



## Report Card on President Obama's First 100 Days

As a candidate, Barack Obama signaled his clear intention to break with the Bush administration's abusive counterterrorism policies. Once sworn in as president, Obama immediately issued executive orders that set a course toward reform.

Human Rights Watch issued a [comprehensive set of recommendations](#) to Obama last November that laid out the steps his administration should take to combat terrorism and respect basic human rights. Now, 100 days into the new administration, Human Rights Watch assesses the extent of President Obama's reforms, while analyzing his missteps and making recommendations about what remains to be done.

### Key Accomplishments

#### *Closing Secret CIA Prisons*

On January 22, 2009, his second full day in office, President Obama issued an [executive order](#) to close the Central Intelligence Agency's secret detention program. CIA Director Leon Panetta confirmed that the president's order had been implemented in an April 9, 2009 memorandum to all CIA staff that stated unequivocally: "The CIA no longer operates detention facilities or black sites and has proposed a plan to decommission the remaining sites." The CIA's prisons, which are thought to have held some 100 detainees since 2002, were the site of some of the Bush administration's most egregious human rights violations.

#### *Implementing the Ban on Torture and Cruel, Inhuman or Degrading Treatment*

The January 22 executive order also prohibited the CIA from using coercive interrogation techniques, requiring it to abide by the same interrogation standards as the US military. However, the order also set up an interagency task force to assess whether the interrogation

practices spelled out in the Army Field Manual are adequate to acquire needed intelligence and whether to recommend that the CIA be provided additional guidance. This review is scheduled to be completed by mid-July 2009 (180 days after the issuance of the executive order).

In his April 9 memo to CIA staff, CIA Director Panetta reported that the agency was in compliance with the president's order, stating that, "the CIA does not employ any of the enhanced interrogation techniques that were authorized by the Department of Justice from 2002 to 2009." The memo also explained that CIA officers "will continue to conduct debriefings using a dialogue style of questioning that is fully consistent with the interrogation approaches authorized and listed in the Army Field Manual."

### ***Repudiating Past Authorizations for Torture***

The January 22 executive order also revoked past presidential directives and other orders and regulations that authorized the abusive treatment of detainees, and repudiated all Justice Department memos relating to interrogation that were issued between September 11, 2001, and January 20, 2009. On April 16, the Obama administration took the further step of declassifying four Bush-era memos on so-called enhanced interrogation techniques. The memos provided the legal framework for the CIA's use of waterboarding and other abusive interrogation techniques that violate domestic and international law. They prove beyond any doubt the falsity of the Bush administration's repeated protestations that the United States did not engage in torture.

### ***Bringing Al-Marri to Justice***

On January 22, Obama circulated a presidential memorandum directing a review of the status of [Ali Saleh Kahlah al-Marri](#), a US resident who had been held in military custody as an "enemy combatant" since 2003. On February 27, the administration returned al-Marri to the custody of federal criminal authorities, charging him with conspiracy and material support of terrorism.

Al-Marri, a citizen of Qatar, was in the United States on a student visa when he was arrested in December 2001. Charged with credit card fraud, he was just weeks away from trial in 2003 when the Bush administration pulled him out of the criminal justice system and declared him an "enemy combatant." His indefinite detention without trial attested to the Bush

administration's sweeping views of executive power, and its aggressive rejection of the federal court system for prosecuting terrorist suspects.

## **Ongoing or Incomplete Reforms**

### *Closing the Military Detention Facility at Guantanamo Bay*

On January 22, Obama issued a second [executive order](#), which required that the military detention facility at Guantanamo Bay be closed by January 2010. In contrast to President George W. Bush's vague indications that he would "like" to close the facility, the order represented a tangible and promising step forward. Besides setting a date for Guantanamo's closure, the order called for a review of the status of the roughly 240 men still held at Guantanamo to determine if they should be transferred, released, prosecuted, or handled in some other way.

Since issuing the order, however, the administration has done little to shrink the prisoner population at Guantanamo. Only a single detainee, Binyam Mohamed, has been released since Obama took office. Notably, some 15 Yemeni detainees who have been cleared for release or transfer have yet to be returned to their home country. Detainees' lawyers claim that conditions at the military detention facility have not improved, and that a purported Pentagon review of detention conditions was a sham. The administration has yet to respond to a request by four human rights and civil liberties groups, including Human Rights Watch, to be granted access to the facility in order to evaluate conditions there.

A key Obama administration misstep on Guantanamo involves the 17 Uighur prisoners held there. Originally from China, the men have been cleared for release but cannot be returned to their home country because of the likelihood of torture. To date, the Obama administration has failed to release any of them into the United States, even though a large local Uighur community has pledged to assist in their reintegration into society, and even though the willingness of European countries to resettle detainees from Guantanamo is in large part contingent on the United States doing so first. Because an estimated 50 to 60 detainees cannot be returned to their home countries for fear of abuse, it is crucial that the Obama administration jumpstart the resettlement process.

Human Rights Watch urges the Obama administration to act immediately to resettle the Uighurs in the United States, and to intensify negotiations with other countries to resettle the others.

### ***Suspending the Unfair Military Commissions***

On the day he took office, President Obama directed military prosecutors to seek a 120-day suspension of military commission proceedings, the deeply flawed prosecutions that have been ongoing at Guantanamo. The president's subsequent executive order on Guantanamo stated that military commission proceedings would be halted during the detainees' status review process. That order also specifically mandated an assessment of whether it was feasible to prosecute Guantanamo detainees before US federal courts.

As of yet, the Obama administration has not indicated how or where it will try detainees who are implicated in crimes. Human Rights Watch urges the administration to transfer all military commission prosecutions to the federal courts, which have a strong track record of trying terrorism cases, and have proven capable of handling even the most sensitive and complicated such prosecutions. Human Rights Watch believes it would be a serious mistake to try to reconstitute the military commissions, even using fairer rules, since the need for a new legal framework has not been demonstrated, and since any new legal framework will inevitably give rise to legal challenges, controversy, and delays.

### ***Accounting for Past Abuses***

The American people deserve a full and public accounting of the scale of post-9/11 abuses, why and how they occurred, and who was responsible for authorizing and facilitating them. Moreover, officials responsible for the enforced disappearance and torture of post-9/11 detainees should be brought to justice. Both are essential steps for repudiating these serious abuses and ensuring that they do not recur.

The Obama administration has showed little enthusiasm for establishing a commission of inquiry or for initiating criminal investigations of officials implicated in serious crimes against detainees. When the Justice Department released four Bush-era torture memos in April, President Obama initially signaled a willingness to set up a non-partisan commission to investigate abuses, but his office quickly backed away from the idea. The president also seems to have ruled out prosecuting CIA agents who carried out orders that they believed

were legal, but he has left open the possibility of prosecuting those higher up the chain of command who gave orders to the CIA permitting detainees to be tortured.

Human Rights Watch urges President Obama to work with Congress to set up a commission of inquiry to investigate, document, and publicly report on post-9/11 counterterrorism-related abuses. The commission should make specific recommendations for individuals to be criminally investigated.

### ***Ensuring that Prisoners Are Not Rendered to Torture***

The January 22 [executive order on interrogations](#) establishes a special task force mandated, among other things, to review US prisoner transfer policies to ensure that suspects are not rendered to countries where they may face torture. It is unclear whether the task force will recommend that the US government stop carrying out transfers based on “diplomatic assurances,” non-binding promises from the receiving country that detainees will be treated humanely. Human Rights Watch's research has found that such assurances against torture are unreliable. In a worrying sign, CIA Director Panetta said during his confirmation hearings that the CIA would continue to rely on diplomatic assurances in carrying out prisoner transfers. Human Rights Watch urges the administration to reconsider this position, and, consistent with US obligations under international law, to mandate that detainees under no circumstances be transferred based on diplomatic assurances to countries where they may face torture.

## **Missteps and Missed Opportunities**

### ***Maintaining the War Paradigm as a Justification for Holding Suspected Terrorists Indefinitely without Trial***

One of the most potentially far-reaching Obama administration positions came to light in a Justice Department brief filed in Guantanamo litigation. On March 13, in response to a federal court order seeking a definition of the term “enemy combatant,” the Obama administration claimed the authority to pick people up anywhere in the world on the grounds of support for or association with al Qaeda or the Taliban, and to hold them indefinitely in military detention. Rather than rejecting the Bush administration's ill-conceived notion of a “war on terror,” the Obama administration merely discarded the phrase and tinkered with its

form. The position expressed in the filing was a worrisome portent for the administration's future detention decisions.

While the filing avoided using the phrase "enemy combatant," it did not jettison the idea that persons alleged to be involved in terrorist activities are participating in a war. The filing instead relied on closely-related phrases like "members of enemy forces" and "members of an opposing armed force." The only substantive difference from the position previously asserted by the Bush administration is that if the person's link to al Qaeda or the Taliban is support, that support must be "substantial." But membership in any of the targeted organizations remains grounds for detention.

Human Rights Watch believes the court filing to be an enormous disappointment. It raised real concerns that the new administration might eviscerate the point of closing Guantanamo by simply moving detainees to US soil, and continuing to hold them indefinitely without trial. It is important to note, however, the administration specifically stated in its filing that its position was subject to revision as its comprehensive review of detention policy takes shape. Human Rights Watch strongly urges the administration to reject the war paradigm and the use of indefinite detention without trial.

### ***Denying Basic Rights to Prisoners at Bagram***

The Obama administration made another serious misstep in litigation involving prisoners held in indefinite detention at Bagram Air Base in Afghanistan. In a short document filed in US federal district court in February, the Justice Department reaffirmed the Bush administration position that prisoners held at Bagram—even those arrested in other countries and brought to Afghanistan—have no right to challenge their detention in US court.

On April 2, the district court rejected the Obama administration's position, ruling that three Bagram detainees who were arrested abroad had the same right as detainees at Guantanamo to challenge their detention in US court. The decision applied the legal framework set out in *Boumediene v. Bush*, the landmark 2008 US Supreme Court [decision](#) on Guantanamo. The Justice Department appealed the ruling, arguing that because Bagram, unlike Guantanamo, is located in a traditional theatre of war, the courts have no jurisdiction over detainees held there.

Human Rights Watch recognizes that Afghanistan is war zone, but believes that petitioners in the Bagram litigation—who were flown to Afghanistan from non-war zones such as

Thailand and Dubai—cannot simply be detained without charge and without access to any court. We urge the Obama administration to withdraw its appeal, and to stop indefinitely detaining terrorism suspects without trial. We also urge the administration to grant basic due process rights, such as the right to a lawyer and to challenge their detention locally, to other detainees held by the US at Bagram, including Afghan citizens picked up in Afghanistan.

### ***Adhering to the Bush Administration's Expansive View of the State Secrets Privilege***

The Obama administration has taken an indefensible position on the "state secrets" privilege. In three separate court cases, the Obama administration has invoked an overly broad understanding of the scope of the privilege, claiming that meritorious litigation should be summarily dismissed because it might lead to the revelation of classified information. The administration has also failed to indicate whether it will support reform legislation, introduced by Senators Patrick Leahy (D-VT) and Arlen Specter (R-PA), that would give judges greater power to limit the government's use of the state secrets privilege.

The first indication of the Obama administration's views came in the case of *Mohamed v. Jeppesen Dataplan, Inc.* In urging a federal appeals court to uphold the dismissal of a lawsuit involving CIA flights that brought suspects to be tortured, a Justice Department lawyer acknowledged that the administration was taking "exactly" the same position as the Bush administration. In subsequent cases the administration adhered to this expansive position.

Human Rights Watch disagrees with such a broad-brush approach to protecting state secrets, and is thus encouraged by Attorney General Eric Holder's recent comments on CBS News. In an April 9 interview, Holder emphasized that the Justice Department was still reviewing pending uses of the state secrets privilege. He specifically said that the department was considering reversing its past reliance on the privilege in one pending case, although he did not name the case. Human Rights Watch urges the Obama administration to opt for a much narrower approach to the privilege: to invoke it only to protect national security—not to prevent the release of information that the government might find embarrassing—and only when truly necessary.