

THE INTERROGATION AND DETENTION REFORM ACT OF 2008: A CRITICAL ANALYSIS

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**Immigration and Human Rights Policy Clinic
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EXECUTIVE SUMMARY

In the years following the terrorist attacks of September 11, 2001, the United States witnessed an acute deterioration of respect for established human rights norms in the detention and treatment of suspects detained in the name of the “war on terror.” Extensively documented reports of the use by U.S. officials of torture, cruel, inhuman, and degrading treatment, and extraordinary rendition on terror suspects have shocked the world and incited calls for action ranging from reform of existing detention laws to accountability for those involved in human rights abuses. The Bush administration justified this flouting of established norms through a series of questionable legal arguments that resulted in an intentionally deceptive reinterpretation of the existing legal framework. The inauguration of President Barack Obama brings the hope that the United States will turn its back on the previous administration’s objectionable policies and renew its commitment to upholding human rights norms. However, codification of the prohibitions on torture and human rights abuses is a fundamental requirement that supersedes the reforms that can be accomplished through executive orders and policy reform and initiatives.

This paper sets out to demonstrate the critical need for legislation that will fully foreclose the possibility of such human rights abuses occurring in the future. While numerous efforts to fine-tune interrogation and detention laws have been introduced in recent years, reform must be comprehensive and address the full range of human rights violations. One such effort is the Interrogation and Detention Reform Act of 2008 (IDRA), H.R. 591, introduced by Representative David Price of North Carolina. This paper provides a comprehensive analysis of the gaps in the existing legal framework that this legislation seeks to fill. Additionally, it

provides suggestions on issues not addressed by this legislation relating to the treatment and detention of terror suspects that must be addressed, including a more explicitly defined prohibition on torture and a prohibition of extraordinary rendition. Finally, it addresses the issue of accountability for human rights violations that have occurred in recent years.

I. THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK

International law unequivocally prohibits the use of both torture and extraordinary rendition. International treaties, customary law and the opinions of both domestic and international tribunals support these prohibitions. Furthermore, states are required under international law not only to refrain from carrying out these practices, but also to act affirmatively to criminalize, investigate, and prosecute these international crimes.

The law of the United States also codifies the prohibition of these practices. Legislation such as the Federal Torture Statute, the Detainee Treatment Act, and the Immigration and Nationality Act all contain provisions prohibiting them. Furthermore, U.S. courts have recognized both the force of international law and the existence of these human rights norms in domestic law. However, this section demonstrates that U.S. law relating to detainee treatment is a patchwork of laws that, taken together, do not ensure the protections required under international law.

II. THE INTERROGATION AND DETENTION REFORM ACT OF 2008

The IDRA successfully closes many of the loopholes in U.S. law and will ensure that in the future, potential human rights abusers will not have the leeway to use the Bush administration's legal arguments to justify torture and cruel, inhuman, and degrading

treatment. Keeping in mind our ongoing efforts to actively and effectively fight terrorism, the legislation sets forth the goal of bringing terror suspects to justice while maintaining effective interrogation and detention practices that are in accordance with the values and principles of the Constitution of the United States and various human rights instruments.

To accomplish this goal, the IDRA mandates the development of a uniform policy for the interrogation and detention of all detainees. It requires the closure of the detainment facility at Guantánamo Bay, Cuba, and calls for bringing to justice terror suspects in the domestic courts of the United States. It further requires that the all detainees under the control of the United States be provided unrestricted access to the International Committee of the Red Cross and prohibits the awarding of private contracts for interrogation and detention. It makes significant steps toward bringing U.S. law into line with international human rights norms by requiring that the President create guidelines for detainee treatment that are in line with various international obligations, including the Convention Against Torture and the Geneva Conventions.

III. BEYOND THE INTERROGATION AND DETENTION REFORM ACT OF 2008

Though the IDRA makes important steps toward bringing U.S. law in line with international human rights obligations, it leaves several important matters unaddressed. While the IDRA improves the law relating to torture by requiring that the President create a list of acceptable techniques and practices, it does not go far enough to address the complex and context specific nature of torture and cruel, inhuman, and degrading treatment. Furthermore, it does not address the issues of extraordinary rendition and use of black sites around the world

for the secret detention of terror suspects. These practices are clear violations of international law, yet domestic law does nothing to address these abuses.

A final and crucial issue that must be addressed is the question of accountability for the numerous human rights abuses that have occurred over the past decade. Though President Obama has emphasized the importance of moving forward rather than looking back, this policy ratifies the wrongful actions of the past and sends the message that future abuses will be tolerated. In order to truly move forward, it is necessary to first demand accountability for past abuses. This section examines the possibility of criminal prosecutions, civil liability, and the creation of an investigatory commission to reveal to the public the extent of these abuses.

CONCLUSION

Widespread human rights abuses carried out during the Bush administration have highlighted the need for the United States to bring its domestic law into compliance with international human rights norms, especially those governing the use of torture and extraordinary rendition. The Interrogation and Detention Reform Act is an important measure that will help to bring U.S. law on torture into compliance with international norms. However, it is only the first step: the IRDA does not sufficiently address the issue of torture and extraordinary rendition, and further measures must be taken to make these practices illegal. Furthermore, it is a forward-looking bill that does not deal with the issue of accountability for abuses that occurred in the past. In order to seek accountability and fulfill its obligations under international law, the United States must investigate these abuses and seek criminal justice for those involved in the human rights abuses of the past administration.

In sum, the IDRA will be significantly improved by incorporating the following proposals for change:

- Recognize the complex and context specific nature of torture and cruel, inhuman, and degrading treatment and incorporate this into the President's required list of approved interrogation techniques;
- Explicitly prohibit extraordinary rendition and use of black sites for the secret detention of terror suspects; and
- Provide accountability for the numerous human rights abuses that have occurred over the past decade.

INTRODUCTION

Vivid accounts of the consistent and frequent use waterboarding, sleep deprivation, exposure to extreme temperatures and loud music, the use of stress positions, and other deplorable practices on detainees in U.S. custody in Guantanamo and around the globe have been released in a steady stream in the months since the end of the Bush Administration. These accounts are not mere sensationalist news reports: they include reports by a congressional committee¹ and respected human rights organizations such as the International Committee of the Red Cross.² More notably, these practices are described and analyzed in exacting detail in memos written by the Office of Legal Counsel of the Department of Justice, which reveal not only the extent to which the practices were used, but also the convoluted and misleading legal arguments set forth to justify the use of these practices.³ These reports and memos make clear not only that egregious abuses have occurred, but also the critical need for reform to domestic law and accountability for those responsible to send the message that the United States will not tolerate future abuse.

While the history of human rights abuses by the United States extends far into the years prior to the Bush administration, the terrorist attacks of September 11, 2001 precipitated an unprecedented of torture and rendition. The Bush Administration, through a series of well-

¹ *Inquiry into the Treatment of Detainees in U.S. Custody*, Report of the Committee on Armed Services, United States Senate, November 20, 2008 (available at <http://graphics8.nytimes.com/packages/images/nytint/docs/report-by-the-senate-armed-services-committee-on-detainee-treatment/original.pdf>).

² *ICRC Report on the Treatment of Fourteen "High Value Detainees in CIA Custody*, International Committee of the Red Cross, February 2007 (available at <http://www.nybooks.com/icrc-report.pdf>).

³ See, e.g. Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative*, August 1, 2002 (available at <http://documents.nytimes.com/justice-department-memos-on-interrogation-techniques#p=1>)

crafted legal maneuvers, attempted to justify the interrogation, torture, and detention of terrorist suspects during the war on terror in Afghanistan and Iraq. On January 20, 2009, the United States elected Barack Obama as the 44th President of the United States and with this inauguration comes the possibility that the United States will recognize the importance of human rights and end an administration that justifies the torture and cruel, inhuman and degrading treatment of numerous people. President Obama's actions in the early days of his presidency have indicated a general willingness to conform the actions of the United States to established human rights norms. However, the full extent to which these changes will be carried out remains to be seen.

Perhaps more importantly, legal protections concerning basic human rights requires more than executive orders. Congress should be wary of excessive executive power and instead codify basic human right protections into law. The Interrogation and Detention Reform Act of 2008, a bill introduced into the House of Representatives by Rep. David Price of North Carolina, represents an historic effort to enact human rights protections into federal statutory law.

The Interrogation and Detention Reform Act of 2008 (IDRA) is designed to "improve United States capabilities for gathering human intelligence through the effective interrogation and detention of terrorist suspects and for bringing terrorists to justice through effective prosecution in accordance with the principles and values set forth in the Constitution and other laws." While this bill calls for the continued fight against terrorism on a global scale, the bill addresses and revises the methods used to collect intelligence, capture and detain suspects and eventually deliver justice. The IDRA provides new protections for captured individuals and

mandates that all detainees be allowed unfettered access to the International Committee of the Red Cross. It requires the permanent closing of the detention facility at Guantánamo Bay, Cuba. Moreover, the IDRA addresses the issue of interrogation and extraordinary rendition. It calls on the President to establish uniform standards for interrogation, requires the recording of strategic interrogations, and prohibits private contractors from engaging in activities with persons in the custody or under the effective control of the intelligence committee. These provisions are designed to prevent the torture of detainees. The IDRA, however, while breaking new ground and serving the ends of human rights protections in new and critical ways, does not go far enough. The bill, as currently proposed, fails to provide comprehensive protections against torture and extraordinary rendition and falls short of full compliance with well-established international legal standards pertaining to these issues. Because the bill is of such historic significance and at the same time is one of the most important responses to current circumstances, it is urgent that these shortcomings should be addressed before the IDRA is enacted in order to maximize the present opportunities for reforms.

The first section of this paper will discuss the existing international and domestic legal framework. The international legal framework section sets forth the obligations binding the United States under international law and the domestic legal framework identifies existing protections currently embedded within the domestic laws of the United States. The domestic legal framework section also pinpoints the loopholes used by past administrations to evade their legal obligations. The second section of the paper will provide an analysis of the provisions of the IDRA for the purposes of identifying how this proposed legislation closes some of the gaps in the existing framework. The third section of the paper analyzes where the IDRA

falls short of providing full protection against torture and rendition and fails to comply with existing binding international legal standards that prohibit the commission of such violations of human rights. Finally, the paper will suggest measures to achieve accountability for acts that were committed under the Bush administration, a matter that the IDRA does not address but that is necessary if the United States wants to take seriously its commitment to reforming interrogation and rendition standards.

PART I: TORTURE AND RENDITION: THE DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORK

The prohibition on torture and extraordinary rendition consistently recurs throughout both international and domestic law. Despite the protection that the existing international and domestic parameters provide, the weaknesses that remain demand reinforcement. This section will provide a context for understanding the weaknesses in domestic law on torture and extraordinary rendition and the urgent need to reinforce this law by first examining the existing international legal framework, including the customary law and treaties currently binding on the United States. It will then provide an overview of the existing domestic legal framework prohibiting these practices. This overview provides the context for considering the proposed IDRA against the existing legal framework in order to determine how the bill conforms to existing international legal norms and where it fails to assure compliance with such standards.

A. THE INTERNATIONAL LEGAL FRAMEWORK

The prohibition on torture under international law is unquestionable: it echoes throughout human rights treaties, customary law, and opinions by domestic and international courts. Moreover, under international law, States are obligated not only to refrain from practicing torture, but also to take steps to prevent torture and to punish those who engage in torture. This section will first look at the prohibition on torture generally, and then turn to the affirmative obligations that consequently create a prohibition on extraordinary rendition.

1. The Prohibition on Torture

a. JUS COGENS

The prohibition on torture is a *jus cogens* norm: a peremptory norm of customary international law recognized by the international community from which no derogation is permitted.⁴ These norms are legally binding on all States, and contravention of these standards is the most severe form of violation of international law. The force of *jus cogens* prohibitions may not be superseded by treaties or other executive actions, and may only be modified by subsequent *jus cogens* norms.⁵

Jus cogens norms function similarly to customary international law in the courts of the United States. The Supreme Court of the United States has held that customary international law is federal law that may be interpreted and applied by the courts.⁶ As such, customary law must be applied by the courts, but may be superseded by subsequent inconsistent treaties or federal legislation.⁷ However, as peremptory norms, *jus cogens* norms may not be overridden by subsequent treaties or federal laws.⁸ Torture has achieved near universal recognition as a *jus cogens* norm.⁹ Violations of *jus cogens* norms create legal duties to prosecute or extradite violators, and legal doctrines providing for impunity such as statutes of limitations, head of state immunity, *respondent superior* do not apply to violators.¹⁰

⁴ See, e.g. Restatement (Third) of Foreign Relations Law § 702, note k (1987) [hereinafter Restatement of Foreign Relations].

⁵ See Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. [hereinafter VCLT].

⁶ See *Paquete Habana*, 175 U.S. 677 at 701, 20 S.Ct. 290, 299 (1900). (Noting that in ascertaining norms of customary international law, courts should look “to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators”)

⁷ See Restatement of Foreign Relations, *supra* note 4, at § 102, comment J.

⁸ See e.g. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992).

⁹ *Id.* at 717 (holding that the prohibition on official torture has attained the status of a *jus cogens* norm).

¹⁰ *White Paper on the Law of Torture and Holding Accountable Those who are Complicit in Approving Torture of Persons in U.S. Custody*, National Lawyers Guild & International Association of Democratic Lawyers, 163.

b. INTERNATIONAL HUMANITARIAN LAW

International Humanitarian Law, or the law regulating the conduct of armed conflict, clearly prohibits the use of torture under all circumstances. The four Geneva Conventions and their additional protocols form the foundation of humanitarian law with respect to treatment of detainees. They protect individuals who, in times of armed conflict, do not take part in the fighting or are no longer able to fight.¹¹ International humanitarian law, or *jus in bello*, regulates in the conduct of war, including permissible use of weapons, means of warfare, and the treatment of civilians and prisoners during armed conflicts.¹² Humanitarian law coexists with and complements human rights law, which protects freedoms that all individuals may claim as a matter of right as human beings and remain in effect in times of war and peace.¹³ However, humanitarian law generally trumps inconsistent human rights law in times of war. While some derogation from human rights treaties may be permitted in times of war or states of public emergency, no derogation from humanitarian law is permitted because this body of law was conceived expressly for emergency situations.¹⁴

The Geneva Conventions unequivocally prohibit the torture of all persons protected by the Conventions. The Third Geneva Convention, which applies to prisoners of war in the context of an international armed conflict, prohibits physical and mental torture and all coercive actions against prisoners of war.¹⁵ Violations of this provision are classified as grave

¹¹ See The Geneva Conventions: the core of international humanitarian law, Jan. 2006 (available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>).

¹² Black's Law Dictionary (8th ed. 2004), humanitarian law.

¹³ See International humanitarian law and human rights, 2008 (available at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/section_ihl_and_human_rights).

¹⁴ See What is the difference between humanitarian law and human rights law?, Oct. 2002 (available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5KZMUUY>).

¹⁵ See Geneva Convention Relative to the Treatment of Prisoners of War, art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII].

breaches of the Geneva Conventions.¹⁶ The Fourth Geneva Convention, which protects non-P.O.W.s who fall into the hands of the enemy, also prohibits an occupying power from torturing individuals protected under this Convention.¹⁷ Common Article 3, which is present in all of the Geneva Conventions, has been interpreted to provide a minimum baseline of protection for all individuals in the custody of the enemy.¹⁸ Common Article 3 prohibits torture and inhuman, humiliating, and degrading treatment of individuals not taking part in hostilities or members of the armed forces who are *hors de combat*.¹⁹

The applicability of the Geneva Conventions and their prohibition on torture in the context of the war on terror has been the subject of extensive dispute. The Conventions apply in times of armed conflict of international and non-international character.²⁰ The United States has wavered repeatedly on its policy with respect to the applicability of the Geneva Conventions to individuals detained in the context of the war on terror.²¹ Article 2, common to the Third and Fourth Conventions, stipulates that the Conventions apply in “cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them.”²² The Bush Administration initially

¹⁶ *Id.*, at art. 130.

¹⁷ See Geneva Convention Relative to the Treatment of the Protection of Civilian Persons in Time of War, art. 32, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV].

¹⁸ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S.Ct. 2749 (2006).

¹⁹ GCIII and GCIV, *supra* notes 15 and 17, at art. 3. Individuals who are *hors de combat* are no longer taking an active role in hostilities.

²⁰ *Id.* at art. 2.

²¹ See, e.g., Memorandum from John Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep’t of Justice to William J. Haynes, II, Gen. Counsel, U.S. Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), reprinted in *Torture Papers*, *supra* note 1, at 38 [hereinafter Jan. 9 Memo] (arguing that the Geneva Conventions do not apply to al Qaeda or Taliban prisoners captured in Afghanistan).

²² GCIII and GCIV, *supra* notes 15 and 17, at art. 2.

reasoned that as al Qaeda is not a High Contracting Party, the Conventions would not apply to certain “unlawful enemy combatants” who were detained in the course of the war on terror.²³

Common Article 3 sets forth minimum provisions that apply to armed conflicts not international in character occurring in the territory of a High Contracting Party.²⁴ In *Hamdan v. Rumsfeld*, the Supreme Court ultimately determined that Common Article 3, with its prohibition on torture and cruel, inhuman, and degrading treatment, does provide a baseline level of protection to individuals not associated with a state party to the Conventions, such as the “unlawful enemy combatants” held by the United States in prisons such as Guantánamo.²⁵

c. HUMAN RIGHTS TREATIES

Numerous human rights treaties that are currently binding on the United States explicitly reiterate the prohibition on torture.²⁶

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR): Article 7 of the ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁷ It further states that Article 7 is a non-derogable provision.²⁸ The United States’ understanding attached to this treaty stipulates that “cruel, inhuman or degrading treatment or punishment” shall be defined as punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. This treaty has been binding on the United States since 1992.

²³ Jan. 9 Memo, *supra* note 21, at 38.

²⁴ GCIII and GCIV, *supra* notes 15 and 17, at Art. 3.

²⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557 at 562, 126 S.Ct. 2749 at 2757 (2006).

²⁶ The Geneva Conventions also serve as a source of human rights law.

²⁷ See International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), art. 7 [hereinafter ICCPR]

²⁸ *Id.* at art. 4.2.

THE AMERICAN CONVENTION ON HUMAN RIGHTS: The American Convention on Human Rights is another treaty which guarantees that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”²⁹ The United States has signed, but not ratified this treaty.³⁰ Under the Vienna Convention on the Law of Treaties, when a state signs but does not ratify a treaty, the state is not bound by the treaty, but it has an obligation to desist from any acts which would defeat the objective and purpose of the treaty.³¹

THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT (CAT): The CAT is a treaty dedicated in its entirety to reinforcing the prohibition on torture. The CAT categorically prohibits torture and cruel, inhuman, and degrading treatment. It also goes a step further than previous treaties: it not only prohibits, but also requires parties to criminalize torture.³² The CAT defines torture as

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”³³

The United States has both signed and ratified this treaty. It has adopted legislation implementing the provisions of the treaty, which will be discussed at greater length in the next section.

²⁹See American Convention on Human Rights, Art. 5.2, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, (entered into force July 18, 1978), art. 5.2.

³⁰Ratifications of the Convention (available at <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>).

³¹VCLT, *supra* note 5, at art. 18.

³²Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, 1465 U.N.T.S. 112 [hereinafter CAT],

³³*Id.* at art. 1.

d. CUSTOMARY INTERNATIONAL LAW

The prohibition on torture is firmly rooted in customary international law.³⁴ Customary law embodies practices consistently carried out by States out of a sense of legal obligation.³⁵ This legal obligation has been acknowledged repeatedly by both international organizations and domestic courts in the United States.³⁶ The Universal Declaration of Human Rights, which the U.N. General Assembly has declared constitutes basic principles of international law,³⁷ clearly articulates this prohibition: “no one shall be subjected to torture.”³⁸ In addition to its status as international law, customary law is the law of the United States.³⁹

2. The Prohibition on Extraordinary Rendition

The prohibition on torture extends beyond the obligation not to torture: States are prohibited from engaging in extraordinary rendition, or the practice of sending individuals to states where they may be tortured. Rendition refers to the movement of an individual across state or international borders.⁴⁰ Deportation and extradition are forms of rendition that occur within a framework of domestic law or international treaties.⁴¹ Extraordinary rendition differs from legal forms of rendition in that it is carried out for the purpose of questioning an individual in

³⁴ See, e.g. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that the prohibition on official torture is a norm of customary international law); Restatement of Foreign Relations, *supra* note 4, at § 702(d); Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975).

³⁵ See Restatement of Foreign Relations Law, *supra* note 4, at § 102(2).

³⁶ See, e.g. G.A. Res. 39/46 (Dec 14, 1984) (acknowledging the “existing prohibition under international law of every form of cruel, inhuman, or degrading treatment or punishment”).

³⁷ G.A. Res. 2625 (XXV) (Oct. 24, 1970).

³⁸ Universal Declaration of Human Rights. G.A. Res. 217 (III)(A) (Dec. 10, 1948)

³⁹ See, e.g. *Paquete Habana*, *supra* note 6.

⁴⁰ See Ingrid Detter Frankopan *Extraordinary Rendition and the Law of War* 33 N.C. J. Int’l L. & Com. Reg. 657, 658.

⁴¹ See *Id.* The purpose of deportation is to remove illegally present or otherwise undesirable individuals from a State, and includes international legal safeguards that a person will not be deported without some form of due process or judgment before a state authority. The purpose of extradition is to hand custody of an individual to another State so he may be tried in that state’s courts.

another jurisdiction, usually for the purpose of torturing the individual being rendered, and it occurs outside of the framework of treaties or domestic law.⁴² Unlike in the cases of deportation and extradition, there is typically no link between the individual rendered and the country to which he is sent.⁴³

The customary principle of *non-refoulement* prohibits States from sending individuals to other States where they may be subject to torture or persecution. This principle is widely held to be part of customary international law.⁴⁴ It is prohibited by several treaties to which the United States is a party, including the Convention Against Torture, the ICCPR, and the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”).

CONVENTION AGAINST TORTURE The principle of *non-refoulement* is codified by the Convention Against Torture. Article 3 of the CAT provides that

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.⁴⁵

The “substantial grounds” standard does not require knowledge that torture will occur.

This standard has been interpreted this to mean something more than “mere theory or suspicion,” but its occurrence need not be highly probable.⁴⁶ When ratifying the CAT,

⁴² See *Id* at 662

⁴³ See *Id*.

⁴⁴ See, e.g. Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law* 20 Int’l J. Refugee L. 373, 383-384 (arguing that *non-refoulement* is a fundamental component of the prohibition on torture and cruel, inhuman, or degrading treatment under customary law).

⁴⁵ CAT, *supra* note 32, at art. 3.

⁴⁶ See Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law* 37 Case W. Res. J. Int’l L. 309, 320-321.

the United States attached an understanding that “substantial grounds” would be interpreted to mean “more likely than not.”⁴⁷ The prohibition on *refoulement* in the CAT is absolute and permits no derogations.⁴⁸

ICCPR: Although the ICCPR does not make the prohibition on extraordinary rendition explicit, the Human Rights Committee has found an implicit *non-refoulement* obligation in article 7.⁴⁹

REFUGEE CONVENTION Article 33 of the Refugee Convention also codified the principle of *non-refoulement* by providing that no Contracting State may expel or return a refugee to a territory where his “life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.”⁵⁰ Protection against *non-refoulement* in the Refugee Convention is relatively narrow when compared with the CAT: it is limited to threats of persecution in the individual’s home states or state of habitual residence, and permits exceptions under certain circumstances, such as circumstances where there are reasonable grounds for believing that the person poses a threat to the security of the rendering state.

Even though States engaging in extraordinary rendition do not participate directly in torture, and regardless of whether it was their intent for the rendered individual to be tortured,

⁴⁷ See *Id.* (noting that the implication of an understanding, in contrast to a reservation, is that it does not change the U.S. obligations under the treaty)

⁴⁸ See Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* 70 (New York: ABCNY & NYU School of Law, 2004) [hereinafter *Torture by Proxy*].

⁴⁹ See Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 *Geo. Wash. L. R.* 1333, 1357 (2007), U.N. Human Rights Comm., *General Comment 20, Article 7*, U.N. Doc. A/47/40 (1992).

⁵⁰ See Convention Relating to the Status of Refugees, (1954) 189 U.N.T.S. 137, Art. 33(1).

if there are substantial grounds for believing that the individual will be tortured, the *non-refoulement* principle will be violated.

3. States' Affirmative Duties with Respect to Torture and Extraordinary Rendition

States' duties with respect to torture extend beyond a mere prohibition on the practice by state actors: Human rights treaties and customary law create affirmative duties to criminalize, investigate, prosecute, and punish acts of torture.

a. CRIMINALIZE

Article 4 of the CAT requires that State Parties criminalize acts of torture, attempts to commit torture, and complicity or participating in acts of torture.⁵¹ This requirement includes the duty to impose appropriate penalties that reflect the serious nature of the crime of torture.⁵² It has also been argued that implementation of Article 7 of the ICCPR requires criminalization of torture and cruel, inhuman and degrading treatment.⁵³

b. INVESTIGATE

The CAT also requires that States "ensure that its competent authorities proceed to a prompt and impartial investigation, whenever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."⁵⁴ This investigation must

⁵¹ CAT, *supra* note 32, at art. 4.

⁵² See Center for Human Rights and Global Justice, *Enabling Torture: International Law Applicable to State Participation in the Unlawful Activities of Other States* at 10 (New York: NYU School of Law, 2006) [hereinafter *Enabling Torture*].

⁵³ *Id.*

⁵⁴ CAT, *supra* note 32, at art. 12.

be undertaken regardless of the source of suspicion that the act as occurred, and must occur promptly to enable evidence to be collected effectively.⁵⁵

c. PROSECUTE

Where jurisdiction is appropriate, parties are required to prosecute individuals responsible for torture.⁵⁶ The CAT obliges State Parties to assert jurisdiction and prosecute under five circumstances: (i) acts of torture in any territory where that State has jurisdiction; (ii) acts of torture or complicity to torture on a ship or aircraft registered to that State; (iii) acts of torture or complicity in torture by state actors who are nationals of the State Party, or nationals acting with the consent or acquiescence of state actors, regardless of the state where the action takes place; (iv) acts of torture or complicity in torture by nationals of any other state who act with the consent or acquiescence of the state party; and (v) any other acts of torture over which jurisdiction is permissible under domestic law.⁵⁷ The CAT permits States to use domestic laws to establish jurisdiction over crimes of torture.⁵⁸ Additionally, the Human Rights Committee has stated that failure to prosecute perpetrators of torture could amount to a breach of the ICCPR.⁵⁹

International law not only prohibits the practice of torture, but also obligates states to take measures to criminalize, investigate, and prosecute acts of torture. Furthermore, States must act to prevent torture and refrain from sending individuals to States where they may be

⁵⁵ Enabling Torture, *supra* note 52, at 10.

⁵⁶ CAT, *supra* note 32, at art. 7. Treaties are generally applicable within the territorial jurisdiction of the parties to the treaty. However, human rights treaties prohibiting torture such as the CAT extends its obligations extraterritorially.

⁵⁷ See Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* 46-48 (New York: ABCNY & NYU School of Law, 2004) [hereinafter *Torture by Proxy*].

⁵⁸ Enabling Torture, *supra* note 52, at 11.

⁵⁹ *Id.* at 11, citing HRC General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21Rev.1/Add. 13 (2004) at para. 15.

tortured. The CAT has amplified jurisdiction over torture to a near-universal level. This body of law is rooted in customary international law and has been reinforced and expanded by human rights and humanitarian treaties. Having laid out the international legal framework, this paper will now turn to an overview of the law of the United States implementing the international legal obligations with respect to torture.

B. THE DOMESTIC LEGAL FRAMEWORK

1. The Prohibition on Torture

The prohibition on torture under the domestic law of the United States is well established by legislation, executive orders, and opinions of the courts of the United States.

a. LEGISLATION⁶⁰

FEDERAL TORTURE STATUTE OF 1994. The Federal Torture Statute of 1994 (Torture Statute) was enacted by Congress and prohibits torture by a United States national outside “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.”⁶¹ This statute was passed to bring the United States into compliance with the Convention Against Torture (CAT), which requires State Parties to establish jurisdiction over offenses committed by nationals of that State, or when an offender of any nationality is present in that State.⁶² The statute defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”⁶³

WAR CRIMES ACT OF 1996. The War Crimes Act of 1996 (WCA) was signed into law by President Clinton. The Act defines “war crime” and outlines the punishment for Common Article 3 violations, including torture and cruel, inhuman, or degrading treatment.⁶⁴ The WCA provides sanctions for violating the prohibition on acts of torture and cruel, inhuman, and

⁶⁰ See Appendix A for a discussion of introduced but ultimately unsuccessful legislation relating to torture and extraordinary rendition

⁶¹ Federal Torture Statute, 18 U.S.C. § 2340-2340A (1994).

⁶² CAT, *supra* note 32, art. 5.

⁶³ Federal Torture Statute, *supra* note 61.

⁶⁴ War Crimes Act, 18 U.S.C. § 2441 (1996).

degrading treatment outlined in the Torture Statute.⁶⁵ The law applies if either the victim or the perpetrator is a national of the United States or a member of the U.S. armed forces.⁶⁶ The penalty may be life imprisonment or death.⁶⁷ Along with the subsequent Detainee Treatment Act, the WCA strengthens the domestic legal framework prohibiting torture in the United States and its territories.⁶⁸

DETAINEE TREATMENT ACT OF 2005. The Detainee Treatment Act of 2005 (DTA) was signed into law by President George W. Bush on December 30, 2005.⁶⁹ The DTA prohibits inhumane treatment of prisoners, including those being detained at Guantánamo Bay, Cuba.⁷⁰ This act addresses a loophole in the Torture Statute by prohibiting lesser forms of torture, namely cruel, inhuman, or degrading treatment or punishment of detainees and provides for “uniform standards” for interrogation.⁷¹ A noticeable weakness of the DTA is that it provides no criminal punishment for violations of the act.⁷² The DTA also absolves interrogators of criminal and civil liability for conduct related to the interrogation of detainees suspected of

⁶⁵ Scott L. Silliman, Professor of Law, Duke University School of Law, Torture and Interrogation: Have We Gone Too Far, The Parr Center for Ethics University of North Carolina (Sept. 13, 2008).

⁶⁶ War Crimes Act, *supra* note 64.

⁶⁷ *Id.* The death penalty is not invoked unless the conduct resulted in the death of one or more victims.

⁶⁸ During the Bush administration, however, White House officials were concerned with the possible prosecution of US officials under the WCA for war crimes stemming from offenses committed against detainees after the September 11th terrorist attacks, which gave rise to the Military Commissions Act of 2006. *See Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban*, Memorandum from the President from Alberto R. Gonzales, January 25, 2002 (available at http://www.washingtonpost.com/wp-srv/politics/documents/cheney/gonzales_addington_memo_jan252001.pdf)

⁶⁹ <http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>

⁷⁰ Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2739 (2005). (the act, however, limits the habeas corpus petitions of the detainees as well as limiting appellate review of decisions rendered against them); *But see* Boumediene v. Bush, 128 S. Ct. 2229 (2008) (holding it is unconstitutional to limit detainee’s access to judicial review and it also stated that detainees have a right to access courts to dispute their incarceration)

⁷¹ Detainee Treatment Act, *supra* note 70.

⁷² Silliman, *supra* note 65.

international terrorism if the interrogations were “officially authorized and determined to be lawful at the time that they were conducted.”⁷³

MILITARY COMMISSIONS ACT OF 2006. The Military Commissions Act of 2006 (MCA) was signed into law by President George W. Bush on October 17, 2006.⁷⁴ The MCA was introduced to limit the scope of the War Crimes Act by specifically defining grave abuses of Common Article 3.⁷⁵ The MCA details the “procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.”⁷⁶ The MCA seeks to limit the liability of United States government officials and military personnel concerning alleged abuses of detainees relating to the ongoing “War on Terror.”⁷⁷ The World Organization for Human Rights USA has argued that the MCA, if given a literal application, could violate the United States obligation under the CAT and limit the ability to issue punishment for breaches of obligations under the WCA.⁷⁸ These concerns stem from section eight of the MCA that amends the WCA and DTA, allowing the “just following orders” defense against criminal prosecution for cruel, inhuman and degrading treatment of detainees during interrogations.⁷⁹

⁷³ Detainee Treatment Act, *supra* note 70 at § 1004 (a). The DTA does not address what happens when, as in recent years under the Bush administration, the alleged interrogation of terrorism suspects is outright denied by the executive branch.

⁷⁴ See Michael A. Fletcher, *Bush Signs Terrorism Measure*, The Washington Post, A04, October 18, 2006 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/17/AR2006101700190.html>)

⁷⁵ Military Commissions Act of 2006, Publ. L. No. 109-336, 120 Stat. 2600 [hereinafter MCA]; Section 7 of the Military Commission Act was found to be unconstitutional by the United States Supreme Court in *Al Odah v. United States*, 128 S. Ct. 1923 (2008); The Supreme Court ruled in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) that the MCA is unconstitutional insofar as it encroaches on the Habeas Corpus rights of Guantanamo detainees; the MCA also gave federal courts jurisdiction to hear habeas corpus petitions from detainees tried under the Act.

⁷⁶ MCA, *supra* note 75.

⁷⁷ See World Org. for Human Rights USA, Center for Constitutional Rights, Accountability for Torture: Request to the Inter-American Comm’n on Human Rights for a Thematic Hearing on the Issue of Accountability for Torture 3 (2009).

⁷⁸ *Id.* at 4.

⁷⁹ MCA, *supra* note 75, § 8(b).

b. EXECUTIVE ORDERS

President Obama has issued several executive orders to address interrogation techniques, policies related to the detention of terror suspects, as well as the status of the detention facility at Guantánamo Bay, Cuba. These executive orders were issued on January 22, 2009 and are outlined in the following table:

Executive Order	Title	Description
13491	Ensuring Lawful Interrogations ⁸⁰	This executive order revoked executive order 13440 that was issued by President George W. Bush and is intended to improve human intelligence collection by setting standards for interrogation of individuals in the control or effective control of the United States. This order will also require the CIA to close all of the detention facilities it controls and grant Red Cross access to all detained individuals. Moreover, the order will require the creation of an interagency task force on interrogation and transfer policy.
13492	Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities ⁸¹	This executive order calls for the closing of the Guantánamo detention facility and the immediate review of all Guantánamo detentions.
13493	Review of Detention Policy Options ⁸²	This executive order will require a special interagency task force on detainee disposition.

⁸⁰ Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009).

⁸¹ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

⁸² Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 27, 2009).

c. CASE LAW

Federal case law is an important part of the existing domestic legal framework on torture and extraordinary rendition. Although most cases have not progressed to the point of promulgating standards that relate to torture and extraordinary rendition, there are at least three worth mentioning that have articulated important legal concepts and protect the rights of detainees. *Arar v. Ashcroft*⁸³ was decided by the United States Court of Appeals for the Second Circuit in 2008. The plaintiff, a dual citizen of Canada and Syria, was detained by U.S. authorities at JFK Airport in New York while en route from Tunisia to Montreal.⁸⁴ He was then removed to Syria where he was subjected to torture.⁸⁵ He sued the U.S. officials for constitutional violations related to the torture.⁸⁶ The U.S. District Court for the Eastern District of New York dismissed the case.⁸⁷ This verdict was upheld by the Court of Appeals.⁸⁸ The Court of Appeals stated that the plaintiff was not entitled to relief because of lack of subject matter jurisdiction and failure to state a claim under the Due Process Clause of the Fifth Amendment.⁸⁹ *Arar* is significant because it marked the first time in the context of the “War on Terror” that an individual has attempted to use the courts to seek relief for torture and rendition. Although the Court of Appeals dismissed the case, the plaintiff filed for an *en banc* hearing.⁹⁰

⁸³ *Arar v. Ashcroft*, 532 F.3d 157 (2nd Cir. 2008).

⁸⁴ *Id.* at 162.

⁸⁵ *Id.* at 163.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 164.

⁸⁹ *Id.*

⁹⁰ Benjamin Weiser, *Appeals Court Hears Case of Canadian Citizen Sent by U.S. to Syria*, N.Y. Times, Dec. 9, 2008, A39 (available at http://www.nytimes.com/2008/12/10/nyregion/10arar.html?_r=1&bl&ex=1229058000&en=97e09bceab92cc7c&ei=5087%0A)

*Boumediene v. Bush*⁹¹ was decided by the United States Supreme Court in 2008. The Court held that Section 7 of the MCA unconstitutionally denied Habeas Corpus rights to detainees at Guantánamo.⁹² The Court concluded that Habeas Corpus review applied to persons held in Guantánamo.⁹³ If Congress is going to suspend the right, the Court reasoned, an adequate substitute must be provided, and the DTA did not provide an adequate substitute.⁹⁴ This case marks the first time that the Supreme Court has ruled that Guantánamo detainees are entitled to certain Constitutional rights, namely the right to seek relief from unlawful detention. This is a significant develop in the prohibition against torture because the United States can no longer hold terror suspects for indefinite periods of time without charges or access to courts.

In October 2003, in *ACLU v. Department of Defense*, several advocacy groups filed suit pursuant to the Freedom of Information Act (FOIA) to request records relating to the treatment of prisoners held in U.S. custody overseas.⁹⁵ In what has been a protracted legal action to obtain disclosure of videotapes, photographs, and documents including memoranda authorizing torture and abusive interrogation tactics, a three judge panel of the appeals court for the Second Circuit affirmed the district court's rejection of the Bush administration's efforts to rely on FOIA exemptions "an all-purpose damper on global controversy" and recognized the "significant public interest in the disclosure of these photographs" in light of government

⁹¹ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

⁹² *Id.* at 2240.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ For all documents and press releases pertaining to this action, see <http://www.aclu.org/safefree/torture/torturefoia.html>.

misconduct.⁹⁶ More recently, a federal judge rejected the CIA's ongoing attempt to withhold records related to detainee treatment, and as a result, the Pentagon agreed to release over forty previously undisclosed photographs that depict detainee abuse by the U.S. military although that decision was recently reversed by President Obama.⁹⁷ The series of decisions and orders issued thus far in this lawsuit have articulated the need for and right to disclosure, investigation, and accountability for government sanctioned actions that implicate torture.

2. The Prohibition on Extraordinary Rendition

The domestic laws of the United States expressly prohibit extraordinary rendition. The following section outlines the specific statutes that make this practice illegal in the United States.

IMMIGRATION AND NATIONALITY ACT OF 1952. The INA codifies the principle of *non-refoulement* in its provisions relating to asylum and refugees. Under INA § 241(b)(3), an alien may not be removed to a country if the alien's life or freedom would be threatened in that country due to race, religion, nationality, membership in a social group, or political opinion.⁹⁸ Section 101(a)(42) defines refugee,⁹⁹ and section 208 describe who is eligible to apply for asylum.¹⁰⁰ The Immigration and Nationality Act (INA) also bars individuals who are suspected of committing acts of torture or providing material support to torturers from entering the United

⁹⁶ See *Decision* No. 06-3140-cv, *American Civil Liberties Union v. Department of Defense*, pp. 32-44, http://www.aclu.org/pdfs/safefree/acluvdod_photodecision.pdf

⁹⁷ David Stout, *Pentagon to Release Detainee Photos*, N.Y. Times, April 24, 2009 at A4. Jeff Zeleny and Thom Shanker, *Obama Moves to Bar Release of Detainee Abuse Photos*, N.Y. Times, May 14, 2009 at A1

⁹⁸ Immigration and Nationality Act, § 241(b)(3), § 1231(b)(3) (2000) [hereinafter INA]

⁹⁹ *Id.* at § 101(a)(42), § 1101(a)(42).

¹⁰⁰ *Id.* at § 208, § 1158.

States.¹⁰¹ If an individual is already present in the United States, the INA may also require their deportation.¹⁰² The inclusion of these guidelines in the INA further strengthens the argument that domestic legislation in the United States provides a discernable legal policy that prohibits torture.

FOREIGN AFFAIRS REFORM AND RESTRUCTURING ACT OF 1998. The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) implemented U.S. obligations under CAT and announced the U.S. policy “not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States.*”¹⁰³ The Act further required the adoption of regulations to this effect.¹⁰⁴

The FARRA regulations do not deal specifically with extraordinary rendition, that is, the transfer of individuals located outside of the United States to third countries for interrogation or other purposes.¹⁰⁵ However, the intent of Congress to bar this practice can be deduced from the FARRA policy statement, which states that the United States will not participate in the involuntary return of individuals to a country where there is a strong probability that the individual will be subjected to torture.¹⁰⁶ This policy would seem to apply to persons whether

¹⁰¹ *Id.* at § 212(a)(3)(E), 8 U.S.C. 1182(a)(3)(E).

¹⁰² *Id.*

¹⁰³ See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 2242 § 2242(a) (emphasis added).

¹⁰⁴ *Id.* at § 2242 (b).

¹⁰⁵ See Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (New York: ABCNY & NYU School of Law, 2004).

¹⁰⁶ *Id.*

they are located in the United States or abroad.¹⁰⁷ Thus, the congressional intent gleaned from the FARRA regulations further establishes that U.S. laws prohibit any involvement in torture or rendition for torture under any circumstances. While congressional intent is an important consideration in determining the state of the law regarding U.S. sponsored or involvement in torture and rendition practices, the failure of FARRA and other legislation to create a clear and specific ban on these practices creates loopholes in the laws that need to be closed.

Although the domestic law of the United States contains a number of provisions prohibiting torture and other human rights abuses, it lacks sufficiently inclusive guidelines to ensure that U.S. personnel do not engage in gross breaches of international norms. The current domestic framework in the United States is a patchwork of legislation, executive orders, and case law that contains numerous loopholes and fails to create sufficiently specific and enforceable standards. Moreover, the existing domestic framework should be more inclusive of the international legal obligations with respect to torture and extraordinary rendition described in detail at the beginning of this section.

¹⁰⁷ *Id.*

PART II: THE INTERROGATION AND DETENTION REFORM ACT OF 2008

The following section provides an in depth look at the proposed Interrogation and Detention Reform Act (IDRA). The IDRA was introduced to the House of Representatives by Rep. David Price of North Carolina. This legislation is designed to improve the “United States capabilities for gathering human intelligence through the effective interrogation and detention of terrorist suspects and for bringing terrorists to justice through effective prosecution in accordance with the principles and values set forth in the Constitution and other laws.”¹⁰⁸ Specifically, this section analyzes each portion of the act and deciphers whether and to what extent it closes the loopholes present in the current international and domestic legal framework with regard to torture and extraordinary rendition.

TITLE I – INTERROGATION POLICY

SECTION 101: STATEMENT OF POLICY

This section of the IDRA outlines the purposes of the proposed policy for the United States in regards to the interrogation of suspects.¹⁰⁹ It expresses three concerns. The first is the call for the United States to “vigorously implement” a plan of action to fight terrorism “using all appropriate instruments” at the country’s disposal.¹¹⁰ The bill urges the detention and prosecution of these suspects to the full extent of the law.¹¹¹ The second concern expresses the need to respect and comply with human rights norms. The bill demands the upholding of human rights and acknowledges that human rights are constitutionally guaranteed

¹⁰⁸ Interrogation and Detention Reform Act of 2008, H.R. 7056, 111th Cong. § 101 (2008) [hereinafter IDRA]

¹⁰⁹ *Id.* at § 101.

¹¹⁰ *Id.*

¹¹¹ *Id.*

and well established in the United States.¹¹² The third concern stresses the need for uniform policies concerning interrogation and detention of detainees while also prohibiting outright the use of torture, cruel, inhuman, and degrading treatment as an acceptable part of such policies.¹¹³

The IDRA through its expression of policy reinforces the standards set forth in the preceding international and domestic legal frameworks.¹¹⁴ Specifically, it urges the United States to comply with Common Article 3 by prohibiting torture and inhuman, humiliating, and degrading treatment of detainees.¹¹⁵ It codifies the decision of the Supreme Court in *Hamdan v. Rumsfeld*, which held that Common Article 3 applies to individuals who are associated with a State not a party to the Geneva Convention.¹¹⁶ This bill creates an obligation to comply with standards found in the ICCPR that explicitly ban cruel, inhuman, or degrading treatment or punishment.¹¹⁷ It takes steps toward the implementation of the Federal Torture Statute of 1994 and the requirements of the CAT. The IDRA also incorporates portions of other existing domestic legislation including the DTA and its prohibition on lesser forms of torture that amount to cruel, inhuman, and degrading treatment. Furthermore, the development of a uniform policy for the interrogation and detention of detainees will improve the accountability of the U.S. Government and ensure adherence to the established framework by increasing awareness of customary legal norms and enacted federal regulation.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ GCIII and GCIV, *supra* notes 15 and 17, at art. 3.

¹¹⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557 at 562, 126 S.Ct. 2749 at 2757 This case destroyed President Bush's argument that enemy combatants are not eligible for protection under Common Article 3.

¹¹⁷ See ICCPR, *supra* note 27.

TITLE II – DETENTION OF TERROR SUSPECTS

SECTION 201: REGISTRATION WITH THE INTERNATIONAL COMMITTEE OF THE RED CROSS

The IDRA mandates that all detainees under the effective control of the intelligence community of the United States must be registered with the International Committee of the Red Cross (ICRC).¹¹⁸ These detainees also must be allowed access to the ICRC.¹¹⁹ The IDRA's provisions that require ICRC access are not unique: both the Third and Fourth Geneva Conventions require that the ICRC be granted access to Prisoners of War (POW) and civilians protected under the Conventions.¹²⁰ However, the IDRA requires that access be granted even if the detainees are not protected under the Geneva Conventions.¹²¹ Currently, the Red Cross is only allowed access to detainees who have been declared as POWs and subsequently afforded rights under Common Article 3. The IDRA would require access to all detainees, regardless of status, and would allow for access to all persons currently in the control or effective control of the United States. Assuring readily available access to Red Cross personnel who can provide detainees with proper medical assistance complies with obligations to treat these individuals humanely and makes it more difficult to conceal torture, cruel, inhuman or degrading treatment.¹²² Assuring that detainees are provided access to the International Red Cross will increase accountability for detainee treatment.

¹¹⁸ IDRA, *supra* note 108, at § 201.

¹¹⁹ *Id.*

¹²⁰ *See* GCIII, *supra* note 15, at art. 2.

¹²¹ IDRA, *supra* note 108, at § 201.

¹²² *Id.*

TITLE III – ENHANCING PROSECUTION OF TERRORISTS

SECTION 301: CONGRESSIONAL FINDINGS

The proposed congressional findings state that international terrorist organizations remain a threat to the national security of the United States.¹²³ In order to maintain national security and fight the war on terrorism, the United States must be able to detain and prosecute suspects that commit or support acts of terrorism.¹²⁴ The IDRA provides a way for the United States to continue the fight against global terrorism without subjecting terrorist suspects to cruel, inhuman, and degrading treatment.

The Military Commissions Act (MCA) and various executive orders have failed in the mission of bringing terror suspects to trial.¹²⁵ At the time the IDRA was introduced, there had been only three convictions under the previous military tribunals and commissions and none of these convictions were for individuals connected to the September 11, 2001 terrorist attacks.¹²⁶ In this bill, Congress acknowledges that the Uniform Code of Military Justice and civilian justice system “[possess] adequate jurisdiction to try any individual engaged in committing, conspiring to commit, or providing material support for, act of terrorism, unlawful combat, or other hostilities against the United States.”¹²⁷ If, as proposed by the IDRA, there are to be increased prosecutions of terror suspects, the bill increases compliance with international human rights standards and enhances the legitimacy of these prosecutions by providing detainees with due process. The IDRA thus may improve the status and reputation of the United States as a nation

¹²³ IDRA, *supra* note 108, at § 301.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

willing to uphold basic human rights derived from customary law and international and domestic law.

SECTION 302: REPEAL OF MILITARY COMMISSIONS ACT OF 2006

The IDRA distinguishes itself from other domestic legislation by requiring that the Uniform Code of Military Justice (UCMJ) and civilian courts be used to try terrorism suspects and calls for repealing the unsuccessful MCA as well as portions of the Detainee Treatment Act of 2005 (DTA).¹²⁸ The goal is to provide detainees improved access to the justice system thereby preventing cruel, inhuman, and degrading treatment related to prolonged detention.¹²⁹ While controversial, to be sure, the well-established UCMJ and civilian courts are better equipped to handle the proceedings against those alleged to be involved in terrorism. This has been demonstrated when these institutions have been used, for example, in the first World Trade Center bombings as well as the criminal trial of Zacarias Moussaoui. The IDRA will strengthen the established framework by resorting to the UCMJ and civilian courts to properly adjudicate alleged acts of terrorism and provide an account that will be available to the public. This increase in transparency and accountability addresses a significant gap present under the MCA.

¹²⁸ IDRA, *supra* note 108, at § 302.

¹²⁹ *See id.*

SECTION 303: CLOSURE OF DETENTION FACILITY AT NAVAL STATION, GUANTÁNAMO BAY, CUBA, AND TREATMENT OF UNLAWFUL ENEMY COMBATANTS

The IDRA calls for the closure of Guantánamo no later than 180 days after it is signed.¹³⁰ The bill proposes to transfer all detainees who have been labeled enemy combatants either to detention facilities in the United States, to be brought before an international tribunal under United Nations authority, transferred to the detainee's home country or another country that complies with the CAT and other Geneva conventions to stand trial, or released from any further detention.¹³¹ The purpose of the closure of Guantánamo is to ensure that detainees are tried for their alleged wrongdoing or released from custody in a timely manner and not subject to cruel, inhuman, or degrading treatment that results from prolonged confinement without access to the judicial process.¹³²

This section of the IDRA may no longer be fully applicable to the present state of the law and may need to be revisited because of Executive Order 13492 signed January 22, 2009 by which President Obama ordered Guantánamo closed.¹³³ It should be noted that Executive Order 13492 would allow Guantánamo to remain open for up to one year while the IDRA would mandate Guantánamo be closed within 180 days of the enactment of the act.

The IDRA stipulates that the President of the United States must submit a plan for the disposition of the cases of all Guantánamo detainees designated enemy combatants, within 60 days of the enactment of the bill.¹³⁴ Although this provision of the IDRA does not respond to any specific obligation arising out of the aforementioned international and domestic legislation,

¹³⁰ IDRA, *supra* note 108, at § 303.

¹³¹ *Id.*

¹³² *See id.*

¹³³ http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/

¹³⁴ IDRA, *supra* note 108, at § 303(b).

the requirements of those laws clearly establish a framework that would prohibit a facility such as Guantánamo.

TITLE IV – INTEGRITY IN CUSTODIAL INTERROGATIONS

SECTION 401: UNIFORM STANDARDS FOR THE CONDUCT OF INTERROGATIONS OF PERSONS IN THE CUSTODY OR CONTROL OF THE INTELLIGENCE COMMUNITY

Section 401 of the IDRA calls for the President to establish uniform standards for the interrogation of suspects in the custody or effective control of the United States.¹³⁵ The standards established by the President must include a list of approved interrogation techniques that do not amount to cruel, inhuman, or degrading treatment and comply with federal law including Common Article 3 and the CAT.¹³⁶ The President is required to receive input from the head of each intelligence community as well as the armed forces while compiling the abovementioned list of uniform interrogation standards.¹³⁷ Those responsible for the interrogation of suspects, namely, members of the intelligence community and the armed forces, must receive training “regarding the Federal and international obligations and laws applicable to the humane treatment of detainees,” especially those mentioned above.¹³⁸ Lastly, within 180 days of the enactment of the IDRA, the bill provides that the President must submit a report to congress detailing the implementation of the interrogation standards.¹³⁹

This section of the IDRA will close a significant gap in existing domestic legislation by establishing a set of standards for interrogation that will be used by all members of the

¹³⁵ IDRA, *supra* note 108, at § 401

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

intelligence community as well as the Armed Forces.¹⁴⁰ The WCA outlines punishment for violations of Common Article 3; however, the Bush administration was able to circumvent these requirements by introducing the MCA, which provided the definition for the term “grave abuses” as it is used in the WCA and allowed lesser forms of cruel, inhuman, and degrading treatment to go unpunished.¹⁴¹ A standard set of interrogation techniques would provide guidelines for interrogations that will prohibit any practices that would constitute cruel, inhuman, and degrading treatment. Deviations from these guidelines would then be punishable as a clear violation of the law.

SECTION 402: PROHIBITION ON THE USE OF PRIVATE CONTRACTORS FOR ACTIVITIES INVOLVING PERSONS IN THE CUSTODY OR UNDER THE EFFECTIVE CONTROL OF THE INTELLIGENCE COMMUNITY

This section of the IDRA would amend Title XI of the National Security Act of 1947.¹⁴² Specifically, this section would prohibit the awarding of contracts for the purpose of arresting, interrogating, detaining, transporting or transferring suspects.¹⁴³ The use of private contractors to conduct extraordinary rendition and other aspects of interrogation and detention, such as delivering personnel, has long been a practice of the intelligence community, specifically the CIA.¹⁴⁴ Section 402 of the IDRA would prohibit this practice and strengthen the prohibition on extraordinary rendition by requiring detainees to be transported by the Armed Forces or a branch of the intelligence community directly. By restricting the authority to transport

¹⁴⁰ *Id.*

¹⁴¹ See MCA, *supra* note 75.

¹⁴² Title XI of the National Security Act of 1947 applies federal laws implementing international treaties and agreements to the United States Intelligence Activities.

¹⁴³ IDRA, *supra* note 108, at § 402 (This section does not apply to language interpretation performed under the supervision of Federal Government personnel or to medical assistance).

¹⁴⁴ See Paglen & Thompson, *Torture Taxi* at 86-87.

detainees to government entities,, the likelihood that the movement of these individuals will be documented and subject to review is improved.

SECTION 403: REQUIREMENT FOR VIDEOTAPING OR OTHERWISE ELECTRONICALLY RECORDING STRATEGIC INTERROGATIONS

The IDRA, in this section, calls on the President to ensure that all strategic interrogations are recorded.¹⁴⁵ These recordings are to be properly classified in order to provide for the safety of the suspects and the interrogators.¹⁴⁶ The President is required to create guidelines for the recording of interrogations, which must comply fully with the laws of the United States, ensure that the recordings are kept for a length of time sufficient to serve the interest of justice, “[promote] the exploitation of justice,” and provide for the safety of all parties involved in the interrogations.¹⁴⁷ The requirement to keep the recording long enough to ensure the interests of justice are served would prevent the tapes from being destroyed as occurred in 2005 when the CIA caused the destruction of two interrogation recordings.¹⁴⁸ These recordings documented the interrogation of two Al Qaeda suspects in the custody of the CIA but the tapes were destroyed before their contents could be properly analyzed.¹⁴⁹

The recording requirement of this section is another unique aspect of the IDRA. Requiring the recording of strategic interrogations provides a measure of accountability with regard to the treatment of suspects and ensures that no interrogators exceed the guidelines for the interrogation of suspects described above in section 401.

¹⁴⁵ IDRA, *supra* note 108, at § 403.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. Times, December 7, 2007, A1 (available at <http://www.nytimes.com/2007/12/07/washington/07intel.html>).

¹⁴⁹ *Id.*

TITLE V – BUILDING LONG-TERM CAPACITY FOR EFFECTIVE HUMAN INTELLIGENCE COLLECTION

SECTION 502: INTERAGENCY CENTER FOR EXCELLENCE ON HUMAN INTELLIGENCE COLLECTION UNITED STATES

Section 502 of this title requires the President to establish the United States Center for Excellence in Human Intelligence Collection (Center).¹⁵⁰ The Center will be used for the education and training of Armed Forces members and members of the intelligence community to “conduct research and examine doctrine and policy related to human intelligence collection.”¹⁵¹ Functions and duties of the Center will include: providing education and training to the intelligence community; providing advance training to instructors at existing intelligence training facilities; encouraging cooperation between different elements of the intelligence community; performing research and developing policy relating to human intelligence collection; and reviewing United States intelligence gathering policies.¹⁵² Persons eligible to receive training at the Center include members of the Armed Forces, members employed by an element of the intelligence community, and other Federal Government employees at the discretion of the President.¹⁵³

The requirement for the creation of the Center has the potential to assure adequate training in intelligence collection for intelligence personnel. The Center is one an additional means to ensure compliance with the international and domestic legal framework that requires that the United States refrain from torture and cruel, inhuman, and degrading treatment.

¹⁵⁰ IDRA, *supra* note 108, at § 502.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

SECTION 504: STRATEGY FOR DETENTION OF TERRORISTS SUSPECTS AND CONVICTS

One year after the enactment of the IDRA the President, in conjunction with the Secretary of Homeland Security, the Attorney General, the Secretary of Defense, and the Director of National Intelligence, must submit a strategy for detaining terrorist suspects and convicts that addresses the threat posed by the recruitment of detainees for terrorist activities, a plan for minimizing such recruitment, and the “potential radicalization of prisoners in facilities operated by the Bureau of Prisons or by State or local authorities within the United States,” as well as “detention facilities in Iraq and Afghanistan.”¹⁵⁴ The IDRA would be the first domestic bill to require a strategy to address radicalization and recruitment of prisoners for terrorist activities. Because these provisions are contained within a bill that seeks to strengthen human rights protections of any person in detention, it is assumed that the strategy would comport with basic international and domestic protections set forth above.

¹⁵⁴ IDRA, *supra* note 108, at § 504.

In sum, the IDRA addresses the following gaps found in the current domestic legal framework:

- The development of a uniform policy for the interrogation and detention of detainees;
- The registration of all detainees under the effective control of the intelligence community of the United States with the International Committee of the Red Cross (ICRC) and be allowed unfettered access to the ICRC, even if the detainees are not protected under the Geneva Conventions;
- The use of the Uniform Code of Military Justice (UCMJ) and civilian courts to try terrorism suspects and calls for repealing the unsuccessful Military Commissions Act (MCA) as well as portions of the Detainee Treatment Act of 2005 (DTA);
- The closure of Guantánamo no later than 180 days after it is signed;
- The prohibition on the awarding of private contracts for the purpose of arresting, interrogating, detaining, transporting or transferring suspects;
- The establishment of guidelines by the President for the recording of interrogations that must comply fully with the laws of the United States, ensure that the recordings are kept for a length of time sufficient to serve the interest of justice;
- The creation by the President of the United States Center for Excellence in Human Intelligence Collection; and
- The submission of a strategy by the President to for detaining terrorist suspects and convicts that addresses the threat posed by the recruitment of detainees for terrorist activities.

PART III: BEYOND THE INTERROGATION AND DETENTION REFORM ACT OF 2008

The proposed Interrogation and Detention Reform Act of 2008 takes significant steps toward bringing United States standards in line with obligations under international law. The bill is most significant for its improvement on the law relating to torture and professionalization of interrogation and detention. However, it will not effectively close all of the loopholes in domestic law on torture and extraordinary rendition. Furthermore, it is a forward-looking bill; it does nothing to address the years of human rights violations that have occurred since the September 11 attacks and the commencement of the “War on Terror.” This section sets forth two arguments: first, amendments to the current bill or further legislation are necessary to address the issues not covered by the bill, including more specific language on the prohibition on torture and an explicit prohibition on extraordinary rendition. Second, we cannot reaffirm or reinforce our commitment to human rights without looking back with a critical eye at the human rights violations of the past decade. Congress and the current administration must make a commitment to bringing accountability for past abuses. This section explores three potentially complementary avenues for obtaining accountability for human rights abuses: investigatory commissions, criminal prosecutions, and civil remedies for torture victims. Because of the merit and promise of the IDRA, it is all the more important to assure that the proposed act accomplishes the comprehensive and necessary changes so that opportunities for meaningful reform are not squandered.

A. IDRA'S WEAKNESSES

1. Torture

As discussed in section II, Title IV of the IDRA reinforces the existing prohibition on torture and calls for the president to establish uniform standards for the interrogation of suspects in the custody of the United States.¹⁵⁵ In formulating these standards, the IDRA requires that the president make a list of practices and techniques that are permitted and requires that the president prohibit any practice that subjects a person to cruel, inhuman, or degrading treatment.¹⁵⁶ This provision leaves a great deal of discretion in the hands of the president to establish standards that are in compliance with existing international law. A weakness in this provision of the bill is that while a definitive list of acceptable practices and techniques is a clear step forward, it does not go far enough to address the complex and context specific nature of torture and cruel, inhuman, and degrading (CID) treatment. Recent history has shown that an ambiguous definition of torture can easily be exploited to the point of rendering meaningless any ostensible ban on torture. Bush administration attorneys artfully defined and redefined torture to the point where the only treatments classified as torture were those that were “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”¹⁵⁷ While the administration later repudiated this interpretation,¹⁵⁸ it serves as an illustrative example of what can result when terms such as “torture” or “cruel, inhuman, or degrading treatment” are

¹⁵⁵ IDRA, *supra* note 108, at § 401(b).

¹⁵⁶ *Id.* at § 401(b)(1) & (2).

¹⁵⁷ See Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A (August 1, 2002) at 1 [hereinafter August 1 memo].

¹⁵⁸ See Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (December 30, 2004).

not clearly defined. Accordingly, highly specific statutory definitions of torture and CID treatment are necessary to prevent future opportunistic redefinition of the terms.

A mere list of accepted techniques is not enough to ensure that practices which appear acceptable when practiced in moderation are not practiced in a manner that rises to the level of torture or CID treatment. For instance, requiring detainees to stand for periods of time is a practice that, when brief in duration, would not rise to the level of torture or CID treatment. However, when this punishment extends over a period of hours, it may reach the level unacceptable treatment. Similarly, multiple punishments carried out simultaneously, while relatively harmless individually, may in combination rise to the level of torture. Furthermore, psychological torture is difficult to define and may not be sufficiently captured by a list of specific prohibited techniques. While the list of prohibited techniques is a useful starting point for preventing torture and CID treatment, a statutory definition must go further and include such concepts as duration, intensity, and effect that a particular type of treatment has on the detainee. These concepts might be incorporated into the IDRA by modifying the language of Article IV. Section 401(b)(1) requires that the standards established by the president under § 401(a) “include a list of all practices or techniques of interrogation that personnel of the United States are authorized to practice during such an interrogation.”¹⁵⁹ This language should be modified to require, in addition to a list of authorized techniques, “guidance on permissible duration, intensity, and psychological effect of all authorized techniques.”

¹⁵⁹ IDRA, *supra* note 108, at § 401(b)(1).

2. Global Network of Secret Prisons

In addition to the well-known detention facilities used to hold terror suspects at Guantánamo Bay, Cuba, and Bagram Air Force Base in Afghanistan, the United States has operated a number of secret prisons where prisoners are held incommunicado and outside the rule of law.¹⁶⁰ President Bush acknowledged the existence of these prisons in 2006 when he announced that a number of detainees had been transported from these facilities to Guantanamo.¹⁶¹ Prior to this announcement, the International Committee of the Red Cross (ICRC) had not been informed of the presence of these detainees in U.S. custody or of the existence of the CIA detention program.¹⁶² These fourteen detainees were held in CIA custody for time periods ranging from sixteen months to four and a half years.¹⁶³ The ICRC was allowed to meet with these detainees after they arrived at Guantanamo. In April 2009, the ICRC released a report detailing the treatment and conditions of detention of these detainees while in the CIA secret detention program.¹⁶⁴ The report reveals numerous violations of international humanitarian law including lack of access to the ICRC, enforced disappearance, and torture and cruel, inhuman, and degrading treatment.¹⁶⁵

¹⁶⁰ See *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, February 2007 (available at <http://www.nybooks.com/icrc-report.pdf>) [hereinafter ICRC Report].

¹⁶¹ *Bush admits to CIA secret prisons*, BBC News, Sept. 7, 2006 (available at <http://news.bbc.co.uk/2/hi/americas/5321606.stm>).

¹⁶² ICRC Report, *supra* note 160, at 3.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 4.

¹⁶⁵ *Id.* at 24.

On April 9, 2009, CIA director Leon E. Panetta announced that the CIA no longer operates detention facilities or black sites and plans to decommission all remaining sites.¹⁶⁶ He also stated that all private contracts for detention facility security would be terminated.¹⁶⁷ This action followed President Obama's January 22, 2009 Executive Order, which required the CIA to close all facilities that it currently operates and forbids them from operating such facilities in the future.¹⁶⁸ Additionally, the Obama administration has announced that it is dropping the term "enemy combatant" used by the Bush administration to justify denying certain detainees protections under the Geneva Conventions.¹⁶⁹ While these actions are steps in the right direction, they do not provide sufficient protection against the possibility that these facilities could be used again. The prohibition on secret detention sites must be codified by an act of Congress. Title III of the IDRA mandates the closing of the detention center at Guantánamo Bay, Cuba, the bill does not address the secret CIA program.¹⁷⁰ The prohibition on secret detention sites could be incorporated into section 303 of Title III, which requires the closure of Guantanamo and requires a plan for treatment of enemy combatants.¹⁷¹

3. Extraordinary Rendition

Section I of this paper summarizes the international legal framework prohibiting extraordinary rendition, and the steps that the United States has taken to implement such

¹⁶⁶ Message from the Director: Interrogation Policy and Contracts, April 9, 2009 (available at <https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html>).

¹⁶⁷ *Id.*

¹⁶⁸ January 22, 2009 Executive Order § 4(a).

¹⁶⁹ See Del Quentin Wilber and Peter Finn, *U.S. Retires "Enemy Combatant," Keeps Broad Right to Detain*, *The Washington Post*, A06, March 14, 2009.

¹⁷⁰ See IDRA, *supra* note 108, at § 303.

¹⁷¹ *Id.*

prohibitions in domestic law. Both FARRA and the INA prohibit sending individuals from the United States to other countries where they may be tortured. However, these statutes fail to address explicitly the issue of U.S. participation in renditions from one State to another where the detained individual may never have been present in the territory of the United States. This omission represents a major gap in U.S law that must be addressed by legislation that will unequivocally prohibit this practice. The IDRA purports to provide comprehensive reform to the area of interrogation and detention, yet a prohibition on extraordinary rendition is critically lacking. This section outlines the scope of the United States' use of this practice in order to highlight the importance of its explicit prohibition, and proposes ways to incorporate this prohibition into the IDRA or other legislation.

a. *THE PRACTICE OF EXTRAORDINARY RENDITION BY THE UNITED STATES*

In September 2002, dual Canadian and Syrian citizen Mahar Arar was detained at during a layover at John F. Kennedy Airport in New York, where he was held incommunicado for thirteen days. He was eventually flown to Jordan, and then transferred overland to Syria. Arar was detained in a coffin-like cell in Syria for ten months, during which he was interrogated and tortured continually by his captors. After Canadian officials intervened on his behalf, Arar was released in October 2003 without having any charges filed against him.¹⁷²

In February 2003, CIA agents kidnapped Egyptian citizen and Islamic cleric Hassan Mustafa Osama Nasr in Milan, Italy and transferred him first to Germany and finally to Egypt. He was detained and tortured for four years before an Egyptian court found that his detention

¹⁷² See e.g. *Arar v. Ashcroft*, 414 F.Supp. 2d 250, 252-256, 2006, Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo. Wash. L. Rev. 1333, 1338-1342 (2007) [hereinafter *Rendered Meaningless*].

was “unfounded,” and ordered his release.¹⁷³ Twenty-five suspected CIA agents were indicted by an Italian judge for their roles in the kidnapping, in the first criminal case involving the United States extraordinary rendition program.¹⁷⁴

These are just a few of the highly publicized incidents of extraordinary rendition carried out by the United States government in the years following the September 11 attacks. Due to the extreme secrecy of the program, the true extent to which extraordinary renditions have been carried out may never be fully revealed. However, evidence suggests that its use has not been limited to a few isolated incidents: estimates of the number of detainees who have been subjected to extraordinary rendition range from about 70 to several thousand.¹⁷⁵ Individuals are typically rendered to locations such as Egypt, Morocco, Syria, Jordan, Uzbekistan, and Afghanistan, all countries known by the State Department to engage in torture.¹⁷⁶ Investigations into extraordinary rendition have revealed that the CIA has played the primary role in orchestrating and carrying out renditions, but the Department of Defense and Federal Bureau of Investigation have also been involved.¹⁷⁷

One notable feature of the extraordinary rendition program is the CIA’s reliance on private contractors to carry out rendition flights to “black sites” around the world. For instance, Aero Contractors, Ltd., a company that operates out of the Johnston County Airport in

¹⁷³ See Colleen Barry, *Alleged agents of CIA charged*, The Boston Globe, February 17, 2007.

¹⁷⁴ *Id.*

¹⁷⁵ See e.g. *Rendered Meaningless*, *supra* note 172, at 1343; Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, New Yorker, Feb. 14, 2005, at 106; Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush* (New York: NYU School of Law, 2005).

¹⁷⁶ See Jane Mayer, *The Dark Side* at 110.

¹⁷⁷ See *Rendered Meaningless*, *supra* note 172, at 1344.

Smithfield, North Carolina, has been linked to numerous CIA rendition flights.¹⁷⁸ The CIA has long been affiliated with private aircraft operators for use in its covert-action programs.¹⁷⁹ Aero Contractors was selected in the late 1970s for its short flying distance to Washington, D.C., and its low-profile location in rural North Carolina.¹⁸⁰ After September 11, Aero Contractors rapidly increased in size as the number of rendition flights carried out by the CIA skyrocketed.¹⁸¹ Journalists and human rights organizations have spent the past several years using the tail numbers of planes spotted at airports such as the one in Johnston County to track the flight plans of flights carried out by Aero Contractors and other similar corporations believed to be operating rendition flights, providing a crucial source of information on when and where these flights have occurred.¹⁸²

The practice of extraordinary rendition is not an invention of the Bush-era CIA: rendition flights have been carried out since at least the Regan era.¹⁸³ However, these early renditions were carried out on a more limited basis, and were aimed at rendering criminal suspects to justice, particularly individuals with outstanding foreign arrest warrants.¹⁸⁴ The escalation of the practice of extraordinary rendition during the “War on Terror” accompanied a shift in purpose: rather than bringing criminal suspects to justice, renditions were carried out to interrogate individuals about crimes that had not yet been committed and for which there was not sufficient evidence to bring criminal charges.¹⁸⁵

¹⁷⁸ See Paglen & Thompson, *Torture Taxi* at 80.

¹⁷⁹ See *Id.* at 86-87.

¹⁸⁰ *Id.* at 89.

¹⁸¹ *Id.* at 90.

¹⁸² See, e.g. NC Stop Torture Now, <http://www.ncstoptorturennow.org/resourcesplanespotting.html>.

¹⁸³ See *The Dark Side*, *supra* note 176, at 108.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

b. The Prohibition on Extraordinary Rendition Must be Made Explicit in Domestic Law

Indications that President Obama intends to preserve the practice of extraordinary rendition is cause for concern about the lack of an explicit prohibition on this practice. A February 1, 2009 article in the Los Angeles Times reported that current and former U.S. intelligence officials have claimed that the rendition program may play an expanding role in the future because it is the United States' primary mechanism for taking terrorism suspects into custody.¹⁸⁶ President Obama's January 22, 2009 Executive Order "Ensuring Lawful Interrogations" requires that the CIA close all detention facilities that it operates and not operate any such facility in the future.¹⁸⁷ However, the Order exempts from the definition of "detention facilities" those facilities used to hold people on a short-term, transitory basis.¹⁸⁸ As "short-term" is not defined, this leaves open the possibility that the CIA may continue rendering individuals to such detention facilities for purposes of interrogation and torture, so long as their detention is not "long-term." Additionally, the Executive Order does nothing to prevent United States officials from turning prisoners over to a foreign government where there is reason to believe that they may be subjected to torture.

A recent argument by an Obama administration lawyer before a panel of federal appeals judges provides further evidence of President's Obama's lack of commitment to ending the practice of extraordinary rendition. Binyam Mohamed and four other detainees brought suit against a Boeing subsidiary for carrying out their extraordinary rendition flights.¹⁸⁹ Mohamed had been detained in a secret prison in Morocco, where he was tortured and

¹⁸⁶ Greg Miller, *Obama preserves renditions as counter-terrorism tool*, Los Angeles Times, Feb. 1, 2009.

¹⁸⁷ January 22, 2009 Executive Order, § 4(a).

¹⁸⁸ *Id.* at § 2(g).

¹⁸⁹ John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. Times, February 9, 2009, A12.

threatened with rape, electrocution, and death.¹⁹⁰ Bush administration attorneys had invoked the state secrets doctrine in arguing that the case should be dismissed because it threatened national security.¹⁹¹ Notwithstanding the promises to restore enforcement of human rights protections, an Obama administration attorney continued to press the state secrets argument before a federal appeals judge.¹⁹² These developments suggest that the Obama administration is not only willing to maintain the practice of extraordinary rendition as a tool in the “War on Terror,” but is also committed to preserving the cloak of secrecy surrounding the practice with the state secrets doctrine. Because the executive branch has not demonstrated willingness to comply with domestic and international law on this point, it is critical that the legislature fill the gap.

4. Why Extraordinary Rendition is lacking from the Interrogation and Detention Reform Act of 2008

The Interrogation and Detention Reform Act does much to bridge the gaps in the law relating to standards for interrogation and detention. However, what is clearly missing from the legislation is an explicit provision making the practice of extraordinary rendition illegal under United States law. It may be argued that the prohibition on extraordinary rendition is implicit in the prohibition on torture. For instance, section 401(a)(2)(B) of Title IV prohibits techniques of interrogation on individuals in the custody or effective control of the United States that would amount to cruel, inhuman, or degrading treatment in violation of the CAT. This requirement, however, does nothing to ensure that individuals who are handed over to the

¹⁹⁰ *Obama Torture-Watch*, The Atlantic Online, February 11, 2009 (available at http://ta-nehisicoates.theatlantic.com/archives/2009/02/obama_torture_and_state_secrets.php)

¹⁹¹ *Id.*

¹⁹² *Id.*

custody of another state not be subjected to such treatment. Furthermore, this language captures only the language of the CAT prohibiting torture or cruel, inhuman and degrading treatment; it does not include the Article 3 *non-refoulement* principle.

Section 402 of the Interrogation and Detention Reform Act does take an important step forward by prohibiting the use of private contractors for activities relating to individuals in the custody of the intelligence community.¹⁹³ This section amends the National Security Act of 1947 to prohibit the intelligence community from rewarding contracts for activities relating to arrest, interrogation, detention, or transportation and transfer.¹⁹⁴ This prohibition is significant because a large number of rendition flights have been carried out by private contractors. The CIA would no longer be able to contract out the transfer of detainees to corporations such as Aero Contractors. However, prohibiting rendition by private contractors is not tantamount to prohibiting extraordinary rendition: one can easily imagine the alternatives to private contractors that the CIA could use to accomplish its rendition flights, particularly the military or other government operated aircraft.

5. How Extraordinary Rendition Can be Prohibited in U.S. Law

In order to prohibit effectively extraordinary rendition under United States law, a statute should contain the following elements:

- a prohibition on the transfer of individuals from one state to another
- while the individuals is in the custody or under the effective control of the United States
- by state actors or agents of the state, including private contractors

¹⁹³ IDRA, *supra* note 108, at § 402.

¹⁹⁴ *Id.*

- to a place where there are reasonable grounds for believing that the person would be subjected to torture or cruel inhuman or degrading treatment
- for any purpose other than to be brought to justice in a fair and effective trial before the courts of that state.

Torture and cruel, inhuman, and degrading treatment should be interpreted in light of U.S. obligations under the CAT, ICCPR, any other treaty to which the United States is a party, and other international norms. “Reasonable grounds” would be determined by consulting the reports of the State Department and other human rights organizations as well as media reports on human rights conditions in the state to which the individual is sent. Such a statute, while leaving room for some transfers of individuals from one state to another for purposes of bringing suspected criminals to justice, would effectively put an end to transfers for the sole purpose of interrogation. It would also bring United States law into compliance with the prohibition on extraordinary rendition in international norms, including Article 3 of the CAT and the *non-refoulement* principle implicit in Article 7 of the ICCPR.¹⁹⁵

B. ACCOUNTABILITY FOR U.S. HUMAN RIGHTS ABUSES

Mounting evidence of human rights violations in the treatment of terror suspects has been accompanied by increasing pressure by members of Congress and human rights organizations for accountability for the well documented abuses.¹⁹⁶ Although he has issued an

¹⁹⁵ See e.g. CAT, *supra* note 32, at art. 3, ICCPR, *supra* note 27, at art. 7.

¹⁹⁶ See e.g. *Inquiry into the Treatment of Detainees in U.S. Custody*, Report of the Committee on Armed Services, United States Senate, November 20, 2008 (available at <http://graphics8.nytimes.com/packages/images/nytint/docs/report-by-the-senate-armed-services-committee-on->

executive order closing the detention center at Guantánamo Bay, Cuba and has vowed to bring U.S. interrogation policies in line with international norms, President Obama has yet to take unequivocally affirm the need for accountability for abuses of power that occurred over the course of the Bush Administration.¹⁹⁷ President Obama's emphasis on looking forward fails to comply with the spirit and letter of human rights norms and creates a culture of impunity for torture and human rights abuses. Doing nothing ratifies the wrongful actions and sends the message that future transgressions will be tolerated. Furthermore, it fails to comply with legal obligations to criminalize such actions. The United States cannot expect to be taken seriously in its commitment to reforming interrogation standards if it does not demand accountability for past abuses.

Notwithstanding this paper's call for more extensive legislation making explicit the prohibition on torture and extraordinary rendition, it should be emphasized that retroactivity of new laws is not necessary to bring criminal liability for past actions: there is no doubt that torture is illegal in both times of war and peace, and existing torture prohibitions permit no exceptions. Bringing meaningful accountability for abuses as systematic and widespread as those that occurred during the Bush administration will require a combination of approaches to accountability, including criminal prosecutions, civil liability, and possibly an investigatory commission whose mission is to reveal human rights abuses and facilitate prosecutions. This section first considers the various methods that historically have been used to achieve accountability for human rights violations, including truth commissions, international tribunals,

detainee-treatment/original.pdf); *ICRC Report on the Treatment of Fourteen "High Value Detainees in CIA Custody*, International Committee of the Red Cross, February 2007 (available at <http://www.nybooks.com/icrc-report.pdf>)

¹⁹⁷ See e.g. Jan. 22 Executive Order, *supra* note 168.

and proceedings before foreign courts. It then considers the prospects for success of an investigatory commission, criminal prosecutions, and civil liability for human rights abuses.

1. Accountability and Transitional Justice: An Overview

Over the past decades, the international community has witnessed a marked decrease in tolerance for impunity for war crimes and human rights abuses, and increasing support for movements that reveal truth and demand accountability. International tribunals, both ad hoc and permanent, have been established to deal with the unique challenges of prosecuting perpetrators of international crimes such as torture and other war crimes. Numerous truth and reconciliation commissions have been established to bring to light past abuses and to help societies accept the realities of their pasts in order to move forward. The objective of achieving transitional justice has been applied to diverse situations around the world, ranging political transition following mass killings and genocide such as the one in Rwanda, to a more isolated but still serious abuse of police power in the city of Greensboro, North Carolina.

Transitional justice can be broadly defined as a “set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.”¹⁹⁸

Notwithstanding its promise, the idea of transitional justice is often problematic and raises a number of theoretical questions, including how to conceptualize a “transition,” how to mark the boundaries of a transitional period, and the tension between backward- and forward-

¹⁹⁸ See Naomi Roht-Arriaza, *The new landscape of transitional justice*, in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, 2 (2006).

looking law that characterizes transitional law.¹⁹⁹ Setting aside these theoretical questions, this section examines briefly selected efforts to achieve transitional justice in recent decades in order to consider the likelihood of success if these principles were applied to address the recent human rights abuses that have occurred in the United States.

a. Truth and Reconciliation Commissions

Truth and reconciliation commissions have been established in a number of circumstances in recent decades for the purpose of examining human rights abuses or war crimes. They have met with varying degrees of success. These commissions are often conceptualized as a middle ground between simply “forgiving and forgetting” and pursuing extensive criminal prosecutions through domestic or international legal tribunals.²⁰⁰ Such commissions generally have amnesty as their goal, rather than criminal prosecutions. This is due to the reality that in many instances, systematic prosecutions could plunge a country back into conflict or political turmoil.²⁰¹ Furthermore, where prosecutions may be appropriate, countries in states of transition often lack sufficient financial resources or a justice system equipped to handle extensive prosecutions.²⁰² In such situations, Truth and Reconciliation Commissions bring some measure of accountability in the form of truth telling and lay the foundation for the further development of the rule of law.²⁰³

Truth and reconciliation commissions have been subject to criticism for both their methods of implementation and their very nature as “truth-seeking” bodies. These

¹⁹⁹ See e.g. Ruti G. Teitel, *Transitional Justice*, 4-7 (2000).

²⁰⁰ William A. Schabas. *The Sierra Leone Truth and Reconciliation Commission*, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, 21 (2006).

²⁰¹ Charles Villa-Vicencio, *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice*, 89 (2004).

²⁰² *Id.*

²⁰³ *Id.*

commissions often operate under the assumption that there is a single “truth” to be objectively discovered from numerous and experiences, rather than creating a common narrative or understanding.²⁰⁴ Furthermore, they are often thought of as a replacement for prosecutions, and are disfavored by those who believe that prosecutions are necessary to uphold the rule of law. However this criticism is often unfounded, as experience has shown that truth and reconciliation commissions often coexist with and complement criminal prosecutions.

SOUTH AFRICA: The best known of such commissions was the South African Truth and Reconciliation Commission (TRC), which was established to acknowledge the tragedies of years of apartheid. The commission was the result of a provision in South Africa’s interim constitution that required the granting of amnesty to any individual seeking it and who would make full disclosure of crimes.²⁰⁵ Though this amnesty provision precluded extensive criminal trials, the commission was not considered a second rate alternative to trials; rather, its proponents argued that it could accomplish justice in ways that trials could not. The Truth and Reconciliation Commission, they argued, would focus on overall patterns of injustice and elicit more comprehensive confessions than would likely emerge at trial.²⁰⁶

Though the TRC was praised internationally and often has been held up as a model of a successful truth commission, it was subject to criticism at home.²⁰⁷ For instance, very few of the high-ranking officials who could have come forward to ask for amnesty chose to do so.²⁰⁸

²⁰⁴ Roht-Arriaza, *supra* note 198, at 5.

²⁰⁵ *Id.* at 4.

²⁰⁶ *Id.*

²⁰⁷ See e.g. *Greensboro Truth and Reconciliation Commission Final Report* (available at <http://www.greensborotrc.org/>).

²⁰⁸ Roht-Arriaza, *supra* note 198, at 4.

Others have criticized that its failure to address socio-economic issues has undermined its effectiveness as a tool for social transformation, a necessary goal of restorative justice.²⁰⁹

GREENSBORO: Truth commissions have already been used in the United States as a means to address civil rights abuses that have occurred on a local scale. For instance, in Greensboro, North Carolina, a commission was formed in 2005 to investigate the 1979 Greensboro Massacre, an incident in which five Communist Workers Party demonstrators were killed and ten others wounded by Klansmen at a rally in a Greensboro housing project protesting the reemergence of the Ku Klux Klan.²¹⁰ The Greensboro Truth and Reconciliation Commission, whose mandate was to investigate government involvement in the murders, found that the police department had an extensive role in failing first to prevent and then to respond properly to the incident.²¹¹ The Greensboro commission was criticized for its many weaknesses. For instance, it did not receive official support from the government of either Greensboro or North Carolina, and it lacked the subpoena power to compel witnesses to testify.²¹² The purpose of the Commission was to repair the rift that persisted in the community years after the initial incident. Though reactions to the commission's final report were mixed, it stands as one of the largest-scale truth commissions undertaken in the United States to date.

²⁰⁹ Villa-Vicencio, *supra* note 201 at 37.

²¹⁰ *Greensboro Truth and Reconciliation Commission Final Report, Executive Summary*, at 2-8 (available at http://www.greensborotrc.org/exec_summary.pdf).

²¹¹ *Id.* The commission found the police department gave a copy of the police parade permit to a known Klansman, who then used the information to provoke a violent confrontation with the protestors. They also found that the police made explicit decisions not to warn the demonstrators about the known plans of the Klan to provoke violence, to keep officers away from the location of the protest, and not to intervene and stop cars fleeing from the scene after it was known that shots were fired.

²¹² Darryl Fears, *Seeking Closure on "Greensboro Massacre"*, *The Washington Post*, March 6, 2005 A03.

b. International Tribunals

International criminal tribunals have become an increasingly common method of bringing to justice war criminals and human rights abusers. These tribunals focus on prosecutions of individuals in positions of authority whose actions have broad ranging impacts, rather than attempting to prosecute every individual involved on any level.²¹³ Furthermore, they often focus on offenses committed systematically against persons outside of combat, rather than prisoners of war.²¹⁴ Though such tribunals have achieved varying degrees of success at prosecuting war criminals, the use of such venues to prosecute U.S. war criminals faces a number of unique challenges.

THE INTER-AMERICAN COMMISSION: The Inter-American Commission on Human Rights (IACHR) is a regional human rights body and autonomous organ of the Organization of American States (OAS) that hears petitions involving human rights violations stemming from violations of the OAS Charter, American Declaration on the Rights and Duties of Man, or the American Convention on Human Rights.²¹⁵

The Commission hears both individual petitions and generalized grievances.²¹⁶ Individual petitions may be brought by any aggrieved individual or group, or on behalf of a third party.²¹⁷

General or thematic hearings may be brought when an individual petition would not be appropriate due to jurisdictional or substantive limitations.²¹⁸ The World Organization for

²¹³ Scott Horton, *Justice after Bush: Prosecuting an outlaw administration*, Harper's Magazine, December 2008 (available at <http://harpers.org/archive/2008/12/0082303>).

²¹⁴ *Id.*

²¹⁵ *What is the IACHR?* (available at <http://www.cidh.oas.org/what.htm>).

²¹⁶ Tara J. Melish, "The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions" in *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, M. Langford, ed. at 340 (New York: Cambridge Univ. Press, 2008).

²¹⁷ *Id.*

²¹⁸ *Id.*

Human Rights recently filed a petition with the IACHR for a thematic hearing on the issue of accountability for torture.²¹⁹

AD HOC TRIBUNALS: Some of these international tribunals are established as “ad hoc” entities under the leadership of major world powers and the United Nations. They are designed to address the crimes associated with a particular war or geographically defined conflict. The first significant ad hoc tribunals was created to deal with war criminals were the Nuremberg and Tokyo tribunals set up by the Allies to prosecute Nazi and Japanese leaders at the conclusion of World War II.²²⁰ More recently, the ICTY and the ICTR played similar roles in prosecuting leaders who perpetrated war crimes in the course of the wars in Yugoslavia and Rwanda.

Prosecution of United States officials in an ad hoc tribunal is unlikely. The success of ad hoc tribunals depends on the support of the U.N. and major world powers. Because of political forces, it seems highly doubtful that any such ad hoc tribunal could gather enough international support to carry out successful prosecutions against the United States.

THE INTERNATIONAL CRIMINAL COURT: The International Criminal Court (ICC), seated in the Netherlands, was created by the Rome Statute in 2002 to provide a permanent venue for trying war criminals. However, it is highly unlikely that any American would be indicted by this tribunal. The United States did not sign on to the Rome Statute, and is therefore not a member of the ICC. The Court may exercise jurisdiction where the criminal activity took place in the

²¹⁹ World Organization for Human Rights. *Accountability for Torture: A Request to the Inter-American Commission on Human Rights for a Thematic Hearing on the Issue of Accountability for Torture*. January 2009.

²²⁰ See generally Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslave War Crimes Trials*, 14 Dick. J. Int'l L. 57, 61-65 (1995), Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials*, (2001).

territory of a state party, the person accused of the crime is a national of a state party, or the situation is referred to the Prosecutor by the United Nations Security Council.²²¹

Since the United States is not a state party, it is highly unlikely that the ICC would attempt to exercise jurisdiction over a U.S. citizen. It is unlikely a case would be referred by the U.N. Security Council because the United States holds a veto as a permanent member of the council.²²² If the ICC were to attempt to exercise its jurisdiction, the U.S. citizen would be protected by the American Service members Protection Act, which permits the President to authorize “all means necessary and appropriate” to bring about the release of any person detained by the ICC.²²³

FOREIGN COURTS: Universal jurisdiction is a principle of international law under which the courts of any country in the world may try individuals suspected of involvement in certain crimes in violation of international law, regardless of the nationality of the criminal or the victim or where the crime was committed or other concerns of jurisdiction relating to territoriality.²²⁴ The crimes that trigger universal jurisdiction are *jus cogens* offenses and are agreed upon by the international community as harmful to humans generally.²²⁵ Torture is considered a *jus cogens* norm, and perpetrators of torture would thus be subject to universal jurisdiction.²²⁶

²²¹ Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9 (July 17, 1998); 37 ILM 1002; 2187 UNTS 90 (entered into force July 1, 2002), art. 12 & 13.

²²² *U.N. Security Council Members* (available at <http://www.un.org/sc/members.asp>).

²²³ 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909 (to be codified at 22 U.S.C. §§ 7421-7432); Lilian V. Faulhaber, American Servicemember’s Protection Act of 2002, 40 Harv. J. on Legis. 537, 546.

²²⁴ Linda Carter, Christopher Blakesley, and Peter Henning. *Global Issues in Criminal Law*, 9 (2007).

²²⁵ *Id.*

²²⁶ See, e.g. *Restatement of Foreign Relations*, *supra* note 4, § 702, note k.

Spain exercised universal jurisdiction in 1998 in issuing a warrant for the arrest of Augusto Pinochet of Chile, who was visiting the United Kingdom at the time, for international crimes including genocide, torture, and forced disappearance.²²⁷ The House of Lords found that Pinochet did not have immunity from arrest or extradition based on ratification of the Convention Against Torture by Chile, Spain, and the United Kingdom.²²⁸ Though the United Kingdom ultimately declared Pinochet mentally unfit to stand trial and he was sent back to Chile and placed under house arrest, the Pinochet affair generated intense attention from the media and human rights activists, who saw it as an event with enormous consequences for impunity.²²⁹

A Spanish court has recently opened investigation into the war crimes of the Bush administration, including violations of international law by former Attorney General Alberto Gonzales, Office of Legal Counsel attorney John Yoo, and several others.²³⁰ The case was sent to the prosecutor for review by Baltasar Garzón, the same judge who ordered the arrest of Pinochet in 1998.²³¹ While the move may be mostly symbolic, it represents the first attempt at bringing accountability for Bush administration officials through universal jurisdiction.²³²

²²⁷ Michael Ratner, *The Trial of Donald Rumsfeld*, 216 (2008).

²²⁸ *Id.* at 217.

²²⁹ *Id.*

²³⁰ Marlise Simons, *Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials*, N.Y. Times, March 28, 2009, at A6.

²³¹ *Id.*

²³² *Id.*

C. ACCOUNTABILITY IN THE UNITED STATES

1. Investigatory Commission

Lessons applicable to the United States can be drawn from historical attempts at transitional justice. A truth and reconciliation commission may not be the best solution to achieve accountability for human rights abuses during the Bush administration. Truth commissions work best when their purpose is to promote dialogue and tolerance between groups that must continue to coexist, but are divided some past injustice.²³³ This is not the case in the United States: the injustices committed by the United States were not against U.S. citizens. The need for healing and resolution that often accompanies truth and reconciliation commission is simply not present in the case of human rights abuses by U.S. officials.

However, the possibility of a comprehensive investigation to reveal abuses, independent of criminal prosecutions, should be considered. Interrogations using torture and extraordinary renditions of detainees to locations where they were tortured were carried out under a veil of extreme secrecy. The extent to which these practices were employed is still not fully understood by the American public. While carrying out criminal trials would provide a significant step toward achieving transitional justice, these trials would not do enough to help the public and the rest of the world to understand the extent of these human rights abuses.

Since the first days of the Obama presidency, there have been a number of calls for commissions to investigate Bush administration abuses. A bill introduced to the House by Rep. John Conyers at the start of the 111th session of Congress calls for the establishment of a “National Commission on Presidential War Powers and Civil Liberties” which would investigate

²³³ Elazar Barkan & Alexander Karn, eds., *Taking Wrongs Seriously: Apologies and Reconciliation*, 7 (2006)

the detention and interrogation policies of the Bush administration undertaken under claims of unreviewable war powers.²³⁴ The movement for a commission continues to gain traction: human rights organizations have issued calls for investigations, and on February 9, 2009, Senator Patrick Leahy made an independent call for what he identified as a truth commission with subpoena powers to investigate Bush administration policies on detention and torture.²³⁵ The Senate Judiciary committee will hold a hearing to explore the establishment of such a commission.²³⁶

Proposals for investigatory commissions have met mixed reactions from those who do not believe such a commission would go far enough to bring accountability or would stall prosecutions. A significant criticism of proposals for a truth commission stems from concern that a commission would serve as a replacement for criminal prosecutions. Another problem is the extensive time and resources necessary to set up such a commission. A commission could take years to issue its findings, after which time the statute of limitations for the crimes that it uncovers may have run out.

2. Criminal Prosecutions in Federal Courts

Major General Taguba, the leader of the 2004 inquiry into abuses in the Abu Ghraib prison scandal, stated “[t]here is no longer any doubt as to whether the [Bush] administration has committed war crimes. The only question that remains to be answered is whether those

²³⁴ To establish a national commission on presidential war power and civil liberties, H.R. 104, 111th Cong. (2009), § 1.

²³⁵ See David R. Sands, *Leahy calls for “truth commission,”* The Washington Times, February 10, 2009.

²³⁶ See *Leahy Schedules a Hearing on Commission of Inquiry*. (available at <http://leahy.senate.gov/press/200902/022509b.html>).

who ordered the use of torture will be held to account.”²³⁷ While an investigatory commission would serve the important function of bringing to the attention of the public the nature and extent of human rights abuses that have occurred in recent years, only criminal prosecutions will bring accountability on an individual level to the countless officials who were directly or indirectly involved in planning and carrying out acts of torture. Criminal prosecutions are also important for the disincentive they provide to future officials who may find themselves in the position to make similar decisions.

President Obama has been ambivalent in his first months in office on the issue of criminal accountability. He has clearly voiced his opposition to prosecutions of C.I.A. operatives who carried out interrogations under the legal guidelines of the Bush administration.²³⁸ However, he has not explicitly ruled out criminal prosecutions of higher-level officials, though he has said such prosecutions would be at the discretion of Attorney General Eric Holder.²³⁹

3. Civil Liability

The final element in achieving accountability for torture is civil liability in U.S. federal and possibly state courts. Civil liability not only holds accountable those liable of causing harm through torture, it also provides a remedy to victims of torture. Article 14 of the Convention Against Torture requires that a State Party “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation,

²³⁷ Center for Constitutional Rights, *Prosecutions and Accountability Factsheet* (available at http://ccrjustice.org/files/CCR_Prosecutions_Factsheet.pdf).

²³⁸ Mark Mazzetti and Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. Times, April 16, 2009, A1.

²³⁹ Sheryl Gay Stolberg, *Obama Won't Bar Inquiry, or Penalty, on Interrogations*, N.Y. Times, April 22, 2009, A17.

including the means for as full rehabilitation as possible.”²⁴⁰ In order to comply with this obligation under international law, the United States must ensure that all victims of human rights violations at the hands of the government have access to legal remedies through its courts.

While an in depth review of all the theories of liability is beyond the scope of this policy review, it should be noted that several challenges must be overcome in order for plaintiffs to bring a successful action in federal court, including the state secrets doctrine and immunity of state officials.²⁴¹ No attempt has yet been successful, including an attempt by Mahar Arar to sue under the Torture Victim Protection Act (TVPA).²⁴² However, optimism remains that torture victims will continue to take advantage of legislation such as the TVPA to obtain successfully reparations for their suffering.²⁴³

²⁴⁰ CAT, *supra* note 32, at art. 14(1).

²⁴¹ See Bardo Fassbender, *Can Victims Sue State Officials for Torture?* J. of Int’l Crim. Just. 6 2 (347) (2008).

²⁴² Arar v. Ashcroft. 414 F.Supp.2d 250 (E.D. N.Y. 2006)

²⁴³ See, e.g. *Prosecutions and Accountability Factsheet*, Center for Constitutional Rights (available at http://ccrjustice.org/files/CCR_Prosecutions_Factsheet.pdf).

CONCLUSION

With the recent release of reports detailing the abusive techniques used by the Bush Administration and memos written by high-level officials authorizing these shocking practices, the need for clear, unequivocal legislation prohibiting the practice of torture becomes more apparent every day. By developing a comprehensive strategy for intelligence gathering and bringing interrogation and detention standards into compliance with international law, the Interrogation and Detention Reform Act makes great progress toward achieving that goal. Most notably, this act requires the closure of Guantanamo, prohibits the awarding of private contracts for activities relating to detention, requires that the president establish a set of guidelines for interrogations that is compliant with international law, and creates a professional center for human intelligence collection. By closing many of the gaps in domestic law on torture, this legislation will make clear to the world that past human rights abuses will no longer be tolerated and will not be repeated.

While this legislation represents an important effort at comprehensive reform of existing law, it does not go far enough. A firm statutory prohibition on the practice of extraordinary rendition is necessary to bring U.S. law into compliance with international norms. Furthermore, a commitment to curtailing future human rights abuses must be accompanied by a hard look back at the abuses that have already occurred. Recent comments from the Obama administration indicating a willingness to consider an investigation or prosecutions of high-level Bush administration officials suggest a changing tide in attitudes toward accountability for human rights abuses. However, President Obama's reluctance to deal with the issue of

backward-looking accountability has not completely dissipated. Congress, human rights organizations, and the American people must continue to put pressure on the Obama administration to bring accountability for these atrocious abuses.

APPENDIX A: H.R. 591, THE INTERROGATION AND DETENTION REFORM ACT

[110H7056]

.....
(Original Signature of Member)

111TH CONGRESS
1ST SESSION

H. R. _____

To improve United States capabilities for gathering human intelligence through the effective interrogation and detention of terrorist suspects and for bringing terrorists to justice through effective prosecution in accordance with the principles and values set forth in the Constitution and other laws.

IN THE HOUSE OF REPRESENTATIVES

Mr. PRICE of North Carolina introduced the following bill; which was referred to the Committee on _____

A BILL

To improve United States capabilities for gathering human intelligence through the effective interrogation and detention of terrorist suspects and for bringing terrorists to justice through effective prosecution in accordance with the principles and values set forth in the Constitution and other laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled

SECTION 1. SHORT TITLE.

This Act may be cited as the “Interrogation and Detention Reform Act of 2008”.

TITLE I—INTERROGATION POLICY

SEC. 101. STATEMENT OF POLICY.

It shall be the policy of the United States to—

(1) vigorously implement a sustained national strategy to combat the short- and long-term threat to national security posed by global terrorism and global terrorist organizations using all appropriate instruments of United States national power;

(2) arrest, detain, and prosecute to the full extent of the law individuals who are involved in or are providing material support for terrorist activities, and use all appropriate means to obtain from individuals lawfully in United States custody timely, accurate, and actionable intelligence to protect the national security interests of the United States;

(3) provide extensive specialized training to personnel working in support of the Federal Government who are involved in the arrest, detention, interrogation, and prosecution of terrorist suspects;

(4) enforce, in the arrest, detention, interrogation, and prosecution of terrorist suspects, standards of conduct that uphold the principles of human rights that are set forth in the Constitution and have been held sacred by generations of Americans;

(5) prohibit the application of all forms of torture and cruel and inhuman or degrading treatment or punishment during the arrest, detention, interrogation, and prosecution of terrorist suspects and aggressively work to prevent such behaviors by personnel that come into contact with terrorist suspects while such suspects are in the custody or under the effective control of the Federal Government;

(6) actively seek to research and develop the most effective practices for arrest, detention, interrogation, and prosecution of terrorist suspects in cooperation with

nations allied with the United States, incorporating insights from past international experiences in combating global terrorism and global terrorist organizations;

(7) develop and regularly monitor policies related to the arrest, detention, interrogation, and prosecution of terrorist suspects to ensure that their effective exercise is consistent with the United States' strategic goals of weakening global terrorist organizations and their recruitment capabilities over the long term and strengthening the international leadership of the United States; and

(8) work through international fora, including the United Nations, to strengthen the capacity of international treaties and organizations to confront the challenge of global terrorism.

TITLE II—DETENTION OF TERRORIST SUSPECTS

SEC. 201. REGISTRATION WITH THE INTERNATIONAL COMMITTEE OF THE RED CROSS.

(a) REGISTRATION.—The head of an element of the intelligence community (as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a (4))) that has custody or effective control of an individual shall, upon the detention of the individual—

(1) immediately notify the International Committee of the Red Cross of such custody or effective control; and

(2) as soon as practicable, provide the International Committee of the Red Cross physical and repeat access to such individual.

(b) CONSTRUCTION.—Subsection (a) shall not be construed to—

(1) create or modify the authority of an element of the intelligence community to detain an individual; or

(2) limit or otherwise affect any other rights or obligations which may arise under any provision of law or an international agreement.

TITLE III—ENHANCING PROSECUTION OF TERRORISTS
SEC. 301. FINDINGS.

Congress finds the following:

(1) International terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States and constitute a grave and sustained threat to the national security of the United States.

(2) In response to the threat of international terrorism, the United States must pursue a multi-faced strategy that applies all appropriate tools of national power, including military, diplomatic, economic, cultural, and legal tools.

(3) The ability of the United States to detain, prosecute, and convict individuals suspected of committing or supporting terrorism or of otherwise waging hostilities against the United States is vital to efforts to combat terrorism and to United States national security.

(4) Attempts to implement a military tribunal system in accordance with Executive Order 13425, the Military Commissions Act of 2006 (Public Law 109–366), or the President’s Military Order of November 13, 2001 (66 Fed. Reg. 57,833), have failed to achieve their stated mission of bringing suspected terrorists and combatants to justice. To date, the tribunals and commissions established in connection with these efforts have yielded just three convictions, the first following a guilty plea by the defendant, and have failed to achieve the conviction of a single individual in connection with the terrorist attacks on the United States on September 11, 2001.

(5) The United States Supreme Court has found serious conflicts between efforts to implement a military tribunal system for the trial of detained terrorist suspects and obligations under the Constitution, Federal law, and international treaties to which the United States is party.

(6) The United States, through the Uniform Code of Military Justice and the civilian justice system, possesses adequate jurisdiction to try any individual engaged in committing, conspiring to commit, or providing material support for, acts of terrorism, unlawful combat, or other hostilities against the United States.

(7) The Uniform Code of Military Justice establishes a system for the fair and speedy trial of combatants and others engaged in hostilities against the United States for violations against the law of war and related offenses.

(8) The United States civilian justice system allows for the fair and speedy trial of individuals who engage in terrorist activities against the United States who are enemy combatants, terrorists, or otherwise engaged in criminal acts, and there is an extensive legal framework providing jurisdiction over the offenses committed by such individuals.

(9) Since September 11, 2001, the United States civilian justice system has accumulated an impressive record of success in prosecuting and convicting individuals suspected of committing or supporting terrorism, having convicted at least 145 such individuals, and is an essential and effective tool in combating international terrorism.

(10) Existing laws and regulations, including the Classified Information Procedures Act (1824 U.S.C. App. 3; Public Law 96–456), provide a detailed framework for protecting the full range of sensitive and classified information during the prosecution of cases involving terrorism offenses and related, crimes.

(11) In addition to the existing United States civilian and military justice systems, the Federal Government possesses other legal authorities that may be useful as tools in detaining and prosecuting international terrorists, including authority to detain illegal aliens under Federal immigration laws.

(12) Given the failure of the military commissions system established under the Military Commissions Act of 2006 (Public Law 109–366) and other authorities, the legal and constitutional obstacles to fully implementing military commissions system, and the success and potential of the civilian and military justice systems in bringing

terrorists to justice, the national security of the United States is best served by vigorously pursuing efforts to bring terrorists to justice through the United States civilian and military justice systems.

SEC. 302. REPEAL OF MILITARY COMMISSIONS ACT OF 2006.

(a) REPEAL OF AUTHORITY TO CONDUCT CERTAIN MILITARY COMMISSIONS.—

(1) IN GENERAL.—Subtitle A of title 10, United States Code, is amended by striking chapter 47A.

(2) CLERICAL AMENDMENT.—The tables of chapters at the beginning of subtitle A, and at the beginning of part II of subtitle A, of title 10, United States Code, are each amended by striking the item relating to chapter 47A.

(b) CONFORMING AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE.—Chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended as follows:

(1) REPEAL OF APPLICABILITY TO LAWFULENEMY COMBATANTS. Section 802(a) (article 2(a)) is amended by striking paragraph (13).

(2) REPEAL OF EXCLUSION OF APPLICABILITY.—Sections 821, 828, 848, 850(a), 904, and 906 (articles 21, 28, 48, 50(a), 104, and 106) are each amended by striking the following sentence: “This section does not apply to a military commission established under chapter 47A of this title.”.

(3) REPEAL OF INAPPLICABILITY OF REQUIREMENTS RELATING TO REGULATIONS.—Section 836 (article 36) is amended—

(A) in subsection (a), by striking “, except as provided in chapter 47A of this title,”; and

(B) in subsection (b), by striking “, except insofar as applicable to military commissions established under chapter 47A of this title”.

(c) REPEAL OF PUNITIVE ARTICLE OF CONSPIRACY.—Section 881 of title 10, United States Code (article 81 of the Uniform Code of Military Justice), is amended—

- (1) by striking “(a)” before “Any person”; and
- (2) by striking subsection (b).

(d) REPEAL OF PROVISIONS RELATING TO TREATY REQUIREMENTS.—The Military Commissions Act of 2006(Public Law 109–366) is amended by striking section 5 and subsection (a) of section 6.

(e) REPEAL OF REVISION TO WAR CRIMES OFFENSE UNDER FEDERAL CRIMINAL CODE.—

(1) IN GENERAL.—Section 2441 of title 18, United States Code, is amended—

(A) in subsection (c), by striking paragraph (3) and inserting the following new paragraph (3): “(3) which constitutes a violation of common Article 3 of the international conventions signed at 25 Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or”; and

(B) by striking subsection (d).

(2) RETROACTIVE APPLICABILITY.—The amendments made by this subsection shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105–118 (as amended by section 4002(e)(7) of Public Law 107–273).

(f) REPEAL OF ADDITIONAL PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT.—The Military Commissions Act of 2006 (Public Law 109–366) is amended by striking subsection (c) of section 6.

(g) REPEAL OF HABEAS CORPUS PROVISION.—

(1) REPEAL.—Section 2241 of title 28, United States Code, is amended by striking subsection (e).

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act.

(h) REPEAL OF REVISIONS TO DETAINEE TREATMENT ACT OF 2005 RELATING TO PROTECTION OF CERTAIN UNITED STATES GOVERNMENT PERSONNEL.—

(1) IN GENERAL.—Section 1004(b) of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd– 1(b)) is amended—

(A) by striking “shall provide” and inserting “may provide”;

(B) by striking “or investigation” after “criminal prosecution”; and

(C) by striking “whether before United States courts or agencies, foreign courts or agencies, or international courts or agencies,”.

(2) CONFORMING REPEAL.—The Military Commissions Act of 2006 (Public Law 109–366) is amended by striking subsection (b) of section 8.

(i) REPEAL OF AUTHORITY TO CONDUCT COMBATANT STATUS REVIEW TRIBUNALS.—The Detainee Treatment Act of 2005 (title X of Public Law 109–148) is amended by striking section 1005 (10 U.S.C. 801 note).

**SEC. 303. CLOSURE OF DETENTION FACILITY AT NAVAL STATION, GUANTANAMO BAY, CUBA,
AND TREATMENT OF UNLAWFUL ENEMY COMBATANTS.**

(a) CLOSURE OF GUANTANAMO BAY DETENTION FACILITY.—Not later than 180 days after the date of the enactment of this Act—

(1) the President shall close the Department of Defense detention facility at Guantanamo Bay, Cuba; and

(2) each individual detained at such facility who has been designated as an enemy combatant or unlawful enemy combatant shall be removed from the facility and—

(A) transferred to a military or civilian detention facility in the United States, charged with a violation of United States law, and tried in a court constituted pursuant to Article III of the Constitution or military legal proceeding before a regularly-constituted court;

(B) transferred to an international tribunal operating under the authority of the United Nations with jurisdiction to hold trials of such individuals;

(C) transferred to the individual's country of citizenship or a different country for further legal process, as long as that the transfer complies with the Convention Relating to the Status of Refugees, done at Geneva July 28, 1951, the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York December 10, 1984, and Federal law; or

(D) released from any further detention and, if possible, transferred to the individual's country of citizenship in accordance with the obligations of the

United States under international human rights and humanitarian law.

(b) TREATMENT OF ENEMY COMBATANTS.—Not later than 60 days after the date of the enactment of this Act, the President shall submit to Congress a plan for the prosecution, transfer, release, or other disposition of the cases of all individuals designated as enemy combatants or unlawful enemy combatants, as defined in section 948a (1) of title 10, United States Code, as in effect immediately before the enactment of this Act.

(c) IMMIGRATION STATUS.—The transfer of an individual under subsection (a) shall not be considered an entry into the United States for purposes of immigration status.

SEC. 304. SENSE OF CONGRESS.

It is the sense of Congress that the President—

(1) should vigorously investigate and prosecute, to the full extent of the law, individuals and organizations suspected of involvement with international terrorism, using all available assets of the United States civilian and military justice systems;

(2) should carry out a review of the capacity of the United States criminal justice system to successfully investigate and prosecute individuals and organizations suspected of terrorism, including the adequacy of existing Federal anti-terrorism laws, and should inform Congress of any gaps or obstacles limiting the ability of the United States to bring terrorists to justice; and

(3) should take immediate measures to enhance international legal cooperation in the investigation and prosecution of individuals and organizations suspected of involvement in international terrorism, including enhancing international police cooperation and working to improve the capacity of and enhance United States participation in international tribunals to prosecute terrorist acts.

TITLE IV—INTEGRITY IN CUSTODIAL INTERROGATIONS

SEC. 401. UNIFORM STANDARDS FOR THE CONDUCT OF INTERROGATION OF PERSONS IN THE CUSTODY OR CONTROL OF THE INTELLIGENCE COMMUNITY.

(a) **IN GENERAL.**—The President shall establish uniform standards for the interrogation of persons in the custody or under the effective control of the United States.

(b) **STANDARDS.**—

(1) **IN GENERAL.**—The standards established under subsection (a) shall include a list of all practices or techniques of interrogation that personnel of the United States are authorized to practice during such an interrogation; and

(2) **PROHIBITIONS.**—The President shall ensure that no practice or technique of interrogation is authorized if such practice or technique subjects a person in the custody or under the effective control of the United States to cruel, inhuman, or degrading treatment in violation of Federal law, including—

(A) common Article 3 of the international conventions, done at Geneva August 12, 1949, or any protocol to such conventions to which the United States is a party; or

(B) the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, done at New York December 10, 1984 and entered into force for the United States on November 20, 1994.

(c) **INPUT FROM THE INTELLIGENCE COMMUNITY.**—The Director of National Intelligence and the Secretary of Defense shall be responsible for obtaining and providing to the President input from the head of each element of the intelligence community and each branch of the Armed Forces during the development and revision of the standards established under subsection (a).

(d) TRAINING.—The Director of National Intelligence and the Secretary of Defense shall ensure that personnel of the intelligence community and the United States Armed Forces, respectively, who are responsible for the interrogation of persons in the custody or under the effective control of the United States receive training regarding the Federal and international obligations and laws applicable to the humane treatment of detainees, including protections afforded under the conventions referred to in subparagraphs (A) and (B) of subsection (b)(2).

(e) REPORT.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the President shall submit to Congress a report on the implementation of this section, including the standards established under subsection (b)(1).

(2) UPDATE.—Not later than 30 days after the President approves a change to the standards established under subsection (b)(1), the President shall submit to Congress an update of such standards.

(3) FORM.—The report under paragraph (1) and updated standards under paragraph (2) shall be submitted in unclassified form, but may include a classified annex.

SEC. 402. PROHIBITION ON THE USE OF PRIVATE CONTRACTORS FOR ACTIVITIES INVOLVING PERSONS IN THE CUSTODY OR UNDER THE EFFECTIVE CONTROL OF THE INTELLIGENCE COMMUNITY.

(a) IN GENERAL.—Title XI of the National Security Act of 1947 (50 U.S.C. 442 et seq.) is further amended by adding at the end the following new section: “SEC. 1104. PROHIBITION ON THE USE OF PRIVATE CONTRACTORS FOR ACTIVITIES INVOLVING PERSONS IN THE CUSTODY OR UNDER THE EFFECTIVE CONTROL OF THE INTELLIGENCE COMMUNITY. “

“(a) IN GENERAL.—Notwithstanding any other provision of law, no element of the intelligence community may award a contract for performance related to an activity described in subsection (b).

“(b) ACTIVITIES.—An activity described in this subsection— “(1) is an activity relating to the capture, custody, control, or other pertinent interaction with an individual who is a detainee or prisoner in the custody or under the effective control of the Federal Government, including, with regard to such an individual—

“(A) arrest;

“(B) interrogation;

“(C) detention; or

“(D) transportation or transfer; and

“(2) does not include the performance of work related to language interpretation, if such work occurs under the direct supervision of Federal Government personnel, or to the provision of medical assistance or treatment.”.

(b) CONFORMING AMENDMENT.—The table of contents in the first section of such Act is amended by adding at the end the following new item: “Sec. 1104. Prohibition on the use of private contractors for activities involving persons in the custody or under the effective control of the intelligence community.”.

(c) EFFECTIVE DATE.—Section 1104 of the National Security Act of 1947 (as added by subsection (a)) shall take effect on the date that is 180 days after the date of the enactment of this Act.

SEC. 403. REQUIREMENT FOR VIDEOTAPING OR OTHERWISE ELECTRONICALLY RECORDING STRATEGIC INTERROGATIONS.

(a) IN GENERAL.—In accordance with the guidelines developed pursuant to subsection (e) and section 401, the President shall take such actions as are necessary

to ensure the videotaping or otherwise electronically recording of each strategic intelligence interrogation of any person who is in the custody or under the effective control of the United States or under detention in a United States facility.

(b) CLASSIFICATION OF INFORMATION.—To protect United States national security, the safety of the individuals conducting or assisting in the conduct of a strategic intelligence interrogation, and the privacy of persons described in subsection (a), the President shall provide for the appropriate classification of video tapes or other electronic recordings made pursuant to subsection (b). The use of such classified video tapes or other electronic recordings in a civilian or military court proceeding or other proceeding under the laws of the United States shall be governed by applicable rules, regulations, and law.

(c) EXCLUSION.—Nothing in this section shall be construed as requiring—

(1) any member of the Armed Forces engaged in direct combat operations to videotape or otherwise electronically record a person described in subsection (a); or

(2) the videotaping or other electronic recording of tactical questioning, as such term is defined in the Army Field Manual on Human Intelligence Collector Operations (FM 2–22.3, September 2006), or any successor thereto.

(d) GUIDELINES FOR VIDEOTAPE AND OTHER ELECTRONIC RECORDINGS.—

(1) DEVELOPMENT OF GUIDELINES.—The President shall develop and adopt uniform guidelines designed to ensure that the videotaping or other electronic recording required under subsection (a), at a minimum—

(A) promotes full compliance with the laws of the United States;

(B) is maintained for a length of time that serves the interests of justice in cases for which trials are being or may be conducted pursuant to applicable United States law;

(C) promotes the exploitation of intelligence; and

(D) ensures the safety of all participants in the interrogations.

(2) SUBMITTAL TO CONGRESS.—Not later than 30 days after the date of the enactment of this Act, the President shall submit to Congress a report containing the guidelines developed under paragraph (1). Such report shall be submitted in unclassified form, but may include a classified annex.

(e) STRATEGIC INTELLIGENCE INTERROGATION DEFINED.—In this section, the term “strategic intelligence interrogation” means an interrogation of a person described in subsection (a) conducted by a personnel of the intelligence community or a member of the United States Armed Forces at—(1) corps or theater-level military detention facility, as defined in the Army Field Manual on Human Intelligence Collector Operations (FM 2– 22.3, September 11, 2006) or any successor thereto, or a comparable centralized detention facility operated by any element of the intelligence community (as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)));

(2) a detention facility outside the area of operations (AOR) where the detainee or prisoner was initially captured, including—

(A) a detention facility owned, operated, borrowed, or leased by the United States Government; and

(B) a detention facility of a foreign government at which United States Government personnel are permitted to conduct interrogations by the foreign government in question.

TITLE V—BUILDING LONG-TERM CAPACITY FOR EFFECTIVE HUMAN INTELLIGENCE COLLECTION

SEC. 501. SENSE OF CONGRESS REGARDING INTERNATIONAL COOPERATION ON HUMAN INTELLIGENCE COLLECTION.

(a) FINDINGS.—Congress finds the following:

(1) Key allies of the United States have accrued significant experience over the course of several years in the collection of human intelligence relating to efforts to prevent terrorism and eradicate terrorist organizations.

(2) The United States could substantially benefit from cooperation with such allies on identifying and examining the most effective laws, practices, and policies relating to human intelligence collection.

(b) SENSE OF CONGRESS.—It is the sense of Congress that—

(1) the President, acting through the Secretary of Defense and the Director for National Intelligence, should cooperate with other nations to support the mutual improvement of human intelligence collection capabilities, including through—

(A) the mutual exchange and review of doctrine, laws and regulations, best practices, and lessons learned relating to human intelligence collection capabilities;

(B) participation by United States personnel in international exercises relating to human intelligence collection; and

(C) participation by United States personnel in seminars, conferences, and other educational activities relating to human intelligence collection; and

(2) the President should not cooperate with regards to human intelligence collection with a nation that is not a party to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

SEC. 502. INTERAGENCY CENTER FOR EXCELLENCE ON HUMAN INTELLIGENCE COLLECTION UNITED STATES.

(a) CENTER AUTHORIZED.—The President, in consultation with the Director of National Intelligence and the Secretary of Defense, shall establish a center to be known as the United States Center for Excellence in Human Intelligence Collection (in this section referred to as the “Center”).

(b) PURPOSE.—The purpose of the Center shall be to educate and train members of the United States Armed Forces and personnel of the intelligence community to conduct research and examine doctrine and policy related to human intelligence collection, with emphasis on practices related to the interrogation and detention of hostile actors and human intelligence collection on the battlefield or in relation to United States efforts to combat global terrorism.

(c) DUTIES.—The Center shall—

(1) provide and facilitate education and training for members of the United States Armed Forces and personnel of the intelligence community on the practice of human intelligence collection, including—

(A) strategies, techniques, best practices, and lessons learned relating to the interrogation of individuals for intelligence purposes;

(B) United States policy, regulations, and law regarding authorized interrogation practices and techniques;

(C) strategies, techniques, best practices, and lessons learned relating to human source operations for intelligence purposes; and

(D) command, management, and oversight of U.S. personnel involved in human intelligence collection;

(2) collaborate with existing agency or service specific entities that provide education and training on the practice of human

intelligence collection, and provide advanced training for instructors at such entities;

(3) foster interoperability and cooperation between human intelligence collectors working for different elements of the intelligence community;

(4) provide and facilitate ongoing study and scientific research into all aspects of operations and doctrine relating to human intelligence collection, including the identification of best practices and the development of recommendations for policy and doctrine reform; and

(5) conduct a regular review of United States policies relating to human intelligence collection.

(d) ELIGIBLE PERSONNEL.—The Center may provide training and education to—

(1) members of the United States Armed Forces;

(2) personnel employed by an element of the intelligence community; and

(3) other personnel of the Federal Government, at the discretion of the President.

(e) ANNUAL REPORT.—Not later than March 31 of each year, the President shall submit to Congress a report on the activities of the Center during the preceding year.

(f) INTELLIGENCE COMMUNITY DEFINED.—In this section, the term “intelligence community” has the meaning given the term in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4)).

SEC. 503. UNITED STATES MILITARY INTELLIGENCE SPECIALISTS.

(a) FINDINGS.—Congress finds the following:

(1) Ensuring the national security of the United States, including through long-term efforts to combat global terrorism, the vigilant

defense against proliferation and use of weapons of mass destruction, and the use of military force as a last resort to defend the Nation, will require a sustained capacity for effective human intelligence collection.

(2) The United States Armed Forces will, in the course of carrying out their duties in defense of our Nation, be required to carry out human intelligence collection activities.

(3) Improving the human intelligence collection capacity of the United States Armed Forces requires the maintenance of a corps of career military professionals in the discipline of human intelligence who are experts in the practice and management of human intelligence collection and who can carry out sustained long-term intelligence operations.

(b) IMPROVEMENT OF HUMAN INTELLIGENCE COLLECTION CAPABILITIES.—The Secretary of Defense shall develop a strategy to—

(1) reform organizational and incentive structures to—

(A) provide for career-long focus in the human intelligence discipline for military officers of each military department;

(B) ensure career advancement opportunities for officers specializing in the human intelligence discipline that are focused on human intelligence collection, rather than service with or command of a military unit not involved in the intelligence discipline; and

(C) organize, within the human intelligence career field, assignments, promotions, and incentives structured with the goal of developing and increasing expertise in the human intelligence discipline and

preparing officers for greater responsibilities within that discipline;

(2) provide ongoing professional education and development in specialized intelligence skills, specialized language and cultural skills, relevant law and doctrine pertaining to the practice of human intelligence activities, and command, management, and oversight of personnel involved in human intelligence activities;

(3) provide training in human intelligence activities for select personnel not assigned to an intelligence career field in order to enable a surge capacity for assigning personnel to human intelligence activities when additional personnel are needed for military intelligence activities; and

(4) assign human intelligence personnel to positions according to geographic, language, or cultural expertise.

(c) REPORT REQUIRED.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to Congress a report on the development of the strategy required under subsection (b).

SEC. 504. STRATEGY FOR DETENTION OF TERRORIST SUSPECTS AND CONVICTS.

(a) FINDINGS.—Congress finds the following:

(1) A 2006 study by George Washington University and the University of Virginia entitled “Out of the Shadows” found that “Radicalization in prisons is a global problem and bears upon the national security of the U.S.”.

(2) The Report of the Task Force on the Future of Terrorism, a task force created at the direction of the Secretary of Homeland Security and comprised of members of the Homeland Security Advisory Council, recommended to the Secretary of Homeland Security that “The Department should develop and immediately implement, in

concert with the Department of Justice and State and local corrections officials, a program to address prisoner radicalization and post-sentence reintegration”.

(3) Since Operation Iraqi Freedom began in March 2003, the United States has detained more than 65,000 Iraqis, with each individual remaining in detention for an average of over 300 days.

(4) On April 8, 2007, the Los Angeles Times reported that “U.S. run detention camps in Iraq have become a breeding ground for extremists where Islamic militants recruit and train supporters.”.

(b) STRATEGY REQUIRED.—Not later than one year after the enactment of this Act, the President, in consultation with the Secretary of Homeland Security, the Attorney General, the Secretary of Defense, and the Director of National Intelligence, shall submit to Congress a strategy for the detention of terrorist suspects and convicts. Such strategy shall include—

(1) an assessment of the threat posed by radicalization or recruitment for terrorist activities of detained and imprisoned individuals; and

(2) a plan for minimizing radicalization and terrorist recruitment in detention or prison facilities operated by the United States that—

(A) addresses the potential radicalization of prisoners in facilities operated by the Bureau of Prisons or by State or local authorities within the United States; and

(B) addresses the potential radicalization of prisoners in detention facilities operated by the United States in an area where the United States Armed Forces are conducting combat or peacekeeping operations, including detention facilities in Iraq and Afghanistan.

APPENDIX B: PREVIOUSLY INTRODUCED LEGISLATION

It is important to mention some unsuccessful attempts to introduce domestic legislation that would have specifically addressed glaring weaknesses in current domestic law. These bills provide insight into the legislative concerns regarding weaknesses and gaps in the law with regard to torture and extraordinary rendition and proposals as to ways to remedy them.

CONVENTION AGAINST TORTURE IMPLEMENTATION ACT OF 2005. Senator Patrick Leahy introduced the Convention Against Torture Implementation Act (CATIA) on March 17, 2005.²⁴⁴ The purpose of the CATIA was to prohibit the expulsion, return, or extradition of persons by the United States to countries engaging in torture, and for other purposes.²⁴⁵ This bill would have repealed section 2242 of the FARRA.²⁴⁶ The CATIA would have directly addressed the issue of extraordinary rendition by explicitly barring United States officials from engaging in the rendition of suspects from both the United States and foreign countries to countries that engage in torture.²⁴⁷

TORTURE OUTSOURCING PREVENTION ACT OF 2007. Rep. Edward Markey introduced the Torture Outsourcing Prevention Act (TOPA) on March 6, 2007.²⁴⁸ The purpose of the TOPA is to “prohibit the return or other transfer of persons by the United States, for the purpose of detention, interrogation, trial, or otherwise, to countries where torture or other inhuman treatment of persons occurs, and for other purposes.”²⁴⁹ The provisions of this act should be

²⁴⁴ <http://www.govtrack.us/congress/billtext.xpd?bill=s109-654>

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ <http://www.govtrack.us/congress/billtext.xpd?bill=h109-952>

²⁴⁹ *Id.*

incorporated into the IDRA in order to address that its lack of an express prohibition on extraordinary rendition.

LIMITATIONS ON INTERROGATION TECHNIQUES ACT OF 2008. Senator Christopher Bond introduced the Limitations on Interrogation Techniques Act (LITA) on July 31, 2008.²⁵⁰ The purpose of the LITA was to prohibit any personnel of the intelligence community of the United States as well as contractors, or subcontractors thereof from subjecting individuals in their control to interrogation techniques that include:

- 1) forcing the individual to be naked, perform sexual acts, or pose in a sexual manner;
- 2) placing hoods or sacks over the head of the individual or using duct tape over the eyes;
- 3) applying beatings, electrical shock, burns, or similar forms of physical pain;
- 4) using the technique known as waterboarding;
- 5) using military working dogs;
- 6) inducing hypothermia or heat injury;
- 7) conducting mock executions; or
- 8) depriving the individual of adequate food, water, or medical care.²⁵¹

The LITA would have directly prohibited the type of interrogation techniques used by the CIA, approved by President Bush in Executive Order 13440, and infamously conducted at Abu Ghraib prison in Baghdad, Iraq.²⁵²

²⁵⁰ <http://www.govtrack.us/congress/bill.xpd?bill=s110-3386>

²⁵¹ *Id.*

²⁵² See Exec. Order No. 13,440, 72 Fed. Reg. 40707 (July 24, 2007); see generally <http://www.washingtonpost.com/wp-dyn/content/linkset/2006/02/15/LI2006021501067.html>

APPENDIX C: PROJECT SUMMARY

Interrogation and Detention Reform Policy Project

University of North Carolina School of Law, Immigration and Human Rights Policy Clinic

Caroline Smiley and Martá Brown

Our Project

The purpose of our project is to examine the need for reform to U.S. law on detention and interrogation of terror suspects. Our project first examines existing international and domestic standards governing torture and extraordinary rendition to identify gaps in the existing legal framework. We then examine H.R. 591, the Interrogation and Detention Reform Act of 2008 in light of the loopholes identified and analyze the important role that this legislation will play in closing these gaps. Finally, we explore issues not addressed by H.R. 591 including improvements that could be made to the bill and the issue of accountability for past abuses.

H.R. 591: The Interrogation and Detention Reform Act of 2008

- **SIGNIFICANCE:** the Interrogation and Detention Reform Act (IDRA) fills in many of the loopholes in federal law relating to detention of terror suspects that were exploited by the Bush administration and resulted in gross human rights violations. This legislation is particularly significant for the improvements in the law on torture and cruel, inhuman, and degrading treatment.
- Major changes to the law made by the IDRA
 - Develops a uniform policy for the interrogation and detention of detainees

- All detainees under the effective control of the intelligence community of the United States must be registered with the International Committee of the Red Cross and be allowed unfettered access to the ICRC, even if the detainees are not protected under the Geneva Conventions
- The Uniform Code of Military Justice and civilian courts are used to try terrorism suspects
- Repeals the unsuccessful Military Commissions Act as well as portions of the Detainee Treatment Act of 2005
- Requires the closure of Guantánamo no later than 180 days after it is signed
- Prohibits the awarding of private contracts for the purpose of arresting, interrogating, detaining, transporting or transferring suspects
- Requires the President to create guidelines for the recording of interrogations which must comply fully with the laws of the United States, ensure that the recordings are kept for a length of time sufficient to serve the interest of justice
- Requires the President to establish the United States Center for Excellence in Human Intelligence Collection
- Requires the President to submit a strategy for detaining terrorist suspects and convicts that addresses the threat posed by the recruitment of detainees for terrorist activities.

Beyond the Interrogation and Detention Reform Act of 2008

- The IDRA's Weaknesses
 - Does not address the issue of the worldwide network of C.I.A. "black sites"
 - Does not sufficiently define torture and cruel, inhuman, and degrading treatment
 - Does not prohibit extraordinary rendition
- Accountability for past human rights violations
 - Backward looking accountability is essential to send the message that future human rights abuses will not be tolerated
 - Methods for bringing accountability
 - Investigatory Commissions
 - Criminal Prosecutions
 - Civil liability



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