



Fighting Terrorism Fairly and Effectively Recommendations for President-Elect Barack Obama

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Summary

Over the past seven years, the US government's consistent disregard for human rights in fighting terrorism has diminished America's moral authority, set a negative example for other governments, and undermined the goal of reducing anti-American militancy around the world. The use of torture, unlawful rendition, secret prisons, unfair trials, and long-term, arbitrary detention without charge has been both morally wrong and counterproductive.

Upon taking office, President Barack Obama should promptly and decisively reject the abusive practices of the past administration and embrace an effective counterterrorism policy grounded in respect for human rights. By making a high-profile, public commitment to a new course, and by taking bold steps toward reform, he can signal to the nation and to the world that his administration understands that US counterterrorism policy should be consistent with the country's basic values and with international law.

Human Rights Watch calls upon President Obama to take the following actions:

- Close the military detention facility at Guantanamo Bay.
- Abolish the military commissions and prosecute terrorist suspects in federal court.
- Reject preventive detention (detention without trial) as an alternative to prosecuting terrorist suspects.
- Reject the "global war on terror" as the basis for detaining terrorist suspects.
- Issue an executive order to implement the ban on torture and cruel, inhuman or degrading treatment.
- End the CIA detention program.
- Prohibit renditions to torture.
- Account for past abuses.
- Provide redress for abuse.
- Repudiate presidential directives and Justice Department memos that permit torture and other abuses.
- Protect innocent victims of persecution abroad from being defined as terrorists.

I. Close the Military Detention Facility at Guantanamo Bay

The United States continues to hold some 250 people in military detention at Guantanamo Bay, most of whom have now been in US custody for nearly seven years without charge. There is a growing bipartisan consensus that the continued operation of the detention facility at Guantanamo has not only caused significant damage to America's standing around the world, but has been counterproductive in fighting terrorism. Five former secretaries of state have urged the next president to move quickly to close Guantanamo, and President-elect Obama has committed to doing so.

Closing Guantanamo will not be easy. Merely moving the system of indefinite detention without charge to the United States would not solve the underlying problem. Nor would it solve the problem to transfer detainees to be held elsewhere without charge.

Human Rights Watch has long called for detainees at Guantanamo to be either properly tried or released. The following proposals lay out how to do so in a manner that protects both human rights and national security:

- (1) Immediately announce plans to close Guantanamo.

Upon taking office, President Obama should announce his intention to close Guantanamo, lay out a plan for doing so, and set a date for final closure. Such an announcement will signal a clear break with the abusive policies and practices of the last seven years and help garner the international cooperation needed to make the goal of closure a reality.

- (2) Review the detainees' files.

The Obama administration should establish an interagency task force (led by the Department of Justice, but with input from the Department of State, the Department of Defense, and the Director of National Intelligence) that is

mandated to review the files of all detainees to decide which of them should be charged and brought to trial, and which should be released.

The Bush administration has long asserted that Guantanamo holds an unspecified number of detainees who are too dangerous to release yet cannot be tried. Because the evidence purportedly justifying these claims has been kept secret, even from the detainees against whom it has been used, challenging these claims has been difficult. Continuing to hold individuals who are not charged with a crime not only damages America's reputation as a nation committed to the rule of law, but helps fuel terrorist recruitment and ultimately harms the effort to fight terror.

- (3) Set up a process to ensure that detainees are not returned to torture or abuse.

An estimated 30 to 50 detainees—from countries such as China, Algeria, Tunisia, and Libya—have expressed fears of torture or abuse if returned home. The United States should set up a fair process before a federal court by which all detainees are provided advance notice and an opportunity to contest any planned transfer. Detainees found to have credible fears of abuse should not be returned to their home countries.

- (4) Repatriate all detainees who are not slated for trial and can safely be returned home.

The United States should move as quickly as possible to repatriate those detainees who will not be charged with a criminal offense and do not express a credible fear of return.

- (5) Negotiate resettlement agreements with other countries, and accept some detainees for resettlement into the United States.

The Obama administration will need to work with US allies to find homes for the detainees who have been cleared for release but cannot be repatriated. As a first step, the United States should agree to resettle some number of

detainees into the country. Without this step, it will be extremely difficult to convince other countries to help share the burden. Notably, Guantanamo still holds 17 Uighurs, most of whom have been cleared for release since 2004 yet cannot be returned to China because of fears that they would be tortured upon return. Uighur communities and refugee resettlement groups within the United States have committed to providing housing, language, and job training to all 17 Uighurs. They would be an easy group to quickly—and safely—resettle in the United States.

(6) Transfer the remaining detainees to federal custody for trial.

Detainees charged with crimes should be transferred into the United States for trial before federal courts, which have successfully prosecuted more than 100 terrorism cases since September 11, 2001.

II. Abolish the Military Commissions and Prosecute Terrorist Suspects in Federal Court

President Bush issued a military order in November 2001 to establish military commissions for the trial of suspected foreign terrorists. Congress authorized a modified form of these commissions in 2006 after the Supreme Court found the original commissions to be illegal. Even as modified, these military commissions lack basic fair trial guarantees. As a result, they have been subject to extensive public criticism, legal challenge, and delay. Four military prosecutors have resigned in protest from the military commissions system, including the former chief prosecutor who has denounced the system as unfair.

Although some have defended the commissions as an efficient form of military justice, their track record in prosecuting terrorism cases has been abysmal. Since their establishment, the commissions have concluded only three cases, two after trials and one based on a guilty plea. During the same time period, the federal courts have tried more than 107 terrorism cases, obtaining 145 convictions. Several defendants have been sentenced to life in prison.

Some defenders of the military commissions argue that terrorism prosecutions do not effectively protect national security evidence, are too resource-intensive, and are insufficient to prevent future acts of terrorism because they are limited to punishing past crimes.

These criticisms are unconvincing for the following reasons:

- The Classified Information Procedures Act (CIPA) is effective in preventing the dissemination of classified evidence. CIPA gives the government wide latitude to provide the defendant and the jury substitute forms of evidence to protect against the disclosure of evidence and sources it needs to protect. It has been used in countless terrorism cases, allowing the government to introduce evidence obtained by foreign law enforcement and intelligence sources without compromising the integrity of those sources.

- Criminal prosecutions in federal court may be resource-intensive, but so are military commission proceedings.
- It is not true that criminal prosecutions are exclusively backward-looking, responding only to terrorist acts that have already been committed. To the contrary, prosecutions are often used to prevent the commission of terrorist crimes. The Department of Justice cites with pride its reliance on federal statutes that allow prosecutors “to intervene at the early stages of terrorist planning, before a terrorist act occurs.”¹ The crime of conspiracy, for example, is committed when two or more people plan to pursue an illegal act, and take at least one step to advance it, even if a terrorist act is nowhere near fruition. The same intelligence that allows investigators to identify and prevent terrorist plots should allow them to prosecute the participants for conspiracy.
- Under the Sixth Amendment to the US Constitution, a suspect facing criminal charges is entitled to a lawyer, who will generally tell his or her client not to talk to interrogators outside of the lawyer’s presence. But many criminal suspects with lawyers end up willingly cooperating with interrogators—providing evidence that exposes criminal plots and implicates other lawbreakers—because by doing so they can shorten the prison time they face.
- Some have suggested that it would be difficult to prosecute terrorism suspects in US federal courts because much of the evidence against them is tainted by coercion, abuse, or torture, and would not be admissible in court. However, the solution cannot be to try terrorism suspects using procedures where such evidence would be admitted, particularly given the unreliability of such tainted evidence. There is ample evidence against many terrorism suspects at Guantanamo to build cases that do not rely on statements that were coerced. Indeed, Khalid Sheikh Mohammed and some of his co-defendants charged with planning and organizing the 9/11 terrorist attacks freely admit their roles in the attacks.
- Finally, using the civilian criminal justice system serves the additional value of treating terrorists as the common criminals they are. Terrorists, having political motivations, enjoy the heightened status associated with being an “enemy combatant.” When Khalid Sheikh Mohammed appeared before a

¹ Department of Justice, Counterterrorism White Paper, June 22, 2006, <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf> (accessed Nov. 6, 2008), p. 3.

Combatant Status Review Tribunal at Guantanamo Bay, he wore the label of combatant proudly, comparing himself to George Washington and saying that had Washington been captured by the British, he, too, would have been deemed an “enemy combatant.”² Treating terrorists as criminals strips them of that badge of honor.

President Obama should put an end to the military commissions’ failed experiment in flawed justice, and move all terrorist prosecutions to US federal courts, which have a demonstrated track record in handling terrorism cases in a manner that comports with fundamental due process and fair trial standards.

² “Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN10024,” March 10, 2007, http://www.defenselink.mil/news/transcript_ISN10024.pdf (accessed November 6, 2008), pp. 21-22.

III. Reject Preventive Detention as an Alternative to Prosecuting Terrorist Suspects

Some commentators have suggested that the United States cannot close Guantanamo unless Congress passes a law allowing suspected terrorists to be held indefinitely in preventive detention. Under these proposals, detainees will not be charged with a crime, but will be held based on predictions of future dangerousness. Proponents of this approach assume that the regular court system cannot adequately deal with those responsible for planning or carrying out terrorist acts, and that without such legislation, dangerous persons will be set free.

President Obama should reject this effort to “solve” the Guantanamo problem by merely moving it to the United States. A preventive detention regime established by legislation will suffer from many of the same fundamental defects that mar the Guantanamo system: detainees would be held without charge and without a meaningful chance to contest the evidence against them, and detention would be based not on actual criminal activity—such as plotting attacks—but on assumptions about future behavior that are impossible to rebut.

Rather, the Obama administration should embrace the federal criminal courts as the best-equipped—and time-tested—institution for handling persons suspected of terrorist activities.

As described above, the federal court system is well-equipped to prosecute terrorist suspects, while at the same time ensuring that innocent individuals are not arrested and detained based on evidence and assumptions about future behavior that they are unable to know and unable to defend against.

The Obama administration should:

- (1) Reject proposals to detain suspected terrorists without charge as contrary to American values, unnecessary, and counterproductive.

- (2) Publicly affirm the competence of the federal court system to prosecute terrorist suspects.
- (3) Invest in the law enforcement and intelligence-gathering personnel and equipment needed to detect terrorist plots and stop them before they are carried out.

IV. Reject the “Global War on Terror” as the Basis for Detaining Terrorist Suspects

In the immediate wake of the September 11 terrorist attacks, the Bush administration declared a “global war on terror,” claiming that the legal framework that governs armed conflict allowed it to detain people as “enemy combatants” for an indefinite period without charge. People arrested distant from any conflict zone—in locations as far-flung as Bosnia, Thailand, and the US-Mexico border—have since been held for years at Guantanamo.

The Bush administration claimed that the “war on terror” even justified the indefinite detention without charge of terrorist suspects arrested within the United States. US citizen Jose Padilla, for example, was detained as an enemy combatant for more than three years before being transferred to civilian custody and convicted of conspiracy to commit terrorism. Ali Saleh Kahlah al-Marri, a Qatari citizen, was slated to be tried in 2003 for credit card fraud and making false statements to the FBI when President Bush suddenly transferred him from civilian to military custody. More than five years later, he is still being held without charge as an enemy combatant.

A growing number of counterterrorism, military, and law enforcement experts now believe that this approach to fighting terror not only disregards fundamental rights, but is counterproductive. A recent RAND Corporation study, for example, concluded that terrorists should be treated as criminals, not warriors. The study—a historical survey—urged the US to rely primarily on traditional policing and intelligence work to root out terrorism.³

Former federal officials—including former Judge Abner Mikva and former Attorney General Janet Reno—have also urged that terrorism cases be handled in the federal courts, explaining that the courts are fully able to handle such cases. In October 2008, Stella Rimington, the former director-general of Britain’s equivalent to the CIA,

³ Seth G. Jones and Martin C. Libicki, “How Terrorist Groups End: Lessons for Countering Al Qa’ida,” RAND, Monograph Report MG-741-RC, 2008.

endorsed this view, urging the next US president to reject the “war on terror” model and embrace a criminal justice approach to countering terrorism.

President Obama should:

- (1) Reject “global war on terror” justifications for the indefinite detention of terrorist suspects. Apply a criminal justice approach, not inapplicable laws of war rules, to terrorist suspects apprehended outside of traditional armed conflict.
- (2) Prosecute in federal court or release all detainees, including Ali Saleh Kahlah al-Marri, currently held as “enemy combatants.”
- (3) Embrace the traditional criminal justice system as the best and most effective means of prosecuting terrorist suspects.

V. Issue an Executive Order to Implement the Ban on Torture and Cruel, Inhuman or Degrading Treatment

The appalling abuses inflicted upon those held by the United States in Iraq, Afghanistan, Guantanamo, and elsewhere around the world are all too notorious. Particularly in the three years that followed the September 11 attacks, US armed forces and intelligence agencies frequently used interrogation techniques that included stripping detainees naked, subjecting them to extremes of heat, cold, and noise, and depriving them of sleep for long periods—in violation of the Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The apparently routine infliction of pain, discomfort, and humiliation expanded in some cases to include vicious beatings, sexual degradation, near drowning, and near asphyxiation. Some detainees died under torture.

The US government's misguided embrace of torture and other abusive interrogation techniques has undermined its counterterrorism efforts, diminished America's moral authority, and helped fuel anti-American sentiment around the world. As President-elect Obama said during his campaign, "we need to restore our values, because as the counter-insurgency manual reminds us, torture sets back our mission to keep the people on our side."⁴

Earlier this year, the US Congress attempted to enforce the ban on torture and cruel, inhuman or degrading treatment by passing legislation that would have required the CIA to comply with the humane treatment standards adopted by the military in the Army Field Manual. President Bush vetoed that legislation, however, insisting that the CIA be allowed to operate by its own rules.

President Obama should now implement through executive order what Congress tried to do via legislation. Specifically, he should:

⁴ "Remarks of Senator Obama: A Sacred Trust," Kansas City, August 21, 2007, http://www.barackobama.com/2007/08/21/remarks_of_senator_obama_a_sac.php (accessed Nov. 7. 2007).

- (1) Issue an executive order that bans all torture and cruel, inhuman or degrading treatment by requiring the CIA to abide by the interrogation rules that the US military has adopted in the Army Field Manual on Human Intelligence Collector Operations.
- (2) Declare publicly that US domestic law (including the Detainee Treatment Act) bars the use of abusive interrogation techniques such as “waterboarding,” extended sleep deprivation, and forced exposure to extremes of heat and cold.
- (3) Direct the attorney general to rescind all Justice Department Office of Legal Counsel opinions authorizing or justifying abusive and inhumane treatment of detainees in US custody or effective control.

VI. End the CIA Detention Program

Over the past seven years, at least 100 prisoners were “disappeared” by the CIA, held in unacknowledged detention in secret overseas facilities, and barred from communicating with anyone beyond their jailers and interrogators. Many of them were held for years in conditions of strict solitary confinement. Bush administration officials have admitted that at least three of these prisoners were subjected to waterboarding (simulated drowning), and a number of former detainees held by the CIA have described being exposed to other forms of torture and abuse. After varying periods of detention and interrogation, the CIA transferred some of these prisoners to military custody at Guantanamo, and others to the custody of governments such as Libya, Syria, and Yemen. The whereabouts of more than two dozen other people who may have been held in CIA custody remain unknown.

Even with safeguards against torture and other ill-treatment, allowing the intelligence services to detain people without charge is a recipe for abuse. President Obama should put a definitive end to the CIA’s detention program by taking the following steps:

- (1) Repudiate the use of secret detention and coercive interrogation as counterterrorism tactics and permanently discontinue the CIA’s detention and interrogation program.
- (2) Rescind the classified September 2001 presidential directive that reportedly authorized the CIA to hold and interrogate suspected terrorists.
- (4) Revoke Executive Order 13440, issued on July 20, 2007, which purports to determine that the CIA’s detention and interrogation program “fully complies” with US obligations under Common Article 3 of the Geneva Conventions of 1949 as long as the CIA follows certain requirements in carrying out the program.
- (3) Disclose the identities, fate, and current whereabouts of all detainees who have been held at facilities operated or controlled by the CIA since 2001.
- (4) Disclose the location and current status of all the detention facilities used by the CIA since 2001.

- (5) Make public any audio recordings, videotapes, or transcripts that the US government possesses of interrogations of detainees who were held by the CIA.
- (6) Sign and press the Senate to ratify the International Convention for the Protection of All Persons from Enforced Disappearance to signal an intention to never again to engage in such practices.

VII. Prohibit Renditions to Torture

Besides holding terrorism suspects in abusive secret detention, the CIA has also been responsible for transferring or “rendering” persons to other countries for abusive interrogations. Since 2001, the CIA is believed to have rendered detainees to countries such as Syria, Egypt, Morocco, Libya, and Jordan, notorious for their abusive detention practices. While it is not known precisely how many people the CIA has rendered to foreign custody in recent years, CIA Director Michael Hayden stated in 2007 that fewer than 100 people—“mid-range two figures”—had been subject to rendition since the September 11 attacks.

The practice of unlawful rendition did not begin with the Bush administration, but it should end with it.⁵ Human Rights Watch and others have documented how numerous rendered prisoners were subjected to torture and other ill-treatment while in foreign custody. Ibn al-Sheikh al-Libi, whom the CIA handed over to Egypt and possible other countries for temporary detention, was reportedly tortured until he admitted to a connection—later found to be false—between Iraqi leader Saddam Hussein and al-Qaeda. At present, 26 Americans, including 25 supposed CIA operatives, are being tried *in absentia* in Milan, Italy, for the rendition to Egypt of Egyptian cleric Hassan Mustafa Osama Nasr, known as Abu Omar, who claims that he was badly tortured in Egyptian custody.

Defending the practice of rendition in 2005, Secretary of State Condoleezza Rice stated that, where necessary, “the United States seeks assurances [when carrying out renditions] that transferred persons will not be tortured.”⁶ But there is substantial evidence to show that such diplomatic assurances do little to protect people at risk of torture on return. To the contrary, dozens of detainees have reportedly been subject to torture and other abuse despite promises of humane treatment from the receiving government. Moreover, both the receiving and sending

⁵ During the administration of President Bill Clinton, the CIA unlawfully rendered several Egyptian terrorist suspects from Albania and Croatia to Egypt, where some of them had previously been sentenced to death *in absentia*. See Human Rights Watch, *Black Hole: The Fate of Islamists Rendered to Egypt*, vol. 17, no. 5(E), May 2005, <http://hrw.org/reports/2005/egypt0505/>, pp. 19-24.

⁶ U.S. Secretary of State Condoleezza Rice, “Remarks upon her Departure for Europe,” December 5, 2005.

government have an incentive to hide mistreatment, and, even when there is a monitoring system in place, detainees are often too afraid of reprisal to report abuse.⁷

President Obama should put an end to the practice of rendition to torture, which violates fundamental rights. Specifically, he should:

- (1) Repudiate the use of rendition to torture as a counterterrorism tactic and issue an executive order permanently discontinuing the CIA's rendition program.
- (2) Disclose the identities, fate, and current whereabouts of all persons rendered to foreign custody by the CIA since 2001.
- (3) Repudiate the use of "diplomatic assurances" as a justification for transferring suspects to countries where there is otherwise reason to believe they will face torture and ill-treatment.

⁷ See, for example, Human Rights Watch, *The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*, vol. 19, no. 2(D), March 2007, <http://www.hrw.org/reports/2007/russia0307/>; Human Rights Watch, *Questions and Answers: 'Diplomatic Assurances' against Torture*, November 2006, <http://www.hrw.org/background/eca/ecaqna1106/>; Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, vol. 17, no. 3(D), April 2005, <http://hrw.org/reports/2005/eca0405/>.

VIII. Account for Past Abuses

When photos of detainee abuse at Abu Ghraib first hit the news in 2004, the Bush administration tried to limit the damage by claiming that they showed the illegal actions of a few “bad apples.” But over the past several years, the Bush administration’s narrative about why abuses occurred has been shown to be false. We now know that abusive practices such as waterboarding were discussed and approved at the highest levels of government, even though torture is illegal and waterboarding has been prosecuted as a crime by US courts for over 100 years.

The American public deserves 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. Although several congressional inquiries, military reports, and Department of Justice investigations have looked into particular aspects of these questions, there has never been a comprehensive public inquiry into post-9/11 abuses, and investigations to date have either lacked independence from the executive branch or access to necessary documentary and testimonial evidence.

During the first six months of his term, President Obama should 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 specifically address the question of who should be held accountable for these abuses and how such accountability can be achieved. It should also make recommendations regarding what steps should be taken to ensure that these abuses are never repeated.

In order to carry out its mandate fairly and effectively, the commission should meet the following criteria:

- (1) The commission should be non-partisan.

To ensure that the commission operates fairly and impartially—and that it is not perceived as a partisan effort to punish those in the prior administration, nor stymied by partisan wrangling—its membership should be non-partisan.

Commission members should be distinguished figures known for their intelligence, expertise, and achievements, rather than for their political affiliations, and they should be fully vetted for possible conflicts of interest.

- (2) The commission should have subpoena power.

In order to ensure that the commission is equipped to make a full and accurate assessment of the activities and decision-making post 9/11, it will be essential that the commission be vested with subpoena power to compel the testimony of those involved. This will require legislative authorization, which President Obama should request immediately upon announcing the commission.

- (3) The commission should make recommendations for prosecution should it find that current or former government officials were responsible for serious crimes.

Some will likely push for blanket immunity from criminal prosecution for all those compelled to testify before the commission. But this would only reinforce the impunity that has allowed abuse to go unpunished and so tarnished America's reputation. While in some circumstances it may be useful for the commission to offer immunity in exchange for critical testimony, the commission should reject any call for blanket immunity and should conduct its work with the aim of making specific recommendations for prosecution.

A commission should still be created even in the event that President Bush in his last days in office issues a blanket pardon for some or all government officials involved in counterterrorism-related crimes. A presidential pardon that blocks prosecutions should not be permitted to block an essential inquiry into the historical record.

- (4) The commission should have full access to classified materials.

Commission members must have full access to classified materials related to the detention, treatment, and transfer of terrorist suspects post-9/11, as well as materials concerning interrogation techniques. Once a commission is established, the administration should dedicate resources to a rapid security clearance process for commission members, and direct all relevant government agencies to facilitate the sharing of information.

IX. Provide Redress for Abuse

Over the past several years, victims of abusive counterterrorism policies have been effectively shut out of US courts, unable to obtain redress for even the most egregious abuses.

Part of the problem stems from legislation that was passed in 2006. The Military Commissions Act bars alien “enemy combatants”—including current and former Guantanamo detainees, as well as Ali Saleh Kahlah al-Marri, the Qatari citizen detained for years in a South Carolina military brig—from bringing suit in US court to challenge their treatment, or to obtain damages for past mistreatment. This prohibition applies even to detainees who were brutally tortured, and even in cases where US officials have conceded error.

Another aspect of the problem is in the Justice Department’s litigation strategy. Justice Department lawyers have relied on overbroad national security claims to prevent victims of abusive counterterrorism practices from obtaining compensation for their injuries. Specifically, they have used such claims to block a lawsuit brought by Khaled el-Masri, a German citizen who was arbitrarily arrested and rendered by the US to a CIA-run prison Afghanistan, where he was beaten and held incommunicado for several months. They have similarly blocked a damages action brought by Maher Arar, a Canadian citizen secretly detained and rendered by the US to Syria, where he was tortured and imprisoned for 10 months. In both cases, Justice Department lawyers successfully argued that discovery in the cases would lead to the revelation of “state secrets,” even though specific details of the cases and general details of US rendition operations have been documented in numerous media reports, congressional inquiries, and formal investigations by foreign governments.⁸

⁸ The US Court of Appeals for the Second Circuit has agreed to reconsider the dismissal of Arar’s case; a hearing is scheduled for December 2008. See also European Parliament, “Report on the on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners,” 2006/2200(INI), January 30, 2007; Parliamentary Assembly of the Council of Europe, “Secret detentions and illegal transfers of detainees involving Council of Europe member states,” Doc. 11302 rev., June 11, 2007.

President Obama should ensure that victims of US government abuses are able to seek redress in the federal courts, or are otherwise provided compensation for their injuries, as required under international law obligations.⁹ Providing redress to victims will help compensate them for their injuries, make amends for the past, and help restore America's reputation around the world.

Specifically, President Obama should:

- (1) Direct the Department of Justice to allow claims for redress to proceed on their merits, rather than relying on "state secrets" protections to hide abusive and embarrassing practices.
- (2) Work with Congress to repeal the Military Commissions Act (or at a minimum, the provisions of the Military Commissions Act that prevent victims of abuse from obtaining redress).
- (3) Set up a compensation scheme so that victims of the abusive counterterrorism practices of the past seven years can be compensated for their injuries without having to engage in protracted litigation.

⁹ See International Covenant on Civil and Political Rights (ICCPR), adopted December 26, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, ratified by the US on June 8, 1992, article 3.

X. Repudiate Justice Department Memos and Presidential Directives that Permit Torture and Other Abuses

Over the past seven years, the Office of Legal Counsel (OLC) in the Department of Justice has issued a number of poorly reasoned legal memoranda that have given a green light to torture, unlawful rendition, arbitrary detention, and other abuses. Several executive orders and directives have relied on these opinions in authorizing abusive practices and policies. Several of these memos, executive orders, and directives have been leaked to the media or turned over in response to congressional inquiries, while others are known to exist, but have never been made public.

President Obama should signal a renewed US commitment to human rights and the rule of law by publicly disclosing and repudiating all of the legal opinions, executive orders, and directives that have authorized torture and abuse, including, but not limited to, the following:

- The September 17, 2001, Executive Order that reportedly authorizes the CIA's secret detention, interrogation, and rendition program, as well as any other related directives (not yet public).
- President Bush's February 7, 2002, Order stating that the Geneva Conventions do not apply to Taliban detainees or to al-Qaeda and excusing cruel treatment in cases of "military necessity".
- Letter to Alberto Gonzales, Counsel to the President, from John Yoo, Deputy Assistant Attorney General, OLC, on the applicability of the Convention Against Torture (July 22, 2002) (not yet public).
- Two August 1, 2002, Jay Bybee/John Yoo-authored OLC memos to the CIA authorizing abusive interrogation techniques (only one of which has yet been made public).
- March 13, 2002, Jay Bybee-authored OLC memo to William Haynes, II, Defense Department General Counsel, reportedly authorizing renditions to torture and abuse (not yet public).

- Three 2005 Stephen Bradbury-authored OLC memos authorizing aspects of the CIA interrogation program (not yet public).
- Additional OLC opinions, memoranda, or directives that suggest that the humane treatment standards of Common Article 3 of the Geneva Conventions vary according to the circumstances (not yet public).
- Additional OLC opinions, memoranda, or directives analyzing the applicability of the torture statute and other criminal statutes prohibiting physical abuse or mistreatment (not yet public).
- Additional OLC opinions, memoranda, or directives analyzing the applicability and scope of the US obligations under the Convention against Torture and the International Covenant on Civil and Political Rights (not yet public).
- Executive Order 13440, issued July 20, 2007, which authorizes the CIA to maintain a secret detention program using interrogation techniques that have been prohibited by the military.
- All other still secret opinions, memoranda, or directives that authorize abuse, sanction rendition to torture, or suggest that domestic and international standards of humane treatment do not apply in a post 9/11 world.

XI. Protect Innocent Victims of Persecution Abroad from Being Defined as Terrorists

The United States will never be able to effectively fight terrorism if it cannot define terrorism appropriately. Yet for the past several years, overbroad terrorism-related bars in immigration law have been used to label victims of abuse abroad as terrorists and deny them entry into the United States. Rape victims forced into sexual slavery by West African rebel groups have been labeled “material supporters” of terrorism because they performed household chores while enslaved. Iraqis who fought against Saddam Hussein and Afghans who fought against the Soviets are now being defined as terrorists solely because they took up arms—often in self-defense.

Legislation passed in December 2007, which was sponsored by Senators Patrick Leahy and Jon Kyl, gave the executive branch the discretion to waive most of these bars, and avoid the unintended consequences of the overbroad definition of terrorism. But the Bush administration has been painfully slow in exercising this discretion, and hundreds of deserving asylum seekers and thousands of formerly admitted men, women, and children who have applied to begin the process of naturalizing as American citizens have been told that their cases are on indefinite hold.

President Obama should take immediate steps to exercise his discretion responsibly and to work with Congress to codify a narrow and sensible definition of terrorism in US law. Specifically, the new administration should:

- (1) Protect victims of terror by ensuring that those forced against their will to provide food, water, shelter, or other support to a terrorist group are no longer defined as “material supporters” of terrorism and barred entry into the United States.
- (2) Ensure that members of resistance groups that have not targeted civilians—such as those organized against Saddam Hussein—are no longer defined as “terrorists” and barred entry to the United States.

- (3) Establish a process so that individuals subject to deportation orders based on these bars have a chance to apply for—and present evidence in support of—a discretionary waiver of these bars.
- (4) Work with Congress to amend the definition of “terrorist activity” and “terrorist organization” in immigration law so that victims of terror are no longer defined as terrorists and groups of two or more people are no longer defined as “terrorist organizations” simply because they have borne arms.