Rehabilitating the U.S Ban on Torture: A Call for Transparent Treatment Policy

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I. Introduction

The disclosure of abusive United States (U.S.) detention and interrogation policies and practices over the past seven years has engendered serious confusion about the U.S. government's commitment to the most fundamental of human rights: to be free from torture or other cruel, inhuman, or degrading treatment. The destruction of Central Intelligence Agency (CIA) tapes of interrogations that allegedly involved waterboarding, exposure to frigid temperature, and sleep deprivation; the withholding of memo after memo of highly suspect legal opinions interpreting humane treatment obligations; and the admission of a secret prison system to which the International Committee of the Red Cross (ICRC) is denied access are just a few examples of U.S. government actions that have done tremendous damage to international humane treatment standards. These policies have also fostered the popular misconception that respect for basic human dignity is incompatible with safeguarding our national security.

It is not surprising that a U.S. policy of official cruelty has emerged from a cloak of secret and ever evasive legal opinions and clandestine detentions. Transparency in detention practices and independent monitoring of detention facilities have long been acknowledged as an inoculation against torture and other cruelty.[1] When detention systems are removed from the public eye and the accompanying pressure for accountability, conditions become ripe for prisoner abuse.

The ability of the U.S. government to protect the secrecy of properly classified information is unquestionably essential to national security. But no U.S. agency need be, or should be, secretive about its commitment to upholding the ban on torture and other forms of cruelty. Disclosing proof of U.S. adherence to humane treatment standards through thoughtful and transparent mechanisms can only make the nation more secure. Restoring confidence in the nation's commitment to humane treatment is essential to assuring full intelligence and law enforcement cooperation with other countries.[2] The United States must unambiguously

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[1] Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application And Enforcement*, 14 HARV. HUM. RTS. J. 87, 90 (Spring 2001) ("The minimum criteria for achieving good governance include the elements of accountability, transparency, responsibility, and the consent of the governed. The standards which guide the practices of official torture, however, involve an obfuscation of accountability, a strenuous cloak of secrecy to prevent any level of transparency, a denial of any sense of responsibility for torture, and a complete disregard for the will of the people.")

[2] In January 2008 the Canadian Foreign Affairs Department put the United States on a list with Iran, Syria and Saudi Arabia as prisoners are at risk of being tortured. *Canada Document Puts U.S. on Torture List*, ASSOCIATED PRESS, Jan. 18, 2008.

demonstrate that it understands its obligation to treat all prisoners in U.S. custody with the same humanity that it would demand for U.S. citizens in foreign custody — including U.S. soldiers in the custody of the enemy. Moreover, if the United States ever hopes to rebuild its status as a human rights leader, it must make unparalleled commitments to strengthen the international prohibition of torture and other cruel treatment.

This paper explores how the current situation became so dire and examines ways to improve the situation in a new Administration. Part I of this paper provides an overview of the continued role of ambiguity and secrecy in perpetuating distrust of the United States' enforcement of its obligation not to engage in torture. Part II explores the costs of this ambiguity and secrecy, and the benefits to be gained through increased transparency in prisoner treatment policy and practice. In Part III, the paper suggests concrete steps for fostering greater transparency, which has the power to expediently restore confidence in U.S. commitment to humane treatment.

II. The Torture Problem: A Legacy of Secret Law, Secret Policy, and Secret Prisons

Experience has proven that the failure of the United States to clearly enforce prohibitions on torture and other cruelty is not due to weaknesses in the legal standards, but due to the misinterpretation of the standards behind closed doors. Prisoner treatment is not the only area of national security policy where excessive secrecy has created a deficiency in accountability. However, prisoner treatment is clearly an area where lack of transparency both in policy formation and practice has seriously obstructed any outside oversight of the Executive's adherence to the law.

A. Secret Law and Policy

In recent years, secret legal opinions interpreting humane treatment standards have continued to play a central role in the Administration's attempt to justify the continuation of interrogation policies that lack the support of Congress,[3] U.S. allies, and the American public. As formerly classified legal opinions on humane treatment standards are released, often provoking outrage from the legal community, the Administration has engaged in the equivalent of a legal opinion shell game. Time and again, the Administration states that it has revoked a given controversial legal interpretation, but stops short of renouncing the analysis or admitting that the new analysis requires a change in practice. In this manner, Administration officials continue to avoid having to state their understanding of the legal standard for humane treatment.

For instance, in late 2004, the Office of Legal Counsel (OLC) of the Department of Justice replaced John Yoo's memorandum of August 2, 2002, which came to be known as the "torture memo", with a memorandum written by Daniel Levin.[4] However, the Administration never repudiated the August 2002 memo and the superseding Levin memo explicitly states that,

[3] In 2007 Congress passed a provision as part of the Intelligence Authorization Act that would have eliminated the use of secretly authorized so-called "enhanced" interrogation techniques by the CIA by requiring the intelligence community to use only those approaches authorized by the Army Field Manual for Human Intelligence Collector Operations, FM 2-22.3. The President vetoed the bill on March 8, 2008. *See* H.R. 2082, 110th Cong. (2009).
[4] Memorandum for James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004).

"[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."[5]

Another example is the manner in which the Administration maneuvered in response to congressional attempts to restore integrity to U.S. interpretations of treatment standards. In the wake of the Abu Ghraib scandal, Congress passed an amendment, sponsored by Senator McCain, establishing a single standard of conduct for all U.S. interrogators. The amendment prohibits the use of cruel, inhumane and degrading treatment or punishment (CIDTP) against all detainees in U.S. custody, regardless of their nationality or location. But while the McCain amendment was still being considered by Congress, Steven Bradbury, acting OLC head, prepared an opinion that remains secret but reportedly asserts that all "enhanced interrogation techniques" — including exposure to frigid temperatures, sleep deprivation and waterboarding — were permissible under the CIDTP standard, which Bradbury has apparently interpreted as a nearly frictionless sliding scale.[6]

In response to questions during his confirmation hearings regarding his understanding of humane treatment standards, Michael Mukasey assured the Senate Judiciary Committee that once confirmed as Attorney General, he would review all DOJ legal interpretations related to detainee treatment.[7] Many members of Congress and human rights groups assumed that this would include memoranda that the Committee had reviewed and that had been reported in the press, such as the Bradbury memorandum on the McCain amendment. They further expected that, after the review, the new Attorney General would respond with an analysis of the approach taken in these documents. But at the Committee's first oversight hearing, Mukasey sidestepped difficult questions about the legal opinions — including opinions written by current DOJ officials such as Bradbury — by stating that he had only evaluated the current and undisclosed 2007 opinion.[8]

At an April 2008 hearing of the Senate Judiciary Committee on "secret law," the Administration committed to making Justice Department legal opinions justifying harsh interrogation techniques available to Senate and House intelligence committees.[9] Unfortunately it remains unclear what, if any, opinions will be disclosed to the judiciary committees,[10] and no commitment has been made to disclose the opinions to the public.

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[5] *Id*. at FN 8. In a recent congressional hearing Levin admitted having discussed footnote 8 of the 2004 memorandum with the White House but Levin refused to answer when Rep. Robert Scott (D-VA) asked him whether the White House insisted that he include footnote 8. *Interrogation Techniques: Hearing Before the H. Judiciary Subcomm. on Const'n, Civ. Rts., and Civ. Libs.*, 110th Cong. (2008) (testimony of Daniel Levin).
[6] Scott Shane, D. Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007.
[7] *Nomination of Judge Michael Mukasey to be Attorney General: Hearing Before the S. Judiciary Comm*, 110th Cong. (Oct. 18, 2008).
[8] *Oversight of the Department of Justice: Hearing Before the Comm. on the Judiciary*, 110th Cong. (Jan. 30, 2008).
[9] *Secret Law and Government Accountability: Hearing Before the S. Judiciary Subcomm. on the Constitution*, 110th Cong. (Apr. 15, 2008).
[10] *Id.*

It remains unclear why legal opinions that do not include operational information should be classified. As long as the executive branch continues to hide the ball when it comes to its understanding of the definition of torture, outside actors will likely — and justifiably — assume that these interpretations are motivated by a desire to continue abusive interrogation practices.[11]

Secretly changing previously publicly announced executive branch policy is part of a larger pattern of troubling behavior. The executive branch has also asserted that it is following a given humane treatment standard as a matter of *policy* as opposed to a matter of *law*. The U.S. government has taken the position that under the Convention against Torture neither Article 3[12] — prohibiting the transfer of individuals to places where a risk of torture exists—nor Article 16[13] — prohibiting cruel, inhuman or degrading treatment or punishment (CIDTP) — binds the United States when it is acting outside of U.S. territory. When Congress explicitly applied the Article 16 CIDTP standard to all detainees in U.S. custody or control *regardless of location or nationality* in a defense appropriations bill, the Administration issued a signing statement indicating that the executive branch might not always consider itself bound by the provision.[14]

Moreover, there is reason to believe that the Administration understands its current application of Common Article 3 of the Geneva Conventions to all detainees regardless of their status[15] to be as a matter of policy, not as a matter of binding law. Troublingly, the Attorney General indicated in his confirmation testimony that he understood the Supreme Court's holding in *Hamdan v. Rumsfeld* to address only the application of Common Article 3's statutorily codified trial requirements, as opposed to the Article's prisoner treatment standards.[16] In his written questions for the record, Mukasey wrote that "whether the President otherwise may order a violation of Common Article 3, beyond the grave breaches [under the Military Commissions of 2006], is more complicated because a non-self-executing treaty obligation stands on a different footing than an act of Congress."[17] Mukasey then went on to state that it was the Administration's policy to remain committed to upholding the Geneva Conventions.

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[11] Note that the OLC has responded to some specific inquiries into the department's analysis of Common Article 3 and the McCain amendment, but this analysis is far from comprehensive. *See* Letter from Brian Benczkowski, Principal Deputy Assistant Attorney General, to Senator Ron Wyden, March 6, 2008; Letter from Brian Benczkowski, Principal Deputy Assistant Attorney General, to Senator Ron Wyden, Sept. 27, 2007.

[12] *See* UNITED STATES, LIST OF ISSUES TO BE CONSIDERED DURING THE EXAMINATION OF THE SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA: RESPONSE OF THE UNITED STATES OF AMERICA 32-33, *available at* http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/listUSA36_En.pdf.

[13] *See id.* at 86.

[14] President's Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 30, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html. ("The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.")

[15] *See* Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (Jul. 20, 2007); U.S. DEP'T OF DEF., THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM, Directive No. 2310.01E (Sept. 5, 2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf.

[16] *Nomination of Judge Michael Mukasey to be Attorney General: Hearing Before the S.Comm. on the Judiciary*, 110th Cong. (Oct. 17, 2007).

[17] Response from Michael Mukasey to the S. Comm. on the Judiciary's written questions for the record, 110th Cong. 162 (Oct. 30, 2007).

If it is the Department of Justice's official position that violations of Common Article 3 "beyond grave breaches" are prohibited only as a matter of policy and not as a matter of law, then the Administration would likely not consider itself legally bound to continue to follow its policy under: (1) Executive Order 13440, which states that the President has determined that Common Article 3 "shall apply to a program of detention and interrogation operated by the Central Intelligence Agency;" or (2) Directive 2310.01E, which mandates that the Department of Defense (DoD) shall apply, "without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 … as construed and applied by U.S. law … until their final release, transfer out of DoD control, or repatriation."[18]

The uncertainty about whether the Administration perceives humane treatment standards as legally binding is compounded by the Administration's position that it can stop, and has secretly stopped, abiding by publicly declared executive branch policy. To Congress' understandable dismay, an assistant attorney general from OLC recently testified to the President's ability to waive or modify a published executive order without providing notice to the public or Congress—simply by not following it.[19] Regardless of the President's constitutional authority in this area, not knowing whether the executive branch is following its own publicly disclosed rules on detainee treatment is clearly a troubling impediment to public and Congressional oversight.[20]

Finally, the Administration has also been evasive about the implementation of its obligation under Article 3 of the Convention against Torture not to transfer individuals to countries where they are at risk of torture, particularly in the context of renditions. Under current regulations, the Administration has relied upon "assurances" obtained in secret from the receiving government—including governments with pervasive torture problems. The individual being transferred is allowed no opportunity to challenge the assurances' reliability, and very little is known about how these assurances are obtained, what they consist of, and what happens to individuals who are rendered in reliance on them. In a recent hearing, Legal Advisor to the Secretary of State John Bellinger refused the request of the Chairman of the House Foreign Affairs Subcommittee on International Organizations, Human Rights and Oversight to provide the Committee with copies of these assurances for oversight purposes.[21]

In spite of the cloak of secrecy over the diplomatic assurances process, in at least one case the U.S. government's reliance on assurances resulted in an individual being transferred to torture: the case of Canadian citizen Maher Arar. Arar was taken into U.S. custody at JFK Airport and eventually transferred to Syria where he was held for thirty days and tortured. The details of how the assurances were obtained and relied upon in the Arar case were redacted from the Department of Homeland Security Inspector General report on the incident.[22]

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[18] *Id.* Dep't of Def. Directive 2310.01E.
[19] *Secret Law and Government Accountability: Hearing Before the S.Judiciary Subcomm. on the Const'n*, 110th Cong. (April 15, 2008) (testimony of John Elwood, Assistant Att'y Gen., Dep't of Justice, Office of Legal Counsel).
[20] For further discussion, see Marty Lederman, *Misdirected Outrage*, BALKINIZATION (Dec. 8, 2008), http://balkin.blogspot.com/2007/12/misdirected-outrage.html.
[21] *Extraordinary Rendition: Hearing Before the H. Foreign Aff. Subcomm. on Int'l Org's, Hum. Rts., and Oversight*, 110th Cong. (June 10, 2008).
[22] DEP'T OF HOMELAND SECURITY, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA, OIG-08-18 (March 2008), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-18_Mar08.pdf.

B. Secret Prisons & Ghost Prisoners

In addition to shielding legal opinions, authorizations, and diplomatic assurances from the public scrutiny, the Administration has also engaged in a broad attempt to shield prisoners themselves from any form of outside monitoring that would provide oversight and accountability for their treatment. Many of the abuses suffered by detainees in U.S. custody took place in secret detention facilities or in DoD facilities where certain individuals were kept from the ICRC.[23]

There have been no recent reports of the military holding "ghost prisoners," but the CIA presumably continues to detain individuals in secret, undisclosed facilities to which the ICRC is denied access. In September 2006, President Bush publicly acknowledged for the first time that the CIA had been secretly detaining suspected terrorists in facilities outside the United States. Such sites have reportedly been operated in Afghanistan, Pakistan, Jordan, Poland and Romania as well on U.S. ships including the USS Bataan and USS Peleliu.[24] The continued existence of the secret detention program was confirmed as recently as March 14, 2008, when the Pentagon announced that Muhammad Rahim al Afghani had been transferred to Guantánamo Bay from CIA custody.[25]

Moreover, the fate of many detainees who have been transferred out of secret custody has been withheld from the public. In a recent report, human rights groups identified 39 individuals who are thought to have been subjected to enforced disappearance whose whereabouts remain unknown.[26]

III. Why Transparent and Humane Treatment Policy Makes America Safer

Some assert that opacity in U.S. interpretation and application of the law requiring humane treatment of prisoners in U.S. custody is necessary for national security. Yet there is significant evidence to the contrary: that transparency in prohibiting cruelty actually improves security by facilitating intelligence-gathering cooperation with allies, advancing strategic counterinsurgency goals, and ensuring that the United States can demand humane treatment for U.S. citizens in the custody of foreign governments.

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[23] During the Iraq war and occupation the United States hid particular prisoners from Red Cross monitors and failed to ever register some prisoners in official logs. *See* Maj. Gen. Antonio Taguba, AR 15-6, Investigation of the 800th Military Police Brigade (Feb. 2004), *available at* http://www.humanrightsfirst.org/us_law/800th_MP_Brigade_MASTER14_Mar_04-dc.pdf; General Paul J. Kern, Commander of U.S. Army Materiel Command, testified before the Senate Armed Services Committee that as many as 100 prisoners were held as "ghost detainees." *Investigation of the 205th Military Intelligence Brigade At Abu Ghraib Prison: Hearing Before the S. Armed Services Comm.*,108th Cong. (2004).

[24] Deborah Pearlstein & Priti Patel, *Behind the Wire: An Update to Ending Secret Detentions*, HUM. RTS. FIRST (Mar. 2005), *available at* http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf; *CIA jails in Europe 'confirmed'*, BBC NEWS, June 8, 2007, http://news.bbc.co.uk/2/hi/europe/6733353.stm.

[25] Press Release, U.S. Dep't of Def., Defense Department Takes Custody of a High-Value Detainee (Mar. 14, 2008), http://www.defenselink.mil/releases/release.aspx?releaseid=11758.

[26] AMNESTY INT'L, OFF THE RECORD: U.S. RESPONSIBILITY FOR ENFORCED DISAPPEARANCES IN THE "WAR ON TERROR" (June 2007), *available at* http://www.amnesty.org/en/library/asset/AMR51/093/2007/en/dom-AMR510932007en.pdf.

One justification that various Administration officials — including the President — have repeatedly given for refusing to take particular cruel techniques off the table is that Al Qaeda members will be trained to resist all approaches to U.S. interrogations.[27] The military considered and rejected this reasoning when it revised its interrogation manual in 2006.[28] When announcing the release of the new manual, Lt. Gen. John Kimmons, Army Deputy Chief of Staff for Intelligence, stated that over a period of months the Army considered including a classified annex in the manual, but decided against it because it would inhibit cooperation with our allies, confuse interrogators, and the enemy would learn of the methods regardless.

> We weighed that [possibility of including a classified appendix] against the needs for transparency and working openly with our coalition partners and also the need to be as clear as we can be in the training of these techniques to our own soldiers, sailors, airmen and Marines as to reduce the risks of inadvertent migration from a classified domain into a(n) unclassified text by virtue of them being separated.
>
> We also felt that even classified techniques, once you use them on the battlefield over time, become increasingly known to your enemies, some of whom are going to be released in due course. And so on balance, in consultation with our combatant commanders, we decided to go this route. We're very comfortable with it; so are our combatant commanders. [29]

The new Counterinsurgency Manual issued in June 2006 further emphasizes how transparency in adherence to the rule of law, including to humane treatment standards, is essential to our counterinsurgency effort. It states:

> Efforts to build a legitimate government though illegitimate action—including unjustified or excessive use of force, unlawful detention, torture, or punishment without trial—are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law. [ ] Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local population and eventually around the world

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[27] *See e.g. Detainee Interrogation Rules: Hearing Before the S. Comm. on the Judiciary, Subcomm. on the Const., Civil Rts. and Civil Liberties*, 110th Cong. (2008) (testimony of David Addington); George W. Bush, U.S. President, Address from the White House, The East Room: President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

[28] Detainee Treatment Act of 2005 42 U.S.C.S. § 2000dd (2006); The Army Field Manual on Human Intelligence Collector Operations was revised after the McCain amendment made it illegal to use any interrogation approach not described in the manual on a detainee in Dep't of Def. custody. U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3 HUM. INTELLIGENCE COLLECTOR OPERATIONS (Sept. 6, 2006).

[29] LTG General John Kimmons, Briefing at Foreign Press Center (Sept. 7, 2006) (transcript available at: http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3712).

> because of the globalized media and work to undermine the COIN [Counterinsurgency Operations] effort.[30]

The Manual makes clear that in order to gain the popular support it needs to confront insurgency threats, the United States must send an unequivocal message that it is committed to upholding the law and basic principles of human dignity. General David Petraeus, former commander of the Multi-National Force-Iraq reiterated this message in a May 2007 letter which states:

> This fight depends on securing the population, which must understand that we—not our enemies—occupy the moral high ground. [ ] In everything we do we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect.[31]

Transparency in humane treatment policy and practice helps to prevent and detect abuse that General Petraeus and the counterinsurgency manual asserts is detrimental to our strategic security goals. The ICRC alerted military authorities in Iraq to the abuse at Abu Ghraib, leading to some of the military's first disciplinary actions against those involved.[32] The Army's investigations into the Abu Ghraib abuses suggest that if the military had given the ICRC monitors more complete access and followed the ICRC's recommendations it could have avoided the tremendous damage done to the international standing of the United States.[33]

Finally, opacity in U.S. interpretation of its obligations to treat detainees humanely puts U.S. citizens taken into foreign custody at risk. When the United States is elusive about what it means when it says that it follows Common Article 3 and does not torture, it becomes extremely difficult to argue that other governments should not use particular forms of cruelty, such as waterboarding and sleep deprivation, against U.S. citizens. On September 12, 2006, forty-nine Admirals and Generals, including former Chairman of the Joint Chiefs of Staff John Shalikashvili, sent a letter to the Senate Armed Services Committee that stated: "We have people deployed right now in theaters where Common Article 3 [of the Geneva Conventions] is the only source of legal protection should they be captured. If we allow that standard to be eroded, we put their safety at greater risk."[34]

There are many costs to allowing the uncertainty in U.S. prisoner treatment policy to persist and many strategic security gains to be reaped from shifting to a policy of increased transparency. Accordingly, the U.S. government should be exploring new ways to publicly demonstrate its renewed commitment to upholding the ban on torture or other cruelty.

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[30] U.S. DEP'T OF DEF., FM 3-24/MCWP 3-33.5, COUNTERINSURGENCY MANUAL, 1-19 (Dec. 2006).
[31] Letter from Gen. David Petraeus, Former Commander of the Multi-National Force-Iraq, to Soldiers, Sailors, Airmen, Marines, Coast Guardsmen, and Civilians of Multi-National Force-Iraq (May 2007).
[32] Maj. Gen. George R. Fay, AR 15-4 Investigation of Intelligence Activities at Abu Ghraib 65-67 (Aug. 25, 2004).
[33] *Id.*
[34] Letter from 49 Retired U.S. Military Leaders to the S. Armed Services Comm. (Sept. 12, 2006), *available at* http://www.humanrightsfirst.org/media/etn/2006/alert/107/index.htm.

IV. Recommendations

To overcome the recent legacy of secret law and policy regarding detention and interrogation, and the practice of secret prisons, the United States will have to do far more than publicly assert its commitment to upholding its humane treatment obligations. Instead, it will need to build a model system to prevent prisoner abuse. Transparency and accountability must be the core principles upon which that model system is built. Specifically, the U.S. government needs to: (1) bring the past six years of detainee treatment policies out in the open; (2) issue new and publicly available interpretations of humane treatment obligations and apply the same standards of humane treatment to all U.S. agencies; and (3) ensure sufficient and transparent outside monitoring of all U.S. detention facilities.

A. Illuminate the Past to Inoculate Against Future Abuse

Any agenda of increased transparency in prisoner treatment will most likely require disclosure of past policies and practices. Only by publicly acknowledging the extent of past mistakes will the United States be able to demonstrate to the world that, going forward, it is taking the most effective steps to inoculate against future abuse.

There are a number of legal, policy and investigatory documents on detainee treatment that have not yet been released. Documents that should immediately be made public include: the September 17, 2001 Executive Order establishing the CIA covert prison system;[35] CIA inspector general reports and CIA legal memos on detention, interrogation, and humane treatment standards;[36] and a number of rescinded OLC legal memos on humane treatment standards.[37] Any legal opinions interpreting the crimes established by the Military Commissions Act's amendments to the War Crimes Act, particularly the definition of cruel and inhuman treatment, should also be made available.[38] Finally, DOJ's Inspector General's investigation and the Office of Professional Responsibility investigation into the role of lawyers in interrogation and related opinions need to be completed and made public in some form.

Limited progress has already been made in shedding light on how abusive prisoner treatment was authorized and employed within particular executive branch agencies. DOJ's OIG issued an extensive report in May 2008 on the FBI's involvement in, and observations of, interrogations in Iraq, Afghanistan and Guantanamo. This report recognizes for the first time the role of various players involved in the decision-making process and the fielding of complaints of

[35] *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.
[36] According to news reports these reports include findings 1) that CIA interrogation techniques violated the Convention against Torture's ban on cruel inhumane and degrading treatment, 2) on the CIA's role in the rendition program and 3) on the CIA's role in detentions in Iraq and Afganistan. Douglas Jehl, *Report warned CIA about Interrogations*, N.Y. TIMES, Nov. 9, 2005; R. Jeffrey Smith, *Fired Officer believed CIA Lied to Congress*, WASH. POST, May 14, 2006; Douglas Jehl, *Questions Are Left by CIA Chief on the Use of Torture*, N.Y. TIMES, Mar. 18, 2005.
[37] *See* Scott Shane, D. Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007.
[38] 18 U.S.C.A. § 2441(d)(B) (2006).

abuse.[39] Recently, certain congressional committees have also begun to demonstrate a rigorous — if somewhat belated — focus on investigating the involvement of the DOJ and the DoD in prisoner abuses, holding over six hearings on the issue in early 2008.[40]

However, there needs to be a serious inquiry into the roles of particular departments and of White House officials, including the Principals Committee and Policy Coordinating Committee of the National Security Counsel (NSC).[41] While news and government reports have alluded to the involvement of White House officials — such as then National Security Advisor Condoleeza Rice, then Secretary of State Colin Powell, and then NSC Legal Advisor John Bellinger[42] — these assertions have received surprisingly little attention from Congress or the public. Though unlikely to happen until there is a change in Administration, the involvement of even these most senior officials needs to be fully and publicly investigated.

B. Establish Transparent Law and Policy on Humane Treatment Standards

While uncovering the full extent of how past detainee treatment policy led to abuse is important, such investigations should not delay the production of public, good-faith interpretations of the humane treatment obligations of the United States. New memoranda should take on the fallacious legal reasoning of prior legal interpretations and lay out contrary understandings of obligations that rightfully consider all existing precedent and that are motivated by a genuine desire to uphold and strengthen the ban on torture. This new good-faith interpretation of the law should be applied to all U.S. agencies.

In particular, there should be public memoranda issued with understandings of the humane treatment standards in and scope of applicability of our obligations under: the International Covenant on Civil and Political Human Rights; Common Article 3 of the Geneva Conventions; Articles 1, 3, and 16 of the Convention against Torture; the Anti-Torture Statute (18 U.S.C. § 2340); the McCain amendment; and the War Crimes Act as amended by the Military Commissions Act of 2006. As current OLC opinions slowly become public, it has

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[39] OFF. OF THE INSPECTOR GEN., DEP'T OF JUST., A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ (May 2008).

[40] *See e.g. Coercive Interrogation Techniques: Hearing Before the S. Judiciary Comm.*, 110th Cong. (June 10, 2008); *Extraordinary Rendition: Hearing Before the H.R. Foreign Aff. Subcomm. on Int'l Org's, Hum. Rts., and Oversight* , 110th Cong. (June 10, 2008); *Maher Arar Deportation Investigation: Joint Hearing Before the H.R. Judiciary Subcomm. on the Const., C.R., and C.L. and the H.R., Foreign Aff. Subcomm. on Int'l Org's, Hum. Rts., and Oversight*, 110th Cong. (June 5, 2008); *Improving Detainee Policy: Hearing Beofre the S. Judiciary Comm.*, 110th Cong. (June 4, 2008); *The FBI's Role at Guantanamo Bay: Hearing Before the H.R., Foreign Aff. Subcomm. on Int'l Org's, Hum. Rts., and Oversight,* 110th Cong. (June 4, 2008).

[41] The role of these NSC committees in various discussions regarding detainee policy and the legality of the CIA interrogation techniques has been made clear by recent reports by a recently released DOJ OIG report. OFF. OF THE INSPECTOR GEN., DEP'T OF JUST., A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ (May 2008). *at* 16-17 (May 2008)

[42] OFF. OF THE INSPECTOR GEN., DEP'T OF JUST., A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ (May 2008) *at* 16-17 (May 2008); Jan Crawford Greenburg, Howard L. Rosenberg, & Ariane de Vogue, *Sources: Top Bush Advisors Approved 'Enhanced Interrogation'*, ABC NEWS, Apr. 9, 2008; JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 24-26 (2006); *see also* Letter From the ACLU to S. Judiciary Leadership Urging the Questioning into the National Security Council's Role in Torture (June 9, 2006), *available at* http://www.aclu.org/safefree/torture/35587leg20080609.html.

become clear that no legitimate national security interest has been served in keeping secret such legal interpretations.

New interpretations of existing humane treatment standards need not and should not attempt to include a comprehensive list of prohibited interrogation techniques or forms of abuse.[43] Doing so would inevitably leave the door open to forms of cruelty that were omitted from the list and would ignore the importance of circumstance and combined effect to the ultimate physical and mental impact of abuse on the victim.[44] However, a non-exclusive list of specific forms of cruelty reported to have been authorized for use in the past as "enhanced" interrogation techniques — such as waterboarding, sleep deprivation, sensory deprivation, and exposure to frigid temperatures — should be renounced as illegal.

There are also a number of substantive changes in this analysis that could indicate a renewed commitment to promoting human rights and enforcing the prohibition on torture. The Administration can make clear that it understands the executive branch to be bound by laws regulating prisoner treatment by: (1) denouncing the signing statement that accompanied the passage of the McCain amendment, (2) declaring that the amendment is a constitutional exercise of Congress' authority, and (3) expressing an intention to implement the amendment under all circumstances.[45] The U.S. State Department should also explicitly recognize and report to the international Committee against Torture that it understands Article 3 (prohibiting returns to torture) and Article 16 (prohibiting cruel, inhumane or degrading treatment or punishment) of the Convention against Torture to apply extraterritorially.[46] Moreover, the United States should change the position it has held since 1995 and accept the Human Rights Committee's interpretation of the International Covenant on Civil and Political Rights as applying extraterritorially.[47]

Policies regarding the use of assurances from destination countries in implementing our obligations not to transfer an individual to torture also need to be rewritten in a way that subjects the process to adequate outside scrutiny. So long as the practice of obtaining and relying on such assurances occurs in secret, the practice will continue to be extremely vulnerable to mistake and abuse. It is particularly important to ensure that an individual being transferred — whether from the United States or a third country — has the ability to challenge the reliability of the assurance. This is a change that can most effectively be done by the executive branch, and it will necessarily involve amending regulations.[48]

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[43] NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW (2d ed. 1999). ("[A] juridical definition cannot depend upon a catalogue to of horrific practices; for it to do so would simply provide a challenge to the ingenuity of the torturers, not a viable legal prohibition.")

[44] HUMAN RIGHTS FIRST & PHYSICIANS FOR HUMAN RIGHTS, LEAVE NO MARKS: ENHANCED TECHNIQUES AND THE RISK 7 (Sept. 2007).

[45] *See* id.

[46] Written Response of the U.S. to Questions Asked by the Comm. Against Torture (Apr., 18, 2006) *available at* http://www.state.gov/g/drl/rls/68554.htm.

[47] *See* U.N. HUM. RTS. COMM., *Summary Record of the 1405th Meeting: United States of America*, U.N. DOC. CCPR/C/SR 1405 ¶¶ 7, 20 (Apr. 24, 1995); U.N. HUM. RTS COMM., *Concluding Observations: United States of America*, U.N. DOC. CCPR/C79/ADD.50 at 284 (Oct. 3, 1995).

[48] These include regulations such as 8 C.F.R. § 208.18(c), which provides for reliance on diplomatic assurances in immigration proceedings where the individual is raising a claim under the Convention against Torture. *See* HUMAN RIGHTS WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE 81 (Apr. 2005).

Publicly acknowledging the legally binding nature of humane treatment standards is one way to instill confidence in the permanency of a changed U.S. approach to prisoner treatment. There should also be a mechanism to ensure that new detention and interrogation policies will not be secretively superseded as they have been in the past. One way to approach this challenge would be to adopt a formal mechanism for the public cataloguing of all executive orders — particularly such orders related to detainee policy — and/or to announce a commitment to publicly disclose any revocation or change of all such orders.[49]

Finally, there should be extensive, frank, and open discussion about how obligations under the Convention against Torture must be incorporated into the intelligence-gathering policies and practices of the United States. This discussion should extend even to situations where the individual at risk of torture or other cruelty may never be in direct U.S. custody. Difficult questions must be approached directly. For instance, what obligations does the U.S. incur when providing intelligence information that could lead to an individual's detention within another country, and what reasonable steps can and should be taken to ensure that intelligence information received by the United States is not obtained through torture or other cruelty? These difficult questions have been largely overshadowed by more direct examples of interrogation-related abuse over the past six years, but they are undeniably questions with which any Administration will eventually have to grapple. These questions should also include a re-examination of U.S. reservations to the Convention against Torture that have been used over the past six years to justify abusive detainee treatment. Unless the U.S. government tackles these admittedly complex problems openly, there will continue to be allegations that the United States has simply farmed out abusive practices of the past to foreign countries through the use of proxy detention and interrogation and other manners of intelligence sharing. [50]

C. Ensure Transparency and Oversight of Detention Facilities

Increased transparency in the legal interpretations of, and policies regarding, humane treatment standards will mean little if not accompanied by monitoring mechanisms that ensure that such laws and policies are properly implemented at the site of detention. Centuries of experience in detentions have clearly demonstrated that outside monitoring and accountability are essential to preventing abuse inside prisons. According to the Commission on Safety and Abuse in America's Prisons, a committee comprised of civic leaders, experienced corrections administrators, scholars, and law enforcement professionals, "[t]he most important mechanism for overseeing corrections is independent inspection and monitoring."[51] By adopting concrete

[49] While some legislatures and scholars have suggested that Congress should mandate such a system, a president voluntarily adopting such a system could result in similar benefits of transparency without broaching the separation of powers issues raised by a congressional mandate. *See e.g.* Executive Order Integrity Act of 2008, S. 3405, 110th Cong. (2008); Presidential Order Limitation Act of 2001, H.R. 23, 107th (Jan. 3, 2001); Alissa C. Wetzel, *Beyond The Zone Of Twilight: How Congress And The Court Can Minimize The Dangers And Maximize The Benefits Of Executive Orders*, 42 VAL. U. L. REV. 385 (Fall 2007) **.**

[50] There were a number of news reports related to U.S. involvement proxy detention in the spring of 2007 that highlighted the problems related to proxy detention. *See e.g.* Anthony Mitchell, *U.S. Agents Visit Ethiopian Secret Jails*, WASH. POST, Apr. 3, 2007); Press Release, Human Rights Watch, People Fleeing Somalia War Secretly Detained: Kenya, US and Ethiopia Cooperate in Secret Detentions and Renditions (Mar. 20, 2007).

[51] The Comm. on Safety and Abuse in America's Prisons, *Confronting Confinement*, 22 WASH. U. J.L. & POL'Y 385 (2006).

policy reforms that allow objective observers inside the walls of U.S. detention facilities, the United States can prove that it is putting into practice a renewed commitment to humane treatment.

1. ICRC Notification and Access for All Detainees in U.S. Custody

An obvious first step in ending the practice of secret prisons would be to immediately notify the ICRC of, and provide the ICRC access to, any and all detainees in U.S. custody, including those in the custody of the intelligence community.[52] There are no practical obstacles to allowing immediate access to all detainees. The ICRC has already requested access to all foreign terrorist suspects held by the United States,[53] and the U.S. Armed Forces have extensive regulations that could be used as a model for providing ICRC access to prisoners in the custody of other agencies.[54] In the interest of accounting for all individuals that have gone through the secret prison system, the United States should also make available to the ICRC the names, nationalities, and last known locations of all prisoners who were previously kept in secret U.S. custody.[55]

2. New Monitoring Mechanisms for U.S. Detention Facilities

Providing ICRC access and notification by itself will likely prove insufficient to signal a true shift in U.S. detention policies. This is understandable, given the severity and pervasiveness of recent U.S. abusive detention practices and the ICRC's confidentiality requirements and limited mandate. In an attempt to restore faith in its commitment to uphold the ban on torture and other cruelty, the United States will have to go far beyond the transparency mechanisms that existed before 2001 and adopt a more stringent and transparent oversight regime for prisoners in its custody.

One particularly powerful option would be for the United States to sign and ratify the Optional Protocol to Convention Against Torture (OPCAT). OPCAT came into force in October 2006 and, as of June 2008, 61 parties had signed and 35 had ratified the treaty.[56] The protocol provides mechanisms for international and national inspection of all places of detention, very similar to the European system that came into force in the late 1980s.[57] This April the Protocol's

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[52] In early 2008, the U.S. House and the Senate Select Committees on Intelligence have passed provisions that would require such access. *See* Intelligence Authorization Act, S. 2996 § 323 (2008).
[53] Stephanie Nebehay, *Red Cross Seeks Access to CIA Prison*, REUTERS (Nov. 3, 2005).
[54] *See e.g.* DEP'T OF THE ARMY FIELD MANUAL (FM) 27-10, THE LAW OF LAND WARFARE (1956; modified 1976); ARMY REGULATION (AR) 190-8/CHIEF OF NAVAL OPERATIONS INSTRUCTION (OPNAVINST) 3461.6/AIR FORCE JOINT INSTRUCTION (AFJI) 31-304/MARINE CORPS ORDER (MCO) 3461.1, ENEMY PRISONER OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND DETAINED PERSONS (1997).
[55] AMNESTY INT'L, OFF THE RECORD: U.S. RESPONSIBILITY FOR ENFORCED DISAPPEARANCES IN THE "WAR ON TERROR",(June 2007) *available at* http://www.amnesty.org/en/library/asset/AMR51/093/2007/en/dom-AMR510932007en.pdf.
[56] Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, G.A. RES. 57/199, U.N. DOC. A/RES/57/199, *available at* http://www2.ohchr.org/english/bodies/ratification/9_b.htm.
[57] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Feb. 1, 1989, Doc. No. H(87)4 1987.

subcommittee presented its first report, including accounts of subcommittee visits to Mauritius, Maldives and Sweden and upcoming visits to Benin, Mexico and Paraguay.[58]

In addition to providing much needed transparency for U.S. detention facilities, becoming a member state to the Optional Protocol would signal a renewed commitment to the Convention against Torture, the primary instrument codifying the international norm against torture. There are few steps that the United States could take that would send as strong an anti-torture message as signing up for domestic and international inspections of all U.S. detention facilities.

3. Mandate the Videotaping of Interrogations

A fairly straightforward policy that would quickly increase transparency and restore confidence in U.S. interrogation policy would be to mandate videotaping of all interrogations of detainees in the custody of the U.S. military or the intelligence community.[59] Recording interrogations protects interrogators from false accusations, protects prisoners from abuse, and provides records that are extremely useful for gathering intelligence and for refining interrogation approaches. Any regulation mandating the recording of interrogations can and should account for the practical limitations of battlefield captures, when such videotaping might prove impracticable.[60]

The Army Inspector General emphasized the many benefits of capturing interrogations on videotape in a July 2004 report on detainee operations:

> Because interrogations are confrontational, a monitored video recording of the process can be an effective check against breaches of the laws of land warfare and Army policy. It further protects the interrogator against allegations of mistreatment by detainees and provides a permanent record of the encounter that can be reviewed to improve the accuracy of intelligence collection. All facilities conducting interrogations would benefit from routine use of video recording equipment.[61]

The Army Field Manual on *Human Intelligence Collector Operations* also asserts a strong preference for videotaping interrogations. It states that: "video recording is possibly the

[58] First Annual Report of the Subcommittee on Prevention of Torture 25 (April 2008), *available at* http://www2.ohchr.org/english/bodies/cat/opcat/docs/annualreportunitedversion9May08.doc.
[59] The House of Representatives passed a provision as part of the Defense Authorization Act for Fiscal Year 2009 that would mandate such electronic recording of interrogations of individuals in the custody of the Department of Defense. *See* H.R. 5658 § 1078 (2009).
[60] *Id*. (applying the electronic recording requirement only to strategic intelligence interrogations conducted at a theater-level detention facility and excluding members of the Armed Forces engage in direct combat or tactical questioning as defined in the Army Field Manual on Human Intelligence Collector Operations (FM 2-22.3, September 2006)).
[61] THE INSPECTOR GEN., DEP'T OF THE ARMY, DETAINEE OPERATIONS INSPECTION 35 (July 21, 2004), *available at:* http://www.humanrightsfirst.org/us_law/PDF/abuse/mikolashekdetaineereport.pdf.

most accurate method of recording a questioning session since it records not only the voices but also can be examined for details of body language and source and collector interaction."[62]

Recording only interrogation is not in and of itself sufficient to prevent against interrogation-related cruelty, which — as was demonstrated at Abu Ghraib — can occur outside of the interrogation booth. However, a codified policy mandating the creation and preservation of such tapes will signal confidence that all authorized interrogation techniques are legal and may help counter the suspicion sown by the CIA tape destruction scandal.[63]

4. Embracing the legal prohibition on secret prisons and enforced disappearances.

Long-standing U.S. law and policy reflect adherence to the principle of transparency in government detention,[64] and secret detentions are already prohibited under existing U.S. obligations under international human rights and international humanitarian law. But the current Administration has refused to recognize these commitments. The United States could easily accept an international legal obligation to prohibit enforced disappearances and secret detentions by signing and ratifying the International Convention for the Protection of All Persons from Enforced Disappearance.[65]

The Convention was open for signature on February 6, 2007, and as of April 2008 has 73 signatories; the Convention will come into force once 20 of these signatory nations have ratified. The Convention not only prohibits enforced disappearances and secret detention, but also requires the criminalization of participation in enforced disappearances, and bans the return of persons to another state when there are substantial grounds to believe the individual should be disappeared. Furthermore, it contains basic requirements on the maintenance of certain records and the communication of information to the counsel of the detained person.

V. Conclusion

A new page must be turned in U.S. adherence to prohibitions on torture and other cruelty. The next Administration will have a limited window of opportunity to signal its intention to realize the dramatic shift in U.S. prisoner treatment policy that is necessary to repair the tremendous damage caused by the abusive policies of the past six years. Swift steps must be taken to shed light on past abuses, replace faulty opinions with new commitments to adhere to good-faith interpretations of legal standards, and create new oversight mechanisms. Some of the steps outlined in this paper — such as releasing key policy documents and abandoning faulty legal opinions — can be taken within the first month of office. Others — such as treaty ratification — will take more time and will require the cooperation of Congress.

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[62] Army Field Manual 2-22.3, sec. 9-29, *available at* http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.

[63] Mark Mazzetti, *C.I.A. Destroyed Tapes of Interrogations*, N.Y.TIMES, Dec. 6, 2008, *available at* http://query.nytimes.com/search/sitesearch?query=videotapes+and+destroyed+and+interrogation&srchst=cse.

[64] Deborah Pearlstein & Priti Patel, *Behind the Wire: An Update to Ending Secret Detentions*, HUMAN RIGHTS FIRST (Mar. 2005 at 13).

[65] International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, G.A. RES. A/61/177, *available at* http://untreaty.un.org/English/notpubl/IV_16_english.pdf.

The stakes are incredibly high. In the balance hangs the ability of the United States to: maintain the integrity of our counterterrorism policy; improve intelligence cooperation with allies; empower the human intelligence community to effectively employ proven, effective methods for gathering actionable information; and re-establish the moral authority necessary to restore the United States as a leader in upholding human rights. To meet these goals, it is essential not only that the government adhere to its international and domestic legal obligations to treat prisoners humanely, but that it makes this adherence abundantly clear to the public. Only transparency in implementing humane treatment obligations can send the message to the American public that these standards are indispensable to our national security.