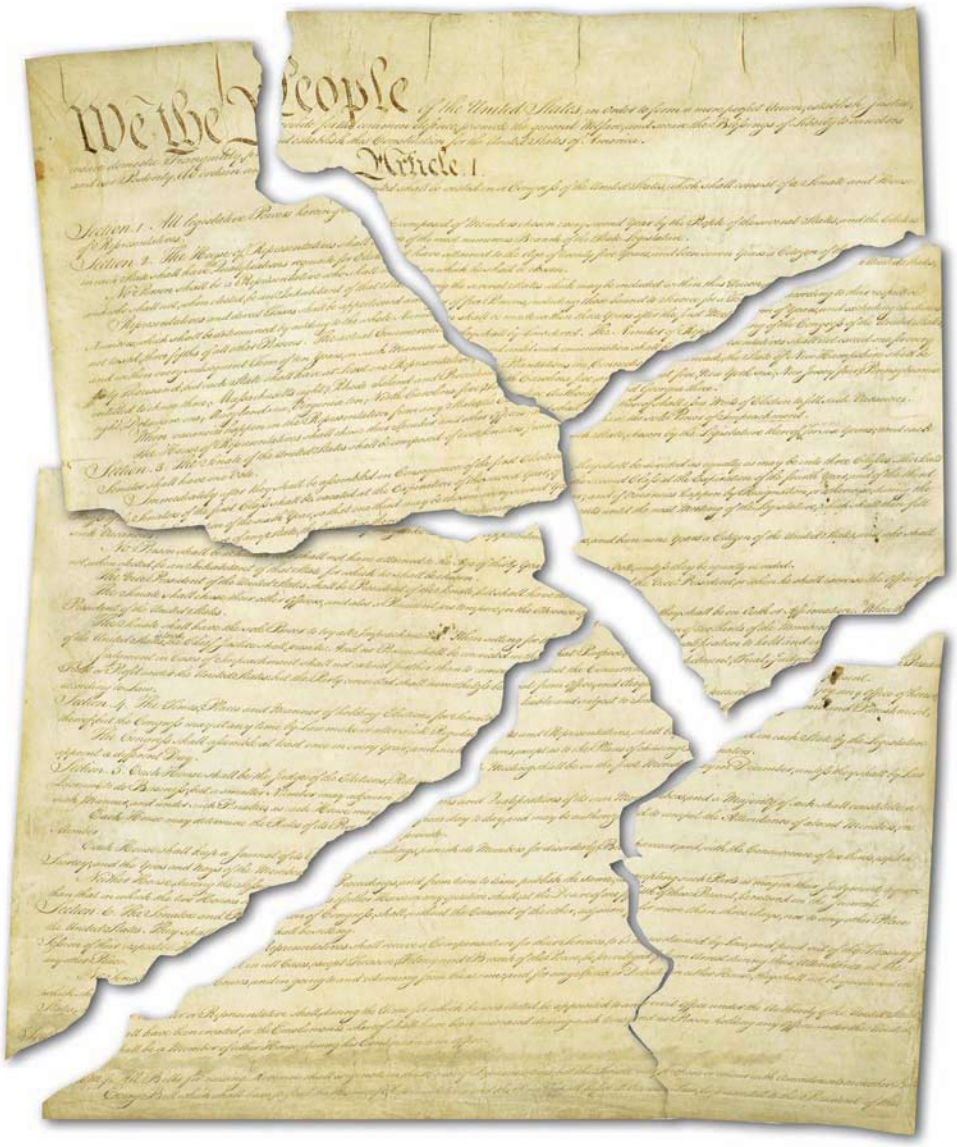
100 DAYS
to restore the constitution

white papers

Restore. Protect. Expand.

Ending Arbitrary Detention, Torture and Extraordinary Rendition



centerforconstitutionalrights

on the front lines for social justice

Restore. Protect. Expand The Constitution:
Ending Arbitrary Detention, Torture and Extraordinary Rendition

In the past eight years, the United States' policies around torture, arbitrary detention, extraordinary rendition and other human rights issues are linked to one paradigm – the so-called "war on terror." This paradigm has guided the U.S. government and the highest levels of the Bush administration to set into place and justify a framework that attempts to rationalize, excuse and legitimize torture, construct an international network for arbitrary and extrajudicial detention and engage in a program of extraordinary rendition that outsources torture, ultimately placing the United States outside the realm of international human rights and humanitarian law.

In many ways, this policy has become associated with infamous sites and activities – for example, the photographs of torture at Abu Ghraib; the Guantánamo Bay prison camp; the victims of rendition programs spirited away and tortured. In each example, the worst abuses have often been pushed aside as the responsibility of low-ranking individuals who overstepped their boundaries or committed "overzealous" acts. The creation of these facilities and programs and the guide for much of what took – and continues to take – place within them, however, has been governed by a slew of legal opinions, official memos and executive orders that attempt to place the United States and its military and executive branches outside the rule of law.

The results have been devastating for the victims and survivors of these practices and policies. These men have endured years of arbitrary detention without charge or trial, and suffered torture, abuse and cruel, degrading treatment as alleged "enemy combatants." This is a slippery, broadly-defined term that has meant not only facing continuing suspicion, but also often a stigma after release or return, as well as the loss of de facto refugee status or homes outside former detainees' countries of citizenship. The consequences of arbitrary detention are many and include the lasting stigma of being classified a so-called "suspected terrorist," a designation made without even the opportunity for such an individual to clear one's his name. These social costs extend far beyond the immediate victims and affect entire families, communities, societies and nations whose history and present have been shaken by forced engagement with the "war on terror" machine.

The practices and policies of the Bush administration also caused substantial costs to the United States itself. Long-heralded protections of the Constitution were discarded in the immediate interests of the Bush administration's so-called "war on terror," and the profundity of the changes unleashed threaten long-term depredation to the protections of the Constitution and international human rights law. The U.S. was previously known to strongly denounce torture, and in the last eight years instead became a nation whose image is synonymous with black-hooded detainees in orange jumpsuits or a "human pyramid" at Abu Ghraib. The U.S.' claim to be a global human rights leader was shattered by the torture and human rights abuses that occurred during the Bush administration, justified in dubious legal memoranda signed into law under circumstances that cast a kingly aura over the president during a wartime – the "war" being the seemingly

endless, vague and borderless "war on terror." This conduct has undermined international human rights structures, with the United States becoming an example for all potential human rights violators to emulate in defense of their own policies and actions.

The Center for Constitutional Rights has long led the legal battle on behalf of the men held at Guantánamo Bay, and to restore, protect and expand the protections and rights provided by the U.S. Constitution. We believe it is imperative that President Obama take action as soon as he is in office to undo this paradigm and reverse the direction in which the Bush administration has led the United States in during the past eight years. The Obama Administration must take action to end arbitrary detention, end and prevent torture, abuse, and cruel, inhuman and degrading treatment, end the use of extraordinary rendition, and enact policies which spearhead the effort to strengthen the legal framework necessary to protect human rights and uphold international law. President Obama has not only the opportunity but also the responsibility to quickly and resolutely ensure accountability for those who have violated the law and the Constitution, as well as provide redress for victims of torture and other abuses. These are not practices or policies that can or should be repaired, modified or saved—they must be scrapped entirely and replaced by a renewed adherence to the Constitution and international law.

Guantánamo Bay and Arbitrary Detention

The detention camp at Guantánamo Bay Naval Base in Cuba is one of the most notorious examples of arbitrary detention in the United States' "war on terror." For the over 778 men held there during its seven year operation, imprisonment has been arbitrary with little or no action taken in their defense. The process of release has often seemed as arbitrary as that of detention itself at Guantánamo. Of the approximately 255 men who remain detained at Guantánamo at the time this was written, the vast majority face no charges and are being held indefinitely solely based on the executive determination that they are "enemy combatants." Many of these men have been "cleared for release" but remain in detention because the government has made almost no effort to repatriate them; in fact, as of December 2008, 40 of these men have been slated for release and are awaiting transfer, some for long periods of time, with little to no action taken to return them to their home countries or a safe third country.

According to a leaked Justice Department memo from December 2001, Guantánamo Bay was specifically chosen for the purpose of detaining the prisoners of the U.S. military because the Bush administration believed it would be beyond the reach of U.S. courts.[1] It was intentionally chosen as a place to conduct interrogations of a significant number of prisoners in isolation from all outside human contact and the international eye. Guantánamo was selected as a place where the rule of law does not apply, but, rather, a place where the military and its Commander in Chief are the only bastion of the law. Its selection demonstrates that from the start the Bush administration planned to engage in activities that are illegal under domestic law and in violation of international treaties.

On January 11, 2002, the U.S. military flew the first 20 prisoners from Afghanistan to Guantánamo. There, they were placed in Camp X-Ray, a makeshift detention facility where detainees were corralled outdoors behind chain link fences. They were later moved to a hastily prepared facility on the base, known as Camp Delta. Today, Guantánamo is a heavily institutionalized facility with a series of "camps." In addition, to the secret Camp 7, which holds detainees transferred to Guantánamo from secret CIA "black sites," are perhaps the most notorious Camps 5 and 6, where detainees are highly isolated, allowed limited contact with other detainees and little recreation. Incarceration in Camps 5 or 6 is equivalent to solitary confinement for approximately 23 out of the 24 hours in a day. While the government has justified the use of these conditions to penalize detainee "misbehavior," a number of detainees cleared for release, including refugees who cannot return to their home countries due to fear of prosecution, have remained held in Camps 5 and 6.[2] Rather than moving towards closure of the base, the erection of new structures has indicated an apparent desire to maintain the base as a permanent offshore prison colony.

By the time President Obama takes office, many of the detainees will have spent close to seven years in detention without trial, charge or a real hearing. President Obama has expressed a desire to close the prison at Guantánamo Bay. This is a project that requires immediate action upon taking office and prioritizing the closure of the prison in a way that protects detainees' rights and ensures that detainees are transferred to safety. This must be the priority of the next administration, rather than the dangerous and haphazard creation of new structures of detention, imprisonment or so-called "national security courts" that only serve to extend arbitrary executive detention and extralegal, unconstitutional authority.

Indeed, the men held at Guantánamo have proven in most cases to be precisely the opposite of former Secretary of Defense Donald Rumsfeld's initial description of them – "the worst of the worst." As many as 85 percent of the men held at Guantánamo were not seized by U.S. troops, but were instead turned over by Northern Alliance-affiliated Afghan warlords or Pakistani security services who often received bounties or other benefits for turning them over, with no supporting evidence that they actually were, "captured Taliban or Al-Qaeda." The vast majority of prisoners engaged in no hostilities, many were not even picked up on a battlefield, and the few that were served as low-level soldiers, conscripts or non-fighting personnel, such as cooks, truck drivers and assistants.[3] Brigadier General Jay Hood, former commander of the base at Guantánamo Bay, said "Sometimes, we just didn't get the right folks."[4] "Most of these guys weren't fighting. They were running," said General Martin Lucenti, former deputy commander of Guantánamo.

Since its inception, Guantánamo Bay was essentially based upon the concept that the detention center was a legal black hole – a place where detention could not be challenged in courts in the U.S. or anywhere else. The Bush administration rejected the classification of the detainees as prisoners of war, and then-Deputy Assistant Attorney General John Yoo and former White House Counsel Alberto Gonzales opined in legal memoranda that Guantánamo detainees were not protected by the Geneva Conventions, allowing for nearly-unlimited interrogation.

Less than one month after the first prisoners were brought to Guantánamo Bay, however, the first lawsuit was filed in U.S. courts challenging arbitrary detention. On behalf of Australian David Hicks and two men from the United Kingdom, Shafiq Rasul and Asif Iqbal, the Center for Constitutional Rights filed a petition seeking a writ of habeas corpus in the District Court for the District of Columbia. The petition challenged the Presidential Executive Order of November 13, 2001, which authorized indefinite detention without due process of law, as a violation of international law and the U.S. Constitution.[5]

The core contention of the litigation was that the United States cannot order indefinite detention without due process, and that the detainees have the right to challenge the legality of their detention in court. In compliance with international standards for fair trials and the fundamental guarantees of the U.S. Constitution, the detainees' challenge held that they had the fundamental right to be informed of the charges against them and the right to present evidence on their own behalf, as well as the right to cross-examine their accusers. The writ of habeas corpus is one of the oldest and most fundamental protections in international jurisprudence, protecting individuals from the power of executive authority. This litigation, which reached the U.S. Supreme Court in the momentous case *Rasul v. Bush,* led to a Supreme Court decision in 2004 upending the Bush Administration's argument that Guantánamo detainees were outside the law, ruling instead that detainees had a right to fair hearings before federal judges under the federal habeas statute.[6]

Despite the Supreme Court's ruling, the Bush administration refused to acknowledge defeat and set up the bogus "Combatant Status Review Tribunal" system as an alternative to meaningful habeas corpus hearings, and continued to mount court challenges to detainees' right to a hearing. The Administration also impelled a series of legislative initiatives in Congress that culminated in two pieces of legislation: the Detainee Treatment Act of 2005, which purported to replace the detainees' access to the federal courts under habeas corpus with a limited challenge to the CSRTs, and the Military Commissions Act of 2006, which attempted to strip the federal courts of their authority to hear habeas claims brought by detainees.

On June 13, 2008, the U.S. Supreme Court ruled in *Boumediene v. Bush/Al Odah v. U.S.* that the Military Commissions Act was unconstitutional. In its historic decision, the Court unambiguously rejected the political branches' attempts to cut the federal courts out of the process. The Court further held that the men detained at Guantánamo have a constitutional right to file petitions for habeas corpus in U.S. federal court challenging the lawfulness of their detention. Acknowledging the uniqueness of the Bush administration's practices at Guantánamo, the Court turned to the fundamental principles underlying the purpose of habeas corpus: to allow the courts to act as a check against the abuse of Executive power. In the Court's order, it noted that "[f]rom an early date, it was understood that the King, too, was subject to the law." The Court emphasized that the Suspension Clause – the clause of the U.S. Constitution that limits the suspension of habeas corpus to periods of rebellion or invasion - was designed by the Founders to "protect against the cyclical abuses of the writ by the Executive and Legislative Branches." It further noted that the "Framers view freedom from unlawful restraint as a fundamental precept of liberty," and that central to the protection of this liberty is the "duty and authority of the Judiciary to call the jailer to account."[7]

The Court strongly criticized Bush and Congress's attempt to declare that because Guantánamo was outside the sovereign territory of the United States, the Constitution did not apply. The Court firmly stated that "[t]o hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.'"[8] Several factors warranted application of the Suspension Clause to Guantánamo, including: 1) that the petitioners are noncitizens who dispute their status as "enemy combatants" as determined by CSRTs in an unfair proceeding; 2) the United States exercises exclusive jurisdiction and control over Guantánamo, with no other country's laws applying; and, 3) no credible arguments exist that habeas proceedings would impede any military mission at Guantánamo.[9]

The Court then concluded that the Detainee Treatment Act review was not an adequate substitute for a habeas petition. Fundamentally, a habeas proceeding – and any substitute – must afford the petitioner an effective and meaningful opportunity to: 1) correct any errors in the decision under review (here, the determination that the petitioner is an "enemy combatant"); 2) to challenge the sufficiency of the government's evidence; and, 3) to present and have a court consider exculpatory evidence not considered by the tribunal. From the initial proceedings in pending cases and the statute itself, the Court concluded that the DTA fails to provide an adequate substitute for habeas. Specifically, the DTA statute fails to provide release from custody as a remedy and offers no procedures for petitioners to present new, exculpatory evidence. The Court further found that the DTA fails to allow for the full range of legal challenges available in a habeas proceeding. As a result, the Court struck down that portion of the DTA that deprived the petitioners of their constitutional right to habeas.[10]

The Court's decision in *Boumediene v. Bush* played a significant role in refuting the Bush administration's ongoing justifications for detention at Guantánamo. Nevertheless, the fundamental issues of executive authority and arbitrary detention remain unresolved in a post-*Boumediene* climate. These issues remain to be confronted and tackled head-on by President Obama in order to restore and expand Constitutional protections. The Obama administration must respect and uphold the decision of the Supreme Court in *Boumediene v. Bush* and act with all expeditiousness to close the prison at Guantánamo Bay and put an end to this malignant chapter in U.S. history.

In order to close Guantánamo, however, it is not sufficient that the Obama administration simply order its prisoners to be transferred elsewhere – particularly to continued detention in other facilities, as some members of Congress and other political figures have suggested. The fundamental problems of Guantánamo – arbitrary executive detention, disdain for the rule of law, indefinite detention without charge or trial, as well as the torture, and cruel, inhuman and degrading treatment suffered by many of its prisoners – do not stem from its unique location and history. Rather, they are key questions to any administration that can – and, indeed, must – act responsibly with its executive authority, respect the Constitution and international humanitarian law, and uphold human rights and dignity.

Many of the men at Guantánamo are, in fact, refugees; they cannot return to their home countries, and

in fact had set up new homes in Afghanistan, Pakistan or elsewhere at the time they were seized by the U.S. In many cases, their very "foreign-ness" was deemed a reason for suspicion, as they were not native Afghans or Pakistanis. Over 50 of the men at Guantánamo cannot return to their home countries or countries of citizenship for credible fear of persecution or torture should they return. A number of their home countries, such as Libya and China, have been cited by the U.S. State Department for their abuses and violations of human rights.[11] Nevertheless, the U.S. has repeatedly sought to return a number of these men to their countries of citizenship despite their well-founded fears of persecution and torture. In the case of the Uighur men, of a Muslim ethnic minority from China, the U.S. government has been compelled to officially acknowledge both the very real persecution faced by the men as well as the men's innocence of the allegations made against them. The U.S. has done little, however, on the international stage to help the men find safe resettlement after over six years of arbitrary detention As of December 2008, the U.S. has thus far refused to resettle any former detainees within the borders of the United States, and has done very little to persuade European or other countries with Uighur populations to accept these former Guantánamo detainees as asylees.

When President Obama takes office, the first critical step to closing Guantánamo will be to transfer all of those detainees who have not been charged either to their home countries, to safe third countries, or to provide them with asylum within the United States. These detainees must be returned to their homes and families, not merely transferred to continued detention, as has been the case for a number of Afghan detainees transferred to Afghan prisons like Pul-i-charki prison where the U.S. oversees the "national security" wing of the prison. These men have been detained for close to seven years, charged with no crimes and heard by no fair tribunal. Furthermore, they should be provided with compensation and reparations for the long-term damage to their lives and the irreparable loss of liberty they have suffered over the past seven years.

The plight of detainees who are refugees requires immediate attention. In finding asylum for these detainees, it is critical that the U.S. not burden countries with overzealous security restrictions, which would likely hinder its efforts. Indeed, the U.S.' insistence on such security restrictions, whether for refugees or for citizens transferred to their home countries, has repeatedly delayed the process of detainees returning home. Such security restrictions, especially in regard to former detainees who have never been charged, tried or convicted of any crime, needlessly create a burden for former detainees and their countries of residence, and comprise an ongoing form of U.S. control over former detainees even after their ostensible transfer and release.

President Obama must affirm his commitment to the rule of law by: 1) implementing the Supreme Court's decision in *Boumediene v. Bush* and pressing the Department of Justice to end its delaying tactics in litigation regarding detainees; 2) applying the Geneva Conventions and Common Article 3 to all facilities where the U.S. holds prisoners of war in short-term, battlefield detention; 3) ending the use of Combatant Status Review Tribunals and officially acknowledging that their determinations were invalid, thus removing the

"enemy combatant" designation from the hundreds of men who have never faced a real hearing or criminal charges yet bear this designation as a stain on their records; and, 4) committing to the use of the existing criminal justice system to try those accused of crimes.

The detainees who the government seeks to charge with recognizable crimes should face an independent and impartial court within the existing federal criminal justice system. If the government cannot make its case outside of a rigged military system that allows for evidence obtained through torture and coercion, it is the government's responsibility to ensure that future prosecutions of people accused of crimes are conducted in accordance with the rule of law. In fact, U.S. federal courts have already prosecuted people accused of the same criminal acts as those currently facing military commissions, such as the men convicted of participating in the bombing of the U.S.S. Cole and Zacarias Moussaoui.[12] Though these specific proceedings were deeply flawed and problematic, they took place within the standard criminal justice system, thereby ensuring a measure of accountability and Constitutional protections of the rights of the accused.

Throughout the Bush administration, the White House has been the driving force for the expansion of executive power and the weakening of the Constitution. It is long past time for the White House to uphold different principles – primarily, to strengthen Constitutional rights and safeguard protections for all. President Obama has a key opportunity to take the lead, with political integrity and courage, in urging Congress to repeal the Military Commissions Act of 2006 in its entirety. Furthermore, the President must withdraw all executive orders that attempt to legitimize extralegal detention and deny the protections of the Geneva Conventions to prisoners of war or others held by the United States.

At the core of closing the detention center at Guantánamo Bay is a reaffirmation of the Constitutional principles of checks and balances and a restrained executive branch. Closing Guantánamo is a sorely needed step – but it is only the first step towards restoring the U.S. Constitution.

Black Sites and CIA "ghost detention"

Arbitrary executive detention, however, is not confined to Guantánamo Bay. The prisons that comprise the CIA's extensive network of "black sites" originally held many of the detainees currently facing military commissions charges at Guantánamo. Black sites have been reported in locations as far afield as the Horn of Africa, a ship off the coast of Diego Garcia and multiple locations in Eastern Europe. The "ghost detainees" held at these secret black sites are individuals seized by the U.S. in the so-called "War on Terror."[13]

These individuals are victims of enforced disappearance as defined by international law. Enforced disappearances occur when there is an:

> "…arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State,

followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."[14]

Enforced disappearances involve violations of several treaties which are binding on the United States, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). They also violate international humanitarian law. While it is not currently binding on t he United States, the Obama administration should move quickly to join the more than 80 countries that have signed the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

Several individuals who were detained at "black sites" have since been released, and fourteen so-called "high-value" detainees were transferred to Guantánamo Bay from CIA custody in September 2006. Those detainees were sent to Guantánamo Bay in advance of a public statement by President George W. Bush acknowledging the U.S. secret detention program on September 6, 2006. President Bush asserted that the sites were then "empty," but pointedly left the possibility of future use of the program open. He did not clarify the fate and whereabouts of any other individuals who were held in the program. The transfer of Abd al-Hadi al-Iraqi from secret CIA custody to Guantánamo Bay in April 2007 and the March 14, 2008 transfer of Muhammad Rahim al Afghani to Guantánamo Bay from CIA custody clearly demonstrate the system was still operating.

In 2007, George W. Bush released Executive Order 13440 regarding CIA detainees. The order banned cruel and inhuman treatment of detainees and while it did not explicitly state which interrogation techniques are allowed, it permitted exemptions for the use of waterboarding and stress positions. Furthermore, the Executive Order provided no mechanisms for notification of the imprisonment of these detainees to family members or the International Committee of the Red Cross (ICRC).[15]

Enforced disappearance is a violation of international law and U.S. obligations, and grossly violates the limitations of executive authority under the Constitution. "Ghost detainees" have no access to challenge their detention; furthermore, it is impossible for family members or other interested parties to verify their detention and raise claims on their behalf. The creation and maintenance of a CIA netherworld is a legacy of the current administration that must be quickly repudiated. President Obama must order and announce the immediate closure of all secret CIA detention facilities. The use of enforced disappearance and the holding of ghost detainees must be renounced immediately and domestic law must be passed that explicitly implements international obligations and provides for redress for victims of ghost detention.

The stain of secret detention, however, cannot be erased simply by ending the program, nor can it be solved by transferring authority to third countries to hold detainees at the direction of the United States. The U.S. has mechanisms to arrest, charge, try and question individuals for recognizable criminal offenses. For those individuals currently held in secret detention, they must immediately be given access to legal counsel and

the ICRC, and the U.S. must immediately make known their names and whereabouts, and release them. If the U.S. government wishes to hold individuals, it must charge them and bring them to trial in the existing federal criminal justice system. And, if their prosecution and detention is so tainted by years of abuse and violation of law that it cannot so proceed, the only recourse is to release these individuals, not to create new, arbitrary structures to perpetuate their unlawful detention.

The power of secret detention and enforced disappearance lies in its arbitrary and secretive nature. It is imperative that the U.S. United States make known the identities and whereabouts of all individuals it has detained in the "War on Terror," even if they have been released, transferred to the custody of another state or are deceased. President Obama must make ending secret detention and enforced disappearances a high priority. Within the first 100 days of taking office, he must issue an executive order directing the CIA to discontinue all such practices and favor legislation in Congress to rein in the CIA and prohibit the use of such secret detention programs in the future.

Extraordinary Rendition and Outsourcing Torture

The U.S. government's use of secret detention did not end with U.S.-controlled "black sites." In September 2001, it is reported that President Bush signed a secret order purportedly authorizing the CIA to render, abduct and transfer people to foreign countries for purposes of "interrogation." This practice, known as "extraordinary rendition" serves to send detainees to countries for the purpose of arbitrary detention and interrogation under torture, both illegal actions punishable under U.S. law.

Extraordinary rendition is illegal. The CAT and the ICCPR, both signed and ratified by the U.S., prohibit torture and require states to prevent, investigate and punish acts of torture. Torture is defined by the CAT as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." CAT Article 3 explicitly prohibits the transfer of a person to a country where there are "substantial grounds" to believe the person would be in danger of torture.[16] The Foreign Affairs Reform and Restructuring Act of 1998 codifies U.S. policy to comply with CAT Article 3 and takes extra measures to prevent the involuntary return, removal or extradition of a person to a country where he or she fears torture. The President's actions, however, were purportedly (and disingenuously) sanctioned by an opinion of the Office of Legal Counsel in the Department of Justice, *The President's Power as Commander in Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations,* dated March 13, 2002. The White House has consistently refused congressional requests for release of this memo. In instances where the government has acknowledged such transfers, it continues to deny knowledge of the use of torture, saying that it relies on diplomatic assurances from the recipient country that the prisoners will be

treated humanely. The U.S. has never publicly protested after reports confirming torture in countries of U.S. sanctioned transfers have become public, and continues to deny the practice of extraordinary rendition.

At the request of the United States, victims of extraordinary rendition have been held in Syria, Egypt, Jordan, Libya, Russia, Bosnia, Indonesia, the United Arab Emirates, Yemen and Mauritania, as well as in Afghanistan where many prisoners were captured. That the United States continues to condemn the human rights abuses that take place in these countries, while taking advantage of them for its own illegal purposes, is blatant hypocrisy.

The case of Maher Arar is a vivid example of extraordinary rendition. Mr. Arar, a 38-year old Canadian citizen, is a wireless systems engineer who has worked in his field in the United States. He was born in Syria and moved to Canada when he was 17 years old, becoming a citizen in 1991. On September 26, 2002, on his way home to Canada from a family trip with his wife and children, he was detained at Kennedy Airport in New York. He was interrogated by U.S. officials from the INS, FBI and New York Police Department about alleged links to terrorism and was repeatedly denied the right to have a lawyer present or go to court. He was held and questioned under punitive conditions for 13 days during which time he was asked go "voluntarily" to Syria but refused. Mr. Arar was finally able to meet with a lawyer briefly on a Saturday, but despite repeated requests that his lawyer be present, he was questioned for six hours about his fears of being sent to Syria without her present. Within a day, Mr. Arar was taken in shackles to a private airport in New Jersey and flown by private jet to Amman, Jordan via Rome, where he was beaten. He was later delivered to Syria, a country in which prisons are widely reported to practice torture, particularly in detention centers run by security forces. Mr. Arar was interrogated, tortured and held in a grave-like underground cell that was three feet by six feet, during most of his year-long detention. No country, including the U.S., has ever charged him with any crime.[17]

CCR, with co-counsel, represents Mr. Arar in a civil suit against current and former U.S. officials responsible for sending him to Syria to be tortured. Filed in January 2004 just three months after his return home, the lawsuit continues to wind its way through the federal courts. The U.S. government continues to doggedly fight this lawsuit and refuses any responsibility, claiming outside of the courtroom that it had diplomatic assurances that Syria would not torture Mr. Arar. In June 2008, a federal appellate court affirmed the district court's dismissal of Arar's case two-to-one based on the potential for interfering with national security; however, in August 2008, the court took the highly unusual step of deciding – before being asked – to rehear his case *en banc*, before the full court, on December 9, 2008.[18] Despite abundant public information that has come out about Mr. Arar's rendition, a report by the Inspector General of the Department of Homeland Security and Congressional hearings investigating his rendition, the Secretary of State has done no more than admit that Mr. Arar's case was mishandled.

In contrast, the Canadian government launched a rigorous inquiry that found that Mr. Arar had no connection to terrorism, apologized to him for its role and awarded him a multi-million dollar settlement. After

reviewing over 20,000 government documents and taking testimony from over 70 government witnesses, the Commission released a 1,200 page report in September 2006. The Commission concluded that:

1. There is "no evidence" indicating the Mr. Arar committed any offense or implicating him in terrorist activity.
2. There is no evidence that Canadian officials participated in the U.S. decision to detain Mr. Arar and send him to Syria.
3. The U.S. decision to detain Mr. Arar very likely relied on inaccurate and unfair information about Mr. Arar that had been provided by Canadian officials.
4. Canadian officials had not acted quickly enough to get Mr. Arar out of Syria and leaked false information which tarnished Mr. Arar's reputation upon his return.[19]

Canadian Justice Dennis O'Connor, who headed the Commission, stated: "Canadian investigators made extensive efforts to find any information that could implicate Mr. Arar in terrorist activities. They did so over a lengthy period of time, even after Mr. Arar's case became a cause célèbre. The results speak for themselves: they found none." Prime Minister Harper of Canada and the Commissioner of the Royal Canadian Mounted Police apologized to Maher Arar and his family for the "terrible ordeal" they suffered. He has also called on the US to "come clean" and acknowledge "the deficiencies and inappropriate conduct that occurred in this case."[20]

Maher Arar's case is only the tip of the iceberg in the practice of extraordinary rendition. Numerous cases of post 9/11 extraordinary rendition – by one journalist's estimation, up to 150 – have been documented by journalists, and many of those individuals who have since been released have reported being subjected to torture and cruel, inhuman and degrading treatment, often based on nothing more than mistaken identity or incorrect translation.[21]

The new President should make an official apology on behalf of the U.S. government to Mahar Arar and all others similarly treated. An independent commission or outside special counsel should be established to investigate extraordinary rendition and the circumstances of Mr. Arar's and others who were similarly detained. President Obama must order the government to provide full disclosure of information pertaining to the extraordinary rendition program. It is incumbent upon President Obama to not only make reparations to Maher Arar and other victims of extraordinary rendition, but to take action to prevent further acts of extraordinary rendition. It must be made clear that extraordinary rendition stands in violation of U.S. and international law, and that any instances of extraordinary rendition will be fully investigated and those responsible prosecuted for their violations of the law.

Torture and Its Attempted Justification

Abuse of executive power and arbitrary detention are not the only common threads of the horrors of Guantánamo, CIA secret detention and extraordinary rendition – these are also linked by the use of torture. In the seven years since the opening of Guantánamo, the notoriety of the U.S. as a state which uses torture, including physical, psychological, sexual and religious abuse, and cruel, inhuman or degrading treatment has risen dramatically. The U.S. has in fact been implicated in torture for decades, both for its involvement with systematic torture in a number of countries in Asia, Africa and Latin America, as well as domestically in police stations and prisons across the United States. In the past years, however, the U.S. has institutionalized, attempted to legally justify, sanctioned and perpetrated torture with escalating intensity and more overtly. Naomi Klein wrote, "Past administrations kept their 'black ops' secret; the crimes were sanctioned but they were committed in the shadows, officially denied and condemned. The Bush administration has broken this deal: post-9/11, it demanded the right to torture without shame, legitimized by new definitions and new laws."[22] Torture has always been illegal and unjustifiable – but the Bush administration has acted to flaunt its impunity and utter disregard for human rights and international law.

Indeed, the use of torture by the U.S. – often sanctioned by the highest levels of government – has been widely exposed in recent years, and more often excused than denied by those responsible. Former prisoners, government employees and U.S. and international human rights organizations have described and documented the use of torture in U.S. facilities. In prisons in Afghanistan Iraq, Guantánamo Bay, secret CIA prisons and at the hands of other countries, the United States has subjected or seemingly allowed others to subject prisoners to torture as defined by domestic and international law. In 2005, news reports revealed that the U.S. government was using waterboarding as an acceptable interrogation technique. The CIA subsequently admitted to the use of waterboarding, a torture tactic dating back to medieval Europe in which it was used during the Spanish Inquisition.

While the Bush administration publicly called the notorious images released from Abu Ghraib the result of individual cruelty or inexperience on the part of individual guards or soldiers, it was simultaneously crafting a "legal" rationale that would serve to institutionalize and approve torture. In fact, Bush administration officials of the highest level, including Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld and National Security Adviser and later Secretary of State Condoleezza Rice, held meetings to precisely determine the extent of interrogation used by the CIA for purported "high-value" detainees in places such as Guantánamo and secret CIA facilities.[23] Cheney, who participated in these and similar planning meetings, publicly defended the use of torture, describing the use of waterboarding in interrogation as a "no brainer" and stating that the U.S. "might have to work…on the dark side."[24]

From the Constitution's Eighth Amendment prohibition of "cruel and unusual punishment," to the Geneva Conventions, the War Crimes Act and the Convention Against Torture, torture under any circumstances is unquestionably illegal under U.S. and international law. Therefore, proponents of legalized torture must

attempt to construct an entirely new framework in order to redefine torture and justify so-called "enhanced interrogation techniques" or "aggressive interrogation." A series of memos emanated from the Justice Department's Office of Legal Counsel, drafted primarily by then-Deputy Assistant Attorney General John Yoo. Relying on the Authorization of Use of Military Force passed following the September 11, 2001 attacks, these memos promulgated a vision of untrammeled executive power in the "War on Terror" era.

The first of these memos, issued on January 9, 2002, concluded that the Geneva Conventions, including Common Article 3, did not apply to "War on Terror" prisoners.[25] A second Yoo memo, "Standards of Conduct for Interrogation under 18 U.S.C. Secs. 2340-2340A," was issued on August 1, 2002, soon to be known as the "torture memo,"[26] In the memo, Yoo adopted a narrow and illegal definition of "torture" that attempted to justify the use of conduct heretofore considered to be prohibited. The memo's definition of torture, which conflicts with the definition of torture accepted under international law and previously adopted by the United States, concluded that: 1) physical pain constituting torture "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death"; 2) that severe mental suffering "must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality"; 3) psychological harm must last "months or even years" to constitute torture; and, 4) anything below these thresholds merely constitutes "cruel, inhuman or degrading kind of treatment" which, he reasoned, though prohibited under the Third Convention, does not constitute a punishable offense under the War Crimes Act. The memo continued to make the extraordinary claim that the President had the power to order torture, and that any attempt to limit this authority would be an unconstitutional infringement of the President's powers as Commander-in-Chief.[27]

Following the large-scale controversy over U.S. torture that came on the heels of the release of the infamous Abu Ghraib photos, Rumsfeld continued to deny that the Geneva Conventions applied at Guantánamo, while ostensibly acknowledging their application in Iraq.[28] On November 3, 2005, the Department of Defense issued a new policy on military interrogations barring torture and inhuman treatment of prisoners that included a large loophole allowing the Secretary to override the policy.[29] In early 2005, the Department of Justice had issued yet another legal opinion – which remains classified – authorizing the use of harsh interrogation techniques including waterboarding. The disclosure of secret CIA prisons has resulted in a number of public acknowledgements of the use of waterboarding against CIA detainees.[30]

The Bush administration did not acknowledge the applicability of the Geneva Conventions until it was forced to do so by the Supreme Court's decision in *Hamdan v. Rumsfeld* in 2006, a successful challenge by a detainee to the first military commissions system created by executive order.[31] Indeed, in recent years, at Guantánamo, reports of physical torture are less common than in the prison's early days, although hunger strikers continue to be forcibly fed utilizing painful techniques. Instead, the ongoing psychological torment of solitary confinement has replaced earlier physical brutality, perhaps illustrating the government's diminished interest in interrogating the majority of detainees. The open justification of torture continues, however, as

Bush's executive orders continue to seek exemption for the CIA from prohibitions on waterboarding and other forms of torture in its secret prisons around the world.

President Obama has a responsibility to lead the U.S. to put an end to torture by: 1) rejecting all attempted legal justifications for torture; 2) meeting international obligations regarding the absolute prohibition on the use of torture as defined in CAT; 3) rescinding any and all executive orders giving approval to torture, cruel, inhuman and degrading treatment, and "enhanced" interrogation; and, 4) authorizing an executive order that reaffirms the absolute prohibition and ban on torture, with no loopholes or escape clauses. In addition, President Obama has the responsibility to appoint officials to the Office of Legal Counsel – and throughout the executive branch – who are committed to upholding the Constitution and human rights, and reject an unconstitutional and inflated view of executive authority that justifies lawbreaking and torture.

The Obama administration must not accept complacency by the mere assertion that a new day has arrived; rather, it must properly investigate the actions of the recent past and hold responsible those at the highest levels who planned and enacted war crimes and violations of domestic and international law, as well as the U.S. Constitution. A full investigation by the Department of Justice, including the appointment of a special prosecutor and the commencement of criminal prosecutions, is a necessity, along with the full, open and public disclosure of the results of the investigation and the records uncovered therein. It must be made clear that an era of torture, arbitrary detention, extraordinary rendition and the systematic degradation and assault on human rights comes with consequences for its engineers. It must be made clear – at home and abroad – that torture and abuse are no more, but that the torturers, abusers and creators of the structures and justifications that defied the law will be held accountable for their actions. Only then will the victims and survivors of the torture and other heinous abuses committed in the last 8 years be accorded redress.

Looking Forward

The Center for Constitutional Rights has several key policy prescriptions for President Obama to restore, protect and expand the Constitution, end arbitrary detention, extraordinary rendition and torture, and restore a balanced vision of executive power – including accountability for crimes committed at the behest of the executive. The process of ending the "War on Terror" paradigm and undoing its subsequent structures constructed via inflated war powers and military might is a long and complicated one. Regardless, there is not a more critical task facing the Obama administration than taking the following steps during in the first 100 days:

1. Close Guantánamo

The military prison at Guantánamo Bay Naval Base has become a symbol for torture, abuse and lawlessness. President Obama must act swiftly to close the prison at Guantánamo and ensure the safe repatriation or resettlement of the men held there through the following steps.

Quickly Transfer Detainees Home – The Obama administration cannot and must not insist on diplomatic guarantees and extensive security regimes in order to return detainees to their home countries. These men have been held without charge or trial for nearly seven years, and the U.S. must create no further obstacles to their return.

Resettle Refugees – The Obama administration must take responsibility to resettle the refugees of Guantánamo Bay. Unable to return their countries of citizenship, the Obama administration must use its political weight to find safe third countries for these men to settle in, or resettle them temporarily or permanently in the United States.

Rescind "Enemy Combatant" Status – The Obama Administration should acknowledge that the CSRT process was an unmitigated failure and that it was in fact a sham. The CSRT "enemy combatant" designation, which may harm former detainees even though legitimate allegations were never made in a real court, must be overturned for all current and former detainees. The "enemy combatant" label should be rejected and the CSRT process abandoned, and prisoners of war should be treated in accordance with the Geneva Conventions.

No More Guantánamos – The solution to Guantánamo Bay is not the creation of new Guantánamos around the world, including proxy detention centers in Afghanistan, the Horn of Africa, on U.S. military bases or elsewhere. Transfer to home countries should be guaranteed to mean the transfer to the regular system of that country, not to a form of U.S.-ordered or requested detention. The problem at Guantánamo cannot be solved by recreating it elsewhere. Closing Guantánamo does not mean only closing the facility, but ending the legacy of arbitrary and indefinite detention.

No "National Security Courts" or Military Commissions – If the Obama administration wishes to pursue criminal charges against any individual, it should do so properly within the federal criminal justice system. The federal criminal justice system has handled massive prosecutions and classified material on numerous occasions, demonstrating that there is no need or justification for an extralegal system that allows evidence based upon coercion or torture, hearsay evidence and government secrecy. A key first step in restoring the rule of law is abandoning the military commissions structure, rejecting any proposals for so-called "national security courts" and utilizing the existing federal criminal justice system for any criminal prosecutions.

2. End Ghost Detention and Close the "Black Sites"

CIA "ghost detention" in "black sites" is enforced disappearance. It is a violation of U.S. law and international law and is unjustifiable under any constitutional or legal regime. The President should immediately order and announce the closure of all secret CIA prisons.

Furthermore, the Obama administration must conduct a full investigation and release the names, whereabouts and current status of all present or former detainees. The President should order all agencies to follow standard policies when arresting individuals, which include access to legal counsel and the ICRC, and put an end to all arbitrary detentions currently ongoing under U.S. authority.

3. End Extraordinary Rendition:

President Obama must immediately issue an executive order barring the use of extraordinary rendition by any agency under the control of the executive branch and any branch of the U.S. military, in accordance with U.S. and international law. Furthermore, the Obama administration should immediately issue an apology and damages to Maher Arar and other victims of the rendition policy, and pursue a full investigation of the use of extraordinary rendition, with the full potential for criminal prosecution. The Department of Justice, the Department of Homeland Security and the Department of Defense should be ordered, and should pledge, to follow the State Department's definitions of human-rights abusing regimes when transferring prisoners in order to prohibit the transfer of prisoners to human rights abusing regimes, and prohibiting the reliance on so-called "diplomatic assurances" against torture.

4. End Torture:

The Obama administration must act quickly to establish its leadership in ending torture and undoing the legal justifications for torture that have been created over the past eight years. President Obama should immediately and officially denounce all "torture memos" and reject all existing legal advice from the Office of Legal Counsel that justifies torture, cruel, inhuman or degrading treatment, or enhanced interrogation so as to bring the United States back under the legal framework governed by the CAT and earlier domestic anti-torture statutes. Furthermore, President Obama should issue an executive order repealing all executive orders that attempt to give the president authority to permit torture by the CIA or any other agency or military branch for that matter. He should renounce language used in signing statements, such as that attached by President Bush to the Detainee Treatment Act, which attempts to exempt certain types of detention from guidelines against torture, cruel, inhuman or degrading treatment.

5. Restoring the Rule of Law

President Obama has a responsibility to not merely correct some abuses, but rather to fundamentally restore the rule of law after a period of time during which executive power and privilege has justified unthinkable acts on a broad systematic level. President Obama should work in the first 100 days of his administration to create processes that not only restore the rule of law by removing and rescinding past policies, but to also ensure accountability and continued adherence to the rule of law in the future.

Repeal the Military Commissions Act and other laws – The president should immediately begin to work with Congress to pass legislation that repeals the Military Commissions Act and those portions of the Detainee Treatment Act that preserve the CSRT system, thereby attempting to prohibit current or former detainees from challenging any aspect of their detention in the courts. These laws maintain a system that is neither sustainable nor justifiable, and President Obama should demonstrate the political will and commitment necessary to push forward such legislation in the next Congress. The Supreme Court's decision

in *Boumediene v. Bush* struck down the most notorious habeas-stripping clauses in these laws; however, much of their text – including prohibitions on detainee lawsuits regarding conditions and treatment, acceptance of coerced evidence and prospective immunity for violations of U.S. law – remain intact and must be quickly remedied.

Reparations for Victims of U.S. Policy – The president should work within the first 100 days to create a system for reparations for victims of U.S. policy who were deprived of their rights and their liberties by U.S. policies of torture, detention, and/or rendition. While financial reparations cannot fully repair the harms of the past years, they are both an important mechanism for accountability for the harm caused by the government and to protect the future interests of victims whose lives were irreparably changed by U.S. actions. The president should work with Congress immediately to institute a structure and system for providing and disbursing reparations to former detainees and rendition victims.

Accountability – President Obama should, within the first 100 days, launch multiple Department of Justice investigations into all activities related to arbitrary detention, torture and extraordinary rendition. These investigations should be vast and comprehensive, and fully empowered to begin the process of criminal prosecution. The results of these investigations must be made public, to begin to overturn the legacy of secrecy left by the previous administration. Anyone who engaged in – or aided and abetted – such violations should be prosecuted to the fullest extent.

---

[1] Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Att'ys Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def., "Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba" 6-8 (Dec. 28, 2001), available at http://www2.gwu.edu/nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf

[2] *Miami Herald,* "A Prison Camps Primer." February 6, 2008. Updated: August 8, 2008. Available at: http://www.miamiherald.com/news/nation/story/102770.html

[3] Mark Denbeaux, Joshua Denbeaux, et.al. "Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data," February 8, 2006. Available at: http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf

[4] Brigadier General Martin Lucenti in Mark Huband, "US Officer Predicts Guantánamo Releases," Financial Times (London), Oct. 4, 2004. Jay Hood, Commanding General, Joint Task Force, in Christopher Cooper, "Detention Plan: In Guantánamo, Prisoners Languish in Sea of Red Tape," *Wall Street Journal*, Jan. 26, 2005.

[5] Center for Constitutional Rights, "Rasul v. Bush." Available at: http://ccrjustice.org/ourcases/past-cases/rasul-bush

[6] *Rasul v. Bush*, 542 U.S. 466 (2004)

[7] *Boumediene v. Bush*, 553 U.S. ___ (2008)

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] U.S. Department of State, "Country Reports on Human Rights Practices: Libya 2007." Released March 11, 2008. Available at: http://www.state.gov/g/drl/rls/hrrpt/2007/100601.htm. U.S. Department of State, "Country Reports on Human Rights Practices: China 2007." Released March 11, 2008. Available at: http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm.

[12] Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*. May 2008. Available at: http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf

[13] "Off the Record: U.S. Responsibility for Enforced Disappearances in the 'War on Terror'". May 2007. Available at: http://ccrjustice.org/files/Report_offTheRecord.pdf

[14] International Convention for the Protection of All Persons from Enforced Disappearance, art. 2, Feb. 6, 2007. Available: http://www.ohchr.org/english/law/disappearance-convention.htm.

[15] President George W. Bush, "Executive Order 13440." July 30, 2007. Available at: http://www.fas.org/irp/offdocs/eo/eo-13440.htm

[16] Center for Constitutional Rights, "Rendition to Torture: The Story of Maher Arar, " page 5. Available at: http://ccrjustice.org/files/Final%20rendition%20to%20torture%20report.pdf

[17] *Id.*

[18] Center for Constitutional Rights, "Arar v. Ashcroft et.al" archive of all documents. Available at: http://ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft.

[19] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Report of the Events Relating to Maher Arar: Analysis and Recommendations." 2006. Available at: http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf

[20] Center for Constitutional Rights, "Rendition to Torture: The Story of Maher Arar,". Available at: http://ccrjustice.org/files/Final%20rendition%20to%20torture%20report.pdf

[21] *Id.*

[22] Naomi Klein, "The US has used torture for decades. All that's new is the openness about it." The Guardian (UK). Dec 10, 2005. http://www.guardian.co.uk/usa/story/0,12271,1664174,00.html

[23] Jan Crawford Greenburg, Howard L. Rosenberg and Ariane deVogue, "Sources: Top Bush Advisors Approved 'Enhanced Interrogation'". ABC News, April 9, 2008. Available at: http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1

[24] "Meet the Press," September 16, 2001. Transcript of interview available at: http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html

[25] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. and Robert Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def., "Re: Application of Treaties and Laws to Al-Qaeda and Taliban Detainees" (Jan. 9. 2002), available at http://lawofwar.org/Yoo_Delahunty_Memo.htm

[26] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen. and Jay S. Bybee, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, White House Counsel., Jan. 9. 2002), available at http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html.

[27] *Id.*

[28] Associated Press, "Rumsfeld: U.S. interrogation techniques don't violate Geneva Conventions," May 12, 2004.

[29] Department of Defense, "Directive: DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning." November 3, 2005. Available at: http://www.cdi.org/news/law/DoD-Directive-3115_09.pdf

[30] Amnesty International, "USA: CIA 'Waterboarding': Admission of a crime, now there must be a criminal investigation." February 6, 2008. Available at: http://www.amnesty.org/en/library/asset/AMR51/011/2008/en/AMR510112008en.html

[31] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)

centerforconstitutionalrights
666 Broadway, 7th floor, New York, NY 10012
Phone (212) 614-6489 Fax (212) 614-6422
ccrjustice.org

Acknowledgements: This paper is the work of a number of staff and associates of the Center for Constitutional Rights, in particular Annette Warren Dickerson, Andy Fois, Katherine Gallagher, Qa'id Jacobs, Shane Kadidal, C. Lynne Kates, Maria LaHood, Lauren Melodia, Jen Nessel, Alison Roh Park, Michael Ratner, and Vincent Warren.