolution of the world order and the emergence of serious threats from terrorists have supplied new labels for the ways in which force is used and, in some cases, new justifications for its use. But they have not changed the constitutional dictate that only Congress is empowered to authorize the initiation of the use of force abroad except when force is used for a limited range of defensive purposes. Nevertheless, presidents have asserted that Congress’s authorization for various uses of force abroad was not necessary, and the executive branch has failed to share complete and accurate information with Congress regarding the asserted justification for the use of force. Congress at times has failed to exercise its constitutional duty to insist on a collective judgment about initiating force abroad, either because it tries to evade political accountability for a decision on war or because it defers to the presumed superior competency of the executive to make that decision. Insofar as national security decisions rest on secret information shared nominally, if at all, with Congress, the temptation to defer to the President only increases. Furthermore, despite the intentions of its sponsors, the 1973 War Powers Resolution has contributed to the erosion of the checks and balances system insofar as it has been understood to give both political branches a “free pass”: the President to use force for sixty days without prior congressional authorization, and Congress to assume that it could discharge its constitutional duty by doing nothing.

II. Proposed Solutions

A. Guiding Principles

Except when force is used for a limited range of defensive purposes, only Congress has the constitutional authority to decide whether and when our Nation should deploy our troops abroad, and the President must seek advance authorization from Congress for initiating the use of force abroad. In seeking such authorization, the President must share complete and accurate information with Congress. Likewise, Congress must perform its constitutional duty to reach a deliberate and transparent collective judgment about initiating the use of force abroad except when force is used for a limited range of defensive purposes.

B. Proposed Measures

1. Proposal 1: The new President should publicly pledge that he will not commit troops abroad without prior congressional authorization, except when force is used for a limited range of defensive purposes. The President should further pledge that he will present complete and accurate information to Congress about any such proposed use of force.

2. Proposal 2: To obtain the informed collective judgment of Congress on initiating the use of force abroad, the President should supply Congress with timely, truthful and complete information about a proposed use of force.
3. **Proposal 3:** Congress should exercise its constitutional authority to reach a deliberate and transparent collective judgment about whether and when the United States should deploy our forces abroad, except when force is used for a limited range of defensive purposes. Congress should also use its own investigatory tools to determine the reliability and completeness of the information on which it bases its collective judgment.

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The Constitution Project, *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*, available at  
[http://www.constitutionproject.org/warpowers/article.cfm?messageID=49&categoryId=1](http://www.constitutionproject.org/warpowers/article.cfm?messageID=49&categoryId=1)

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

IV. Counterarguments and Rebuttals:

The National War Powers Commission recently proposed that Congress be involved only in “significant armed conflicts,” and not in minor engagements, emergency defensive actions or law enforcement activities, as to which the Commission believed that the President should have authority to act unilaterally. In the Commission’s view, its proposal is “practical” and “realistic,” has a “reasonable chance” of garnering support from both the President and Congress and maximizes the likelihood that the executive and legislative branches will productively consult with each other regarding matters of war. However, its recommendation that some war powers authority be reserved exclusively for the President in consultation with a small cross-section of Congress (a proposed “Joint Congressional Consultation Committee”) is contrary to the Constitution’s delegation of powers.

V. Recommended Documents for Further Information

a. Public Opinion Polls:

Gallup polls show that Americans strongly favor requiring prior congressional approval of decisions to go to war. A May 2008 Gallup poll found that an overwhelming majority of Americans, 79%, believe that the President should be required to obtain congressional approval before sending troops abroad. This number is essentially unchanged from the 80% of Americans who held the same belief in November 1973, at the close of the Vietnam War, and the 82% in January 1991 who believed it “important” for the President to obtain congressional approval before initiating military action in Iraq. See National War Powers Commission Report, App. 6 at 2.
Gallup polling in May 2008 also indicates that Americans favor congressional approval even in exigent circumstances and where military involvement is limited. For example:

- Approximately 76% of Americans believe congressional approval should be required even if military involvement was not expected to last long;
- Approximately 70% of Americans believe congressional approval should be required if the President wants to use planes to bomb suspected terrorists;
- Approximately 50% of Americans favor requiring congressional approval for humanitarian missions in response to natural disasters;
- Approximately 46% of Americans thought congressional authorization should be required for any response to an attack on the United States; and
- Approximately 40% favored congressional approval even if American citizens were in danger or in need of rescue abroad.

b. Cato Institute, “Reclaiming the War Power,” Cato Handbook for Congress, Policy Recommendations for the 108th Congress, available at http://www.cato.org/pubs/handbook/hb108/hb108-11.pdf (recommending that Congress should (i) insist that U.S. armed forces not be deployed were hostilities are likely or imminent without congressional approval; (ii) defund any such deployment that lacks prior congressional approval; (iii) insist that hostilities not be initiated by the executive branch unless and until Congress has authorized such action; and (iv) oppose any effort to reshape national security doctrine in a way that denies congressional supremacy over the war power).


i. The Constitution Project, Deciding to Use Force Abroad: War Powers in a System of Checks and Balances, endorsed by a bi-partisan blue ribbon committee co-chaired by two former Members of Congress, Mickey Edwards (R-OK) and David Skaggs (D-CO), available at http://www.constitutionproject.org/warpowers/article.cfm?messageID=49&categoryld=1

APPENDIX
WAR POWERS

I. Jurisdiction

A. Congress: Proposal 3 would most likely be addressed by the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, which have jurisdiction over declarations of war.

B. Executive Branch: Proposals 1 and 2 would be addressed by the White House and could be addressed by enforcing and complying with the existing constitutional requirements.

II. Status of Actions in Legislative, Executive, and Judicial Branches

A. Legislative Branch:

1. House Joint Resolution 53 (Constitutional War Powers Amendments of 2007) was introduced on September 25, 2007 by Rep. Walter Jones (R-NC) (with 11 co-sponsors). The bill would amend the War Powers Resolution to ensure the collective judgment of both the Congress and the President will apply to the initiation of hostilities by the Armed Forces and the continued use of the Armed Forces in hostilities. The bill also includes consultation procedures concerning the participation of the Armed Forces in military operations of the United Nations. The bill was referred to the House Foreign Affairs and Rules Committees on September 25, 2007. No further action has been taken.

2. House Concurrent Resolution 33 was introduced on January 16, 2007 by Rep. Peter DeFazio (D-OR) (with 59 co-sponsors). The Resolution states the congressional belief that: (1) initiating military action against Iran without congressional approval does not fall within the President’s “Commander-in-Chief” powers under the Constitution; and (2) seeking congressional authority prior to taking military action against Iran is not discretionary, but rather is a legal and constitutional requirement. It also rejects any suggestion that P.L. 107-40 (the authorization of force resolution approved in response to the terrorist attacks of September 11, 2001) or P.L. 107-243 (the authorization of force resolution approved to go to war with Iraq) extends to authorizing military action against Iran, including over its nuclear program. The Resolution was referred to the House Committee on Foreign Affairs on January 16, 2007. No further action has been taken.

3. Senate Concurrent Resolution 13 was introduced on February 15, 2007 by Sen. Bernard Sanders (I-VT) and is the related, Senate version of House Concurrent Resolution 33 discussed immediately above. The Senate Resolution was referred to the Senate Committee on Foreign Relations on February 15, 2007. No further action has been taken.