

September 2, 2005

Patrice Gillibert
Secretary
Human Rights Committee
Office of the High Commissioner for Human Rights
Palais Wilson, Office 1021
Rue des Paquis 52
1201 Geneva
SWITZERLAND

By e-mail: pgillibert@ohchr.org

Dear Ms. Gillibert:

Re: Issues of concern in the United States for consideration by the United Nations Human Rights Committee

We refer to your request of August 3, 2005 for information on counter-terrorism measures adopted by the United States following the events of September 11, 2001 and enclose a memorandum on our major concerns with these measures. We note that the Committee's request has been prompted by the United States' failure to submit its Second and Third Periodic Reports and welcome the Committee's initiative in attempting to ensure that the United States complies with its obligations under the International Covenant on Civil and Political Rights.

We understand that this information will be considered by the Human Rights Committee in adopting a list of specific concerns should the United States fail to submit its reports by October 17, 2005.

At the outset, the Committee should note that many of the measures directed against persons suspected of involvement in terrorism, such as, for example, the round-up and detention of Arab, South Asian and Muslim men in the states of New York and New Jersey, in the immediate aftermath of the September 11 attacks, and the arrest and detention of U.S. and non-U.S. citizens as "enemy combatants" in the United States, Afghanistan, Iraq and elsewhere, have been carried out, not under provisions of the USA PATRIOT Act or other legislative enactments, but rather pursuant to Executive Orders, policies promulgated by the U.S. Executive, and restrictive interpretations of U.S. immigration laws and the Material Witness Act.

Sincerely,

American Civil Liberties Union
Enc.

AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, New York, New York 10004
(212) 519-7870 ph; (212) 549-2680 fax
swatt@aclu.org; jdakwar@aclu.org

TO: Members of the United Nations Human Rights Committee

FROM: The American Civil Liberties Union

DATE: September 2, 2005

RE: Request for Information on Counter-Terrorism Measures Adopted by the United States Following the Events of September 11, 2001

I. THE EFFECT OF MEASURES TAKEN IN THE FIGHT AGAINST TERRORISM FOLLOWING THE EVENTS OF SEPTEMBER 11, 2001

1. Post-September 11 law enforcement policies against Arab, South Asian and Muslim immigrant communities in the United States

Violations of the right to be free from arbitrary arrest and detention, from cruel, inhuman or degrading treatment and discrimination. (ICCPR, Articles 7, 9, 10, and 26).

The Round-up, Detention and Deportation of Arab, South Asian and Muslim Men

According to two official reports published by the Office of the Inspector General of the U.S. Department of Justice, published in 2003¹ shortly after the terrorist attacks on New York and Washington, D.C., the United States rounded-up, arbitrarily detained and interrogated hundreds of men from (or appearing to be from) Arab, South Asian or Muslim countries. Despite the lack of any concrete evidence, these men were said to have been investigated on suspicion of their possible involvement in terrorist activity, although the Inspector General found that few, if any, had any real links to terrorism and that the process of naming them as “of special interest” to the investigation was often based on the most tenuous and haphazard of connections. If it transpired during the course of the

¹ See, The U.S. Department of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks, June 2003; The U.S. Department of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York, December 2003. Available at <http://www.usdoj.gov/oig/igspeccr1.htm>; See also, America's Disappeared: Seeking International Justice for Immigrants Detained After September 11. Available at <http://www.aclu.org/files/openfile.cfm?id=14799>. Brooklyn's Abu Ghraib. Available at <http://nydailynews.com/front/story/282716p-242172c.html>;

investigation that they were in the United States in violation of the immigration laws, they were immediately arrested, even if the violation was technical and if immigrants in similar circumstances had, as a matter of policy, been given the opportunity to file paperwork to correct such violations in lieu of arrest and deportation. These men were detained often for months at a time, even if they were not contesting deportation and despite the fact that the government was able to effectuate their removal from the country.

While detained, these immigration detainees were subjected to a regime of physical and psychological abuse. According to the conclusions of the second report, published in December 2003 and focusing on one detention center in Brooklyn, New York, staff and supervisors engaged in the following types of physical brutality: slamming, bouncing and ramming detainees against the walls; bending detainees' arms, hands, wrists and fingers; pulling and stepping on detainees' restraints to cause pain; improper use of restraints; and rough and inappropriate handling.²

These incidents were not isolated. The OIG report is replete with evidence substantiating the systemic nature of the abuse, noting that: "almost all the detainees were slammed against walls"; at least "one officer always twisted detainees' hands"; some officers stepped on detainees' leg chains "whenever they were stopped"; and detainees were often handled roughly and inappropriately."³ The report also notes that despite the fact that reports of these incidents were made to senior management, no corrective action was taken.⁴ To date, not one government official has been prosecuted for involvement in these acts of abuse.

Two reports published by the ACLU also document the devastating impact that the deportation of these men has had on their families and the immigrant communities in the United States.⁵

Special Registration Program

In September 2002, the U.S. Department of Justice began the "special registration" program, also known as the National Security Entry-Exit System (NSEERS), which required selected visitors to the U.S. to be fingerprinted, photographed and questioned. Those subjected to special registration then faced often-confusing re-registration and departure registration requirements, with harsh penalties -- including exclusion from the U.S. -- imposed for failure to comply. NSEERS's most controversial component, known

² *Id.* at 16, 18, 20, 22, 25, 28.

³ *Id.* at 10, 17, 21, 26.

⁴ *Id.* at 22, 24, 25, 38.

⁵ America's Disappeared, *supra*, fn. 1 and World's Apart: How Deporting Immigrants After 9/11 Tore Families Apart and Shattered Communities, *available at*: <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17163&c=206>

as "domestic" or "call-in" registration, imposed the special registration requirements on men and boys, aged 16 and over, who came to the U.S. as "nonimmigrants" before NSEERS was introduced. The domestic component, implemented in four phases, applied exclusively to male citizens and nationals of twenty-five countries. With the exception of North Korea, every country designated for special registration was predominantly Muslim and located in the Middle East, South Asia or North Africa. In less than a year, 83,519 men and boys complied with the special registration requirements.

None of the individuals who reported for special registration were charged with terrorism. While special registration was ineffective as a national security tool, it was effective as a tool for selectively enforcing U.S. immigration law. By the end of the program's first year, 13,799 of those who reported were placed in deportation proceedings, and 2,870 were detained. The government never extended domestic registration beyond the initial list of predominantly Muslim countries.

In December 2003, with problems mounting as a consequence of the government's failure to provide adequate notice about re-registration requirements, the Department of Homeland Security, which had assumed responsibility for special registration, suspended the program's 30-day and annual re-registration requirements. However, some of the special registration requirements remain in effect to this day, including an often unknown requirement that those who went through special registration must restrict their departures from the U.S. to designated ports and formally register their departures before leaving.

2. Racial Profiling of the U.S. Arab, South Asian and Muslim Communities

Violations of right to privacy, to freedom from discrimination and religious freedom. (ICCPR, Articles 2(1), 17, 18 and 26).

Discrimination By Airlines

As well as the round-up and detention of Arab, South Asian and Muslim men noted above, in the immediate aftermath of the terrorist attacks, many large U.S.-based airline corporations including American, Continental, Northwestern and United Airlines, discriminated against Arab, South Asian and Muslim men (or men who airline staff perceived to be so). Many of them were summarily ejected from flights based solely on the prejudices of airline employees and passengers and for reasons wholly unrelated to security. While the Government took steps immediately after the attacks to remind airlines of their obligation not to discriminate on the basis of race, ethnicity, religiosity or other grounds, and in some instances even entered into agreements to this effect, it nevertheless failed to adequately ensure that the airlines complied with the measures adopted, resulting in numerous cases of discrimination by the airlines.

On June 4, 2002, the ACLU filed five civil rights lawsuits in an attempt to redress blatant discrimination by airline corporations across the country. Two of these lawsuits ended in

settlements with the airlines undertaking to institute measures that will militate against future discrimination. The other two lawsuits are pending before federal court.⁶

Anti-Islamic Border Security Policy

The Department of Homeland Security, the government department currently responsible for immigration, has also adopted policies that encourage racial profiling of persons of Muslim faith. On their way back from attending an Islamic conference in Toronto, Canada in December 2004, U.S. citizens, all of whom are Muslim, were detained, frisked, photographed and fingerprinted by U.S. Immigration officials. Their treatment resulted from a policy promulgated by the Department of Homeland Security which required they be treated in such a manner simply because they attended an Islamic conference. Among those detained by border officials were several families with their children, including an infant and a pregnant woman.⁷

3. Detention of U.S. and Non-U.S. Citizens as “Enemy Combatants” In the United States

Violations of the right to be free from arbitrary arrest and detention and cruel, inhuman or degrading treatment, and to a trial by a fair and impartial tribunal (ICCPR, Articles 7, 9 and 14)

Since September 11, the United States has detained three men, two U.S. citizens and one, non-U.S. citizen, in indefinite military custody after being designated as “enemy combatants” by the President. Yarer Esam Hamdi, who was born in the United States, but who lived most of his life in Saudi Arabia, was captured in Afghanistan, allegedly fighting for the Taliban. Initially held at Guantánamo, Hamdi was transferred to military custody in South Carolina when it was discovered he was in fact a U.S. citizen. Jose Padilla, also a U.S. citizen, was picked up by law enforcement officials at Chicago International Airport. At first he was held as a material witness under the Material Witness Act before being designated an “enemy combatant” and transferred to military custody also in South Carolina. Al Marri, unlike Hamdi and Padilla, is not a U.S. citizen. A citizen of Qatar, Al- Marri was a student in Illinois when law enforcement officials detained him, designated an “enemy combatant” and transferred to military custody in South Carolina.⁸

In legal proceedings on behalf of all three, the Government has taken the position that the President has the unilateral power, in his position as commander in chief of the armed forces to capture “enemy combatants” wherever they are found, including within the

⁶ See, <http://www.aclu.org/RacialEquality/RacialEquality.cfm?ID=10422&c=133>

⁷ See, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=18070&c=206>

⁸ See generally, Indefinite Detention Without Charge of American Citizens as “Enemy Combatants” (September 13, 2002) available at: <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=10673&c=206&Type=s>

United States, and to detain them indefinitely, without permitting any court to review the president's actions.⁹

To date the government has used the "enemy combatant" designation in many different ways to achieve numerous different ends. Although in the Hamdi case the government claimed that it had established a set of criteria that govern its determination of who receives "enemy combatant" status, no such guidelines have ever been made publicly available. Consequently, it is impossible to assess who in the Government participates in the decision to designate an individual as an "enemy combatant," what factors are considered when the decision is made, what evidence is required to support the finding, what standard of proof is used to assess the evidence, who reviews the assessment and under what standard, and how the decision is made to prosecute the individual in the criminal justice system --- as was the case with John Walker Lindh --- or transfer him to military detention for indefinite executive detention.¹⁰

The term as used by the government, does not fit within any category of participants in military hostilities as those categories have been defined under U.S. or international law.

In habeas proceedings brought on behalf of Hamdi, the U.S. Supreme Court ruled against the government's contention that he had no right to have his habeas claims considered by a U.S. court. Subsequent to the Court's ruling, the government released Hamdi from custody and deported him to Saudi Arabia. Both Padilla and al-Marri remain in military custody, with both their cases pending before U.S. federal Court in South Carolina.

On February 28, 2005, the federal district court in Padilla's case ruled that the President had no power to hold Padilla as an "enemy combatant" and ordered him released from military custody within 45 days.¹¹ The government has since appealed this ruling.

As well as a habeas corpus challenge to his indefinite detention, Al-Marri recently filed proceedings against United States officials responsible for his detention, among them Secretary of State for Defense Rumsfeld, challenging the conditions under which he is

⁹ See, <http://www.aclu.org/court/court.cfm?ID=15039&c=261> (Detention of Yaser Esam Hamdi) <http://www.aclu.org/court/court.cfm?ID=15454&c=261> (Detention of Jose Padilla)

¹⁰ In a speech before the American Bar Association, then-White House counsel (now U.S. Attorney General) Alberto Gonzales, laid out a series of bureaucratic steps taken in secret by the U.S. administration to determine whether to detain a terrorist suspect as an "enemy combatant," thereby effectively depriving the suspect of the right to counsel, the presumption of innocence, the right to see the charges against him, and other legal rights. The steps outlined by Mr. Gonzales largely consist of a series of legal memos based on classified information and written by various government agencies, including the White House counsel's office, the Criminal Division of the Department of Justice, the Defense Department, and others. The speech made clear that the entire process is secret, ex parte, and occurs entirely within the Executive Branch on the basis of secret criteria never reviewed by Congress or the Judiciary. See, Remarks by Alberto Gonzales, Counsel to the President, Before the American Bar Association Standing Committee on Law and National Security, (Feb. 24, 2004). available at: http://www.abanet.org/natsecurity/judge_gonzales.pdf

¹¹ See, *Jose Padilla v. Commander C.T. Hanft*, CV, No. 2:04-2221-26AJ (S.C.C., Feb. 28, 2005)

being held. He alleges mistreatment amounting to cruel, inhuman and degrading treatment, including lack of access to counsel and family members, and inability to practice his religion.¹²

4. Use of the Material Witness Act for Arrest, Detention and Interrogation of Persons Suspected of Involvement in Terrorism

Violations of the rights to be free from arbitrary arrest and detention, from cruel, inhuman or degrading treatment and from discrimination. (ICCPR Articles 7, 9, 10, and 26).

Following the September 11 attacks, the Justice Department held at least 70 men—all but one Muslim—under a narrow federal law that permits the arrest and brief detention of “material witnesses” who have important information about a crime, if they might otherwise flee to avoid testifying before a grand jury or in court. Although federal officials suspected the men of involvement in terrorism, they held them as material witnesses, not criminal suspects.

Almost half of the witnesses were never brought before a grand jury or court to testify. The U.S. government has apologized to 13 for wrongfully detaining them. Only a handful were ever charged with crimes related to terrorism.

A report published in June 2005 jointly by the ACLU and Human Rights Watch details how the U.S. Department of Justice relied on false, flimsy or irrelevant evidence to secure arrest warrants for the men and to persuade courts that they were flight risks who had to be incarcerated. Almost all the men, in fact, had cooperated with federal authorities before their arrest. Many proved to have no information relevant to a criminal proceeding.

Although detainees were not even accused of any criminal wrongdoing, witnesses were typically arrested at gunpoint, held around the clock in solitary confinement, and subjected to the harsh and degrading high-security conditions usually reserved for prisoners accused or convicted of the most dangerous crimes. Corrections staff verbally harassed the detainees and, in some cases, physically abused them.

The report found that one-third of the 70 confirmed material witnesses were incarcerated for at least two months. Some were imprisoned for more than six months, and one actually spent more than a year behind bars. According to the report, the Justice Department apparently used the material witness statute to buy time to conduct fishing expeditions for evidence to justify arrests on criminal or immigration charges. When there was no such evidence, the Justice Department simply held the men under the material witness law until it concluded that it had no further use for them or until a judge finally ordered their release.

The report also documents the long-term effects of the Justice Department’s material

¹² See, *Ali Saleh Kahlah Al-Marri v. Rumsfeld*, available at: <http://hrw.org/us/us080905.pdf>

witness policy on witnesses and their families. While recovering from the trauma of being jailed in harsh conditions, witnesses often continued to live under a specter of suspicion. They faced lingering questions in the community about their ties to terrorism, even in cases when the government apologized. Many lost businesses and job opportunities, and some had to move to new communities to restart their lives.¹³

5. Random Searches

Violations of the right to privacy. (ICCPR Article 17)

Two weeks after the terrorist attacks on the London metropolitan transportation system, the New York Police Department (NYPD) adopted a policy of searching possessions of persons seeking to enter the New York subway system without any suspicion of wrongdoing. Since adopting this policy, police officers have searched the purses, handbags, briefcases and backpacks of thousands of people, all without any suspicion of wrongdoing.¹⁴ While the NYPD insist that the searches are random, the arbitrary nature of the searches gives rise to the possibility of racial profiling.

6. Criminalization of political protest

Violations of the right to freedom of expression and peaceful assembly. (ICCPR Articles 19 and 21).

Since September 11, hundreds of individuals have been arrested for exercising their constitutionally protected freedom to dissent; some have lost their jobs or been suspended from school. Some government officials, including local police, have gone to extraordinary lengths to silence dissent wherever it has sprung up, through a number of different tactics -- from censorship and surveillance to detention, denial of due process and excessive force.¹⁵ For example, during the Republican National Conference in New York in August, 2004, numerous protesters were arrested without probable cause and police officers involved in their arrests have not been held to account.¹⁶

The Federal Bureau of Investigation also has directed the Joint Terrorism Task Force (JTTF) (legal partnerships between the FBI and local police) to monitor, interrogate and suppress anti-war and other political protesters. Law enforcement officials throughout the

¹³ Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11. available at: <http://www.aclu.org/Files/OpenFile.cfm?id=18584>; See also, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11370&c=206>

¹⁴ See, http://www.nyclu.org/mta_searches_suit_pr_080405.html

¹⁵ <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12942&c=207>; See also, Freedom Under Fire: Dissent in Post 9/11 America. available at: <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12666&c=206>

¹⁶ <http://www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=16879&c=86>

U.S. have engaged in the monitoring of the daily activities of various activists they believed to be planning to protest major national political events, including the Republican National Convention. In the days leading up to the Democratic National Convention, officials identifying themselves as JTTF agents made “visits” to the homes of several activists as well as their friends and family members.¹⁷

On April 5, 2004, the Department of Justice’s Office of Legal Counsel issued a legal memorandum that supports this policy of surveillance of peaceful protesters.¹⁸

7. Surveillance of U.S. based activist groups by U.S. law enforcement agencies

Violations of the right to freedom of expression and peaceful assembly. (ICCPR Articles 19 and 21).

Since September 11, the ACLU has uncovered evidence that the FBI and local police are illegally spying on political, environmental and faith-based groups. For example, media reports documented many instances of JTTF involvement in the investigation of environmental activists, anti-war protesters, and others who are clearly not terrorists nor involved in terrorist activities, including, the infiltration of student peace activists and tracking down their parents; the gathering of files on Americans Friends Service Committee anti-war events; the interrogation of animal rights activists in their homes; sending undercover agents to National Lawyers Guild meetings; and aggressive questioning of Muslims and Arabs on the basis of religion or national origin rather than suspicion of wrongdoing.

On December 2, 2004, the ACLU and its affiliates filed Freedom of Information Act (FOIA) requests in 10 states and the District of Columbia seeking information about the FBI’s use of JTTFs and local police to engage in political surveillance. The FOIAs seek two kinds of information: 1) the actual FBI files of groups and individuals targeted for speaking out or practicing their faith; 2) information about how the practices and funding structure of the task forces, known as JTTFs, are encouraging rampant and unwarranted spying.

Since filing the requests, the ACLU has uncovered that that federal and state counterterrorism officers have indeed been actively monitoring the activities of groups and individuals engaged in peaceful protest activities, civil and human rights work and religious activities. Most recently, the ACLU obtained an FBI report labeled “Domestic Terrorism Symposium,” that designates a Michigan-based peace group and an affirmative action advocacy group as potentially “involved in terrorist activities.”

Among the groups mentioned in the report are Direct Action, an anti-war group, and BAMN (By Any Means Necessary), a national organization dedicated to defending

¹⁷ <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16248&c=282>

¹⁸ See, <http://www.aclu.org/Files/OpenFile.cfm?id=16252>

affirmative action, integration, and other gains of the civil rights movement of the 1960s. The FBI acknowledges in the report that the Michigan State Police has information that BAMN has been peaceful in the past.¹⁹

8. Excessive Government Secrecy

Restrictions on Freedom of Information Act requests

Violation of the right to freedom of expression. (ICCPR Article 19).

Enacted in 1974, the Freedom of Information Act allows anyone to hold the U.S. government accountable by requesting and scrutinizing public documents and records. On October 12, 2001, then U.S. Attorney General John Ashcroft urged federal agencies to adopt a highly restrictive approach to Freedom of Information Act requests made by the American public. Rather than asking federal officials to pay special attention when a request for information might interfere with the government's need to safeguard national security, the Policy Memorandum instead asked them to consider whether “institutional, commercial and personal privacy interests could be implicated by disclosure of the information.” The memorandum also stipulates that if a federal agency decides to withhold records, in whole or in part, it can be assured that the Department of Justice will defend the decision unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records. In practice this policy has made it very much more difficult for members of the public to secure government documents through the FOIA process.²⁰

Closed Immigration Hearings

Violation of the right to a fair and public hearing. (ICCPR, Article 14)

Pursuant to a memorandum from the Chief Immigration Judge of the United States, all post-911 “special interest” immigration hearings were required to be held in closed court and even omitted from the court dockets. (In a reversal of the time-honored presumption of innocence, “special interest” cases were those in which the detainee in question had not been cleared of connections to terrorism by the law enforcement agencies). Previously, immigration judges had been permitted to determine on a case-by-case basis whether security or other reasons would require a case to be closed to the public, with a presumption in favor of open hearings. Although one Court of Appeal upheld the constitutionality of this measure, it was struck down by another. The U.S. Supreme Court turned down the opportunity to give a final decision on the issue.²¹

¹⁹ See, <http://www.aclu.org/spyfiles/>; See also, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=18862&c=206>

²⁰ See, http://www.doi.gov/foia/new_attorney_general_memo.html

²¹ See, <http://www.aclu.org/Files/OpenFile.cfm?id=11997>

“No Fly” Lists

Violation of the right to privacy and to due process of law. (ICCPR, Articles 9 and 17)

In November 2002, the Transportation Security Administration (TSA), a governmental body concerned with airline and airport security, acknowledged the existence of a “No-Fly” list. Originally created in 1990, the list was distributed to all airlines after September 11 with instructions to stop or conduct extra searches of people suspected of being threats to aviation. Initially administered by the Federal Bureau of Investigation, the Federal Aviation Administration and the TSA assumed full responsibility for its control in November 2002.

Pursuant to instructions incorporated in the list, many innocent travelers who pose no safety risk whatsoever are stopped and searched repeatedly. In all parts of the country, there have been countless instances of individuals being singled out because of their ethnicity, religion or political activity. The list appears to have been shared widely among U.S. law enforcement agencies, internationally and with the U.S. military.

On April 6, 2004, the ACLU filed suit in federal court against the then Secretary of the Department of Homeland Security, Tom Ridge and others seeking to have the list as it has been administered declared unconstitutional as being in violation of their right to be free from unreasonable search and seizure and to due process of law. The ACLU also sought to have the TSA develop procedures to allow innocent people (such as those who have the same name as a suspect on the list or who are wrongly placed on the list) to fly without being treated as terrorists and subjected to humiliation and delay.²²

On January 7, 2005, the case was dismissed on legal grounds. No appeal was filed because while the case was pending, Congress passed legislation that effectively remedied many of the violations that the lawsuit sought to address.

9. Promulgation of a policy of “extraordinary rendition”: the transfer of individuals to countries in which there is a substantial likelihood that they will be tortured for purposes of interrogation or detention

Violation of the right to be free from torture and other cruel, inhuman or degrading treatment or punishment. (ICCPR Article 7).

In early 2002 media reports emerged indicating the use of a counter-terrorism technique known as “rendition” or “extraordinary rendition” whereby individuals suspected of involvement in terrorist-related activity are transferred by the United States to the custody of foreign intelligence services in countries where the practice of torture and other cruel, inhuman or degrading treatment is well-documented. These transfers occur outside the confines of any legal procedure, such as deportation or extradition, and do not allow the individual access to counsel or to any judicial body to contest the transfer. They are

²² See, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12740&c=206>

apparently for the purpose of continued detention in the country of transfer or detention and interrogation.

Pursuant to the practice, U.S. officials maintain contact with the country to which the individual is “rendered” and exchange information with foreign intelligence agents conducting the interrogation. While U.S. officials have claimed they obtain “diplomatic assurances” from the governments concerned that detainees will not be tortured, it appears that in practice officials do nothing to monitor whether those assurances will be honored, turning a blind eye to the methods they employ to extract the information. Foreign intelligence agencies appear to be chosen specifically because of their expertise in the use of torture and other harsh interrogation techniques.²³

Countries to which detainees have been sent include Egypt, Syria, Jordan, Morocco and Saudi Arabia. The U.S. Department of State Human Rights Reports for these countries all document the use of torture in these countries as “routine.”

The technique has been described publicly by the former Director of the Central Intelligence Agency, George J. Tenet, as one of the United States’ key counter-terrorism policies. In his testimony before the 9/11 Commission of Inquiry, Tenet stated publicly that in an unspecified period before September 11, the U.S. had undertaken over 80 such renditions, adding that the CIA had “racked up many successes, including the rendition of many dozens of terrorists prior to September 11, 2001.”²⁴

News media have reported that the practice of “rendering” individuals, developed by military or CIA lawyers and “vetted by Justice Department’s office of legal counsel,” has been applied to hundreds – if not thousands – of individuals in post-9/11 terrorism interrogations.²⁵ More recently, it has been reported that the President himself authorized the current practice.²⁶

²³ Rajiv Chandrasekaran and Peter Finn, “U.S. Behind Secret Transfer of Terror Suspects”, *Washington Post*, March 11, 2002; David E. Kaplan, et al., “Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After Al Qaeda”, *U.S. News & World Report*, June 2, 2003, (describing rendition of individuals to Jordan, Egypt, Morocco and Syria); *See also*, Priest & Gellman, *supra* (quoting senior United States official as stating that after an individual is rendered, the CIA are “still very much in control” and that they will often “feed questions to their investigators”). For a comprehensive news report on the practice, see Jane Mayer, “Outsourcing Torture: The Secret History of America’s ‘Extraordinary Rendition’ Program”, *The New Yorker*, February 14, 2005.

²⁴ *Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States* (March 24, 2004) (statement of George Tenet, former Director of CIA).

²⁵ Dana Priest and Joe Stephens, “Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons is Coming to Light”, *Washington Post*, May 11, 2004 (detailing the long-time existence of “interrogation rooms of foreign intelligence services – some with documented records of torture – to which the U.S. government delivers or ‘renders’ mid- or low-level terrorism suspects for questioning”).

²⁶ Douglas Jehl and David Johnson, “Rule Change Lets CIA Freely Send Suspects Abroad to Jails”, *The New York Times*, March 6, 2005.

U.S. Attorney General Alberto Gonzales has openly defended the practice, stating that U.S. policy is not to send detainees “to countries where we believe or we know that they’re going to be tortured.” He added that if a country has a long history of torture, the United States seeks diplomatic assurances that torture will not be used. However, he acknowledged openly that it was not possible to “fully control” what other nations do.²⁷

II. THE EFFECTS OF THE USA PATRIOT ACT ON U.S. AND NON-U.S. CITIZENS²⁸

Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001, forty-five days after the September 11 attacks with little or no debate in Congress or the Senate. The ACLU believes there are significant flaws in the Act, flaws that threaten certain fundamental rights of both U.S. and non-U.S. citizens. In summary, the ACLU’s major concerns are that the Act:

- Expands terrorism laws to include “domestic terrorism” which could subject political organizations to surveillance, wiretapping, harassment, and criminal action for political advocacy.
- Expands the ability of law enforcement to conduct secret searches, gives them wide powers of phone and Internet surveillance, and access to highly personal medical, financial, mental health, library and student records with minimal or no judicial oversight.
- Allows law enforcement officers to investigate U.S. citizens for criminal matters without probable cause of crime if they say it is for “intelligence purposes.”
- Permits non-U.S. citizens to be jailed based on mere suspicion and to be denied re-admission to the U.S. for engaging in free speech.
- Permits suspects convicted of no crime to be detained indefinitely in six month increments without meaningful judicial review.
- Violations of the rights to privacy and freedom of expression. (ICCPR Articles 23 and 19).

²⁷ R. Jeffrey Smith, “Gonzales Defends Transfer of Detainees”, *Washington Post*, March 8, 2005. *See also*, Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard Against Torture, April 2005. *See also*, Association of the Bar of the City of New York and the Center for Human Rights and Global Justice at NYU School of Law, *Torture by Proxy: International and Domestic Law Applicable to ‘Extraordinary Renditions’*, Oct. 14, 2004.

²⁸ *See generally*, <http://action.aclu.org/reformthepatriotact/facts.html#one>; *see also* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12126&c=207>

Surveillance Powers

The PATRIOT Act increases the government's surveillance powers in a number of ways. The most invasive of the Acts surveillance powers are set forth in sections 213, 215, and 505. In short, these provisions dramatically expand the authority of law enforcement officials to monitor the activities and communications of both U.S. and non-U.S. citizens. As well as violating the right to privacy, these provisions have a significant adverse impact on the freedom of expression.²⁹

Section 213 expands law enforcement's ability to conduct secret "sneak and peek" searches of private residences. Investigators can obtain a search warrant to enter private dwellings or offices, take pictures and seize items without informing the owners or occupiers that a warrant was issued, for an indefinite period. These warrants are not limited to terrorism cases, but can be used in any federal criminal investigation. Section 215 gives law enforcement broad access to any types of records – medical, financial, gun, library, educational, sales, etc. – without probable cause of a crime, and without any individual suspicion that such records are related to the legitimate target of an intelligence investigation, such as a suspected international terrorist, spy, or other agent of a foreign power. It also prohibits the holders of this information, like librarians, from disclosing that they have produced such records, under threat of imprisonment. A secret intelligence court in Washington issues the court orders and judges have little power to deny applications.³⁰

Section 505 authorizes the FBI to issue "national security letters" (NSLs) requiring recipient organizations to disclose sensitive records concerning their patrons, customers, or subscribers. NSLs can be used to obtain a list of websites that a particular person has visited, a list of individuals that a particular person has corresponded with over e-mail, or the identity of a person who has communicated anonymously over the Internet. NSLs are issued unilaterally by the U.S. Department of Justice and are not subject to judicial review of any kind. Section 505 expanded the FBI's authority to issue NSLs. Before the Patriot Act, NSLs could be used to obtain information about suspected terrorists and spies. The amended law permits the FBI to issue NSLs to obtain information about innocent people. Like Section 215, Section 505 includes a gag provision that prohibits NSL recipients from disclosing to anyone that the FBI sought or obtained information from them.

In April 2004, the ACLU and an anonymous Internet Service Provider (ISP) filed a lawsuit challenging the FBI's authority to issue National Security Letters. Because of the gag provision, the ACLU was forced to file the case under seal; it was three weeks before

²⁹ See, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12263&c=206>; see also, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16273&c=262>

³⁰ See, <http://action.aclu.org/reformthepatriotact/215.html>

the ACLU could announce that it had challenged the law. The government continues to insist that the gag provision prohibits the ISP plaintiff from disclosing its name.

In September 2004, a federal judge struck down the NSL statute that applies to communications records and the associated gag provision. In striking down the gag provision, the judge wrote: “Democracy abhors undue secrecy . . . [A]n unlimited government warrant to conceal, effectively a form of secrecy per se, has no place in our open society.”³¹ The government has appealed the Judge’s decision. The appeal is expected to be heard later this year.³²

On August 8, 2005, the ACLU filed a second case challenging the constitutionality of the NSL provision used by the FBI to demand records from an organization that possesses “a wide array of sensitive information about library patrons, including information about the reading materials borrowed by library patrons and about Internet usage by library patrons.” The case is pending before federal court.³³

Material Support Provisions

Section 2339A of Title 18, as amended by the PATRIOT Act section 805(a)(2)(B), criminalizes the provision of “material support or resources” to terrorists and defines material support as including, *inter alia*, “expert advice or assistance.” The phrase “expert advice or assistance” is so vague as to prohibit legitimate freedom of expression activities, such as distribution of human rights literature or consulting with an attorney. As one U.S. federal court which considered this specific provision noted, the phrase is so broad and encompassing that it effectively bans *all* “expert” advice regardless of the nature of that advice.³⁴ In other words, it assumes that all expert advice is material support to a terrorist organization. This same Court held that the phrase also violated due process by failing to give proper notice of what type of conduct was prohibited.³⁵

Relief workers and organizations have testified before the courts and Congress that these provisions are so broad that they have inhibited the distribution of urgently-needed humanitarian supplies to areas of Sri Lanka affected by the 2005 Tsunami disaster that are under the control of the Tamil Tigers, which the U.S. government has designated as a “foreign terrorist organization” under the material support laws. Despite this testimony, Congress has not addressed the overbreadth of the statute, and is now considering legislation to make certain temporary aspects of the law permanent.

³¹ See, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16603&c=282>

³² See, <http://www.aclu.org/nsl/internetrecords.html>

³³ See, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=18957&c=262>

³⁴ *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185, (Cal. C.D. 2004). This case is pending appeal before the Ninth Circuit Court of Appeals.

³⁵ *Id.* at 1199; See also, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=18246&c=206>

Ideological Exclusion Provision

Section 411 of the PATRIOT Act provides that an alien is inadmissible to the United States if he or she has used a “position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activity.” This provision has been used to exclude scholars and other prominent individuals from the United States based on their political views and/or expressive or associational activity, impinging upon the right to freedom of expression of U.S. and non-U.S. citizens living in the United States.³⁶

Those who have been denied entry to the United States on ideological grounds include:

Tariq Ramadan, a widely respected Muslim scholar who was named a “spiritual leader” in *Time Magazine*’s Top 100 Innovators of the 21st Century series, was forced to resign his position at the University of Notre Dame after the government revoked his visa. News reports suggest that Professor Ramadan was excluded under Section 411.

Dora Maria Tellez, a leader in the 1979 movement to overthrow Nicaraguan dictator Anastasio Somoza (and later a democratically elected official), was forced to abandon a teaching position at Harvard University after the government refused to grant her a visa.

A group of 61 Cuban scholars was refused permission to enter the United States to participate in the Latin American Studies Association’s international congress in Las Vegas last October. The United States deemed the scholars’ entry “detrimental to the interests of the United States.” Those rejected include poets, sociologists, art historians, and economists, many of whom have frequently traveled to the United States to lecture at leading American universities in the past.

Instead of addressing this problem by focusing more narrowly on individuals whose speech constitutes incitement to imminent lawless action (and thus lacks the protection of the first amendment to the U.S. constitution) Congress recently enacted the REAL ID Act of 2005, which broadened the reach of section 411 by making ideology a ground of deportation as well as inadmissibility.

III. THE PROBLEMS OF LEGAL STATUS AND TREATMENT OF PERSONS DETAINED IN AFGHANISTAN, GUANTÁNAMO, IRAQ AND OTHER DETENTION FACILITIES UNDER U.S. JURISDICTION AND CONTROL IN OTHER PARTS OF THE WORLD

Since the terrorist attacks of September 11, 2001, the United States government has detained thousands of foreign nationals in connection with the “war on terror.” Presently,

³⁶ See, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17741&c=206>

according to official and unofficial sources, the United States holds approximately 500 prisoners in Afghanistan, 505 at the Guantánamo Bay Naval Base in Cuba,³⁷ and over 10,000 in Iraq.³⁸ Credible reports suggest also that the United States holds numerous other prisoners at secret detention centers – detention centers to which even the International Committee of the Red Cross (ICRC) has been denied access.³⁹ According to media reports, reports of non-governmental organizations, first-hand accounts of former detainees, official investigations by the United States government itself and internal government emails and memoranda, which a federal court ordered the U.S. government to produce pursuant to a Freedom of Information Act (FOIA) request made by the ACLU,⁴⁰ hundreds of these detainees were subjected to torture and other forms of cruel, inhuman or degrading treatment. These documents prove also that abuse of detainees was widespread, systematic, policy-driven and authorized by high-ranking officials.⁴¹

For the most part, the U.S. has utilized presidential executive war powers as well as laws of armed conflict to continue to detain persons suspected of involvement in terror attacks or hostilities against U.S. forces and civilians. While partially recognizing and applying its obligations under international humanitarian law (IHL) and specifically under the Third Geneva Convention Relative to the Treatment of Prisoners of War and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time Of War, the U.S. government has failed to uphold non-derogable human rights protections including the absolute prohibition on torture and other cruel, inhuman or degrading treatment, in all places and at all times.⁴² As detailed below, the U.S. government has violated and continues to violate basic human rights of persons held in U.S. custody abroad, in breach of its specific obligations under articles 2, 4, 5, 6, 7, 9 10, 13, 14, 16, 17, 18, and 26 of ICCPR.⁴³

1. Guantánamo Bay Naval Station

³⁷ <http://www.defenselink.mil/releases/2005/nr20050822-4501.html>

³⁸ Bradley Graham, “700 More Troops to Be Sent To Iraq”, *Washington Post*, August 18, 2005.

³⁹ Human Rights Watch, *The United States’ ‘Disappeared’* (October 2004).

⁴⁰ *ACLU et al. v. Department of Defense et al.*, Docket No. 04-CV-4151 (SDNY 2004).

⁴¹ The FOIA documents can be viewed online at <http://action.aclu.org/torturefoia/>. Since August 2004, the ACLU has received over 75,000 documents.

⁴² “...the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable...both spheres of law are complementary, not mutually exclusive.” Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, April 21, 2004.

⁴³ As a state party to the ICCPR, the U.S. may, in time of declared public emergency, take measures derogating from part of its obligations under the covenant. Thus far, the U.S. has failed to follow the procedures necessary to derogate from any of its obligations under the Covenant.

Violation of the right to non-discrimination (Article 4)
Violation of the right to be free from torture and other cruel, inhuman or degrading treatment or punishment (Article 7)
Violation of right to liberty and freedom from arbitrary arrest or detention (Article 9)
Violation of the right to be treated humanly and with respect to human dignity (Article 10)
Violation of the right to recognition everywhere as a person before the law (Article 16)
Violation of the right to freedom of religion (Article 17)
Violation of the right to be equal before the law (Article 26)

Status of Detainees Held at Guantánamo Bay Naval Station

For nearly four years the U.S. government has detained prisoners at Guantánamo Bay Naval Station, Cuba (Guantánamo).⁴⁴ Although many of them were captured during hostilities in Afghanistan, many others were captured hundreds or thousands of miles from the battle zone in the traditional sense of that term. For example, some of the detainees presently seeking *habeas corpus* relief before federal court in Washington D.C. include men who were taken into custody as far away from Afghanistan as Gambia, Zambia, Bosnia and Thailand.⁴⁵ All have been held there virtually *incommunicado* with only limited access to families, lawyers and U.S. courts.

The U.S. continues to deny detainees the status of prisoners of war under international humanitarian law and at the same time denies them meaningful protections under international human rights law.⁴⁶ The United States asserts that all detainees are “enemy combatants” and can be held as such pursuant to the President’s powers as Commander-in-Chief and under the laws and usages of war until the end of hostilities. The government further asserts that as foreign nationals held outside the sovereign territory of the United States, the detainees are devoid of any rights, enforceable in either U.S. courts or any court in the world, whether under the U.S. Constitution or international law.⁴⁷

⁴⁴ According to U.S. Department of Defense, as of August 31, 2005, approximately 505 detainees are currently held in Guantánamo. Since January 2002, 177 detainees were transferred for release and another 68 were transferred to the control of other countries (Pakistan, Morocco, France, Russia, Saudi Arabia, Spain, Sweden, United Kingdom, Kuwait, Australia, Belgium and Jordan). *See*, <http://www.defenselink.mil/news/Aug2005/d20050831sheet.pdf>

⁴⁵ *See*, *In re Guantánamo Detainee Cases*, Civil Action Nos., 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK) (D. D.C., January 31, 2005) available at: <http://news.findlaw.com/wp/docs/gitmo/inregitmo13105opn.pdf>

⁴⁶ *See*, White House Press Secretary announcement of President Bush’s determination re legal status of Taliban and Al Qaeda detainees (February 7, 2002). available at: <http://www.state.gov/s/l/38727.htm>

⁴⁷ *See*, ACLU’s Amicus Brief in *Rasul v. Bush*, available at: <http://www.aclu.org/court/court.cfm?ID=14741&c=261>

Despite the U.S. Supreme Court ruling in *Rasul v. Bush*, 124 S.Ct. 2886 (2004) in June 2004, that detainees have a right to *habeas corpus* review of their detention before a U.S. federal court, the U.S. government continues to take the position that detainees possess no rights enforceable through the writ of *habeas corpus* before U.S. courts. In response to the *Rasul* decision, the government established two administrative bodies to determine detainee status: Combatant Status Review Tribunals (CSRTs) and Administrative Review Board (ARB).

Combatant Status Review Tribunals

CSRTs were established by the U.S. Department of Defense in an effort to comply with the decision of the Supreme Court in *Rasul*.⁴⁸ Issued on July 7, 2004, the Executive CSRT Order, broadly defines the term “enemy combatant” to mean “an individual who was part of or supporting *Taliban* or *al Qaeda* forces or partners... This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”⁴⁹ These tribunals fail to provide minimum standards of fairness and due process. For example, the rules of the tribunals reverse the presumption of innocence, by presuming that the detainee is in fact an “enemy combatant.” The individual detainee, therefore, carries the burden of rebutting the presumption. Additionally, these administrative tribunals substantially rely upon classified evidence and in the course of the proceedings the detainee has no access to legal counsel but rather is entitled only to the assistance of a personal representative without confidentiality protections.

The CSRT procedure has been heavily criticized by one federal judge in a post-*Rasul* consolidated habeas case on behalf of a number of the detainees. U.S. District Judge Joyce Hens Green ruled in January 2005 that CSRT procedures “fail to satisfy constitutional due process requirements in several respects”⁵⁰ and held that the U.S. government should allow detainees to challenge their detention in U.S. courts. Her ruling is presently on appeal before the U.S. Court of Appeals for the District of Columbia Circuit.⁵¹

⁴⁸ As of August 31, 2005, the total number of Guantánamo detainees who underwent a CSRT is 558. According to the U.S. Department of Defense, 38 detainees were classified as no longer enemy combatants of whom 28 had been transferred from Guantánamo. *See*, <http://www.defenselink.mil/news/Aug2005/d20050831sheet.pdf>

⁴⁹ Deputy Secretary of Defense, Order Establishing Combatant Status of the Navy (July 7, 2004). *available at*: <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>

⁵⁰ *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) *available at*: <http://host3.uscourts.gov/02-299b.pdf>

⁵¹ In a second decision concerning the rights of Guantánamo detainees, Judge Richard J. Leon, also of the district court for the District of Columbia, ruled in favor of the government, finding that detainees had no rights cognizable on habeas and that the CSRT procedure provided more than adequate due process protections. *See, Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). Both this decision and that in *In re Guantánamo Detainee Cases, Id.*, are on appeal before the United States Court of Appeals for the District

Administrative Review Board

The ARB is another administrative body that reviews on an annual basis the affirmed CSRT status of detainees as “enemy combatants.” Based on classified evidence, including evidence that might have been extracted under coercion, the Board determines whether an individual detainee should continue to be held in U.S. custody, be transferred to the custody of another country or be released.⁵² As in CSRT proceedings, detainees have no access to a lawyer and at the outset are presumed to “pose a threat to the United States or its allies.” Detainees have the burden to gather any information that will prove they are no longer a threat and why they should be released from detention, yet they are afforded no resources, staff or financial support to obtain such potentially exculpatory evidence.⁵³

2. Trial of Detainees Before Military Commission

Violations of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law and to be free from discrimination. (ICCPR, Articles 14 and 26)

On November 13, 2001, the President signed an Executive Order formalizing a Department of Defense plan to try certain non-citizens designated by the President as “enemy combatants” before military commissions.⁵⁴ The Order can be applied to anyone suspected of being, or having knowingly harbored either a member of al-Qaida or someone who has “engaged in, aided or abetted, or conspired to commit, acts of international terrorism.”

The Order has been supplemented by six military commission orders that set forth crimes cognizable before the commissions and rules governing proceedings before them.⁵⁵ To date, four detainees have been charged with offences under the Order,⁵⁶ and a further

of Columbia Circuit. *See, Khalid, Ridouane, et al v. Bush, George, et al*, U.S. Court of Appeals Docket #: 05-5063.

⁵² As of August 31, 2005, the total number of Guantánamo detainees who have undergone an ARB is 240. According to the U.S. Department of Defense, 5 detainees were recommended for release, 41 detainees were recommended for transfer to the custody of other countries, and 79 detainees recommended to remain under the ARB process. *See, <http://www.defenselink.mil/news/Aug2005/d20050831sheet.pdf>*

⁵³ *See generally, http://www.defenselink.mil/news/Combatant_Tribunals.html*

⁵⁴ *President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, November 13, 2001. <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>

⁵⁵ *See, http://www.defenselink.mil/news/Aug2004/commissions_orders.html*

⁵⁶ *United States of America v. Salim Ahmed Hamdan; United States of America v. David Matthew; United States of America v. Ali Hamza Ahmad Sulayman Al Bahlul; United States of America v. Ibrahim Ahmed Mahmoud Al Qosi*. *See, <http://www.defenselink.mil/news/commissions.html>*

eight have been designated for trial but not yet charged.⁵⁷ The procedures adopted by the Order and governing regulations fail to comport with basic due process protections as provided under the U.S. Constitution, the U.S. Uniform Code of Military Justice or as required by international human rights or humanitarian law.

The ACLU highlights the following concerns with the commission rules and procedures:⁵⁸

Lack of Independence: The procedures outlined for military commissions fail to provide for an impartial and independent tribunal and appeal. The military, with the president as its commander in chief, has the sole authority to appoint the judges, prosecutors and defense counsels. The Defense Department chooses the people who will hear any appeal.

Limited access to legal counsel: The right to counsel of choice and to an effective defense is severely restricted. Attorney-client privilege is weakened as the government can listen in on the conversations the accused has with his attorney.

Serious due process deficiencies: The prosecution can use secret evidence against the accused, and the accused has no way to compel the government to produce evidence or witnesses showing his innocence. Evidence - even evidence of innocence - could be withheld from the proceedings under the vaguely defined guise of “national security.” The government has the power to change the rules in the middle of the trial, including the elements of the offense charged, so that the government unfairly can avoid problems of proof that it encounters during the course of the trial. The commission rules permit the admission of evidence extracted under torture or other form of coercion.

Incompetent body: The Defense Department chooses the military officers that serve as adjudicator of fact and law without any requirement of even minimal legal training.⁵⁹

Indefinite detention and death penalty: At the end of the trial, if acquitted, the accused could still be detained indefinitely. If convicted, he could be put to death with no outside review whatsoever.

Discriminatory process: Only foreign nationals are subject to such trials, in violation of the prohibition on the discriminatory application of fair trial rights.

On August 1, 2005, the *New York Times* obtained copies of e-mails exchange between

⁵⁷ Originally, 15 detainees were determined to be subject to the President’s Executive Order. Three of them were subsequently transferred to their home countries. *See*, <http://www.defenselink.mil/news/Aug2005/d20050831sheet.pdf>

⁵⁸ *See*, <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=10457&c=111&Type=s>; *See also*, <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=11537&c=111>; <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=10150&c=111&Type=s>

⁵⁹ The Presiding Officer is currently the only commission member with any legal training, and yet all panel members can rule on questions of law.

high-ranking officials at the Department of Defense who expressed serious concerns and doubts regarding the legal status of the military commissions and their ability to meet minimum standards of due process and fair trial guarantees.⁶⁰

On July 15, 2005, the U.S. Court of Appeals for the District of Columbia Circuit unanimously overturned a lower court's decision that had found that military commissions violated the U.S. Constitution and international law.⁶¹ The Court of Appeals ruled that the military commission should be considered a "competent tribunal" under Article 5 of the Third Geneva Convention Relative to the Treatment of Prisoners of War and that the defendant was not entitled to court-martial proceedings in accordance with the U.S. Uniform Code of Military Justice, nor to the protections of common Article 3 of the Geneva Conventions which prohibit trials by any tribunal other than "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The Court has also ruled that "[i]f Hamdan were convicted, and if common article 3 covered him, he could contest his conviction in federal court *after* he exhausted his military remedies."

While Hamdan's request for an appeal to the U.S. Supreme Court is still pending, the Department of Defense stated that the military commission proceedings will resume as soon as possible against the four detainees being held at Guantánamo.⁶²

On August 31, 2005, the Department of Defense introduced certain amendments to the military commission procedures.⁶³ While some of these procedural changes improve the flaws in the system of military commissions, major due process deficiencies remain. The timing of these changes also seems to suggest an attempt by the Government to influence the Justices of the Supreme Court to rule in the government's favor and to uphold the constitutionality of the military commission system.

Torture and Other Cruel, Inhuman or Degrading Treatment of Detainees at Guantánamo

Since the transfer of the first group of detainees to Guantánamo in early January 2002, credible reports of the use of torture and other cruel, inhuman or degrading treatment were received from various sources, including U.S. government officials, lawyers representing detainees in habeas litigation, accounts of former detainees, the ICRC and other non-governmental human rights organizations.

⁶⁰ Neil A. Lewis, "Two Prosecutors Faulted Trials for Detainees", *The New York Times*, August 1, 2005.

⁶¹ *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). available at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200507/04-5393a.pdf>

⁶² See, http://www.defenselink.mil/news/Jul2005/20050719_2124.html

⁶³ See, <http://www.defenselink.mil/news/Aug2005/d20050831fact.pdf>

Through litigation under the Freedom of Information Act (FOIA), the ACLU and other public interest organizations obtained internal documents of the Federal Bureau of Investigation (FBI) concerning detainee abuse at Guantánamo. These documents show that as early as late 2002, the FBI had begun to document and complain internally about interrogation techniques used by the military on Guantánamo detainees. The abuses noted in these memoranda included harsh treatment of detainees as part of an approved list of interrogation methods used to ‘soften up’ detainees. FBI agents alleged specific instances of abuse encompassing physical and psychological abuse, religious and sexual humiliations as well as inhuman and degrading conditions of confinement.⁶⁴ For example:

- An e-mail, dated December 2003, describes an incident in which Defense Department interrogators at Guantánamo impersonated FBI agents while using “torture techniques” against a detainee. The e-mail concludes “[i]f this detainee is ever released or his story made public in any way, DOD interrogators will not be held accountable because these torture techniques were done [sic] the ‘FBI’ interrogators. The FBI will [sic] left holding the bag before the public.”
- An FBI email relating to the same incident refers to a “ruse” and notes that the Deputy Secretary of Defense approved “all of those [techniques] used in these scenarios.” (Jan. 21, 2004)
- Another FBI agent recounts an incident involving the interrogation of detainees at Guantánamo where the detainees were shackled hand and foot in a fetal position on the floor. The agent states that the detainees were kept in that position for 18 to 24 hours at a time and most had “urinated or defecated [sic]” on themselves. On one occasion, the agent reports having seen a detainee left in an unventilated, non-air conditioned room at a temperature “probably well over a hundred degrees.” The agent notes: “The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night.” (Aug. 2, 2004)
- An e-mail stating that an Army lawyer “worked hard to cwrite [sic] a legal justification for the type of interrogations they (the Army) want to conduct” at Guantánamo. (Dec. 9, 2002)
- An FBI agent’s account of an interrogation at Guantánamo - an interrogation apparently conducted by Defense Department personnel - in which a detainee was wrapped in an Israeli flag and bombarded with loud music and strobe lights. (July 30, 2004)⁶⁵

⁶⁴ See, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=18685&c=206>; See also, Executive Summary of Report by Naval Inspector General, Vice Admiral Albert T. Church, III, available at: <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>; Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility (April 2005). available at: <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>

⁶⁵ See, <http://www.aclu.org/torturefoia/released/fbi.html>

- Another account narrates three situations observed by FBI agents of highly aggressive interrogation techniques used against detainees. First in late 2002, a female agent was seen to apply lotion to a detainee and caress him during Ramadan, hands moved to detainee's lap, detainee grimaced in pain. Marine said [redacted] grabbed detainee's thumbs and bent them back, and grabbed detainee's genitals. Marine implied that this was less harsh than her treatment of others that would result in detainees in fetal position on floor crying in pain. 2. Oct 2002, [redacted]. 3. Sep/Oct 2002, canine used in aggressive manner to intimidate detainee; Nov, 2002, intense isolation for over 3 months in cell always flooded with light - detainee exhibited behavior consistent with extreme psychological trauma.⁶⁶
- A detainee interviewed at Camp Delta said "a female interrogator, after not getting cooperation from him, called four guards into the room. While the guards held him, she removed her blouse, embraced the detainee from behind and put her hand on his genitals. The interrogator was on her menstrual period and she wiped blood from her body on his face and head."⁶⁷
- The use of "torture techniques" by Defense Department Interrogators impersonating FBI agents in Guantánamo.⁶⁸
- Sexual humiliation of a Muslim detainee during Ramadan, isolation for over 3 months, and aggressive use of a canine to intimidate detainees in Guantánamo in late 2002.⁶⁹
- Chaining of Guantánamo detainees "hand and foot" in "fetal position[s] to the floor" for 18-24 hours or more, while they had "urinated or defecated on themselves," and subjecting to extremes of temperature till they were "shaking with cold or were lying unconscious on the floor."⁷⁰

Official documentation obtained under the FOIA also demonstrates that religious icons were used to degrade detainees. Documents supporting this contention include:

- a sworn statement of an incident where a civilian interrogator was seen to step on a copy of the Koran to disorient detainee;⁷¹
- a sworn statement of a civilian interrogator seen using "Pride and Ego Down" technique;⁷²
- an army memorandum detailing the use of a "Star of David" to taunt an Iraqi

⁶⁶ See, http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf

⁶⁷ See, http://www.aclu.org/torturefoia/released/052505/3972_4021.pdf at DETAINEES - 4008 – 4010.

⁶⁸ See, http://www.aclu.org/torturefoia/released/FBI_3977.pdf

⁶⁹ See, http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf

⁷⁰ See, http://www.aclu.org/torturefoia/released/FBI_5053_5054.pdf

⁷¹ See, http://www.aclu.org/torturefoia/released/030905/DOD565_615.pdf

⁷² See, http://www.aclu.org/torturefoia/released/030905/DOD565_615.pdf

detainee;⁷³

- Accounts of a detainee alleging that soldiers ordered a military dog to pick up the Koran in its mouth;
- Accounts of a detainee alleging that soldiers threw the Koran on the floor and stepped on it.⁷⁴

Despite striking evidence regarding the mistreatment of detainees and widespread use of approved harsh and abusive interrogation methods, Air Force Lt. Gen. Randall Schmidt who had been appointed in February 2005 by the Southern Command to investigate allegations of abuse and ill treatment of detainees in Guantánamo, concluded that abuses have not “crossed the threshold of being inhumane.”⁷⁵

The report, from which only the executive summary has been released, found that U.S. interrogators’ application of techniques including the use of dogs, the use of extreme heat and cold as well as sleep deprivation were not improper because the Secretary of Defense had specifically approved them. While the report did not examine the legal validity of interrogation techniques, it found that other techniques used by U.S. interrogators, including interrogation for 18-20 hours per day for 48 out of 54 consecutive days, forcing a detainee to wear a woman’s bra and placing a thong on his head, tying a leash to a detainee and forcing him to perform “a series of dog tricks” were not improper because they had been authorized by Secretary of Defense for use on a specific detainee.⁷⁶

The U.S. government has denied repeated requests by national and international human rights NGOs to monitor conditions of confinement and to document complaints and allegation of torture and abuse. To date, the only international independent body that has been permitted access to Guantánamo has been the ICRC, which does not publicly disclose the findings and recommendations of their reports other than to the state party involved.

On November 30, 2004, the *New York Times* reported that the ICRC concluded in confidential memos that the intentional physical and psychological mistreatment of detainees by the U.S. military was “tantamount to torture.”⁷⁷

⁷³See, http://www.aclu.org/torturefoia/released/051805/8302_8400.pdf

⁷⁴ See, http://www.aclu.org/torturefoia/released/030905/DOD565_615.pdf

⁷⁵ http://www.defenselink.mil/news/Jul2005/20050713_2053.html

⁷⁶ See, Donald Rumsfeld, Memorandum for the Commander, US Southern Command: Counter-Resistance Techniques in the War on Terrorism, (April 16, 2003). (These techniques included isolation for up to thirty days, dietary manipulation, environmental manipulation, “sleep adjustment,” and “false flag”-leading detainees to believe that they have been transferred to a country that permits torture- none of which is consistent with the authorized interrogation techniques in Army Field Manual 34-52). See also, Memorandum from Lieutenant General Sanchez to Commander, U.S. Central Command, re: CJTF-7 Interrogation and Counter-Resistance Policy (Sept. 14, 2003).

⁷⁷Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantánamo”, *The New York Times*, Nov. 30, 2004.

3. Torture and Other Cruel, Inhuman or Degrading Treatment of Persons Detained in Afghanistan and Iraq

Violation of inherent right to life (Article 6)

Violation of the right to be free from torture and other cruel, inhuman or degrading treatment or punishment (Article 7)

Violation of right to liberty and freedom from arbitrary arrest or detention (Article 9)

Violation of the right to be treated humanly and with respect to human dignity (Article 10)

Violation of the right to recognition everywhere as a person before the law (Article 16)

Violation of the right to freedom of religion (Article 17)

Violation of the right to be equal before the law (Article 26)

According to reports by the U.S. military, the ICRC and other non-governmental human rights organizations, and as revealed in voluminous documents obtained under ACLU FOIA litigation, prisoners in Iraq and Afghanistan have been subjected to torture or other forms of cruel, inhuman or degrading treatment.⁷⁸

In contrast to the U.S. position that persons detained in Guantánamo are not entitled to the protections of international humanitarian law, the U.S. government has indicated that it is treating all detainees captured in Iraq in compliance with international humanitarian law.⁷⁹ Despite this official position, government reports confirm the “migration” of approved abusive interrogation techniques from Guantánamo to Afghanistan and Iraq.⁸⁰ In addition, according to numerous statements of U.S. military personnel, including a

⁷⁸ See, Major General Antonio M. Taguba’s Report: Article 15-6 Investigation of the 800th Military Police Brigade. available at: <http://www.defenselink.mil/pubs/foi/detainees/taguba/>; See also, http://www.npr.org/iraq/2004/prison_abuse_report.pdf

See, Human Rights Watch, Enduring Freedom: Abuses by U.S. Forces in Afghanistan, (March 2004). available at: <http://hrw.org/reports/2004/afghanistan0304/>

See, Amnesty International, Human Dignity Denied: Torture and Accountability in the ‘War on Terror’, (October 2004). available at:

<http://web.amnesty.org/library/Index/ENGAMR511452004?open&of=ENG-AFG>

See, Amnesty International, US Detentions in Afghanistan: An aide-mémoire for Continued Action, (June 2005). available at: <http://web.amnesty.org/library/Index/ENGAMR510932005>

⁷⁹ See, Coalition Provisional Authority (CPA) Memorandum Number 3, Criminal Procedures: Sections 6 and 7, (June 18, 2003). The Fourth Geneva Convention allows the United States, as an Occupying Power, to deprive civilians in Iraq of their liberty in only two situations: for “imperative reasons of security,” or for prosecution, either before Iraqi courts or a “properly constituted, non-political military court” set up by the Occupying Power.

⁸⁰ Executive Summary of Report by Naval Inspector General, Vice Admiral Albert T. Church, III, pp. 6: <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf#page=6>

high-ranking general, a U.S. Major General Geoffrey Miller was sent to Iraq specifically to implement interrogation tactics used and developed at Guantánamo.⁸¹

Civilian and military leaders responsible for the U.S. forces in Afghanistan and Iraq issued orders, adopted policies and granted authorizations that fundamentally altered the traditional interrogation practices of the U.S. military, expressly authorizing the use of practices amounting to cruel, inhuman or degrading treatment or punishment and which condoned or authorized torture.

High-ranking officials, including the U.S. Secretary of Defense, issued critical orders and directives that ultimately led to widespread torture and abuse. Evidence also shows that these officials knew of torture and abuse of detainees by their subordinates in Afghanistan and Iraq, yet failed to prevent and punish such conduct.⁸² As a direct result of these policies and practices, the U.S. military has engaged in practices that violated the absolute and non-derogable prohibitions against torture or other cruel, inhuman or degrading treatment.

Afghanistan:

Torture and Other Cruel, Inhuman or Degrading Treatment of Detainees

The U.S. military has detained and continues to detain individuals at detention facilities at approximately twenty-two locations throughout Afghanistan, including facilities in Asadabad, Kabul, Jalalabad, and Khost under the direct control of the U.S. military.

The torture and abuse of detainees in U.S. military custody in Afghanistan has been widespread and systemic. It began soon after the commencement of military actions and has lasted well beyond the declared end of major combat.

As widely documented in human rights and press reports, U.S. military personnel have subjected detainees in U.S. custody in Afghanistan to the following forms of torture or other cruel, inhuman or degrading treatment, among others:

- Extreme physical abuse: Soldiers severely beat detainees, forced them into painful and contorted positions for hours or days on end, and dumped cold water

⁸¹ Josh White, “Army General Advised Using Dogs at Abu Ghraib, Officer Testifies”, *Washington Post*, July 28, 2005, at A18. *See also*, Brown, Drew, “Abu Ghraib Tactics First Used in Cuba.” *Miami Herald* July 14, 2005.

⁸² *See*, Donald Rumsfeld, Memorandum for the Commander, US Southern Command: Counter-Resistance Techniques in the War on Terrorism, (April 16, 2003). (These techniques included isolation for up to thirty days, dietary manipulation, environmental manipulation, “sleep adjustment,” and “false flag”- leading detainees to believe that they have been transferred to a country that permits torture- none of which is consistent with the authorized interrogation techniques in Army Field Manual 34-52). *See also*, Memorandum from Lieutenant General Sanchez to Commander, U.S. Central Command, re: CJTF-7 Interrogation and Counter-Resistance Policy (Sept. 14, 2003).

- over detainees in the middle of the winter. Beatings were for the specific purpose of making detainees more susceptible to interrogation;
- Sexual abuse and humiliation: Detainees were kept naked for prolonged periods in the presence of male and female soldiers and in front of other detainees. Soldiers, both male and female, subjected detainees to sexual taunts, with knowledge that such treatment would be particularly offensive and humiliating by Afghan cultural norms;
 - Use of dogs to frighten and intimidate detainees;
 - Sensory deprivation: Detainees were kept hooded or goggled, held in dark cells, and kept in isolation for prolonged periods;
 - Sleep deprivation: Detainees were forced to stay awake for prolonged periods by methods such as shining bright lights, blaring loud music, shouting at them or beating them if they fell asleep;⁸³

Deaths of Detainees in U.S. Custody

According to information and documents released under the ACLU FOIA litigation, detainees have been killed by torture or other forms of cruel, inhuman or degrading treatment while in U.S. custody in Afghanistan and Iraq.

Documents substantiating this fact include autopsy reports providing graphic details about detainee deaths ruled to be homicides, including death by strangulation and “blunt force injuries.” Other investigative reports describe a mock execution of a teenage Iraqi boy in front of his father, who begged soldiers not to shoot his son, as well as an Army medic’s description of two Iraqis who were “brutally beaten” by U.S. soldiers. This contrasts with a U.S. Army captain’s contention that they “just got roughed up a bit.” Other examples include:

- Murder of an Iraqi detainee in U.S. custody in Nasiriyah, Iraq, on Jun. 6, 2003. According to the final autopsy report, the manner of death was “homicide,” and the cause of death “strangulation.”⁸⁴
- Murder of a 27 or 28 year old Pashtun male in U.S. custody in Bagram, Afghanistan, on Dec. 3, 2002. According to the final report of postmortem examination, the death was a “homicide,” and the cause of death was “pulmonary embolism due to blunt force injuries.”⁸⁵
- Murder of an Afghan civilian in U.S. custody in Helmand Province, Afghanistan, on Nov. 6, 2003. According to the final autopsy report, the manner of death was

⁸³ Tim Golden, “Abuse Cases Open Command Issues at Army Prison”, *The New York Times*, Aug. 8, 2005, at A1; Tim Golden, “In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths”, *The New York Times*, May 20, 2005, at A1.

⁸⁴ See, http://www.aclu.org/torturefoia/released/041905/m001_203.pdf at MEDCOM 37-43; 174.

⁸⁵ See, http://www.aclu.org/torturefoia/released/041905/m001_203.pdf at MEDCOM 19-28; 172.

- “homicide,” and cause of death was “multiple blunt force injuries complicated by Rhabdomyolysis,” (i.e. breakdown of muscle fibers).⁸⁶
- Murder of an Iraqi detainee in U.S. custody in Al Qaim, Iraq, on Nov. 26, 2003. The autopsy examination report states that the manner of death is “homicide,” and the cause of death was “asphyxia due to smothering and chest compression.” The report adds that “the details surrounding the circumstances at the time of death are classified.”⁸⁷
 - Murder of an Iraqi detainee who died in U.S. custody on Jan. 9, 2004 in Al Asad, Iraq. The final autopsy report states that the manner of death is “homicide,” and the cause “blunt force injuries and Asphyxia.”⁸⁸
 - Army Criminal Investigation Command concluded in September 2002 that a U.S. Army captain and three noncommissioned officers murdered a detainee in Afghanistan;⁸⁹
 - Two other Afghan detainees, Mullah Habibullah and Dilawar, died in December 2002 at the Bagram detention facility in Afghanistan while in the custody of the U.S. military. During interrogation by members of the U.S. Army’s 519th Military Intelligence Battalion, the detainees were shackled to the ceiling with their hands suspended over their shoulders for prolonged periods. Both had suffered blunt force trauma to the legs, and investigators determined that multiple soldiers had beaten them. Military pathologists determined within days of the deaths that the cause was homicide. Nevertheless, for months afterwards, and until the *New York Times* obtained a copy of Dilawar’s autopsy report, the military falsely asserted that the men had died of natural causes;⁹⁰

Iraq:

The U.S. military has detained and continues to detain individuals at numerous detention facilities in Iraq under the control of the U.S. military. The policies, patterns or practices of torture and abuse of detainees that commenced in Afghanistan and Guantánamo were extended to detainees in Iraq.

The U.S. government, the ICRC, non-governmental human rights organizations and the press have documented hundreds of cases of abuse committed at U.S. detention facilities

⁸⁶ See, http://www.aclu.org/torturefoia/released/041905/m001_203.pdf at MEDCOM 44-50; 171.

⁸⁷ See, http://www.aclu.org/torturefoia/released/041905/m001_203.pdf at MEDCOM 93 - 100; 178.

⁸⁸ See, http://www.aclu.org/torturefoia/released/041905/m001_203.pdf at MEDCOM 108 - 114; 180.

⁸⁹ See, R. Jeffrey Smith, “Army Reprimand Reported in Slaying: Officers Allegedly Killed Afghan in ‘02”, *Washington Post*, December 14, 2004. available at: <http://www.washingtonpost.com/wp-dyn/articles/A62089-2004Dec13.html>

⁹⁰ Tim Golden, “Army Faltered in Investigating Detainee Abuse,” *New York Times*, May 22, 2005.

in Iraq. Detainees in facilities under the exclusive control of the U.S. military have been subjected to torture or other cruel, inhuman or degrading treatment on a widespread basis in Iraq. U.S. personnel have engaged in this unlawful conduct at facilities including but not limited to the notorious Abu Ghraib prison; the detention facility known as “Camp Cropper” at the Baghdad international airport; a facility near the city of Umm Qasr known as Camp Bucca; facilities in or near the cities of Tikrit and Mosul; and numerous locations in or near the city of Baghdad.

According to reports by the U.S. military, the ICRC, and other non-governmental human rights organizations, and as revealed in documents obtained pursuant to the ACLU FOIA litigation, U.S. personnel inflicted the following types of torture or other cruel, inhuman or degrading treatment, among others, on detainees at numerous U.S. facilities in Iraq:

- Extreme physical abuse: Soldiers tore out detainees’ toenails, administered electric shocks, beat detainees with hard objects (including pistols and rifles), slapped and punched detainees, kicked them with knees or feet on various parts of the body (legs, sides, lower back, groin), forcefully pressed detainees’ faces into the ground by stepping on their heads, purposely exposed detainees to severe heat and sun for prolonged periods, and forced detainees to stay in “stress” positions (kneeling, squatting, standing with arms raised over their heads) for hours at a time;⁹¹
- Various forms of sexual abuse and humiliation: Detainees were stripped naked and forced to stand for prolonged periods in public view, with arms raised or with women’s underwear over their heads, while male and female guards observed and laughed. Detainees were photographed in these positions. Detainees were paraded naked in front of other detainees. Detainees were kept naked in solitary confinement for periods of several days;
- Threats of death, abuse, reprisals against family members, imminent execution or transfer to the military detention facility at Guantánamo: Soldiers aimed rifles at detainees, sometimes putting firearms directly against detainees’ heads or torsos;
- Sensory deprivation: Hooding detainees to prevent them from seeing, to disorient them, and to prevent them from breathing freely. Hooding was sometimes used in conjunction with beatings, thus increasing fear because blows were unanticipated. The practice of hooding also allowed the interrogators to remain anonymous and thus to act with impunity. Detainees were also held in total darkness for prolonged periods;
- Painful and humiliating restraints: Soldiers applied flexi-cuffs to detainees’ wrists so tightly and for such extended periods that they caused skin lesions and long-term nerve damage. Soldiers restrained detainees repeatedly over periods of several days, for several hours each time, with handcuffs to the bars of their cell doors in humiliating (i.e. naked or in underwear) and/or uncomfortable positions causing physical pain;

⁹¹ The Church report found that the “most common type of detainee abuse was straightforward physical abuse, such as slapping, punching and kicking.” See, <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf#page=15>

Official U.S. military reports have documented torture and other forms of abuse at the Abu Ghraib prison, among other detention facilities.⁹² These reports determined that soldiers inflicted the following torture or other cruel, inhuman or degrading treatment on detainees at Abu Ghraib:

- Homicide: A Navy SEAL beat a detainee to death. He struck the detainee in the head with a rifle butt. After the detainee lost consciousness, he was placed in a shower room with a sandbag over his head, and, when guards returned 30-45 minutes later, he was dead;
- Extreme physical abuse: Soldiers punched, kicked and slapped detainees. A soldier knocked a detainee unconscious, and another punched a second detainee in the chest so hard that he could not breathe. Soldiers beat detainees with a broom handle and a chair. Soldiers broke chemical lights and poured the contents on detainees. A soldier slammed a detainee against a wall so hard that he required stitches, and then an ordinary military police guard was permitted to stitch the wound. A detainee was forced to “bark like a dog” and crawl on his stomach while military police personnel spit and urinated on him and beat him until he lost consciousness;
- Torture of a high-school student and his family members in Mosul, Iraq, in December of 2003. Coalition forces placed bags over their heads, beat them all day, doused them with cold water at night, made them sit up and down, and denied them food and water. A soldier pushed the student into the wall and kicked him in the face, breaking his jaw and teeth. The file notes that “[t]here is evidence that suggests the 311th MI personnel and/or translators engaged in physical torture of detainees.”⁹³
- Torture of numerous detainees by interrogators in al Athamiyah Palace, Baghdad from Dec 2003 to May 2004. Detainees were forced to wear women’s underwear on their head, electrocuted, burned with cigarettes, sodomized with wine bottles and wooden sticks, subjected to extreme physical exercise during temperatures of 150 degrees Fahrenheit to the point of collapse, and sustained chest wounds from “battery cables” attached to their chests. Al-Azimiya Palace appears to have been the site of about 90 incidents of abuse.⁹⁴

⁹² See, Major General Antonio M. Taguba’s Report: Article 15-6 Investigation of the 800th Military Police Brigade. *available at:* http://www.npr.org/iraq/2004/prison_abuse_report.pdf

See, Schlesinger Report: The Final Report of the Independent Panel To Review DoD Detention Operations (Aug. 2004). *available at:*

<http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>

See, The Fay-Jones Report: Investigation of Intelligence Activities at Abu Ghraib, AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade LTG Anthony R Jones, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade MG George R. Fay (Aug. 2004). *available at:* http://www.cbc.ca/news/background/iraq/pdf/fay_report20040825.pdf

⁹³ See, http://www.aclu.org/torturefoia/released/032505/1081_1180.pdf, at documents 1164-1280

⁹⁴ See, http://www.aclu.org/torturefoia/released/5487_5561.pdf

- “[S]trangulation, beatings, placement of lit cigarettes into the detainees ear openings and unauthorized interrogations,” which were “covered up.” The details of how the abuse was covered up have been redacted.⁹⁵
- Detainees in the custody of Special Operations Task Force 6-26 (TF 6-26) in Baghdad were bruised, had burn marks on their backs and complained of kidney pain. Defense Intelligence Agency (DIA) personnel witnessed TF 6-26 officers “punch a prisoner in the face to the point where [he] needed medical attention.” The DIA personnel were ordered to leave the room, and pictures they took of the injuries were immediately confiscated. They were also threatened by TF 6-26 personnel and “ordered not to talk to anyone in the US.”⁹⁶
- Sexual abuse and humiliation: Soldiers threatened to rape detainees. An interpreter allegedly raped a juvenile male detainee while a female U.S. soldier watched and took pictures. Soldiers forced a naked detainee to stand on a box with a sandbag on his head, and attached wires to his fingers, toes and penis to simulate electric torture. Soldiers stripped detainees naked and kept them naked for prolonged periods. Soldiers photographed and videotaped naked detainees, sometimes while forcibly posed in sexual positions, forcibly dressed in women’s underwear, or forced to masturbate. Soldiers arranged naked detainees in a pile and then jumped on them. Soldiers placed a dog leash around a naked male detainee’s neck, posed a female soldier next to him and photographed him;
- Use of military dogs to intimidate and attack detainees: In at least one case, soldiers caused a dog to bite and severely injure a detainee. Some soldiers referred to the use of dogs to frighten or attack detainees as “doggy dance” sessions. On one occasion, soldiers placed vicious dogs into a cell with two juvenile detainees. Witnesses reported that the children screamed in terror as the dogs lunged and snapped at them, and that the younger child tried to hide behind the older one. On another occasion, two military dog handlers held a “contest” in which they competed against each other to see who could force detainees to lose control of their bladders or bowels out of fear;
- Sensory deprivation: Soldiers kept detainees in solitary confinement, sometimes in empty concrete cells in total darkness.

In reports presented to U.S. government officials and military commanders, the ICRC documented hundreds of additional individual allegations of abuse committed at U.S. military detention facilities throughout Iraq.⁹⁷ Fifty incidents of torture and other abuse were reported as occurring at the Camp Cropper detention facility alone. Among the “illustrative” cases of torture reported by the ICRC are the following:

⁹⁵ See, http://www.aclu.org/torturefoia/released/FBI.121504.4910_4912.pdf

⁹⁶ See, http://www.aclu.org/torturefoia/released/t2596_0297.pdf

⁹⁷ Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (Feb. 2004) 34. *available at:* http://download.repubblica.it/pdf/rapporto_crocerossa.pdf

- At least two detainees were forced to sit or lie down on blistering surfaces, causing severe burns that resulted in large crusted lesions and, in one case, three months' hospitalization, the amputation of a finger and large skin grafts.
- Military interrogators hooded and restrained a detainee with flexi-cuffs, threatened to torture and kill him, urinated on him, kicked him in the head, lower back and groin, force-fed him a baseball which was tied into his mouth, and deprived him of sleep for four consecutive days. When the detainee said he would report the abuse to the International Committee of the Red Cross, interrogators beat him again.

Command responsibility and lack of accountability

The Right to a Remedy (Article 2(3)(a))

Despite the involvement of high-level civilian and military officials in the unlawful conduct described above, thus far only a handful of low-ranking soldiers have been held accountable.⁹⁸ The government has refused to authorize any independent investigation of the abuses and no high-level official has been charged with any criminal activity in relation to the abuses. Indeed, some of the officials who were involved in developing the policies that led to the abuse and torture of prisoners have been nominated and confirmed to higher government posts despite some government reports that held them responsible.⁹⁹

The U.S. government continues to downplay the extent of the torture and other abuse of detainees in U.S. custody, and continues to assert the position that it was simply the action of a few rogue soldiers. While the U.S. government highlights the actions and courts martial of those soldiers who were directly involved in the torture and abuse of Iraqi detainees in Abu Ghraib, high-ranking commanders and civilian leaders who were involved in developing and implementing the policies on the treatment of detainees in the 'war on terror,' have not been held to account.

The declassification of a series of legal memoranda by high-ranking legal officials in the Executive branch make it clear that the torture and other abuse described above were carried out pursuant to policies and practices devised at the highest levels of the U.S.

⁹⁸ Human Rights First, *Getting to Ground Truth: Investigating U.S. Abuses in the 'War on Terror,'* (September 2005). *See also*, http://www.usatoday.com/news/graphics/abu_ghraib/flash.htm

⁹⁹ *See*, <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> As the The Final Report of the Independent Panel To Review DoD Detention Operations, (August 2004) of former Defense Secretary James Schlesinger concluded, the abuses of detainees were "widespread," and "were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline... There is both institutional and personal responsibility at higher levels."

government.¹⁰⁰ These memoranda purport to set forth a series of arguments for restrictive interpretation of U.S. laws and treaties against torture, including the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. For example:

- In January 2002, the President's chief legal advisor produced a legal memorandum stating that the war on terrorism is "a new kind of war" that "renders obsolete [the] Geneva [Conventions'] strict limitations on questioning of enemy prisoners." In February 2002, President Bush decreed that neither al Qaeda nor Taliban prisoners were entitled to the protections of the Geneva Conventions. While this memorandum provided that in any event prisoners must be treated humanely, that elastic concept has, in practice, not afforded any real protection against much of the abuse described above.
- In August 2002, the U.S. Justice Department's Office of Legal Counsel produced a legal memorandum stating that the infliction of physical pain on a prisoner does not constitute torture under U.S. law or the Convention Against Torture unless it inflicts pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." The memorandum also argued that the prohibition on cruel, inhuman or degrading treatment short of this highly restricted definition of torture did not apply to non-citizens being held overseas. It further argued that Congress lacked power under the U.S. constitution to prohibit interrogation techniques (even those techniques that amounted to torture or cruel treatment) that would interfere with the President's authority over the military as Commander in Chief. This memorandum was not rescinded until December 2004, amid confirmation hearings for its recipient, then-White House counsel Alberto Gonzales. Mr. Gonzales was subsequently confirmed by the U.S. Senate as Attorney General.
- On December 2, 2002, at the recommendation of General Myers and other Defense Department officials, Defense Secretary Donald Rumsfeld authorized for use on detainees at Guantánamo techniques including the removal of clothing, use of detainees individual phobias (such as fear of dogs) to induce stress, removal of all comfort items including religious items, hooding, the use of "stress positions," 20-hour interrogations, deception to make the detainee believe the interrogator was from a country with a reputation for harsh treatment, isolation for up to 30 days, "deprivation of light and auditory stimuli," "use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing," and the use of falsified documents and reports.¹⁰¹

¹⁰⁰ See, A Guide to the Memos on Torture (posted Jun. 26, 2004). available at: www.nytimes.com/ref/international/24MEMO-GUIDE.html.

¹⁰¹ See, <http://www.washingtonpost.com/wp-srv/nation/documents/011503rumsfeld.pdf>

- In January 2003, the Secretary of Defense commissioned a working group report concerning the interrogation of prisoners. When the report was completed, it asserted the necessity of interrogating prisoners “in a manner beyond that which may be applied to a prisoner of war who is subject to the Geneva Conventions.” In April 2003, the Secretary of Defense adopted many of the report’s recommendations and approved the use of numerous interrogation techniques that resulted in abuse and torture.
- On April 16, 2003, Secretary Rumsfeld authorized a set of techniques for use in Guantánamo, including techniques labeled “futility,” “pride and ego down,” “dietary manipulation,” “environmental manipulation,” “sleep adjustment,” “false flag,” “isolation,” and “presence of military working dogs.”¹⁰² Many of these techniques went beyond those authorized under U.S. military doctrine as set forth in the Army Field Manual on interrogations. Once again, Secretary Rumsfeld indicated that techniques beyond this list could be approved. Notably, such techniques were to be submitted for his approval via General Myers, Chairman of the Joint Chiefs of Staff.¹⁰³
- On September 14, 2003, Lieutenant General Sanchez, the senior commander in Iraq, authorized a set of interrogation techniques virtually identical to the techniques authorized by Secretary Rumsfeld in April of 2003. He authorized 29 interrogation techniques- including 12 that far exceeded limits established by the Army’s own Field Manual. The memo specifically allows for interrogation techniques involving the use of military dogs specifically to “[e]xploit[] Arab fear of dogs...,” isolation, and stress positions.¹⁰⁴
- On October 12, 2003, Lieutenant General Sanchez issued a revised set of interrogation techniques for use in Iraq. The substantial overlap with what Secretary Rumsfeld had authorized for use in Guantánamo in April 2003 remained.¹⁰⁵
- A Staff Sergeant with the 104th Military Battalion, 4th Infantry, rebutting accusations that he improperly supervised an interrogator who assaulted an Iraqi prisoner, replied that comments made by senior leaders that detainees are not enemy prisoners of war under the Geneva Conventions “have caused a great deal of confusion as to the status of detainees.” “In hindsight,” he wrote, “it seems clear that, considering the seeming approval of these and other tactics by the senior command, it is a short jump of the imagination that allows actions such as

¹⁰² See, <http://www.washingtonpost.com/wp-srv/nation/documents/041603rumsfeld.pdf>.

¹⁰³ See, Memorandum for the Commander, U.S. Southern Command, from Secretary Rumsfeld, Re: Counter-Resistance Techniques in the War on Terrorism, (Apr. 16, 2003). *available at*: <http://www.washingtonpost.com/wp-srv/nation/documents/041603rumsfeld.pdf>

¹⁰⁴ <http://www.aclu.org/Files/OpenFile.cfm?id=17850>

those committed by [name redacted] to become not only tolerated but encouraged.” The Sergeant also criticized his commanders for soliciting a “wish list” of alternative interrogation techniques and for using phrases such as ‘the gloves are coming off.’ His remarks related to a previously disclosed August 17, 2003 e-mail sent by a captain in Military Intelligence asking for a “wish list” of what techniques interrogators would like to use. Interrogators responding to that request sought approval for the use of “low voltage electrocution,” “phone book strikes,” “muscle fatigue inducement” and the use of dogs and snakes.¹⁰⁶

- A two-page FBI e-mail that refers to an Executive Order states that the President directly authorized interrogation techniques including sleep deprivation, stress positions, the use of military dogs, and "sensory deprivation through the use of hoods, etc." The FBI e-mail, which was sent in May 2004 from "On Scene Commander--Baghdad" to a handful of senior FBI officials, notes that the FBI has prohibited its agents from employing the techniques that the President is said to have authorized.¹⁰⁷

On March 1, 2005 the ACLU and Human Rights First filed a lawsuit against Defense Secretary Donald Rumsfeld on behalf of eight Afghan and Iraqi men who were tortured and mistreated while they were held in U.S. detention facilities.¹⁰⁸ The ACLU has also filed separate lawsuits naming Brig. Gen. Karpinski, Col. Thomas Pappas and Lt. Gen. Ricardo Sanchez. The ACLU continues to call for an independent investigation by an independent counsel with subpoena power to investigate the torture scandal, including the role of senior policymakers.¹⁰⁹

4. Legal Status and Treatment of Persons Detained in Other Parts of the World

Credible evidence exists that the United States is detaining, acquiescing in or ordering the arbitrary detention of individuals suspected of involvement in terrorism in detention facilities other than those facilities in Afghanistan and Iraq. Evidence, for example, exists that the United States is detaining individuals in secret, unacknowledged facilities located on territories or vessels under its control, for example, at Diego Garcia and on board the

¹⁰⁶ See, http://www.aclu.org/torturefoia/released/041905/6570_6668.pdf at Documents 6627-6629.

¹⁰⁷ See, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17216&c=206>

¹⁰⁸ All four cases have been consolidated for pre-trial purposes before Chief Judge Thomas F. Hogan of the U.S. Federal District Court for the District of Columbia, pursuant to an order dated June 17, 2005 by the Judicial Panel on Multidistrict Litigation (MDL-1686). *Arkan Mohammed Ali, et al. v. Donald Rumsfeld*, No. 05C 1201 (N.D. Ill., filed Mar. 1, 2005) available at: <http://www.aclu.org/Files/OpenFile.cfm?id=17573>

¹⁰⁹ See, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=18910&c=206>

U.S.S. Bataan.¹¹⁰ Other men are being detained in secret facilities allegedly operated by the United States but located in the territory of other sovereign states e.g. alleged existence of Central Intelligence Agency (CIA) facility in Jordan.¹¹¹

In March 2005, a government report confirmed the U.S. Department of Defense' practice of holding "ghost detainees" for the CIA whose existence was kept secret from the ICRC. The military investigation reported 30 cases of "ghost detainees" who were held under "oral, ad hoc agreements and was result, in part, of the lack of any specific, coordinated interagency guidance." Official documents obtained pursuant to the FOIA litigation confirmed, however, the existence of memorandum of understanding between the U.S. military and the CIA on "Ghost Detainees."¹¹² According to the same military report the "practice of DOD holding ghost detainees has now ceased."¹¹³

Evidence also exists that the United States is directing the arbitrary detention of individuals by third states. For example, Ahmed Abu Ali, a U.S. citizen, alleged in federal court proceedings that he was being detained in Saudi Arabia at the behest of U.S. law enforcement.¹¹⁴

Finally, the committee should note that while the above information represents the major concerns that the ACLU has in relation to U.S. counter-terrorism measures adopted post-September 11, we consider it important to highlight that there are other areas of concern with U.S. non-compliance with its obligations under the Covenant --- some of which have been documented in the submission of U.S. Civil Society Organizations and Advocates dated August 29, 2005 --- Accordingly, we would urge the Human Rights Committee not to overlook these other areas in its examination of any submission that the United States should make in relation to the process now being undertaken by the Committee.

The American Civil Liberties Union

September 2, 2005

¹¹⁰ "Rumsfeld Ordered Prisoner Hidden", *CBS NEWS*, June 17, 2004. available at: <http://www.cbsnews.com/stories/2004/06/17/iraq/main624411.shtml>; See also, Human Rights First, *Behind the Wire: An Update to Ending Secret Detentions.*, Mar 2005, at 7 available at: http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf

¹¹¹ Amnesty International, *Torture and Secret Detention: Testimony of the 'Disappeared' in the 'War on Terror.'* (August 2005). available at: <http://web.amnesty.org/library/Index/ENGAMR511082005>

¹¹² See, "Newly Released Army Documents Point to Agreement Between Defense Department and CIA on 'Ghost' Detainees", March 10, 2005. available at: <http://www.aclu.org/SafeandFree/safeandfree.cfm?id=17692&c=206>; See also, http://www.aclu.org/torturefoia/released/030905/DOD695_737.pdf

¹¹³ See, <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf#page=18>

¹¹⁴ See, *Omar Abu Ali, et al., v. John Ashcroft, et al.*, 350 F. Supp. 2d 28 (D.D.C. 2004); see also, Carlye Murphy, "Saudis Plan Terror Case Against Virginia Man, Family Says," *Washington Post*, July 30, 2004.