

ESTABLISHING A NEW NORMAL



National Security, Civil Liberties, and Human Rights Under the Obama Administration

AN 18-MONTH REVIEW

JULY 2010



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INTRODUCTION

On January 22, 2009—his second full day in office—President Obama signed a series of executive orders that squarely repudiated some of the most egregious abuses of the Bush administration. The new orders categorically prohibited torture and limited all interrogations, including those conducted by the CIA, to techniques authorized by the Army Field Manual. They outlawed the CIA's practice of secret detention and shut down the CIA's overseas prisons. And they mandated the closure of the Guantánamo prison within one year. These auspicious first steps towards fulfilling candidate Obama's promise of change were more than symbolic gestures: they carried the force of law, they placed the power and prestige of the presidency behind restoration of the rule of law, and they gave weight to the President's oft-stated view that adherence to our nation's fundamental principles makes us safer, not less safe.

But in the eighteen months since the issuance of those executive orders, the administration's record on issues related to civil liberties and national security has been, at best, mixed. Indeed, on a range of issues including accountability for torture, detention of terrorism suspects, and use of lethal force against civilians, there is a very real danger that the Obama administration will enshrine permanently within the law policies and practices that were widely considered extreme and unlawful during the Bush administration. There is a real danger, in other words, that the Obama administration will preside over the creation of a "new normal."

This report examines the Obama administration's record to date on a range of national security policies that implicate human rights and civil liberties. It concludes that the administration has taken positive steps and made genuine

progress in some areas. Perhaps most notably, the administration's release of Justice Department memoranda that purported to authorize the Bush administration's torture regime, as well as a CIA report describing how even those lax limits were exceeded, evinced a commitment to transparency of truly historic significance, and the administration deserves high praise for making those critical documents available for public scrutiny. Regrettably, in a pattern that has repeated itself throughout the administration's

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first eighteen months, a significant achievement was followed by a step back: the administration reversed its decision to comply with a court decision ordering the release of photos depicting the abuse of prisoners in Iraq and Afghanistan, and it supported legislation granting the Secretary of Defense unprecedented authority to conceal evidence of misconduct.

Similarly, the administration's admirable commitment to dismantle the Guantánamo prison has been undermined by its unwillingness to dismantle the legal architecture of the Bush-era detention regime: the Obama administration has continued to assert the authority to detain militarily, without charge or trial, Guantánamo detainees (and others) captured far from any conventional battlefield, and there is a genuine danger that the administration will close the prison but enshrine the principle of widespread military detention without trial. Equally disappointing, the

administration's unequivocal prohibition against torture has been fundamentally weakened by its continuation of the Bush administration's efforts to stymie meaningful accountability: the administration has adopted the same sweeping theory of "state secrets" to prevent torture victims from seeking justice and compensation in U.S. courts, and the President himself has publicly opposed criminal investigations of the architects of the torture regime.

The ACLU will continue to monitor the impact of the administration's national security policies on fundamental civil liberties and human rights. We hope that this report, published less than half-way through the President's first term, will serve as a vehicle for reflection and further dialogue; we hope that the administration will renew its commitment to the principle that the nation's fundamental values are the very foundation of its strength and security.

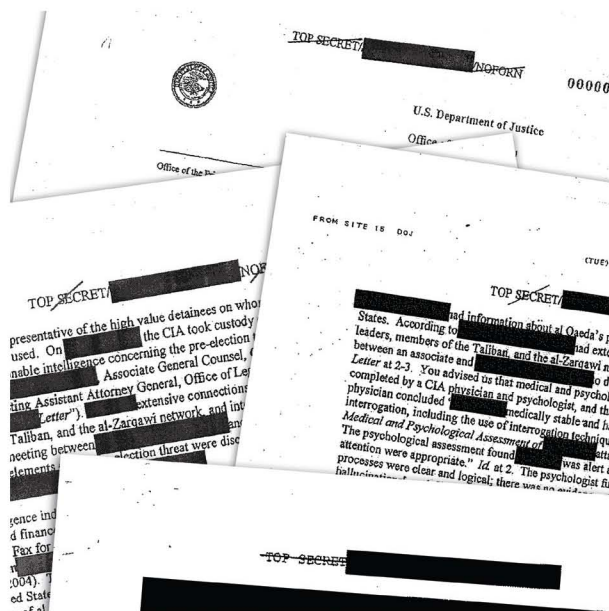
TRANSPARENCY

Many of the Bush administration's most controversial national security policies—the warrantless wiretapping program, the torture program, the rendition program—were conceived, developed, and authorized in secret. The American public found out about these policies long after they were put into place, and after a great deal of damage had already been done. Too often, Americans had to rely on leaks to the news media, or litigation by public interest organizations, in order to find out about consequential national security policies that had been adopted in their name. Too often, national security policies that should have been subject to public debate were implemented secretly. And too often, this secrecy shielded government officials from accountability for decisions that violated the public's trust and the law.

President Obama signaled a break from this past in his first days in office. In a Memorandum on Transparency and Open Government, the President acknowledged that transparency would “strengthen our democracy,” and he pledged that his administration would commit itself to “creating an unprecedented level of openness in Government.”¹ In a Memorandum on the Freedom of Information Act, the President declared that “[a] democracy requires accountability, and accountability requires transparency,” and he ordered all federal agencies to institute a “presumption in favor of disclosure,” thereby reversing the so-called “Ashcroft rule” that had governed during the Bush administration. The President cautioned federal agencies that “[t]he Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.”²

Over the next weeks, the Obama administration made modest—though nonetheless important—improvements to the rules governing classification.³ It funded a FOIA ombudsman.⁴ And it required agencies to release some information proactively and in formats useable by the general public.⁵

Most significantly, the Obama administration agreed to release the Justice Department memos that had been the basis of the Bush administration's torture program—memos that the ACLU and other public interest organizations had long been seeking under the Freedom of Information Act. The decision to release the memos was of historic importance. The memos allowed Americans to evaluate for themselves the legal arguments that were the foundation of the torture



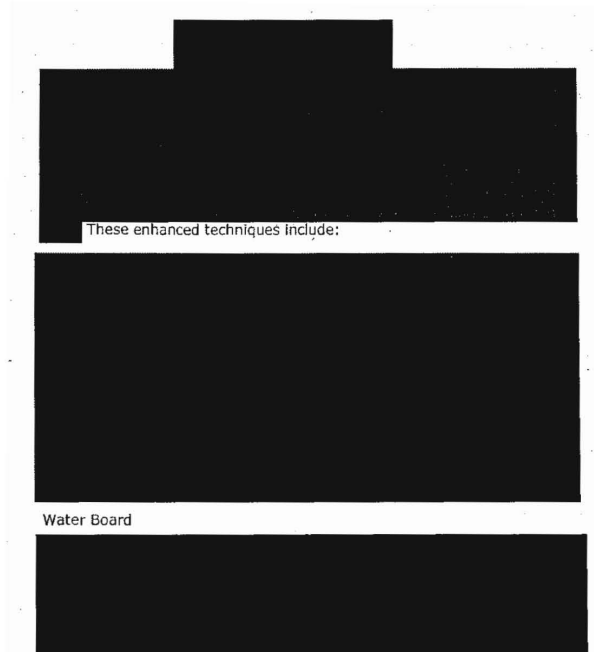
Formerly secret government records released under the Freedom of Information Act

program, and to decide for themselves whether the architects of the program had acted lawfully and in good faith. And in the weeks and months after the release of the memos, the Obama administration released official reports that shed further light on these questions. In August 2009, it released a report by the CIA's Inspector General assessing the CIA's interrogation and detention program.⁶ In February 2010, it released a report by the Justice Department's Office of Professional Responsibility assessing the conduct of the lawyers who wrote the torture memos.⁷

The administration's commitment to transparency, however, has been inconsistent, and it has waned over time. Although the administration initially stated that it would comply with an appellate court decision requiring it to release abuse photographs from detention facilities in Afghanistan and Iraq, it later reversed course and declared that it would seek Supreme Court review, and it supported an invidious amendment to the FOIA intended to retroactively exempt the photos from release under the statute. In addition to thwarting the decision of the appellate court,

the legislation invested the Secretary of Defense with sweeping authority to withhold any visual images depicting the government's "treatment of individuals engaged, captured, or detained" by U.S. forces—no matter how egregious the conduct depicted or how compelling the public's interest in disclosure.⁸ As the ACLU noted at the time, the legislation essentially gave the greatest protection from disclosure to records depicting the worst forms of government misconduct.

Since its change of heart on the abuse photographs, the administration has fought to keep secret hundreds of records relating to the Bush administration's rendition, detention, and interrogation policies. To take just a few of many possible examples, it has fought to keep secret a directive in which President Bush authorized the CIA to establish secret prisons overseas; the Combatant Status Review Transcripts in which former CIA prisoners describe the abuse they suffered in the CIA's secret prisons; records relating to the CIA's destruction of videotapes that depicted some prisoners being waterboarded; and cables containing communications between



“A democracy requires accountability, and accountability requires transparency.”

—PRESIDENT BARACK OBAMA
in a 2009 memorandum to executive departments and agencies

the CIA's secret prisons and officials at CIA headquarters. It has argued that the CIA's authority to withhold information concerning "intelligence sources and methods" extends even to methods that are illegal. The administration has also fought to withhold information about prisoners held at Bagram Air Base in Afghanistan. Indeed, the Obama administration has released less information about prisoners held at Bagram Air Base than the Bush administration released about prisoners held at Guantánamo.

One topic that the Obama administration has shrouded in secrecy warrants particular attention. Over the last few months, many media organizations have reported about the administration's "targeted killing" program—a program under which the administration asserts the authority to kill suspected terrorists anywhere in the world. At least one of the program's targets is a United States citizen. Even the program's proponents concede that the program raises serious questions of law and public policy. (We discuss the program at more length below.) Yet the information available to the public about the program is extremely limited. Stonewalling a FOIA request filed by the ACLU, the CIA has refused even to confirm or deny whether it has records about the program. There is no legitimate basis for the administration's refusal to disclose the legal basis for the program and basic information about the program's scope.

Also of grave concern to us is the administration's aggressive pursuit of government whistleblowers. During his campaign, candidate Obama said that he knew "a little bit about whistleblowing, and making sure those folks get protection." Rather than protect whistleblowers, however, the administration has been prosecuting them. It has charged Thomas Drake, a former official of the National Security Agency, for allegedly leaking information about waste and incompetence at that agency. (Notably, it was only because of

a leak to the media that the public learned of the NSA's warrantless wiretapping program.) It has charged Bradley Manning, a 22-year-old Army intelligence analyst, for allegedly leaking a video showing the killing of two Reuters news staff and several other civilians by U.S. helicopter gunships in Iraq. (Reuters had spent nearly three years trying to obtain the video through FOIA; now that the video is in the public domain, it is clear that there was no basis for withholding it.)⁹

In its first months, the Obama administration pledged a new era of transparency, and it took substantial and historic steps to make good on that pledge. Over the next eighteen months, we urge the administration to recommit itself to the ideals that the President himself invoked in his first days in office. Our democracy cannot survive if crucial public policy decisions are made behind closed doors, implemented in secret, and never subjected to meaningful public oversight and debate. It cannot survive if the public does not know what policies have been adopted in its name.

TORTURE AND ACCOUNTABILITY

The Justice Department memos that the Obama administration released in April 2009 related to a torture program that was conceived and developed at the highest levels of the Bush administration. Justice Department lawyers wrote legal opinions meant to justify torture; senior civilian and military officials authorized torture; and CIA and military interrogators used torture—at Guantánamo, in the CIA's black sites, and elsewhere. Government documents show that hundreds of prisoners were tortured in U.S.-run detention facilities, and that more than one hundred were killed, many in the course of interrogations.

In his first days in office, President Obama unambiguously rejected this legacy. In an executive order, President Obama categorically disavowed torture and directed that all prisoners in U.S. custody be afforded the protection of Common Article 3 of the Geneva Conventions (in compliance with the Supreme Court's 2006 ruling in *Hamdan v. Rumsfeld*); that all interrogations of prisoners in U.S. custody conform to the Army Field Manual; that the CIA close its secret pris-

ons; and that the International Committee of the Red Cross be promptly notified of any person detained by the United States.¹⁰ When the administration released the Bush administration's torture memos in April 2009, the Justice Department withdrew all of the legal memos that had undergirded the Bush administration's torture program,¹¹ and in a public statement President Obama declared:

I prohibited the use of these interrogation techniques by the United States because they undermine our moral authority and do not make us safer. Enlisting our values in the protection of our people makes us stronger and more secure. A democracy as resilient as ours must reject the false choice between our security and our ideals, and that is why these methods of interrogation are already a thing of the past.¹²

The decision to dismantle the Bush administration's torture program was a crucial one, not just for the United States but for the world. President



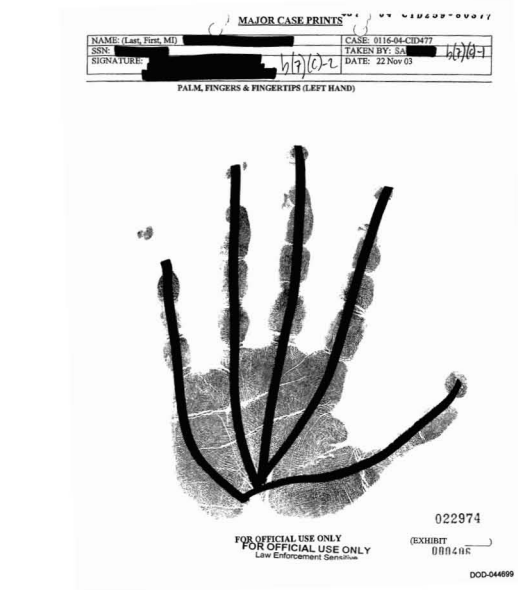
Paintings by American artist Jenny Holzer of U.S. government documents released through ACLU litigation

Obama deserves credit for the decision, and for his vigorous defense of it.

But while the administration has disavowed torture, it has made little effort to hold accountable those who authorized it. In recent years, many other countries—including some of America's closest allies, like the United Kingdom, Germany, Spain, and Canada—have begun to examine their responsibility for the abuse and torture of prisoners in U.S. custody. The United States is increasingly isolated in its unwillingness to investigate the roots of the torture program, its refusal to compensate torture survivors, and its failure to hold accountable the senior government officials who authorized interrogators to use torture.

The truth is that the Obama administration has gradually become an obstacle to accountability for torture. It is not simply that, as discussed above, the administration has fought to keep secret some of the documents that would allow the public to better understand how the torture program was conceived, developed, and implemented. It has also sought to extinguish lawsuits brought by torture survivors—denying them recognition as victims, compensation for their injuries, and even the opportunity to present their cases.

Mohamed v. Jeppesen Dataplan, Inc., for example, is a suit brought by five survivors of the CIA's rendition program. In the district court, the Bush administration argued that the case could not be litigated without the disclosure of state secrets, and that it should therefore be dismissed at the outset. The district court agreed. To the surprise of many, the Obama administration defended that district court decision in the Court of Appeals for the Ninth Circuit, arguing that the district court was correct to deny the plaintiffs any opportunity to present their case in court. Even after a three-judge panel of the Ninth Cir-



cuit court sided with the ACLU and vacated the lower court decision, the Obama administration persisted in its argument that the case should not be litigated at all. It asked the full Ninth Circuit to reconsider the decision of the three-judge panel, and the court did so. A ruling is expected in the next few months.

The state secrets doctrine is not the only mechanism the Obama administration has invoked to extinguish civil suits by torture survivors. In *Rasul v. Rumsfeld*, a suit brought by former Guantánamo detainees seeking redress for torture, abuse, and religious discrimination, the Obama administration argued, remarkably, that the government defendants were immune from suit because, at the time that the abuse occurred, established law did not clearly prohibit torture and religious discrimination at Guantánamo. In *Arar v. Ashcroft*, the administration argued that the Constitution provided no cause of action to an innocent man who had been identified by the United States as a terrorist, rendered to Syria for torture, and not released until ten months later

The Obama administration has gradually become an obstacle to accountability for torture.

when it was determined that he was not a terrorist after all. In that case, the administration also argued to the courts that affording Arar a judicial remedy “would offend the separation of powers and inhibit this country’s foreign policy,” and impermissibly involve the courts in assessing “the motives and sincerity” of the officials who authorized Arar’s rendition.¹³

The administration has sometimes suggested that civil suits are unnecessary because the Justice Department has the authority to investigate allegations that government agents violated the law.¹⁴ But civil suits, of course, serve purposes that criminal investigations do not: they allow victims their day in court, and they provide an avenue through which victims can seek compensation from perpetrators.

In any event, there is little evidence that the administration is committed to a comprehensive criminal investigation into the Bush administration’s torture program. In August 2009, Attorney General Eric Holder announced that he had ordered an investigation into incidents involving CIA interrogations. The Attorney General char-

acterized the investigation, however, as a “preliminary review” meant “to gather information to determine whether there is sufficient predication to warrant a full investigation of a matter.” He also made clear that the investigation was focused not on the architects of the torture program but on incidents in which interrogators exceeded their authority. It is conceivable that what began as a narrowly circumscribed preliminary review will grow into a broader investigation, but we have no reason to have confidence that the investigation will expand in this way. The Special Prosecutor’s torture investigation has already dragged on for nearly a year, and a related investigation into the CIA’s destruction of videotapes depicting brutal interrogations has been ongoing for almost three. And President Obama has made clear that his own preference is to “look forward, not back.”

In fact the choice between “looking forward” and “looking back” is a false one. While it’s crucial that the Obama administration adopt new policies for the future, we cannot ignore the abuses of the past. And while President Obama has disavowed torture, a strong democracy rests not on the goodwill of its leaders but on the impartial enforcement of the laws. Sanctioning impunity for government officials who authorized torture sends a problematic message to the world, invites abuses by future administrations, and further undermines the rule of law that is the basis of any democracy.

DETENTION

While campaigning for the presidency, then-Senator Obama declared that in “the detention cells of Guantánamo, we have compromised our most precious values.”¹⁵ He rejected unequivocally the practices “of detaining thousands without charge or trial” and “of maintaining a network of secret prisons to jail people beyond the reach of law.”¹⁶ His bottom-line was clear: “As President, I will close Guantánamo.”¹⁷ On his second full day in office, President Obama ordered the CIA to close its secret prisons, set a one-year deadline for closing the Guantánamo prison, and established an interagency task force to review the cases of everyone detained at Guantánamo.¹⁸ Soon thereafter, the administration abandoned the Bush administration’s dubious legal argument that

Guantánamo should be closed, but not at the cost of enshrining the principle of indefinite detention in a global war without end.



Former Guantánamo detainees

lawful U.S. resident (and ACLU client) Ali Al-Marri, who had been arrested by civilian authorities in Illinois, could be detained indefinitely by the military without charge or trial. Al-Marri was transferred to civilian custody where he pled guilty to specified offenses and was sentenced to a term of eight years.

It was a promising beginning, but eighteen months later Guantánamo is still open and some 180 prisoners remain there. The administration is not solely responsible for missing this one-year deadline; Congress has obstructed any possible relocation of even indisputably innocent detainees like the Chinese Uighurs to the United States, thereby rendering diplomatic efforts to relocate detainees in Europe and elsewhere far more difficult. And the administration deserves credit for releasing some 67 detainees from Guantánamo. But the Obama administration’s unjust decision to halt all detainee releases to Yemen—even when the detainees have been cleared for release after years of harsh detention—has been a major factor in the prison’s remaining open; a majority of the remaining detainees are Yemeni. Moreover, the administration bears responsibility for opposing in court the release of detainees against whom the government has scant evidence of wrongdoing.

In one recent case, the Obama administration vigorously opposed the release of Hassan al-Odaini—who was 17 years old when arrested and spent eight years imprisoned without charge. The federal court’s decision, which emphatically ordered Mr. Odaini’s release, revealed that the government itself had repeatedly concluded that he was not a threat, but had instead simply been in the wrong place at the wrong time when Pakistani officials arrested him during a surprise

raid of a classmate's home.¹⁹ While the Obama administration complied with the court's order and released Mr. Odaini, the case wholly refutes the claim that the administration would indefinitely detain only those "who pose a clear danger to the American people."²⁰ It also suggests that the Guantánamo review task force, which completed its work months ago, has not resulted in the release of all innocent prisoners still held at Guantánamo Bay.

Of far greater significance than the administration's failure to meet its own one-year deadline is its embrace of the theory underlying the Guantánamo detention regime: that the Executive Branch can detain militarily—without charge or trial—terrorism suspects captured far from a conventional battlefield. President Obama first expressly endorsed this claim of authority in May of 2009, in a major speech at the National Archives. The President stated that Guantánamo detainees whom the administration deemed dangerous, but who "could not be prosecuted" because of a lack of reliable evidence, would be held indefinitely without trial, and he proposed that Congress provide legislative authority for a

new detention regime.²¹ Although, to its credit, the administration has now publicly stated that it will not support any new legislation expanding detention authority, it has continued to assert, in *habeas corpus* proceedings involving Guantánamo and Bagram detainees, a dangerously overbroad authority to detain civilian terrorism suspects militarily. And its task force has identified 48 Guantánamo detainees who will be held indefinitely without charge or trial.

Perhaps the most troubling iteration of this sweeping theory of detention authority occurred in legal proceedings in which the Obama administration defended the detention without judicial review of detainees in the Bagram prison in Afghanistan. While the Obama administration has improved the military screening procedures in place at Bagram, those procedures still fall far short of basic due process standards. In response to *habeas corpus* petitions filed by prisoners who had been captured *outside* of Afghanistan and transferred by the Bush administration to military detention at Bagram Air Base, the government argued that the courts lacked jurisdiction even to hear the prisoners' challenges, let alone



(Left) Drawing by the mother of former Guantánamo detainee, Omar Deghayes. (Right) Drawing by a British artist and activist John Catt presented to Omar Deghayes

decide their merits, because the prisoners were being detained in a war zone. This was disingenuous bootstrapping: the prisoners had been captured outside the war zone and transferred into it; the government thereafter relied on their presence in the war zone as a basis for avoiding any judicial scrutiny.

The Court of Appeals for the D.C. Circuit sided with the administration, effectively giving the government *carte blanche* to operate the prison at Bagram without any judicial oversight. Armed with this decision, Obama administration officials have reportedly begun debating whether to use the Bagram prison as a place to send individuals captured anywhere in the world for imprisonment and interrogation without charge or trial.²²

Finally, the Obama administration has advocated for the transfer of some Guantánamo prisoners

to a prison in Thomson, Illinois, where they would be detained by the military without charge or trial. The ACLU will continue to oppose this effort to transfer the Guantánamo detention regime to the heartland of America; we fear that if a precedent is established that terrorism suspects can be held without trial within the United States, this administration and future administrations will be tempted to bypass routinely the constitutional restraints of the criminal justice system in favor of indefinite military detention. This is a danger that far exceeds the disappointment of seeing the Guantánamo prison stay open past the one-year deadline. To be sure, Guantánamo should be closed, but not at the cost of enshrining the principle of indefinite detention in a global war without end.

TARGETED KILLING

Of all of the national security policies introduced by the Obama administration, none raises human rights concerns as grave as those raised by the so-called “targeted killing” program. According to news reports, President Obama has authorized a program that contemplates the killing of suspected terrorists—including U.S. citizens—located far away from zones of actual armed conflict. If accurately described, this program violates international law and, at least insofar as it affects U.S. citizens, it is also unconstitutional.

The entire world is not a war zone. Outside of armed conflict, lethal force may be used only as a last resort, and only to prevent imminent attacks that are likely to cause death or serious physical injury. According to news reports, the program the administration has authorized is based on “kill lists” to which names are added, sometimes for months at a time, after a secret internal process. Such a program of long-premeditated and bureaucratized killing is plainly not limited to targeting genuinely imminent threats. Any such program is far more sweeping than the law allows and raises grave constitutional and human rights concerns. As applied to U.S. citizens, it is a grave violation of the constitutional guarantee of due process.

The program also risks the deaths of innocent people. Over the last eight years, we have seen the government over and over again detain men as “terrorists,” only to discover later that the evidence was weak, wrong, or non-existent. Of the many hundreds of individuals previously detained at Guantánamo, the vast majority have been released or are awaiting release. Furthermore, the government has failed to prove the lawfulness of imprisoning individual Guantánamo detainees in some three quarters of the cas-

es that have been reviewed by the federal courts thus far, even though the government had years to gather and analyze evidence for those cases and had itself determined that those prisoners were detainable. This experience should lead the administration—and all Americans—to reject out of hand a program that would invest the CIA or the U.S. military with the unchecked authority to impose an extrajudicial death sentence on U.S. citizens and others found far from any actual battlefield.



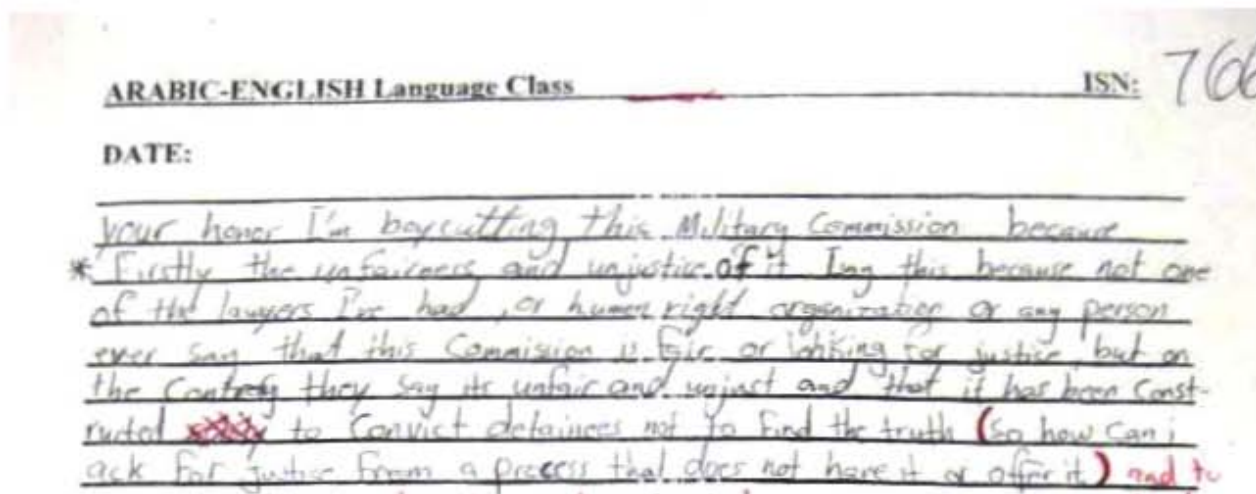
MILITARY COMMISSIONS

While campaigning for the presidency, then-Senator Obama made cogent arguments against military commission trials at Guantánamo on both principled and pragmatic grounds. He professed “faith in America’s courts” and pledged to “reject the Military Commissions Act.”²³ In 2007 he pointed out the practical inferiority of the military commissions, noting that there had been “only one conviction at Guantánamo. It was for a guilty plea on material support for terrorism. The sentence was 9 months. There has not been one conviction of a terrorist act.”²⁴

The administration’s embrace of military commission trials at Guantánamo, albeit with procedural improvements, has been a major disappointment. Instead of calling a permanent halt to the failed effort to create an entirely new court system for Guantánamo detainees, President Obama encouraged an effort to redraft the legislation creating the commissions and signed that bill into law. To be sure, the reformed Military Commissions Act contains improvements, but

there is still a very real danger that defendants might be convicted on the basis of hearsay evidence obtained coercively from other detainees who will not be available for cross-examination.

More fundamentally, the existence of a second-class system of justice with a poor track record and no international legitimacy undermines the entire enterprise of prosecuting terrorism suspects. So long as the federal government can choose between two systems of justice, one of which (the federal criminal courts) is fair and legitimate, while the other (the military commissions) tips the scales in favor of the prosecution, both systems will be tainted by the likelihood that the government will use the federal courts only in cases in which conviction seems virtually assured, while reserving the military commissions for cases with weaker evidence or where there are credible allegations that the defendants were abused in U.S. custody.



Handwritten statement by Guantánamo detainee Omar Khadr condemning his military commissions trial (Photo Credit: Carol Rosenberg/The Miami Herald)

“Part of my job as the next president is to break the fever of fear that has been exploited by this administration.”

—SENATOR BARACK OBAMA
in a November 14, 2007 interview

The error in continuing with a flawed military commission system is perhaps most starkly illustrated by the first prosecution to go forward at Guantánamo under President Obama’s watch. The defendant, accused child soldier Omar Khadr, is a Canadian citizen who was only 15 years old when he was captured after a firefight in Afghanistan. Khadr is alleged to have thrown a grenade that killed a U.S. soldier. If the allegations are true—and they have been cast into

serious doubt by subsequent revelations—then Khadr was a child soldier brought to the battlefield by adults. In any event, Khadr has been subjected to cruel and humiliating interrogations during his eight years at Guantánamo. These interrogations began almost immediately after his capture, while Khadr was in serious pain, being treated for life-threatening wounds in a military field hospital. The very first hearing at the revamped military commissions concerned whether Khadr’s statements to interrogators could be used against him, despite this torture and abuse. It was marred by the same chaotic lack of regular process that characterized other hearings in the military commissions. Proceeding with this prosecution or any other in so flawed a system would be not only unjust but unnecessary: the federal criminal courts are both fairer and more effective. It is long past time to end the failed experiment of military commission trials at Guantánamo.

SPEECH AND SURVEILLANCE

With limited exceptions, the Obama administration's positions on national security issues relating to speech and surveillance have mirrored those taken by the Bush administration in its second term.

Early in his campaign, candidate Obama declared that he disagreed with President Bush's decision to authorize the National Security Agency to conduct warrantless surveillance of Americans' international telephone and email communications.²⁵ He later voted in favor of the FISA Amendments Act, however, a statute that granted immunity to the telecommunications corporations that had facilitated the NSA's program, limited the role of the court that oversees government surveillance in national security cases, and authorized the NSA to continue—and even expand—its warrantless surveillance of Americans' international communications. In effect, candidate Obama made clear that his objection was not to warrantless surveillance, but rather to warrantless surveillance without congressional approval. And over the last eighteen months, President Obama's administration has defended the FISA Amendments Act in the same way that the last administration did so: by insisting that the statute is effectively immune from judicial review. Individuals can challenge the stat-

ute's constitutionality, the administration has proposed, only if they can prove that their own communications were monitored under the statute; since the administration refuses to disclose whose communications have been monitored, the statute cannot be challenged at all. In some ways, the administration's defense of the statute is as troubling as the statute itself.

The Obama administration has been reluctant to yield any of the expansive surveillance powers claimed by the last administration. It has pushed for the reauthorization of some of the Patriot Act's most problematic surveillance provisions. And like the Bush administration, the Obama administration has invested border agents with the authority to engage in suspicionless searches of Americans' laptops and cell phones at the border; Americans who return home from abroad may now find themselves confronted with a border agent who, rather than welcoming them home, insists on copying their electronic records—including emails, address books, photos, and videos—before allowing them to enter the country. (Through FOIA, the ACLU has learned that in the last 20 months alone, border agents have used this power thousands of times.)

The Obama administration has also adopted



some of the Bush administration's arguments on issues relating to free speech. In an important case that reached the Supreme Court, the Obama administration took the position that it could prosecute individuals under a statute that bars the provision of "material support" to terrorist organizations even if the support in question consists solely of speech—advice on issues relating to international law, for example, or on peaceful resolution of conflicts. In a dispiriting oral argument, Solicitor General Elena Kagan even proposed that lawyers could be sent to prison for filing friend-of-the-court briefs on behalf of designated terrorist organizations. The Supreme Court ultimately adopted many of the administration's arguments and issued a decision that can fairly be described as a catastrophe for the First Amendment.

There is one area in which the Obama administration has made a notable break with the policies of the last administration. During the last administration, dozens of foreign writers, scholars, and artists were denied visas to visit the United States because they held political views that the administration disfavored. Many of the excluded individuals were critics of American foreign policy. Early this year, the Obama administration ended the exclusions of two particularly prominent foreign intellectuals—Tariq Ramadan, a professor at the University of Oxford, and Adam Habib, the Vice-Chancellor of Research at the University of Johannesburg in South Africa. The decision to end these exclusions represented an important victory for free speech and the free exchange of ideas across international borders.

WATCH LISTS

The national security establishment's record in creating and managing watch lists of suspected terrorists has been a disaster that too often implicates the rights of innocent persons while allowing true threats to proceed unabated. This regrettable outcome is partly a result of mismanagement and partly due to the deceptive difficulty of creating identity-based systems for providing security. These failures have been documented in a long string of government reports, which are consistent in their identification of persistent design flaws and ongoing, unacceptably high error rates.²⁶ In May 2009 the Department of Justice Inspector General found that many subjects of closed FBI investigations were not taken off the list in a timely manner, and tens of thousands of names were placed on the list without appropriate basis.²⁷ A 2009 report by the Inspector General of DHS detailed extensive problems with the redress process for people improperly identified on watch lists.²⁸ Further, because of outmoded information technology systems, the method for clearing the names of people who pose no threat to national security from watch lists is plagued by delays, and DHS can't even monitor how many cases it resolves. Yet in the wake of Umar Farouk Abdulmutallab's failed Christmas Day bomb-

ing, National Counter-Terrorism Center Deputy Director Russell Travers told Congress that the watch list architecture "is fundamentally sound," and suggested that the lists would soon be getting bigger: "The entire federal government is leaning very far forward on putting people on lists."²⁹

Indeed, rather than reform the watch lists the Obama administration has expanded their use and resisted the introduction of minimal due process safeguards to prevent abuse and protect civil liberties. The Obama administration has added thousands of names to the No Fly List, sweeping up many innocent individuals. As a result, U.S. citizens and lawful permanent residents have been stranded abroad, unable to return to the United States. Others are unable to visit family on the opposite end of the country or abroad. Individuals on the list are not told why they are on the list and thus have no meaningful opportunity to object or to rebut the government's allegations. The result is an unconstitutional scheme under which an individual's right to travel and, in some cases, a citizen's ability to return to the United States, is under the complete control of entirely unaccountable bureaucrats relying on secret evi-



From left to right: Ayman Latif, Adama Bah, Raymond Earl Knaeble, Halime Sat, and Steven Washburn; plaintiffs in an ACLU challenge to the "No Fly List"

dence and using secret standards. The ACLU has filed a lawsuit challenging this lack of due process.

The ACLU has also challenged the government's authority to freeze the assets of U.S. charities "pending investigation" without any judicial process and on mere suspicion that they engaged in prohibited transactions. In *Kindhearts v. Geithner*, a federal district court recently held that the government cannot simply freeze a charity's assets now, and ask questions later. Rather, the court ruled that the government must first at least establish probable cause that some viola-

tion occurred, and that the charity must have an opportunity to rebut the government's allegations. The Obama administration continues to oppose even this small measure of due process, insisting in court filings that the protections of the Fourth Amendment are inapplicable to the wholesale freezing of a U.S. entity's property. Instead of appealing a sensible court decision, the administration should settle this litigation and work with Congress to enact a constitutional scheme that combats terrorist financing while respecting the constitutional rights of American citizens and charitable entities.

CONCLUSION

President Obama will be in office at least through 2012, and perhaps through 2016. But the policies the Obama administration pursues on the issues discussed in this report will have implications that will extend far beyond this presidency. That is why it is so critical that the administration right its course and keep faith with our nation's highest ideals and aspirations.

There can be no doubt that the Obama administration inherited a legal and moral morass, and that in important respects it has endeavored to restore the nation's historic commitment to the rule of law. But if the Obama administration does not effect a fundamental break with the Bush

administration's policies on detention, accountability, and other issues, but instead creates a lasting legal architecture in support of those policies, then it will have ratified, rather than rejected, the dangerous notion that America is in a permanent state of emergency and that core liberties must be surrendered forever.

The ACLU will continue to monitor the impact of the administration's national security policies on civil liberties and human rights. Our hope is that this report, published less than half-way through the President's first term, will serve as a vehicle for reflection and further dialogue.

ENDNOTES

- 1 Presidential Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2010), <http://www.whitehouse.gov/the-press-office/transparency-and-open-government>.
- 2 Presidential Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2010), <http://www.whitehouse.gov/the-press-office/freedom-information-act>.
- 3 Exec. Order No. 13,526, 75 Fed. Reg. 705 (Dec. 29, 2009) (Classified National Security Information), <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>
- 4 Steve Bagley, *FOIA Ombudsman Promises Sunshine*, Main Justice (Oct. 14, 2009), <http://www.mainjustice.com/2009/10/14/foia-ombudsman-promises-sunshine-eventually/>
- 5 Exec. Order No. 13,526, *supra* note 3; Office of Mgmt. & Budget, Open Government Directive (Dec. 8, 2009), http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.
- 6 Central Intelligence Agency, Office of Inspector General, Special Review: Counterterrorism Detention and Interrogation Activities, September 2001 – October 2003 (May 7, 2004), http://luxmedia.com.edgesuite.net/aclu/IG_Report.pdf.
- 7 Office of Prof'l Responsibility, Report of Investigation into the OLC's Memoranda Concerning Issues Related to the CIA's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (July 29, 2009), <http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-OPRFinalReport.pdf>; Memorandum from David Margolis, Assoc. Dep. Att'y Gen., to Att'y Gen. Eric Holder Regarding Objections to the OPR Report of Investigation into the OLC's Memoranda Concerning Issues Related to the CIA's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (Jan. 5, 2010), <http://graphics8.nytimes.com/packages/pdf/politics/20100220JUSTICE/20100220JUSTICE-DAGMargolis-Memo.pdf>.
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- 10 Exec. Order No. 13,491, 74 Fed. Reg. 4891 (Jan. 22, 2009) (Ensuring Lawful Interrogations), http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/
- 11 Memorandum from David J. Barron, Acting Ass't Att'y Gen. to Att'y Gen. Eric Holder Regarding Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (Apr. 15, 2009), <http://www.justice.gov/olc/2009/withdrawalofficelegalcounsel.pdf>.
- 12 Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/
- 13 Brief in Opposition to Petition for Certiorari, *Arar v. Ashcroft*, No. 09-923 (May 12, 2010).
- 14 See, e.g., Brief of the United States, *Padilla v. Yoo*, No. 09-16478 (9th Cir. Dec. 3, 2009).
- 15 Senator Barack Obama, Remarks at the Wilson Center, The War We Need to Win (Aug. 1, 2007), http://www.barackobama.com/2007/08/01/the_war_we_need_to_win.php
- 16 Barack Obama, *Renewing American Leadership*, Foreign Affairs, July/Aug. 2007.
- 17 Obama, The War We Need to Win, *supra* note 14.
- 18 Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) (Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities).
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- 20 President Barack Obama, Remarks on National Security at the National Archives (May 21, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

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- 22** Julian E. Barnes, *U.S. Hopes to Share Prison with Afghanistan*, L.A. Times, June 9, 2010.
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- 24** *Id.*
- 25** Interview by Eric Schmidt with Senator Barack Obama at Google (Nov. 14, 2007), <http://www.youtube.com/watch?v=m4yVlPqeZwo>.
- 26** See for example, GAO Report to Congressional Requesters, GAO-03-322 *Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing* (April 2003); Department of Homeland Security, Office of Inspector General, OIG-04-31 *DHS Challenges in Consolidating Terrorist Watch List Information* (August 2004); Department of Justice, Office of the Inspector General, Audit Report 05-27 *Review of the Terrorist Screening Center (Redacted for Public Release)* (June 2005); Department of Justice, Office of the Inspector General, Audit Report 05-34, *Review of the Terrorist Screening Center's Efforts to Support the Secure Flight Program (Redacted for Public Release)* (August 2005); Department of Justice, Office of the Inspector General, Audit Report 07-41, *Follow-Up Audit of the Terrorist Screening Center (Redacted for Public Release)* (September 2007); Department of Justice, Office of the Inspector General, Audit Report 08-16, *Audit of the U.S. Department of Justice Terrorist Watchlist Nomination Processes* (March 2008); Department of Justice, Office of the Inspector General, Audit Report 09-25, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices* (May 2009); Department of Homeland Security, Office of Inspector General, OIG-00-103, *Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program*, (September 2009).
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- 28** Department of Homeland Security, Office of Inspector General, *Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program OIG-00-103* (September 2009).
- 29** See *The Lessons and Implications of the Christmas Day Attack: Watchlisting and Pre-Screening*, Hearing of the S. Comm. On Homeland Security and Governmental Affairs, 111th Cong. (2010)(Statement of Russell Travers, Deputy Director National Counterterrorism Center); and Mike McIntire, *Ensnared by Error on Growing U.S. Watchlist*, New York Times, Apr. 6, 2010, at: <http://www.nytimes.com/2010/04/07/us/07watch.html?pagewanted=all>.