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*WORKING PAPER*

# War About Terror

Civil Liberties and National Security After 9/11

Daniel B. Prieto

*with research assistance from Swetha Sridharan*

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## Foreword

President Barack Obama, in one of his first moves in office, reversed some of the most controversial detention and interrogation policies of the Bush administration. His three executive orders mandated the closure of the Guantánamo Bay detention facility within a year, and suspended both military commission proceedings and the CIA's enhanced interrogation program. But the interagency task force established by the executive orders has a difficult task ahead: it must not only determine the future of the remaining detainees at Guantánamo, but also shed light on how to detain and interrogate future terrorist suspects in a manner consistent with American law and American values.

The Council on Foreign Relations' Independent Task Force on Civil Liberties and National Security aimed to analyze these very issues. It was launched on the fifth anniversary of the attacks of September 11, 2001, when tensions between counterterrorism priorities and civil liberties concerns were at a fever pitch. Consensus on national security policies and programs was elusive—a result of intense partisanship and an increasingly elaborate policy tug-of-war among the branches of government. There was an absence, as there is now, of a durable framework for effectively securing the United States against terrorism while also upholding its values.

The Council on Foreign Relations initiated the Task Force in order to contribute to the national discussion on these dueling priorities. The Task Force sought to analyze the foreign policy dimensions of the civil liberties debate. It also aimed to craft a long-term strategy for minimizing trade-offs between security and liberty, and, where possible, pursuing both priorities at once. The hope was to learn from the past seven years and to ensure that the response to any future attack judiciously advanced both civil liberties and national security objectives. In the end, however, despite a great deal of thoughtful deliberation by its two dozen members, the Task Force was unable to reach a consensus.

The CFR-sponsored Task Force on Civil Liberties and National Security encountered unique challenges. The nature of the threat to the United States and the ensuing war on terror was new and unprecedented. The issues were extraordinarily politicized. Policymakers were deeply divided on how far executive powers should extend during wartime and on the appropriate role of the courts. The civil liberties versus national security debate became increasingly splintered during the course of the recent election season, a fact that was mirrored in the group. In addition, the political context of these discussions changed, as the Bush administration reviewed and modified many of its earlier policies and as the country prepared for a presidential transition.

The moral aspects of the debate served to divide the Task Force even further. The group agreed that the threat to the United States was real and that significant efforts were needed to prevent future attacks. But, like most Americans, members had deep-seated views of what was right or wrong with America's conduct in the war against terrorism.

All of CFR's Independent Task Forces struggle to find the right tone in presenting judgments on the given issue. The civil liberties Task Force, however, faced a particular obstacle. Most often, Task Forces assess U.S. policies toward other countries and regions. A review of counterterrorism practic-

es required instead that this Task Force look inward. The members could not come to a consensus on the appropriate level of criticism their report should adopt, or on how much to look backward at the past seven years of U.S. counterterrorism practices.

As a result of these difficulties, and despite considerable effort, the Task Force was unable to agree on a set of meaningful conclusions. I continue to believe, however, that it is important that the Council on Foreign Relations add to the national debate on issues of such importance to American democracy and to the way the world sees the United States, especially as the Obama administration launches its interagency review of detention and interrogation policies. We therefore decided to publish this working paper building on the Task Force's work. Authored by Project Director Daniel B. Prieto, it reflects two years of intense deliberations with the Task Force, although we have not asked the members to sign off on or otherwise endorse the document. It is therefore not the product of any consensus. Many of the Task Force members did agree to be recognized as part of the advisory committee, and I thank them and indeed all members for their input and efforts.

We decided to publish the study as a working paper because this format allows the document to be posted quickly online, essential when the issues involved are in flux. The Council on Foreign Relations periodically publishes working papers when ongoing debates or changing policies call for an easily accessible document that can make an immediate contribution to the public discussion. This is certainly the case for issues involving civil liberties and national security, which are very much a moving target.

Institutionally, the process of bringing this paper to fruition has shown us the considerable extent to which reasonable people can disagree on decisions of vital importance to America's security, values, and national character. It has given us valuable insight into the challenges that policymakers and practitioners faced after 9/11. Intelligent people who had America's best interests at heart were making difficult decisions at a difficult time. This working paper, we hope, will provide some guidance to all those who continue to work on these issues.

This study finds that even if the United States successfully solves some of the most high-profile counterterrorism issues on the table, it will still lack a comprehensive, coherent, and sustainable framework for dealing with the strategic challenge posed by transnational terrorism. It argues that sharp disagreements over national security and civil liberties, as well as errors and overreach in U.S. counterterrorism practices, have stood in the way of America's ability to forge a critical and sustainable foreign policy accord on how to address terrorist detention and trials, as well as domestic intelligence policies. The study recommends that the United States reexamine the scope and limits of its war against al-Qaeda, treating national security and the protection of individual liberties as coequal objectives. It calls on Congress and the president to engage these issues in a bipartisan fashion and craft comprehensive long-term counterterrorism policies that reaffirm the U.S. commitment to core values. Only then, it argues, will the United States be able to achieve the kind of foreign policy agreement necessary to prevail against the modern terrorist threat.

We are indebted to two distinguished public servants, Bob Kerrey and William H. Webster, for chairing the Task Force. They provided the intellectual and nonpartisan leadership needed on this set of deeply divisive issues. Special thanks also go to Daniel Prieto, who assumed direction of the project midway. He grappled with a giant scope and exceptionally sensitive issues to craft a framework for civil liberties and national security. Anya Schmemmann and Swetha Sridharan on our Task Force team made every effort to guide this project to the finish line. Finally, I would like to thank all the Task Force members for their dedication to this effort. Their extensive comments and delibera-

tions have contributed much to this document, and to the broader debate on a set of issues whose importance is certain to endure.

**Richard N. Haass**

*President*

Council on Foreign Relations

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## Acknowledgments

This project on civil liberties and national security began as a CFR-sponsored Independent Task Force and has been published as a Working Paper. This project has benefited enormously from the guidance of the two Task Force chairs, Bob Kerrey and William H. Webster. Their broad national security expertise, intimate understanding of the political realities surrounding the issue, and their tireless support for this project were particularly valuable to me as I drafted this report. I am very grateful for their dedication to and leadership on this project.

I would like also to thank the members of the Independent Task Force on Civil Liberties and National Security, many of whom are now members of the advisory committee to this working paper. Although not asked to sign off on the paper or otherwise endorse it, they dedicated substantial time over the past two years to discussing the difficult question of how to address the tensions between security and liberty in the post-9/11 world. Special thanks go to Task Force member Jeffrey H. Smith, who, along with his colleagues Jon Michaels and Lindsay Rodman, drafted the group's initial findings on detention, and also to Juliette Kayyem, who helped kick off the project and laid the framework for the report's general findings. I am especially grateful to all those who provided extensive written comments.

There are many at the Council on Foreign Relations who were instrumental in this effort. Throughout the two-year journey, Swetha Sridharan has been absolutely indispensable as a reliable and tireless researcher, sounding board, and project coordinator. This project would not have been possible without her dedication and hard work. I am also grateful to Anya Schmemmann, director of CFR's Task Force program; this report would not have come to fruition without the benefit of her institutional knowledge and mobilization of CFR's resources, and her savvy in managing an extraordinarily diverse group of individuals. Lee Feinstein launched the project and lent his considerable expertise in international law to our discussions. Lindsay Workman provided helpful guidance on the structure and content of the report, and coordinated with other departments at CFR.

I am indebted to many other departments at CFR for their work on this report. Patricia Dorff and Lia Norton carefully edited the report, polishing it into the final product you see today. Lisa Shields and her communications team crafted a marketing and media outreach strategy. Irina Faskianos and her staff helped engage CFR national members and state and local officials in the discussion. Kay King and her team in Washington arranged previews of the report for members of Congress, congressional staffers, and CFR term members and helped get this work into the right hands.

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We previewed the report for a number of human rights and privacy NGOs, which provided insightful input. Special thanks go to several colleagues at Human Rights First, and to Michael German

at the American Civil Liberties Union, who sent us in-depth written comments. CFR term members Jared Feinberg, Neal Pollard, and Mark Shaheen, who attended our preview in Washington, also provided us with thoughtful feedback. Members of the House of Representatives who attended our bipartisan roundtable were particularly encouraging of our efforts.

A number of individuals briefed the Task Force and helped inform its discussions, including Tom Parker, Lawrence Wright, Andrew Kohut, Bryan Cunningham, David B. Rivkin Jr., and James X. Dempsey. Jon Jason Rosenwasser served as an observer to several Task Force meetings. Joseph Helman and Mary B. DeRosa also provided valuable input on the sections on privacy and surveillance.

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The views, judgments, and recommendations expressed in this report are solely my own and do not reflect the opinions or positions of any of the organizations with which I am affiliated.

**Daniel B. Prieto**

## Author's Note

Within his first week in office, President Obama took important steps to revise the terrorist interrogation and detention policies of the Bush administration. He ordered the closure of the detention facility at Guantánamo Bay within one year, signaling the administration's intent to dramatically shift how the United States deals with transnational terrorism. In addition to the Guantánamo closure, executive orders by President Obama affirmed that all detainees at Guantánamo have access to the writ of habeas corpus, affirmed Common Article 3 of the Geneva Conventions as the minimum baseline for the treatment of all terrorist suspect detainees, ordered the closure of the CIA's overseas prisons, rescinded Executive Order 13440 (which, in 2007, set the legal parameters for the CIA's revised but separate interrogation program), and required that all interrogations, by any government agency, follow the Army Field Manual.

It is important to note, despite these positive steps, that much remains unresolved. The difficult work to redefine U.S. counterterrorism policy still lies ahead of President Obama. In the near term, the interagency task force created by the executive orders must determine which Guantánamo detainees may be released or transferred and how, and whether those who are not approved for release or transfer can be detained and tried in the United States. Longer term, President Obama must craft durable counterterrorism policies for detention, treatment, and trial that protect national security, abide by U.S. values and the law, and are politically and diplomatically sustainable. The difficulty of this challenge is apparent when one recognizes that executive orders leave open the possibility that separate interrogation protocols may yet be allowed for the intelligence agencies (though they would adhere to the restrictions on coercive measures set forth in the orders) and that military commission proceedings have been suspended only temporarily for the 120-day duration of the task force review.

This working paper was finalized prior to President Obama's inauguration. Several of its recommendations closely align with steps already taken by the Obama administration; those recommendations have been subsequently annotated to acknowledge the Obama executive orders. Outside of those instances, the analysis and recommendations on U.S. treatment and detention of terrorist suspects remain highly pertinent to decisions that President Obama and Congress have yet to make about the relationship between civil liberties and national security in U.S. counterterrorism policy. For example, the report provides extensive analysis and recommendations of the other critical component of counterterrorism policy—domestic intelligence. The paper analyzes electronic surveillance programs, national security letters, terrorist finance tracking, watch lists, and more. Moreover, the paper considers counterterrorism policy as a whole, and presents the lessons learned from the Bush administration on executive power during national security emergencies. It calls on the Obama administration to increase collaboration with Congress and work on educating the public about the rationale for controversial counterterrorism measures. This comprehensive examination of the history and evolution of U.S. counterterrorism programs from 9/11 to the present will, I hope, provide valuable perspective and insights as the president seeks to keep America safe from transnational terrorism while upholding the values that are the cornerstone of American democracy.

## Acronyms

ARB	administrative review board
ATS	Automated Targeting System
AUMF	Authorization for Use of Military Force
CAPPS II	Computer Assisted Passenger Prescreening System II
CAT	UN Convention against Torture
CIA	Central Intelligence Agency
CIDT	cruel, inhuman, or degrading treatment
CIFA	DOD Counterintelligence Field Activity Office
CSRT	Combatant Status Review Tribunal
DARPA	Defense Advanced Research Projects Agency
DHS	Department of Homeland Security
DHS TRIP	DHS Traveler Redress Inquiry Program
DNI	Director of National Intelligence
DOD	Department of Defense
DOJ	Department of Justice
DTA	Detainee Treatment Act of 2005
EU	European Union
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act of 1978
FOIA	Freedom of Information Act
ICRC	International Committee of the Red Cross
IG	inspector general
INS	Immigration and Naturalization Service
IOB	Intelligence Oversight Board
IRTPA	Intelligence Reform and Terrorism Prevention Act of 2004
ISAF	International Security Assistance Force
MCA	Military Commissions Act of 2006
NATO	North Atlantic Treaty Organization
NORTHCOM	U.S. Northern Command
NSA	National Security Agency
NSL	national security letter
ODNI	Office of the Director of National Intelligence
OLC	Office of Legal Counsel
PFIAB	President's Foreign Intelligence Advisory Board
PIAB	President's Intelligence Advisory Board
POW	prisoner of war
SWIFT	Society for Worldwide Interbank Financial Telecommunication

TALON	Threat and Local Observation Notice
TIA	Total Information Awareness
TSA	Transportation Security Administration
TSC	FBI Terrorist Screening Center
TSDB	Terrorist Screening Database
TSP	NSA Terrorist Surveillance Program
UCMJ	Uniform Code of Military Justice
UEC	unlawful enemy combatant
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001



## Introduction

Political leaders, lawyers, and scholars have long grappled with questions of how to protect fundamental freedoms in times of national crisis. Supreme Court chief justice William Rehnquist observed that “the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war.”<sup>1</sup> This observation is highly relevant in today’s national security context. In an environment shaped by the terrorist attacks of September 11, 2001, securing the U.S. homeland from further attacks and confronting terrorist networks abroad are central priorities of U.S. foreign and domestic policy. Yet the transformation of the U.S. security apparatus after 9/11 and a range of new national security programs have generated widespread concern over the protection of international human rights, democratic norms, and a number of rights enshrined in the U.S. Constitution that form, collectively, the civil liberties of the American people.

The United States has not suffered another attack on U.S. soil, which speaks to the efficacy of various U.S. counterterrorism efforts. However, as 9/11 led the U.S. government—and the executive branch in particular—to reconsider many existing laws and policies and to create new ones, errors and overreach accompanying these efforts contributed to a serious erosion of trust in U.S. policies and leadership. Overseas, revelations of extrajudicial apprehensions and detainee abuse have harmed U.S. standing and credibility, hampered counterterrorism cooperation with allies, and provided inflammatory propaganda that aids terrorist radicalization and recruitment. Domestically, policy disagreements over security and civil liberties have been frequent, widely publicized, and emotionally charged, producing an environment of acrimony and distrust that has challenged the public’s faith in the government, deepened partisan divides, and undermined cooperation between the political branches of government.

At the close of the Bush administration’s second term, the United States is divided at home and at odds with much of the rest of the world over its counterterrorism policies and its commitment to human rights and civil liberties. The United States is, in effect, engaged in war *about* terror. There is fundamental disagreement on the most basic questions—how to address the threat posed by al-Qaeda, the lengths that the United States will go to combat terrorism, and the potentially corrosive effect of national security efforts on America’s commitment to long-standing moral values and individual liberties. Divides over national security and civil liberties have become so deep that they stand in the way of America’s ability to forge a critical national foreign policy consensus on how to deal with the strategic challenge of transnational terrorism and defeat al-Qaeda. The United States enjoyed a bipartisan foreign policy consensus throughout much of the Cold War that was critical to defeating the Soviet Union. The same level of national consensus is needed today to prevail against transnational terrorism. To be sure, the resolution of the conflict in Iraq will be a critical element in moving toward that consensus. But so will the resolution of acrimonious debates over terrorist detention and domestic intelligence efforts.

Recent polling data illustrate the sharp partisan split over civil liberties and national security within the United States.<sup>2</sup> Republicans and Democrats are diametrically opposed on many aspects of U.S.

counterterrorism policy. Fifty-six percent of Republicans think that U.S. counterterrorism policies have not gone far enough to protect the United States, and only 23 percent think policies have gone too far in restricting civil liberties. In contrast, 47 percent of Democrats think counterterrorism policies have been too restrictive of civil liberties, and only 39 percent feel that policies have not gone far enough to improve security. Seventy-three percent of Republicans think that detainee policies at Guantánamo have been fair. Only 39 percent of Democrats agree, and 47 percent of Democrats feel that Guantánamo policies have been unfair. Sixty-six percent of Republicans feel that torturing terrorist suspects is often or sometimes justified; 60 percent of Democrats feel that torture is rarely or never justified. Seventy-four percent of Republicans believe that it is generally acceptable for the government to surveil suspected terrorists without court approval, and 57 percent of Democrats believe that it is generally wrong.

Detention and surveillance policies have provided skirmish after skirmish, in which both sides have dug in their heels and accused their counterparts of all manner of transgressions, from being soft on terror to being lawless, from putting America at risk to trampling the constitution. Disputes over these issues—among our political leaders, the media, academics, the public, and our allies—are deep. This has been exacerbated by feelings of mistrust on all sides of the American policy debate. Perhaps it is a simple fact that no consensus is possible. Perhaps—as Brian Jenkins, a colleague at the RAND Corporation, recently lamented—issues of national security and civil liberties are akin to theological issues. That is, opinions are so strongly held that they are nonnegotiable.

Indeed, discussions of civil liberties and security frequently end up as conversations about how to balance the two, as if a gain for one invariably comes at the expense of the other. This zero-sum formulation and the high stakes in the debate are well captured in the oft-cited admonition from Benjamin Franklin that “they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” Polarization regarding post-9/11 counterterrorism policies has escalated with a series of conflicting claims. Some civil liberties advocates seem to treat any changes to the pre-9/11 status quo as unacceptable erosions of civil liberties and troubling expansions of executive power. At the same time, defenders of security programs assert their necessity and question whether critics are committed to defeating al-Qaeda. Although the public wants to be kept safe, it is also justifiably anxious about the expansion of the government’s power and the erosion of civil liberties in times of war. The unique nature of terrorism sharpened these fears in light of the fact that a number of terrorist detainees have been U.S. citizens and citizens of U.S. allies, that the war on terror has no foreseeable or easily definable end, and that the government has expanded its counterterrorism powers within the United States using military and intelligence assets that have traditionally been barred from such activities without strict oversight and controls.

Despite these challenges, policy changes that benefit security need not inherently reduce liberty, just as the protection of civil liberties need not inherently jeopardize security. To be sure, these priorities are often in tension, which demands that the United States make some tough choices. But there is a way forward that manages the relationship between civil liberties and national security in U.S. counterterrorism efforts by strengthening U.S. security while protecting civil liberties and remaining true to America’s values.

It is critical that the United States achieve a new consensus on how to confront and defeat the threat posed by al-Qaeda and associated groups while at the same time staying true to U.S. values. Ending the war *about* terror and reaching greater agreement on detention and domestic intelligence policies is a prerequisite to achieving that consensus. U.S. leaders need to end intractable and acrimo-

nious disagreements on counterterrorism policies and reaffirm America's commitment to protecting individual liberties and upholding core values in the pursuit of those policies.

President Barack Obama and Congress need to reengage in this debate in a spirit of cooperation and good faith, to address gaps and inconsistencies in counterterrorism policies, and to create a coherent and sustainable framework for detention and domestic intelligence. A new approach will require concessions on all sides. Hawkish defenders of many post-9/11 detention and surveillance policies will need to display a willingness to acknowledge errors and overreach where they occurred, and civil libertarians and other critics must get past reflexive negative reactions to any policies associated with the Bush administration that altered the pre-9/11 status quo. A new approach must faithfully represent both legitimate security concerns and the imperative to uphold the moral values and commitment to civil liberties that underpin America's strength as a force for democracy and freedom in the world. Only if the United States takes a thoughtful and strategic approach to protecting security while safeguarding civil liberties will it be able to preserve the American way of life and build the national security framework, institutions, and tools needed to defeat the transnational terrorist threat exemplified and inspired by al-Qaeda.

Although achieving consensus on detention and domestic intelligence policies has been elusive, one should not overlook the important progress that has been made. Detention and surveillance policies after 9/11 have evolved as a result of Supreme Court decisions, executive branch adjustment, and congressional action to moderate overreach and rectify errors. Beneath the divisiveness of the policy debates, the checks and balances of our system of governance have been working. What is needed now is to identify remaining gaps and flaws in detention and domestic intelligence policies and to exercise the leadership necessary to craft durable solutions.

This report hopes to contribute to a greater consensus around U.S. counterterrorism policy to help put it on a stronger and more sustainable footing, today and in the future. The report's findings and recommendations on detention and domestic intelligence policies are aimed at improving America's national security and reaffirming its commitment to human rights and civil liberties.

It is important that this report be read in a spirit of good faith with regard to the Bush administration. U.S. counterterrorism efforts since 9/11 have suffered from mistakes, many of them serious. But all should agree that policies were pursued in good faith by people who believed that the steps taken were necessary to confront the threat to the American people presented by transnational terrorism. Fear of another attack and a commitment to protect American lives motivated the administration in the days, months, and years after September 11. With hindsight, the United States is now able to reflect on those decisions and consider how to move forward.

## *SCOPE AND ORGANIZATION*

This report is divided into four main sections. The first sets forth many of the broad themes and challenges that have surrounded the debate on security and civil liberties since 9/11. It provides historical context on the tension between civil liberties and national security, describes the unique challenges posed by modern terrorism, examines the effect of globalization and technology on both the threat and America's ability to address it, and examines the critical importance to U.S. foreign policy and national security of maintaining a firm commitment to human rights and civil liberties. It addresses tensions between the need for innovation and the need to abide by existing laws, and between oversight and secrecy. It discusses the challenge posed by terrorism to pre-9/11 laws, examines the impli-

cations of addressing terrorism using a war paradigm, and assesses the negative foreign policy effects of overreach and errors in U.S. counterterrorism policies. It acknowledges the concerns that post-9/11 national security efforts have raised regarding individual liberties, and examines the critical need to rebuild trust in U.S. counterterrorism policies and to reclaim America's reputation. Last, it sets forth several broad themes that animate the remainder of the report. These include the exercise of executive authority and the benefits of greater consensus and cooperation between the executive and legislative branches in crafting policy.

The second section describes, assesses, and makes recommendations on detention and interrogation policies and activities after 9/11. It outlines various aspects of criminal law and the laws of war related to detention and the treatment of detainees. It discusses the protections and procedures provided to detainees under current U.S. policies, and how they align with constitutional and statutory requirements and with international laws and standards, including the laws of war (e.g., the Geneva Conventions). It addresses the mechanisms for contesting detention, standards for treatment, venues for detaining suspects in military or criminal facilities, including Guantánamo, and procedures for trying terrorist suspects, either in military or civilian courts.

The third section describes, assesses, and makes recommendations on what is broadly defined as domestic intelligence. It recognizes the government's need for more information to discover and thwart terrorist acts before they occur, and the reality that much of that information may need to be gathered within the United States and include a higher level of scrutiny of U.S. persons. It discusses aspects of criminal law and laws related to intelligence. It examines programs for surveillance and the expanded use of technology to analyze personal information contained in business records and commercial data obtained from companies. Specifically, the section analyzes the controversies surrounding the National Security Agency's (NSA) electronic surveillance program, the Federal Bureau of Investigation's (FBI) increased use of national security letters (NSLs), the Department of Defense's (DOD) domestic information collection activities, the growth of terrorist watch lists to screen people for travel and employment, and the use of data mining for counterterrorism intelligence purposes.

The fourth section provides observations on the national security and civil liberties debate. It assesses the manner in which executive authority was exercised after 9/11 and the decisive role that it has played in coloring the debate. It finds that greater congressional leadership is urgently needed to put U.S. counterterrorism efforts on a more sustainable footing and to ensure that the United States takes a more comprehensive and strategic approach to protecting individual liberties in the pursuit of counterterrorism efforts. At the same time, it concludes that though greater congressional attention is important, it is presidential leadership that remains indispensable, both to cultivate a healthy national dialogue on civil liberties and national security and to forge a bipartisan national consensus on U.S. counterterrorism policies and programs going forward. Only through shared leadership and accountability can the president and Congress craft durable counterterrorism policies that both keep the nation secure and respect individual liberties and essential American values. Reaffirming the long-standing commitment of the United States to the fair and humane treatment of prisoners and to individual liberties will bolster the credibility of America's moral message in the fight against al-Qaeda. Reaching national consensus on counterterrorism policies and the protection of individual liberties will allow the United States to end its war about terror and remove what is currently a damaging and self-imposed obstacle to achieving broader U.S. foreign policy objectives.

## Framing the Debate: Civil Liberties and National Security

### *THE VALUES IMPERATIVE*

The United States has long viewed itself and upheld its position as a society and world power committed to individual liberties and human rights. Humanitarian ideals are deeply embedded in the U.S. Constitution and have guided and influenced the actions of American leaders through the centuries. George Washington ordered that enemy prisoners be treated “with humanity, [so they] have no reason to Complain of our Copying the brutal example of the British Army in their treatment of our unfortunate brethren.”<sup>3</sup> The humane treatment of prisoners reflected the fundamental ideals that America sought to uphold as a moral and strategic imperative.

After World War II, the Nuremberg Trials of Nazi war criminals again signaled America’s abiding commitment to the rule of law when dealing with enemy prisoners. According to Robert H. Jackson, the chief U.S. prosecutor, “that four great nations, flushed with victory and stung with injury[,] stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason.”<sup>4</sup>

It is in the expression of these values in domestic and international policies that much of America’s so-called soft power finds its roots. The world has often agreed with America’s view of itself. Dissidents, from Czechoslovakia’s Vaclav Havel and South Africa’s Nelson Mandela to protestors in Tiananmen Square, have viewed the U.S. commitment to democracy, human rights, and civil liberties as more than rhetoric. It has been, to them, a beacon, an achievable aspiration. It is a defining aspect of America’s foreign policy influence around the globe.

In much of the time since September 11, however, the United States has been at odds with itself—and with much of the rest of the world—over these very values. Fairly or not, the nature of post-9/11 counterterrorism efforts, the manner of their pursuit, and the polarization of the debate have led to a view at home and abroad that these principles have lost firm root in U.S. national security policy. It is essential for U.S. foreign policy that this outlook be changed.

This report begins from the premise that human rights and civil liberties are vital to all Americans, and indeed to all people, and must be maintained, even as the United States seeks to enhance security measures to prevent terrorist attacks and to prevail against al-Qaeda and similar terrorist groups. Post-9/11 security efforts are sustainable and durable over the long term only if they are firmly rooted in America’s commitment to its historic values and to a respect for individual liberties.

### **Findings**

- The United States is divided at home and at odds with much of the world over its counterterrorism policies and its commitment to human rights and civil liberties. The United States is, in effect, engaged in a war about terror.

- Divides over national security and civil liberties have become so deep that they stand in the way of America’s ability to forge a critical national foreign policy consensus on how to deal with the strategic challenge of transnational terrorism and defeat al-Qaeda.
- Although security considerations and civil liberties protections are often in tension, the two need not exist in zero-sum, something that is too readily implied when policymakers discuss the need to balance security and civil liberties. Counterterrorism policies are sustainable over the long term only if policymakers design them with the coequal objectives of improving national security and protecting civil liberties. Any policy or program that consistently prioritizes one objective over the other will not be durable over the long term, and will eventually fail the country on both counts.
- Counterterrorism policies and programs that deviate from a commitment to protecting individual liberties harm U.S. foreign policy and national security: they can reduce the legitimacy of U.S. counterterrorism efforts, erode the trust of allies and the American public in U.S. government actions, hamper cooperation and support from American allies, alienate moderate Islamic groups that the United States has an interest in cultivating, and provide powerful propaganda for extremists to radicalize new followers and recruit terrorist operatives.

U.S. leaders need to reaffirm America’s commitment to protecting individual liberties and upholding core values in the pursuit of national security. It is critical that the United States achieve a new bipartisan national consensus on how to confront and defeat the threat posed by al-Qaeda and associated groups, yet stay true to U.S. values. Ending the war about terror and reaching greater agreement on detention and domestic intelligence policies is a prerequisite to achieving that consensus.

### *THE UNIQUE CHALLENGES OF TRANSNATIONAL TERRORISM*

Al-Qaeda and terrorist groups inspired by al-Qaeda pose a distinctive challenge to U.S. national security. The enemy is not a geographically bound nation state. It is a borderless, dispersed, but networked movement driven by the center. Its operatives are frequently independent and self-starting, and they often reside and operate within the countries they target. The seriousness of terrorist attacks inside the United States is magnified by the risk that these groups will use weapons of mass destruction or weapons of mass effect.

Al-Qaeda and similar terrorist groups have successfully attacked the United States, Algeria, Indonesia, Jordan, Kenya, Morocco, Pakistan, Spain, Tanzania, Tunisia, Turkey, the United Kingdom, and Yemen. They have targeted military assets, civilian populations, economic targets, and iconic symbols. As an asymmetric strategy, transnational terrorism exploits the openness and economic infrastructure of societies—weaponizing airplanes, targeting mass transit and rail systems, striking tourist venues, using the Internet to recruit, train, and plan—to inflict damage and disruption at a low cost of operations. The attacks of September 11 inflicted nearly \$80 billion in damage, whereas the cost to the terrorists amounted to only \$500,000.

The life cycle of international terrorism encompasses a broad spectrum of activity that extends beyond the execution of actual attacks. It includes education and research; recruiting, radicalizing, and creating terrorist cells; training; planning; communications; coordination; financing; and acquiring material. Terrorist activities are addressed, typically, in a variety of legal contexts. Outright attacks may be of such magnitude that they constitute acts of war, such as those of September 11. A lesser attack, such as a marketplace bombing that kills ten people, is more often seen as a crime, because the scale is

not enough to constitute an act of war. Activities that precede actual attacks may constitute crimes, depending on the conspiracy, incitement, and other laws of the countries affected. Still other activities, however, particularly during the radicalizing, recruiting, and planning stages before a terrorist cell becomes operational, may constitute suspicious but not necessarily criminal behavior.

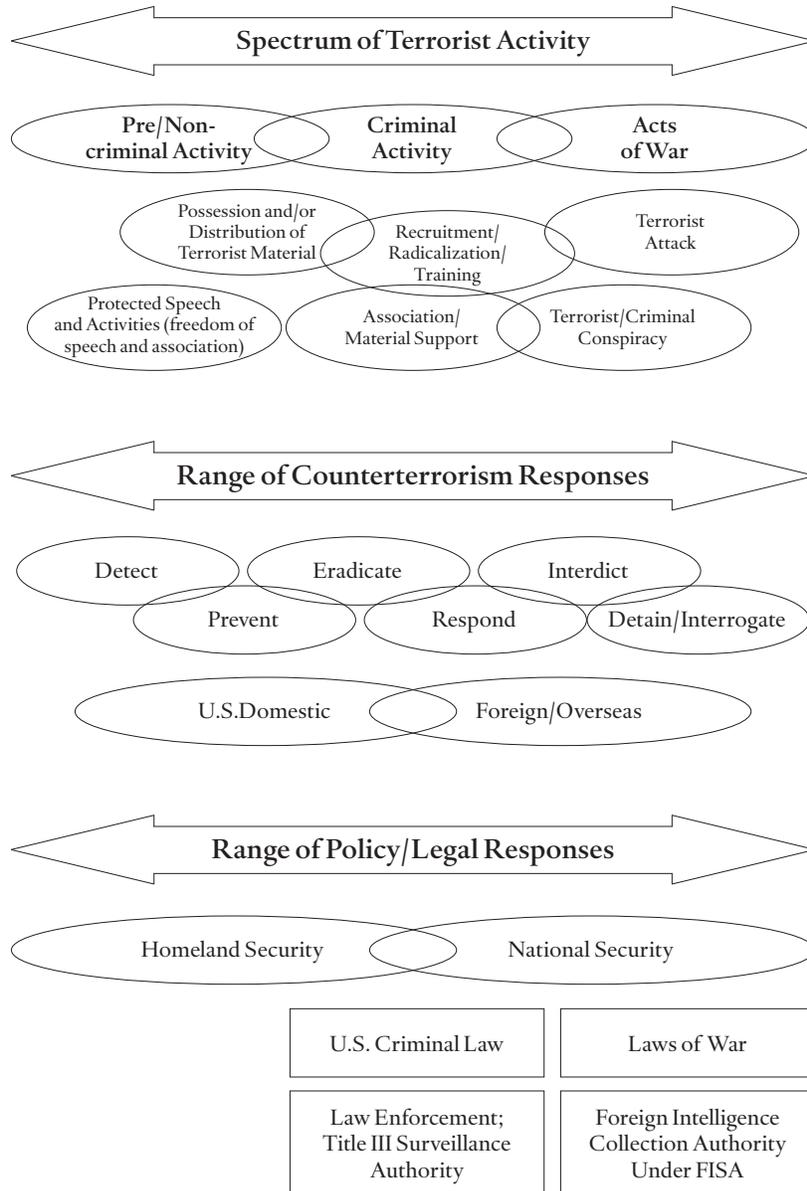
Traditional legal frameworks—U.S. criminal justice and the laws of war—are imperfectly suited to address the unconventional characteristics of the terrorist threat and the needs of homeland security. Terrorist groups may not exhibit a clear chain of command, because cells often operate as independent and self-contained nodes within a networked structure. Many individuals or small groups of operatives are inspired and motivated by groups like al-Qaeda but do not have operational ties to it; many terrorist operatives or groups self-brand themselves as al-Qaeda and many operatives have no record of violence. This makes it particularly difficult for policymakers to define the boundaries and determine the effectiveness of counterterrorism efforts. The traditional metrics associated with war—such as geographic control or the elimination of a leadership cadre—are less salient when it comes to terrorism. There will be no clear guides for determining when the threat posed by al-Qaeda and similar terrorist groups has been eliminated and the conflict put to an end.

Technology further complicates the fight against al-Qaeda and similar terrorist groups. Revolutionary changes in mobile and Internet technologies over the last decade have given terrorists new capabilities by reducing the costs and increasing the reach of their communications. Terrorists rely heavily on the Internet as an operational tool for radicalizing, recruiting, training, and planning. These changes have made it easier for terrorists to operate and hide, but they have also dramatically increased the ability of governments to gather and analyze information to help identify individuals who might pose a terrorist risk or be engaged in terrorist conspiracies.

Therefore, to be effective, counterterrorism policies, laws, authorities, institutions, capabilities, and oversight mechanisms must be capable of addressing all stages in the terrorist life cycle. They should fulfill both preventive and reactive functions. They should be able to address noncriminal activities as well as actions that amount to crime and war. And, finally, successful counterterrorism efforts must confront threats overseas while expanding their focus inside the U.S. homeland.

The different legal regimes that could be part of a counterterrorism framework that achieves these goals—criminal law, the laws of war, laws that regulate surveillance, and intelligence gathering—have historically existed in silos with well-defined boundaries. Working within each of these bodies of law does not adequately address the terrorist threat. At the same time, attempts to straddle, combine, or blend disparate bodies of law have inevitably run into inconsistencies and incompatibilities.

**Figure A. The Threat of Transnational Terrorism Challenges Both Criminal Law and the Laws of War and Their Traditional Boundaries and Limits.**



## FRAMING COUNTERTERRORISM AS WAR

The United States invoked war to confront al-Qaeda and the Taliban after 9/11. This had an immediate, tangible effect on the laws that applied to U.S. efforts to fight international terrorism. It reflected the view that criminal law would not be enough to address the threat posed by al-Qaeda and those harboring its leaders in Afghanistan.

There has been widespread criticism of the Bush administration for its reliance on a war paradigm. But it is important to recognize that the administration was not alone in this characterization. Using a war paradigm after 9/11 arguably represented less a break from the past than a logical next step in an evolution that began during the Clinton administration. In 1998, the Clinton administration concluded that the United States was in an armed conflict with al-Qaeda as the legal justification for its attempts to capture or kill Osama bin Laden. In 2001, Congress passed the Authorization for Use of Military Force (AUMF) within days of 9/11. The AUMF authorized the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.” Congress made it clear that the AUMF gave specific authorization to the president to treat the conflict with al-Qaeda and the Taliban as war. Furthermore, the U.S. Supreme Court affirmed the existence of a state of armed conflict with al-Qaeda and the Taliban in 2004 in the *Hamdi* decision and in 2006 in the *Hamdan* decision.

Despite controversy over the war paradigm, then, the debate has been less about whether the United States is in a state of armed conflict with al-Qaeda, but rather about exactly what that means. What are the limits and boundaries of a stand-alone global conflict with a nonstate, transnational organization like al-Qaeda, which on 9/11 existed in forty countries and today operates in as many as one hundred?<sup>5</sup> Where do you draw the line when engaging in war against an organization that comprises an amorphous array of disparate groups around the globe? “Al-Qaeda core” or “al-Qaeda central” comprises the organization’s core leadership—several hundred individuals hiding in the mountains of Afghanistan and northern Pakistan, as well as several thousand men who received terrorist training in Afghan camps. A broader al-Qaeda network consists of operationally associated groups in Asia, Africa, and the Middle East that have, at various times, received military training, weapons, and financial assistance from al-Qaeda. Finally, al-Qaeda has inspired self-starting terrorist operatives the world over, from London to Madrid and from Bali to Baghdad. Although al-Qaeda central was weakened operationally, it spawned a global jihad movement that looks to it for ideological inspiration. Estimates of the size of al-Qaeda and affiliated groups today range from the “several tens of thousands...with untold numbers involved with other groups in the global jihad movement” to roughly 70,000.<sup>6</sup>

Many aspects of the conflict, such as efforts to defeat its members in Afghanistan, are straightforward and readily addressed with the tools of war. There is a clear distinction, however, between wars on identifiable “hot” battlefields and military actions against al-Qaeda elsewhere. Outside of active war zones, the war paradigm creates clear problems and challenges: civilians are difficult to distinguish from combatants; the line between military and law enforcement activity is blurred; combating al-Qaeda has no geographic boundaries; and there is no clear metric for defining victory and determining a clear end of the conflict. Although under current circumstances, the United States would be

barred from treating American cities and streets and those of its allies as active combat zones, there is a lack of clarity on what is and should be allowed short of actual combat.

Outside the United States, concern is significant regarding the extent and limits of potential American military activities overseas on another state's soil were the United States to locate al-Qaeda operatives there. The United States is not in a state of war with the countries of origin of many current al-Qaeda detainees, for example, Pakistan, Yemen, Saudi Arabia, Kuwait, Libya, Malaysia, France, and Indonesia. Other countries have legitimate concerns that U.S. counterterrorism activities carried out under a war paradigm would allow the United States to justify the targeting of al-Qaeda members on the streets of London, Paris, Islamabad, or other territories that are not active war zones. They worry about the methods by which the United States would seek to capture or detain suspected members of al-Qaeda or associated organizations within their borders.

Similar worries exist within the United States that a broad interpretation of the war paradigm would allow the United States to be viewed simply as part of a global battlefield.<sup>7</sup> The use of military assets and tactics that might be appropriate overseas and in battlefield situations is generally limited by constitutional and statutory restrictions on U.S. military operations inside of the United States and the constitutionally protected rights of citizens and resident aliens. Debates over the war paradigm have played significantly in partisan divisions over U.S. counterterrorism policies. For example, the Bush administration has cited the AUMF as one of the principal arguments justifying NSA warrantless surveillance within the United States without compliance with the Foreign Intelligence Surveillance Act (FISA) of 1978.<sup>8</sup> Some defenders of that program have characterized those who oppose it or prefer a criminal law approach as "soft on terrorism." Critics argue that the invocation of war "has a highly specific legal meaning that is not applicable to most matters of counterterrorism policy" and risks a permanent expansion of executive powers.<sup>9</sup>

A number of European allies, which have longer histories of dealing with terrorism than the United States, generally diverge from characterizing many aspects of the conflict as war. Although a number of European allies recognized the attacks of September 11 as an act of war and invoked Article 5 of the NATO charter for the first time, agreed that the NATO fight against the Taliban in Afghanistan is a war, and viewed the conflict with Iraq as a war, many are less ready to concede that activities targeted at al-Qaeda beyond Afghanistan and Iraq are also war. Whereas the United States tends to view the terrorism problem primarily through the strategic lens of international politics, European authorities often do so in the context of domestic politics, where solutions lie in social and economic policies toward immigrant communities and better community policing. Compared to Muslim communities in Europe, American Muslim communities are generally more affluent, educated, and assimilated, and are not ready sources of terrorist recruiting or activity. European authorities, on the other hand, have faced al-Qaeda-inspired terrorism from their own citizens and immigrant communities. As a practical consideration, therefore, European leaders are highly concerned that certain counterterrorism policies directed at their countrymen could be viewed as heavy-handed and antagonistic, thereby exacerbating the problem of domestic radicalization. Many European governments are reluctant to inject state military power into their homeland security and have relied more heavily than the United States on criminal law enforcement. They have been able to do so in part because many of the completed or planned attacks occurred on their soil, making it easier to gather evidence and find witnesses and thus prosecute those responsible. Further, their tactics have generally involved greater engagement of immigrant communities and the individuals or groups within those communities who demonstrate sympathies with or vulnerability to radical and dangerous ideologies.

Current European attitudes stem from the fact that European governments have struggled with the challenge of international terrorism for decades.<sup>10</sup> In the 1960s, France experimented with quasi-military courts to confront Algerian terrorism.<sup>11</sup> Current French counterterrorism is firmly grounded in French criminal laws, with a high degree of flexibility that allows aggressive preemption. French detention measures have been heavily focused on Muslim and North African minorities. All terrorism cases are handled by investigating magistrates, who conduct independent investigations of potential terrorist activity and have broad powers to issue subpoenas and search orders, to approve surveillance, and to determine whether activities merit prosecution as crime. They may also authorize pre-charge detention, during which time the terrorist suspect's access to lawyers may be curtailed, and a potentially lengthy pretrial detention.

The British approach to counterterrorism was forged by its experience with Northern Ireland in the 1970s. Like the French in the 1960s and the United States after 9/11, the British government resorted to executive detentions with limited judicial process. Many detainees alleged that they were tortured, and many were held without trial. The Irish Republican Army leveraged the significant controversy over the detention policies to aid recruitment. After adverse assessments of these policies by high-level UK commissions and European human rights bodies, Britain moved, by the late 1970s, toward a greater reliance on criminal laws to address the threat of terrorism. After 9/11, British officials have focused on giving the government as much time as possible to interrogate terrorist suspects before charge, because the UK legal system places limits on questioning thereafter. These have taken the form of pre-charge detention, now allowable for up to forty-two days, and control orders, which subject a terrorist suspect to a variety of stringent requirements, such as house arrest, curfews, and limited mobile phone and Internet use.

In reassessing its security apparatus to confront terrorism after 9/11, the United States has faced challenges similar to those faced by European authorities. A comprehensive counterterrorism strategy requires a combination of aggressive preventative measures, strong military and law enforcement efforts, clear rules, limits and procedures that conform to our values, and effective oversight. An appropriate framework for terrorist detention will be found neither in the laws of war nor in U.S. criminal laws alone. Satisfactory approaches to domestic intelligence are provided neither by criminal laws and procedures nor by traditional intelligence rules.

Despite the contentious nature of the debate, there are few who would argue that no legal changes have been necessary to address the threat. The difficult questions arise around which changes are necessary, which changes are appropriate, which changes are useful, and which roles and responsibilities each branch of government should assume to effect change. Successful and durable counterterrorism policies will require creativity, flexibility, and strategic innovation. They will have to leverage existing laws and policies, identify and rectify inconsistencies, and develop new laws and policies where necessary.

## Findings

- Many aspects of the conflict with al-Qaeda and associated groups are legitimately characterized as war. At the same time, it is untenable to treat all aspects of U.S. counterterrorism under this rubric. This is especially true when it comes to U.S. citizens and citizens of allies, and when the counterterrorism activities are conducted within U.S. territory and territories of countries with which the United States is not at war and are not zones of active conflict.

- The armed conflict against al-Qaeda is virtually unprecedented in the modern age. Al-Qaeda is a nonstate actor without state sponsorship that, for the most part, exists outside the state that has declared war on it. The conflict is unlimited by geographic boundaries because al-Qaeda operates within many different noncontiguous countries at the same time.<sup>12</sup>
- The United States is in a period of necessary and desirable strategic change to confront the threat of transnational terrorism. This requires the United States to recalibrate its national security policies and a range of laws and institutions related to privacy and civil liberties. Effective counterterrorism efforts require both changes to existing statutes and the development of new laws, policies, and institutions specifically tailored to confront the strategies and tactics employed by al-Qaeda and associated terrorist groups. These initiatives require a blend of criminal law, the laws of war, and rules governing law enforcement surveillance and foreign intelligence collection. They also require the United States to refine, update, strengthen, or replace various laws intended to protect civil liberties but that are now outdated in the wake of dramatic changes in technology and globalization since the laws were first enacted.

### Recommendations

- Revise or reaffirm the Authorization for the Use of Military Force based on an updated assessment of the threat environment and the magnitude of the continued threat posed within the United States and overseas by al-Qaeda and its affiliated organizations, the number of which has grown significantly since 9/11. The president should work with Congress to update and clarify the AUMF as necessary to best calibrate counterterrorism authorities with the current threat environment.<sup>13</sup> The president and Congress should revisit whether the United States needs all the authorities it has carved out for itself in declaring that it can—at least in theory—first, use military force around the world and hold detainees, wherever captured, as enemy combatants until al-Qaeda no longer poses a strategic threat to the United States and, second, extend the use of intelligence assets and tactics previously reserved for use overseas into the United States.
- As a general rule, the United States should temper counterterrorism efforts under the laws of war by respecting the civil liberties and privacy of U.S. persons, treating the protection of individual liberties as a coequal priority to national security when crafting counterterrorism policies, respecting the sovereignty of other states, and crafting policies that respect international and domestic legal commitments and that are viewed as consistent with American values by the American public and the international community.

### *THE FOREIGN POLICY IMPACT OF U.S. COUNTERTERRORISM POLICY*

The fight by the United States against a very real transnational terrorist threat requires cooperation from partners worldwide. International anxiety and disagreement over U.S. counterterrorism efforts have been of such significance that they cannot simply be written off as anti-Americanism or explained away as policy differences. Unfavorable and deteriorating attitudes toward the United States undermine confidence in the U.S. commitment to the rule of law, human rights, and civil liberties, which have long been central to furthering U.S. foreign policy objectives. Doubts about America's

commitment to those values do more than create a drag on America's moral credibility; they have the potential to seriously undermine U.S. foreign policy.

International support for U.S.-led counterterrorism efforts has declined precipitously in the years since 9/11. Despite some improvement after bottoming out soon after the 2003 invasion of Iraq, the image of the United States in the Middle East, according to the Pew Global Attitudes Project, remains "abysmal."<sup>14</sup> In Indonesia, favorability ratings have dropped from 61 percent in 2002 to 29 percent in 2007. In Turkey, a North Atlantic Treaty Organization (NATO) ally, ratings have fallen to 9 percent, and in Pakistan, a critical partner in counterterrorism efforts, to 15 percent. Approval ratings are not much higher in other NATO countries. Surveys show that there has been a sizable decline in favorable attitudes toward the United States in Canada, Britain, France, Germany, and Spain. In Germany, the ratings dropped from 78 percent in 2000 to 30 percent in 2008, and in Spain, from 50 percent to 34 percent.

The United States has also had disagreements with its allies on specific counterterrorism initiatives. Differences with the European Union (EU) on issues of privacy and information sharing have generated several disputes. Efforts by the Department of Homeland Security (DHS) to gain greater access to Passenger Name Record information from European airlines led Sophie in't Veld, a Dutch member of the European Parliament, to worry that "we cannot accept this excessive appetite for personal data without any kind of protection against mistakes and abuse by public authorities." Differences were again apparent after the June 2006 revelation that the Society for Worldwide Interbank Financial Telecommunication (SWIFT), the international financial records clearinghouse based in Belgium, had shared financial transaction records with U.S. authorities as part of an effort to track terrorist finance. An EU investigation found that the effort violated EU privacy directives. EU and U.S. officials have also disagreed on the role of nonprofit groups in terrorism financing. Although the United States has blocked the assets of many charitable organizations that are suspected of having links to terrorist financing operations, European authorities have drawn sharper lines between political or charitable activities and direct terrorist support. They have, with some exceptions, been disinclined to freeze the assets of charitable organizations connected to groups like Hezbollah and Hamas. Where the U.S. government focuses on the fact that "these groups repeatedly engage in deadly terrorist attacks and the 'charitable' activities help draw recruits," EU authorities instead often tended to view Hezbollah and Hamas as political parties.<sup>15</sup>

These differences aside, European authorities have faced their own challenges to align national security and civil liberties. For example, French authorities maintain a database to track individuals believed to pose security threats. Recent controversy arose over proposals to include information on individuals as young as thirteen in the system. In Germany and the UK, surveillance can be conducted much more easily than in the United States.

It is important to note that U.S.-European counterterrorism cooperation since 2001 has been generally successful, helping thwart a number of plots, including plans to bomb transatlantic flights between the United Kingdom and the United States in August 2006. The United States and the EU also reached a compromise over airline passenger data and financial data. U.S. authorities took a number of steps to address European concerns over privacy, such as limiting the use of acquired data to counterterrorism purposes and establishing time limits for its retention.

Unlike privacy issues, disagreements with the international community over detention policy have been much more damaging and severe. Public awareness of detainee treatment at Guantánamo and abuse at Abu Ghraib prison in Iraq is extremely high in Europe and among Arab Muslim countries.

Unfavorable assessments of U.S. detention practices have become high-profile components of domestic politics in certain countries. The European Union and the Council of Europe have investigated and criticized U.S. rendition policies. Spain and Portugal investigated the alleged use of their territory in the Central Intelligence Agency's (CIA) network of secret prisons. There was widespread public outrage in France when it was revealed that French intelligence authorities worked closely with the CIA and had cooperated in U.S. extraordinary renditions. German and Italian officials indicted CIA operatives as a result of criminal investigations into the kidnapping or transport of terrorist detainees in their territories.

Some of the disagreements arise from philosophical differences about how best to address the threat of terrorism. The Iraq war fostered perceptions that the United States was wedded to using a war paradigm, relying on military hard power, and acting more unilaterally than in collaboration with overseas allies. Concerns that the U.S. detention regime was fundamentally unfair—it could subject detainees to indefinite detention without trial or a meaningful ability to challenge the basis of detention—were seemingly confirmed by revelations of detainee mistreatment. Making matters worse is the not-unreasonable belief that there was a link between U.S. detention policies and guidance broadly and the detainee abuse that occurred in the field. This fed perceptions that the United States was willing to compromise its moral values in its fight against al-Qaeda and associated groups. Taken as a whole, revelations of harsh interrogations at Guantánamo, detainee abuse at Abu Ghraib, secret CIA prisons, and the transfer of detainees to third-party countries with a record of torture have been extremely damaging to U.S. moral credibility and the belief that the United States is committed to the rule of law and the humane treatment of prisoners.

As a result, the United States has been largely discredited as a moral messenger for spreading democracy and supporting human rights. This has made it more difficult for Washington to credibly pressure authoritarian regimes to make progress on human rights and democratic reforms; indeed, several regimes have cited U.S. counterterrorism efforts to help justify crackdowns on their own citizens.<sup>16</sup> Strong negative views of U.S. counterterrorism efforts also undermine U.S. cooperation with moderate groups overseas that could aid efforts to prevent terrorist radicalization and to promote democratic reform.<sup>17</sup> Negative repercussions from U.S. counterterrorism efforts can be an impediment to U.S. diplomacy on economic policy as well. For example, some Bahraini lawmakers threatened to withhold their endorsement of a bilateral free trade agreement with the United States in order to gain leverage for the release of six Bahrainis detained at Guantánamo.

More worrisome is that there are clear examples where U.S. counterterrorism policies, detainee treatment, and the level of secrecy surrounding U.S. detentions and interrogation have hampered counterterrorism cooperation with other nations. Continued controversy over Guantánamo Bay has hindered information sharing, military operations, and law enforcement. British soldiers in Afghanistan and Iraq, for example, are prohibited from turning detainees, including terrorist suspects, over to U.S. custody for fear that potential U.S. mistreatment would make them culpable for violating Ministry of Defense guidelines and EU rules on the humane treatment of prisoners.<sup>18</sup> Detainee abuse and mistaken detentions have contributed to reduced assistance and intelligence cooperation from local communities in Afghanistan and Iraq.<sup>19</sup> Even in the many instances where counterterrorism and intelligence cooperation has remained robust, there is no doubt that international concern over U.S. counterterrorism policies has acted as a drag on the levels of cooperation that might otherwise have been achieved.<sup>20</sup>

Perhaps worst of all is the potential for U.S. counterterrorism policies to incite such distrust of U.S. motives that many Muslims around the world could perceive—wrongly—that the U.S. war on terror is, instead, a war on Islam. Such a perception, and powerful images of detainees at Guantánamo and detainee abuse at Abu Ghraib, are easy and powerful aids to terrorist propaganda, recruitment, and radicalization.

Former secretary of state Colin Powell expressed worry in 2002 that a decision not to apply the Geneva Conventions to the conflict in Afghanistan would “reverse over a century of U.S. policy and practice” and have “a high cost in terms of negative international reaction.”<sup>21</sup> In 2007, he worried that the existence of Guantánamo had “shaken the belief that the world had in America’s justice system” and that “the world is beginning to doubt the moral basis of our fight against terrorism.”<sup>22</sup> The former UN high commissioner for human rights has argued that America’s “war on terror has inflicted a very serious setback for the international human rights agenda,” and it has created a “profound divide” between the United States and the rest of the world.<sup>23</sup>

## Findings

- International skepticism of U.S. detention policies and America’s commitment to human rights are a serious drag on the ability of the United States to achieve its foreign policy goals. It can hamper counterterrorism and cooperation with other nations, aid terrorist radicalization and recruitment, and undermine U.S. credibility in promoting democratization and human rights.
- The foreign policy costs of deviations from America’s commitment to values are magnified in an era of 24/7 Internet communications and satellite TV. Images and stories like those from Guantánamo and Abu Ghraib spread more rapidly and reach a wider audience than ever before, creating a pervasive negative influence on global public opinion and a persistent aid to terrorist groups seeking to radicalize and recruit new operatives.
- The greater availability of negative images and stories contribute to the mistaken perception by many Muslims around the world that the U.S. war on terror is a war on Islam. The United States should dramatically strengthen its efforts to engage Muslim and Arab communities in constructive ways. Cultivating and deepening relationships with Muslim and Arab communities, particularly communities at risk of radicalization, is critical to counteracting the ideology of violent extremism espoused by al-Qaeda and similar groups. The United States should enhance its engagement with Arab and Muslim religious groups, community organizations, and educational institutions, as well as media and other national governments, to counter the risk of radicalization.

## Detention and Interrogation

Detaining terrorist suspects serves three purposes: to prevent detained individuals from engaging in violence against the United States, to facilitate intelligence gathering on existing and potential terrorist threats, and to try detainees for crimes committed. America's detention and treatment of suspected members of al-Qaeda and associated groups since 9/11 has raised serious concerns about the legality and appropriateness of those efforts. Of particular concern have been the risk of error in who is detained, the treatment to which detainees are subject, and the prospect of indefinite detention without trial. This section describes critical aspects of post-9/11 detention and interrogation programs and policies, traces aspects of their evolution over time, assesses their current status, and identifies continued challenges and potential solutions.

Four major issues related to detention and interrogation policy are discussed. First, on what basis are detainees being held, and what rules and laws govern their detention? Second, to what protections are detainees entitled regarding their treatment? Third, what rights, if any, do detainees have to challenge the basis for the detention and what mechanisms are made available to them to do so? Fourth, what mechanisms are appropriate to try detainees for crimes?

### *CRIME, WAR, OR SOMETHING ELSE?*

The challenge posed by U.S. efforts to detain members of al-Qaeda and associated groups relates to the legal basis on which detainees are being held, the rules and laws that govern their detention, and incompatibilities or lack of clear guidance from the legal regimes in existence before 9/11. Military detainees captured on a battlefield are typically held as prisoners of war (POWs) under the laws of war. POWs enjoy protections under the Geneva Conventions, which establish certain treatment standards and review procedures. Citizens and permanent resident aliens (together, "U.S. persons") within the United States generally enjoy protections under the U.S. Constitution, are subject to U.S. criminal law, and are granted access to U.S. courts. Aliens in the United States are also subject to U.S. immigration laws. Traditionally, U.S. laws have allowed the preventive detention of enemy aliens during a national security conflict.<sup>24</sup> The assumption is that individuals who live within U.S. territory, but who are citizens of a state that is at war with the United States, pose a threat to U.S. national security. The Supreme Court has declared, however, that "detention prior to trial or without trial is the carefully limited exception"<sup>25</sup> and requires a congressional declaration of war.<sup>26</sup>

None of the legal regimes on its own provides clear guidance on how best to address the complex challenge posed by transnational terrorism. There are inherent conflicts and incompatibilities between the laws of war and criminal laws. For example, in a criminal law context it is widely accepted around the world that those detained by an executive authority should be afforded access to a court to challenge the basis of their detention and that, if held unlawfully, the court may order them released.

This habeas right is in tension with a core principle of the laws of war—that captured soldiers can be held without charge or trial until the end of hostilities to prevent them from rejoining the fight.

The transnational nature of modern terrorism has rendered laws grounded in rules linked to geography, nationality, and state-controlled militaries less salient and more difficult to apply. Al-Qaeda and associated forces posed a threat that did not fit neatly into these legal categories. They had undertaken an armed attack against the United States. They had established a base in a foreign country but were not acting on behalf of a state. And they had the capacity to support and execute other attacks from within the borders of various countries around the world.

In light of those challenges, the Bush administration made several critical decisions to define and scope the conflict and to craft policies to address the threat.

First, it took the view that the traditional law enforcement approach to terrorism was, taken alone, no longer adequate or appropriate. Based on the AUMF, the Bush administration held al-Qaeda and Taliban detainees under the laws of war.

Second, it resolved that the laws of war and presidential wartime authorities allowed the executive branch to create the new features for a terrorist detention regime at its prerogative, thereby giving the president broad discretion and flexibility in the methods and mechanisms used to capture, detain, and kill purported terrorists. With this understanding, the Bush administration chose to characterize al-Qaeda detainees not as POWs but as unlawful enemy combatants (UECs) to whom the laws of war regarding detainee treatment—particularly the Geneva Conventions, by the terms of the treaty itself—did not apply.

It is in this context of innovation by the executive branch and unclear guidance from existing bodies of law that the deep controversies over U.S. detention policies have arisen. The administration invoked the flexibility that the laws of war provided without applying the detainee treatment protections contained in those laws. Detention efforts have often seemed haphazard, with an ad hoc reliance on selective aspects from each body of law. The potential for mistaken or indefinite detention created intense scrutiny of the administrative and the judicial mechanisms made available to detainees.

## *SNAPSHOT OF DETENTION ACTIVITIES FOLLOWING 9/11*

### **Domestic Preventive Detentions**

In the immediate aftermath of 9/11, the FBI relied on a mix of immigration laws and criminal statutes to temporarily detain a number of individuals (both U.S. and non-U.S. persons) in federal facilities. Although the government has not disclosed the total number of such detentions, third-party investigations indicate that more than 1,200 were held on visa violations and other immigration charges that would not normally warrant incarceration.<sup>27</sup> The Justice Department also arrested approximately seventy individuals on the basis of the material witness statute, used typically to hold witnesses in criminal trials who may flee if subpoenaed.<sup>28</sup> In addition, a small minority were held on assorted criminal charges.

These domestic preventive detention efforts have been criticized for yielding little in the way of tangible counterterrorism results. All seventy material witness suspects were eventually released, with several discharged outright and many released to their home countries after judicial proceedings found them not guilty of wrongdoing. According to Michael Rolince, former FBI special agent in charge of counterterrorism, the FBI conducted about 500,000 interviews without finding a single

lead that, if known earlier, might have helped the agency prevent the terrorist attacks of 9/11. A New York University study indicated that of the 307 convictions that came out of this preventive detention effort, only forty-six were terrorism related.<sup>29</sup>

U.S. domestic preventive detentions directly after 9/11 were an understandable measure, given the fear that additional terrorist attacks were imminent, the general lack of knowledge about al-Qaeda, and the lack of intelligence on al-Qaeda operatives who might be in the United States. However, the legal tools used in the effort comprised an ad hoc mix of criminal statutes and immigration laws. The absence of a clear and comprehensive policy and legal regime for domestic preventive detention played a significant role in many of the errors and abuses that occurred, which are discussed on page 35 of this report.

In October 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001 expanded the government's powers to conduct domestic preventive detention. Section 412 of the act—regarding mandatory detention of suspected terrorists, habeas corpus, and judicial review—permits the attorney general to unilaterally detain aliens for seven days without charge upon certifying that he has reasonable grounds to believe that the individual is a national security threat. The detainee has a right to habeas corpus judicial review, but may appeal decisions only to the U.S. Court of Appeals for the District of Columbia Circuit. After seven days, federal authorities must either begin deportation proceedings or file criminal charges against the detainee. However, an alien whose “removal is unlikely in the reasonably foreseeable future” may continue to be held if the attorney general reauthorizes his certification of national security risk every six months. This technicality creates the potential for indefinite detention without trial. To date, the government has not exercised domestic preventive detention authorities under the Patriot Act.<sup>30</sup>

### **U.S. Person Terrorist Detainees or Detainees Captured in the United States**

At least two U.S. citizens who were initially held in civilian criminal custody—José Padilla and Yaser Esam Hamdi—were declared unlawful enemy combatants by presidential letters of findings and placed in military custody for a period of time.

José Padilla was bounced back and forth between military and criminal custody. He was first arrested and detained in the United States as a material witness. The administration then argued that Padilla was not entitled to a criminal trial. He was designated as a UEC and transferred to detention in a military prison. While in military custody, he was, for years, denied access to counsel, denied the ability to challenge the basis for his detention, and subjected to harsh treatment, including sensory deprivation, solitary confinement, and sleep deprivation. Padilla was eventually transferred back into the criminal justice system. He was tried in a U.S. federal court and sentenced to life imprisonment in August 2007.

Yaser Hamdi is a U.S. citizen of Saudi descent who was captured in Afghanistan in 2001. He was designated a UEC and detained for almost three years without charge. Hamdi was initially detained at Guantánamo Bay, Cuba, and was later transferred to military jails in Virginia and South Carolina after it became known that he was a U.S. citizen. He was released and deported to Saudi Arabia in 2004 after agreeing to renounce his U.S. citizenship and to strict travel restrictions.

Ali Saleh Kahlah al-Marri, a Yemeni citizen and U.S. permanent resident, was captured in U.S. territory in 2001. He was held as a material witness and then on credit fraud and other criminal charges.

Shortly before federal criminal trial proceedings were to begin, the administration declared al-Marri a UEC in June 2003 and had him transferred to a naval brig in South Carolina. Since then he has been held without charge and without prospect for trial. Throughout his detention, multiple habeas petitions were denied by both federal district and circuit courts. In July 2008, the Fourth Circuit Court of Appeals upheld the government's ability to detain al-Marri as a UEC, but—relying, in part, on reasoning from the *Hamdi* decision—found that he had not been given enough opportunity to contest the basis of his detention.

Other terrorist detainees are foreign nationals who were within U.S. territory at the time of their capture. Zacarias Moussaoui, a resident alien of Moroccan descent, had been arrested in the United States prior to 9/11. He was held in federal prisons and—following the attacks of September 11—tried in a federal criminal court. He was convicted in 2006 and is currently serving a life sentence in a U.S. federal supermax prison. Richard Reid, a British national, was arrested in the United States in December 2001 after attempting to set off a bomb on an inbound flight from Europe to the United States. He was tried on criminal charges in U.S. federal courts and is serving a life sentence in a U.S. federal supermax prison.

### Foreign Detainees Captured in Non-Battlefield Situations

The United States and cooperating countries also apprehended a number of individuals who had not been operating on anything akin to a traditional battlefield, but had allegedly supported, planned, or were in the process of planning terrorist attacks against the United States or its allies. Khalid Sheikh Mohammed, the architect of the attacks of September 11, was captured by Pakistani intelligence and handed over to U.S. authorities in March 2003. Ramzi bin al-Shibh, an alleged intermediary between the 9/11 hijackers and al-Qaeda leaders, was captured in Pakistan in 2002. The Algerian Six, a group suspected of planning attacks against U.S. and British embassies in Sarajevo, were captured by Bosnian police and turned over to the U.S. military. Pakistani citizen Saifullah Paracha was arrested on route to Bangkok. Iraqi citizen Bisher al-Rawi and Jordanian citizen Jamil al-Banna were captured by the CIA in an airport in Banjul, Gambia. Indonesian citizen Riduan Isamuddin, better known as Hambali, was apprehended in a joint operation by the CIA and Thai police for his role in the 2002 Bali nightclub bombing, in which 202 people died.

More than a hundred terrorist suspects—including important al-Qaeda members Khalid Sheikh Mohammed, Abu Zubaydah, and Ibn Sheikh al-Libi—were captured by or in coordination with law enforcement or intelligence officials of cooperating countries. Many of them were transferred, using a practice known as extraordinary rendition, to the custody of third-country intelligence agencies, including Egypt, Jordan, Syria, Morocco, and Uzbekistan, or to secret CIA detention facilities in locations that are reported to have included eastern Europe, Afghanistan, Pakistan, and Thailand.

Rendition as a general term refers to a practice that the Clinton administration began using in the 1990s to apprehend terrorists and others abroad, often transferring them to the United States, to face criminal prosecution. Extraordinary rendition refers instead to the transfer of an individual from one jurisdiction to another to obtain intelligence using aggressive interrogation techniques. After 9/11, the United States dramatically increased its use of extraordinary rendition.

To address concerns that U.S. counterterrorism renditions amounted to torture by proxy, the current U.S. policy is to not transfer people, wherever they are held, to countries where it is more likely than not that they will be tortured. President George W. Bush declared in September 2006 that there were no

more detainees in secret CIA facilities, but did not foreclose the use of the secret detention program in the future. Many of these detainees were transferred to the U.S. military facility at Guantánamo.

Up to 780 detainees have been held at Guantánamo since 9/11. At present, 250 detainees remain. The government anticipates trying between sixty and eighty in military commissions, even though only twenty have been charged with war crimes to date. Although an estimated sixty have been approved for release, they remain at Guantánamo because the United States has few good options for how, to whom, and where to release them. That leaves an estimated 130 Guantánamo detainees in effective limbo—they are still considered to pose a threat, but there may not be enough evidence to prosecute them.

### **Foreign Detainees Captured and Held in Overseas Battlefields**

Rules for dealing with overseas detainees have generally been defined by the theater of capture or detention. In the military campaign in Iraq, individuals captured and detained by the United States before June 2004 were designated as POWs protected under the Geneva Conventions; after June 2004, the United States continued to detain individuals on the basis of the authorities and guidelines established by the United Nations and the Coalition Provisional Authority.<sup>31</sup>

In Afghanistan, the United States detains individuals as part of Operation Enduring Freedom and has developed a specific set of regulations for detention and review. The International Security Assistance Force (ISAF) also has detention operations. Though ISAF adheres to guidelines as established under UN Security Council resolutions, there is disagreement on the appropriate legal framework for detention among its thirty-seven member nations.<sup>32</sup> Large numbers of al-Qaeda and Taliban combatants captured in the conflict in Afghanistan were classified as unlawful enemy combatants and eventually transferred to the military facility in Guantánamo Bay.

### **Status Determinations**

Historically, when U.S. forces captured individuals in the course of armed conflict, U.S. military officers followed the procedures set forth in army regulations to make initial status determinations.<sup>33</sup> Traditionally, and in accordance with Geneva Convention rules for conventional conflicts, the U.S. military has classified those it has captured as enemy prisoners of war, civilian internees, or other detainees.<sup>34</sup> The Third Geneva Convention requires that if there is “any doubt” whether a detainee is entitled to POW status, a “competent tribunal” (also known as an Article 5 tribunal) should make the determination. Before September 11, the default position in disputed cases was to accord detainees POW protections under the Third Geneva Convention until the tribunal submitted a decision.

Procedures for reviewing the status of detainees were implemented in Iraq and Afghanistan following the Abu Ghraib scandal. In Iraq, an initial review of detention takes place within seven days. Consistent with the procedures in the Fourth Geneva Convention, and in accordance with Iraqi law, the Iraqi Combined Review and Release Board reviews the detention of each individual within six months of his incarceration. The board comprises both representatives of the Iraqi government and senior officers of the Multi-National Force-Iraq. Those still perceived as a threat are given a written explanation and are scheduled for another review in six months by a Multi-National Force Review Committee. A Joint Detention Review Committee, composed of high-level U.S., UK, and Iraqi officials, reviews the detention of each individual detained for eighteen months. About 6,300 prisoners have been

released to date and many detainees have been funneled into the Iraqi criminal justice system.<sup>35</sup> In Afghanistan, according to U.S. rules, detainee status is reviewed first on capture, and then about seventy-two days after capture, by a combatant commander. Those who continue to be detained receive annual reviews. Some of those released are sent to Afghanistan's reconciliation program.

When the United States originally began to capture UECs on the battlefield in Afghanistan, however, it decided that the president would make a group status determination rather than have the U.S. military use Article 5 tribunals. This is rooted in the fact that the government already had decided that, as a legal matter, al-Qaeda and Taliban detainees were not entitled to POW status. Understandably, this procedural shortcut posed reasonable concerns that a potentially innocent individual might face indefinite detention without meaningful mechanisms for redress. It also caused the public and international community to perceive that the United States had forgone its commitment to the laws of war.

At Guantánamo, the evolution of procedures for detainees to challenge their detention has been driven alternately by Supreme Court decisions and congressional legislation.<sup>36</sup> Only after the Supreme Court's *Hamdi* decision in 2004 were status review mechanisms put in place for detainees at Guantánamo. Today, they are subject to detention and review procedures established in the Detainee Treatment Act of 2005, the Military Commissions Act (MCA) of 2006, the Army Field Manuals, and various DOD directives and regulations. The review begins with the Combatant Status Review Tribunal (CSRT) process. If the government does not intend to prosecute the detainee before a military commission, an administrative review board (ARB) reexamines his case annually to determine if he poses a continued threat. In Detainee Directive 2310.01E, issued in 2006, the Department of Defense restored its traditional position of treating all those in its custody as POWs unless and until a competent tribunal, such as a CSRT, decides otherwise.

## TREATMENT

### Post-9/11 Immigration and Material Witness Detainees

The domestic preventive detention effort after September 11 drew criticism for a number of abuses and mistakes. It disproportionately targeted Arab-American, South Asian-American, and American-Muslim communities, raising concerns about ethnic and racial profiling. These communities felt they were judged on the basis of misguided stereotypes, leading to broad suspicion among the public. They also had to contend with negative portrayals in popular culture and the perception that they pose a risk as a potential fifth column. In addition, a large number of detainees were held mistakenly, on the basis of false associations or assumptions, hearsay, and personal vendettas.

The FBI's inspector general (IG) found that the FBI failed to make a targeted effort to distinguish between aliens who had ties to terrorism and those who were guilty merely of immigration violations.<sup>37</sup> Studies and interviews by human rights organizations indicate that a number of the detainees faced discriminatory or abusive treatment and were denied their basic legal rights. Many detainees were never charged with a crime, prevented from challenging the basis for their detention, and denied full access to counsel. In addition, detainees were often prevented from contacting family members, held in extended solitary confinement, subjected to physical and mental stresses during interrogation, denied access to adequate healthcare, and, on occasion, prevented from fulfilling religious obligations.

The high degree of secrecy surrounding domestic preventive detention efforts soon after 9/11 exacerbated a number of these concerns. The Department of Justice (DOJ), FBI, and Immigration and Naturalization Service (INS) released only a limited amount of information in response to Freedom of Information Act (FOIA) requests from the Center for National Security Studies, the American Civil Liberties Union, and twenty-one other human rights organizations.

Perceptions of bias in counterterrorism and homeland security efforts inside the United States strain relations with American Muslim and Arab communities and risk harming future law enforcement and intelligence efforts.

### Protections for Unlawful Enemy Combatants

Much has been made of the approach taken by the Bush administration to frame the conflict with al-Qaeda and associated groups as war rather than as law enforcement. But of greater consequence was the decision that the Geneva Conventions—which for decades had served as a guide to the United States’ treatment of its detainees—did not apply to many of the terrorist suspects detained by the United States after 9/11. Specifically, the administration argued that the conflict with terrorist groups differed significantly from traditional interstate conflicts (because al-Qaeda was not a state). It also determined that neither Taliban nor al-Qaeda detainees qualified for prisoner-of-war protections or the minimum rights of Common Article 3 of the Geneva Conventions.<sup>38</sup> Al-Qaeda and Taliban fighters were not members of official armed forces or an organized resistance movement; they did not carry arms openly; they did not differentiate themselves from civilian populations by means of uniforms or insignia; and they did not heed the laws of war prohibiting the intentional targeting of civilians—basic requirements for receiving POW status.

The Bush administration classified terrorist detainees as unlawful enemy combatants. Although the concept of unlawful combatants is not an explicit part of the Geneva Conventions, the administration did not invent the term; the concept of unlawful combatancy is implicit in the Geneva Conventions and consistent with international law.<sup>39</sup> The administration took the position that UECs were entitled to humane treatment, but that the policies, rules, and procedures for handling detainees would be determined at the discretion of the executive branch. To that end, the administration argued that terrorists categorized as UECs lacked any protections under the Geneva Conventions, including protections under Common Article 3.<sup>40</sup>

Untethered from the long-standing Geneva Conventions architecture that defined the post-World War II classification and treatment of detainees, the rights of detainees and the procedures and processes of their detention were rendered unclear. First, who makes the determination that someone is an unlawful enemy combatant? Second, if detained UECs are ineligible for prisoner-of-war protections, to what protections are they entitled? Should they be allowed to contest their detention? If so, in what forum? Should they be entitled to counsel? How should the detaining government assess the risk they pose over the duration of detention? And what rules govern when and where they should be released?

Outside scrutiny over how the United States resolved these questions was extraordinarily high, given that detainees included U.S. citizens, citizens of nations allied with the United States, citizens of nations with which the United States was not at war, and boys as young as thirteen. Al-Qaeda lacked a clear military hierarchy and its members wore no uniforms, which increased the likelihood of mistaken detention. The fact that a transnational conflict with al-Qaeda was not amenable to the traditional hallmarks of military victory raised the potential for indefinite executive detention. Scrutiny became even more intense following revelations of detainee abuse at Abu Ghraib and the use of harsh interrogation techniques at Guantánamo Bay. Mistreatment of detainees was taken as

ready evidence—by skeptics of U.S. counterterrorism policies, certain members of Arab and Muslim communities, individuals sympathetic to radicalization, and terrorist groups themselves—that America’s war on terror was, instead, a war on Islam.

### Interrogation of Unlawful Enemy Combatants

Detentions enable military and intelligence personnel to conduct interrogations of individuals with the aim of learning more about terrorist organizations, operations, and targets. Effective interrogations can produce valuable intelligence information. Historically, interrogation guidelines for the U.S. military have been set forth in the Army Field Manuals, which represent the official U.S. government view of the proper interpretation of the Geneva Conventions and U.S. law related to the detention and treatment of those in U.S. military custody.<sup>41</sup> But in the aftermath of the 9/11 attacks, those guidelines no longer constrained interrogation policy, as the Bush administration had concluded that al-Qaeda and Taliban detainees did not qualify as prisoners of war under the Third Geneva Convention.<sup>42</sup>

Limited knowledge about al-Qaeda and an acute fear of another terrorist attack led the Bush administration to seek maximum latitude to interrogate terrorist suspects. Guidance on interrogations was provided in three Department of Justice opinions, two from 2002 and one from March 2003. Together, these three documents provided a legal basis for “alternative” or “enhanced” interrogation procedures from 2002 to 2004. The first 2002 opinion, which the U.S. government has since rescinded, provided an excessively narrow definition of what amounted to torture.<sup>43</sup> A second 2002 opinion, which remains classified, applied that torture analysis as the basis for approving certain CIA interrogation techniques. The 2003 memorandum provided the basis to approve twenty-four interrogation techniques to be used by the Department of Defense.<sup>44</sup> The interrogation program was also approved by the National Security Council and the Office of the Attorney General; congressional leadership was informed of its details.

Among the enhanced or alternative techniques were painful stress positions, hypothermia, and the use of dogs for intimidation. They also included waterboarding, a practice in which interrogators simulate drowning by pouring water over the subject’s nose and mouth, which are covered with cellophane or a wet towel. Many believe that waterboarding constitutes torture. In the past, the U.S. military has forbidden the practice, court-martialing soldiers for it in the Vietnam War and charging enemy soldiers with war crimes for using the technique in World War II.

Secretary of Defense Donald Rumsfeld authorized the military community to use a number of the alternative procedures, including the use of stress positions, sensory deprivation of light and sound, removal of clothing, forced grooming, and the use of dogs to induce stress. He did not authorize waterboarding, but the DOD general counsel noted that Category III techniques, including waterboarding, “may be legally available.”<sup>45</sup>

In 2008, CIA director Michael Hayden acknowledged that up to one-third of the one hundred detainees held in the CIA detention program were subjected to enhanced techniques under the CIA interrogation program.<sup>46</sup> Of those, the administration acknowledged that three high-value detainees—Abu Zubaydah, Khalid Sheikh Mohammed, and Abd al-Rahim al-Nashiri—were waterboarded while in CIA custody.

The Bush administration has argued that alternative interrogation techniques have generated critical pieces of intelligence that have helped the United States and its allies thwart terrorist plots and

save lives. When speaking of the CIA program, former CIA director George Tenet stated that “what the detainees gave us was worth more than [what] the FBI, the Central Intelligence Agency, and the National Security Agency put together have been able to tell us.”<sup>47</sup> Current CIA director Hayden has said that the program was “lawful and effective [and] was born of necessity. . . . Unlike traditional law enforcement, the CIA’s chief objective in interrogations is not forensics on past events, but actionable, forward-looking intelligence.”<sup>48</sup> President Bush argued, when he acknowledged the existence of the program in a September 2006 speech, that alternative interrogation methods were “tough . . . safe and lawful and necessary,” and that without the program, “al-Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this program has saved innocent lives.”<sup>49</sup>

Sentiment within the executive branch regarding the Office of Legal Counsel’s (OLC) legal opinions and the adoption of new treatment and interrogation policies by the military and the intelligence community was divided. A number of military lawyers objected to OLC’s legal analysis on the basis of a long-standing tradition of restraint regarding the interrogation and treatment of detainees. For its part, the FBI avoided the types of harsh interrogation techniques supported by the new policies, with an FBI-internal email noting that “they were not effective or producing intelligence that was reliable.”<sup>50</sup> Internal memoranda reveal that FBI agents refused to deviate from their standard interrogation policies in gathering evidence for use in criminal trials. They criticized the DOD for using techniques that produced little information beyond what the FBI was able to obtain using its traditional interrogation techniques, asserting that whatever extra information DOD did obtain was “suspect at best.”

Cumulatively, the actions taken by the Bush administration—classifying terrorist detainees as unlawful enemy combatants, declaring Common Article 3’s treatment provisions inapplicable, denying detainees protections under Common Article 3—amounted to a rejection of the clear guidelines that had governed detainee treatment for decades.<sup>51</sup> In their place, interrogation practices began to rest on general presidential guidance that declared that detainees should be treated “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949.” At best, the new standard of treatment was unclear, failed to establish explicit standards of conduct to replace the long-standing guidelines that had now been set aside, and created an environment in which there was a heightened likelihood of detainee abuse. At worst, many of the instances of harsh treatment that occurred were the direct result of decisions made by senior Bush administration officials. The Bush administration had sought maximum latitude in interrogating terrorist suspects to obtain intelligence. With the Department of Justice memos and the presidential order, it sought to act with the broadest conceivable discretion under applicable U.S. and international laws, including the 1994 torture statute, the 1996 War Crimes Act, the Geneva Conventions, and the UN Convention against Torture (CAT). The message of the 2002 memo—according to Jack Goldsmith, the assistant attorney general who rescinded it—“was indeed clear: violent acts aren’t necessarily torture; if you do torture, you probably have a defense; and even if you don’t have a defense, the torture law doesn’t apply if you act under color of presidential authority.” This “in effect gave interrogators a blank check,” creating the very real risk that the DOJ opinions might be used to justify interrogation techniques much harsher than those specifically approved.<sup>52</sup>

It is in this context—prevent an attack, the old rules about treatment do not apply, and aggressive interrogation techniques are legal—that detainee treatment scandals erupted at both Abu Ghraib and Guantánamo and regarding CIA renditions and secret prisons.

## **Aggressive Interrogations at Guantánamo and Abuse at Abu Ghraib**

In April 2004, *60 Minutes II* and the *New Yorker* released photographs and stories of U.S. military personnel abusing prisoners at the Abu Ghraib prison in Iraq. There were numerous instances of “sadistic, blatant, and wanton criminal abuses” committed or facilitated by soldiers, intelligence agents, and military contractors.<sup>53</sup> These included various forms of physical abuse and sexual humiliation and the use of military dogs to instill fear in the detainees.

A number of harsh techniques were also used at Guantánamo, though they did not reach the level of abuse at Abu Ghraib. Most of these techniques were authorized at the time as compliant with Army Field Manual standards and additional guidance provided by the secretary of defense. These included gender coercion, playing loud music, exposure to extreme heat and cold, sleep deprivation, and using dogs to threaten detainees. Unauthorized techniques included using duct tape to prevent a detainee from shouting during interrogation, chaining detainees in a fetal position on the floor, and threatening detainees and their families. Many of the techniques were withdrawn in response to the findings of investigations.

There were a number of investigations into detainee treatment at Abu Ghraib and Guantánamo, by the U.S. military itself, the International Committee of the Red Cross (ICRC), and by a commission appointed by the secretary of defense.<sup>54</sup> Investigations concluded that detainee abuses ordered by military intelligence officers at Abu Ghraib resulted, in part, from confusion about whether Geneva protections applied to detainees in Iraq, because they had not applied to Taliban and al-Qaeda detainees in Afghanistan. A report on Guantánamo reprimanded the commander of Joint Task Force Guantánamo for inadequate supervision of certain harsh techniques and the failure to set limits on their implementation. Generally, it was found that an unclear chain of command, combined with poor leadership, lack of communication, and inadequate training, led to confusion about permissible standards for interrogation and resulted in cases of abuse. In December 2008, a bipartisan report from the Senate Armed Services Committee drew a much sharper causal link between policy decisions by senior Bush administration officials and occurrences of detainee abuse.

## **Extraordinary Rendition, CIA Secret Prisons, and Accusations of Abuse**

Extraordinary rendition has been highly controversial, in large part because of reports that the United States rendered some detainees to third countries where they were subjected to torture and others to secret U.S. facilities where CIA officials engaged in enhanced interrogation techniques. This practice of creating detention facilities outside of the U.S. mainland and outside of U.S. legal jurisdiction with little or no political or public oversight has been heavily criticized. The controversy over extraordinary rendition has been heightened by investigative reports by the EU and Council of Europe, lawsuits against U.S. authorities in several EU countries, and widely publicized cases in which the targets were eventually found to have been detained on the basis of faulty evidence or associations, such as those of German citizen Khalid El-Masri and Canadian citizen Maher Arar. Human rights groups and investigations by the Council of Europe and the European Parliament have reported a number of instances in which detainees suffered invasive and humiliating treatment at the hands of the CIA during transit—being blindfolded, shackled, drugged, and put in diapers—and in host countries to which they were transferred.

The UN Convention against Torture prohibits U.S. officials from transferring persons to countries where they are more likely than not to face torture. Although the U.S. government believes that this legal obligation only attaches to transfers from U.S. territory, the U.S. policy nevertheless is not to transfer a person from U.S. custody (wherever held) to another state where it is more likely than not that the person will be tortured. The Bush administration has confirmed that when there is a possibility of torture, it obtains assurances from the receiving state.<sup>55</sup> However, it is widely acknowledged that many of the countries that received U.S. detainees, despite making these guarantees, have a record of engaging in the torture and abuse of prisoners. In 2006, the UN Committee on Torture cautioned the United States against accepting diplomatic assurances from nations that had been known to violate the CAT.

The secret CIA detention facilities have faced similar criticisms. Detainees in these facilities did not have access to any detention review procedures, legal representation, or ICRC or consular officials. The conditions in which they were held, and other details of their detention (including a list of their names), remain undisclosed. As a result of the lack of transparency, treatment and interrogation standards are in question. Former detainees have claimed that they were tortured during their incarceration, and several countries have launched investigations into alleged CIA rights abuses that may have occurred on their soil.<sup>56</sup>

## *TERRORISM TRIALS*

### **U.S. Criminal Trials**

U.S. criminal laws generally focus on addressing criminal activities that have already occurred, and are less capable of achieving the counterterrorism aim of deterring and preventing future attacks. In general, criminal laws face a number of challenges in addressing the terrorist threat.<sup>57</sup> For example, it may be hard to criminally apprehend individuals overseas, as evidenced by the failure before 9/11 of diplomatic efforts to persuade the Taliban to hand over Osama bin Laden. And even after an individual is detained, a host of challenges face a successful criminal trial. How well can the United States prosecute in criminal courts a terrorist suspect who may pose a significant national security threat, but has not yet perpetrated an obvious act of violence? Before 9/11, criminal prosecutions relied on linking the defendant to a particular violent act or a plot to carry out such an attack.

The admissibility of evidence poses another challenge. Information that may be appropriate in an intelligence context may fail to satisfy the evidentiary standards and procedural safeguards of criminal trials, which exclude hearsay and statements taken outside of court proceedings. Further, public criminal trials may create a risk of exposing classified sources and methods. In the trial of eleven terrorists involved in the 1993 World Trade Center bombings, the prosecution shared a list of two hundred coconspirators with the defense, only to have the contents of the list become available to Osama bin Laden and other terrorists in Sudan within ten days. In the case of Ramzi Yousef, disclosures in public proceedings may have alerted terrorists to government surveillance of their cell phones, allowing them to quickly dismantle their communication networks. The Classified Information Procedures Act of 1980 provides procedures for the courts to seek to accommodate the government's interest in protecting secret and sensitive information while seeking to ensure a defendant's right to a fair trial and to maintain rule of evidence in criminal proceedings.<sup>58</sup> Even if trying terrorist suspects is viable under the criminal-law model, the more important policy question is whether criminal pro-

ceedings provide the best and most appropriate mechanism for the United States to confront the threat of transnational terrorism; are criminal trials the most effective venue in which to achieve the dual goals of counterterrorism and the protection of civil liberties?

Despite these challenges, the United States has effectively used criminal laws in the domestic context to charge, try, and obtain convictions of terrorist suspects and thus hold them in long-term detention. Cases in which the terrorist suspects played a role in actual or attempted attacks (for example, Moussaoui and Reid) were reasonably straightforward. In other cases, prosecutors relied on expanded interpretations of material support and criminal conspiracy laws against suspects who had not yet engaged in plotting or implementing a particular terrorist attack, but were involved in activities or could be linked to organizations that signified that they posed a terrorist threat (for example, Padilla and the Lackawanna Six).<sup>59</sup>

This second type faced a range of significant challenges. For example, much of the most potent evidence against Padilla was inadmissible in criminal court because it was gathered in ways that violated due process restrictions and evidentiary rules. Evidence of a plot to detonate a dirty bomb in the United States and blow up apartment buildings by rigging natural gas lines had been obtained by coercive means from Padilla and other detainees when they were held in military custody. Without this information, prosecutors were forced to rely on weaker evidence, such as Padilla's enrollment form at a jihadist training camp and wiretapped conversations that indicated his plans to travel to Afghanistan for this purpose. The prosecution also argued that global jihad itself has the elements of criminal conspiracy. The court eventually found Padilla was guilty of conspiracy to murder, kidnap, and maim individuals in a foreign country.

Critics of the Padilla proceedings argue that the charges were vague, overly broad, and stretched the limits of criminal conspiracy laws. Lowering the threshold on what constitutes conspiracy creates a legitimate concern that the government might be criminalizing behavior that would be considered constitutionally protected activity under other circumstances.

### **Trials by Military Commissions**

Despite a military framework to deal with terrorist detainees, the Bush administration bypassed the traditional forum for military trials—the court-martial—and decided to rely on the less common but more flexible military commission. President Bush authorized military detentions of terrorist suspects and trial by military commissions in a military order issued on November 13, 2001. From the Revolutionary War to World War II, the United States has, on occasion, used military commissions to try suspected war criminals. In World War II, President Roosevelt had Nazi saboteurs, including two U.S. citizens, tried before a military commission. Six, including one of the Americans, were executed. The 2001 presidential order establishing military commissions to try terrorist detainees was modeled closely on Roosevelt's executive order and relied on the same statute and on Supreme Court decisions upholding the legality of military commissions.

In spite of this, criticism of military commissions has been widespread. Some lawyers at the Department of Justice objected to their use, presenting the criminal justice system as the more appropriate venue. A number of military lawyers felt that the post-9/11 commissions failed to conform to well-established practices for the military trial process. Lawyers at the State Department were also critical of this trial process.<sup>60</sup>

As of December 2008, three terrorist suspects have been convicted by Guantánamo military commissions. Australian citizen David Hicks pled guilty, as part of a plea bargain, to one charge of providing material support to terrorism. In August 2008, a military commission convicted Salim Ahmed Hamdan, Osama bin Laden's bodyguard and driver, on five counts of providing material support to terrorism. In November 2008, Yemeni citizen Ali Hamza al-Bahlul was found guilty on both conspiracy and material support charges.

In light of widespread criticism of the military commissions and fear that they would, inherently, provide an unfair process with a bias toward a foregone guilty decision,<sup>61</sup> one could argue that they performed much better than expected and acquitted themselves favorably. During the *Hamdan* case, the military commission judge prevented prosecutors from submitting as evidence statements obtained from Hamdan during his imprisonment in Afghanistan, because the statements were obtained under "highly coercive" conditions. Despite the guilty verdict on material support to terrorism, the commission found Hamdan not guilty on the two counts of conspiracy. As well, when sentencing him, the judge gave him credit for the five years he had already served in military custody.

### **Adjustments to Detention and Trial Policy: Supreme Court, Congressional, and Executive Branch Action**

The U.S. government has long asserted that alien detainees not held on U.S. soil are beyond the reach of the writ of habeas corpus, their right to challenge the basis for their detention in federal courts.<sup>62</sup> Beginning in 2004, at least for Guantánamo, the Supreme Court issued a series of decisions questioning this notion and other critical aspects of the post-9/11 detention regime. Supreme Court decisions, in turn, prompted Congress and the administration to revise and adjust detention policies.

In *Hamdi v. Rumsfeld* in June 2004, the Supreme Court both affirmed and rejected critical aspects of President Bush's assertion of executive authority in detaining terrorist suspects. It affirmed that the president has the authority to hold certain terrorist detainees—even U.S. citizens—as unlawful enemy combatants, and that he can, under the laws of war, detain unlawful enemy combatants until the end of hostilities. The court found that the president could hold Hamdi as a UEC until the end of the Afghanistan war, but it expressed concerns over the prospect of indefinite detention.<sup>63</sup> Further, it found that U.S. citizen detainees could exercise their habeas right to challenge the basis of their detention.<sup>64</sup> They were entitled to "receive notice of the factual basis for their classification, and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker" and that such persons "unquestionably [have] the right to access to counsel." It is worth noting that the court did not require that U.S. citizens held as enemy combatants have access to federal courts. For example, it suggested that one way to satisfy the detention review standards it imposed on the U.S. government would be to use a military tribunal along the lines of those envisioned in Army Regulation 190-8.<sup>65</sup>

The 2004 Supreme Court decision in *Rasul v. Bush* affirmed that U.S. courts had jurisdiction over Guantánamo, upheld the statutory right to habeas for detainees at Guantánamo, and determined that Guantánamo detainees could contest the basis for their detention in federal civilian courts. Given the Supreme Court's long-standing position that enemy aliens held overseas could not invoke habeas rights in U.S. courts,<sup>66</sup> the *Rasul* decision hinged on the peculiar territorial status of Guantánamo: while Guantánamo was not part of U.S. territory, the United States exercised a level of control there that triggered the jurisdiction of U.S. courts and certain rights for detainees.<sup>67</sup> Given the ruling's re-

liance on the peculiarities of Guantánamo itself, it did not necessarily create a habeas precedent for future foreign detainees held at overseas facilities other than Guantánamo.

Responding to the court's decisions in *Hamdi* and *Rasul*, the administration and the Department of Defense established Combatant Status Review Tribunals, whereby a panel of three commissioned military officers determines whether individuals detained at Guantánamo qualify as enemy combatants or should be released. Detainees are assigned personal representatives, who are military officers with security clearance, who help them assemble unclassified information and present their arguments to the tribunal. There is a rebuttable presumption in favor of the government's evidence, and the tribunal makes its determination that an individual is an enemy combatant using a preponderance of evidence standard; in short, the government's position is far more favored from the outset than it would be in a domestic criminal trial.

After a CSRT determines that an individual is an enemy combatant, an administrative review board provides an annual review of each Guantánamo detainee's case, to decide whether to recommend his continued detention, release, or transfer. According to DOD guidelines, "the ARB is required to make an independent assessment and recommendation based on its consideration of all the information presented to it. It will determine, in its sole discretion, the weight to be given to any particular source of information on a case-by-case basis."<sup>68</sup> After the first round of ARBs was completed in 2005, fourteen detainees were released or transferred.

For its part, Congress responded to the *Rasul* and *Hamdi* decisions by passing the Detainee Treatment Act of 2005 (DTA), which barred habeas petitions by Guantánamo detainees. The DTA also created a limited judicial review process by which detainees could appeal the classification decision made by the CSRT to the U.S. Court of Appeals for the District of Columbia (DC) Circuit. The appeals process was limited in that it only allowed the DC Circuit Court to assess whether the CSRT procedures are consistent with U.S. law and the constitution, whether the CSRT in making its decision complied with its own procedures, and whether the CSRT's determination of combatancy is "supported by a preponderance of the evidence."

In 2006, the Supreme Court's *Hamdan v. Rumsfeld* ruling dealt a further blow to post-9/11 rules on the military trials of foreign terrorist suspects held at Guantánamo. The court found that al-Qaeda detainees are protected by the provisions of Common Article 3 of the Geneva Conventions.<sup>69</sup> As such, the *Hamdan* decision held that military commissions at Guantánamo violated the treaty-law requirement under Common Article 3 that criminal trials take place before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>70</sup> The court also held that the Guantánamo military commissions violated the statutory requirement of the Uniform Code of Military Justice (UCMJ) that trial rules be "uniform insofar as practicable" with rules applied in courts-martial. It held further that military commissions should provide a fair hearing before an impartial tribunal and that detainees must be afforded certain due process guarantees as provided for in Common Article 3 and by Article I courts under the UCMJ. Thus President Bush could not create military commissions without congressional authorization, as he had done when creating the Guantánamo military commissions. As well, the *Hamdan* court interpreted the Detainee Treatment Act as barring future filings by Guantánamo detainees to seek habeas relief in federal courts; that is, it did not apply to cases filed before the act was passed in 2005.

In response to *Hamdan*, Congress passed the Military Commissions Act of 2006. For the first time, Congress explicitly authorized certain aspects of the administration's detention regime. The MCA authorized the president to establish military commissions at Guantánamo, and to have them try alien

enemy combatants. The established military commission procedures were in closer alignment with courts-martial procedures under the UCMJ but with a number of exceptions. In response to *Hamdan*, Congress eliminated the ability of *all* Guantánamo detainees to challenge the basis of their detention in federal courts, even those whose cases had been pending at the time of the DTA's passage.<sup>71</sup> For purposes of who could be tried by military commission, the MCA expanded the definition of unlawful enemy combatants to include not only individuals engaged in violence against the United States and its allies, but also those who “purposefully and materially supported” those hostilities and anyone designated as an unlawful enemy combatant by the United States before passage of the MCA.

Though it strengthened the legal foundation of post-9/11 detention policies, the MCA was deeply controversial. Critics of the MCA argue that the act retroactively criminalized actions—conspiracy and material support—that were not traditionally war crimes. They argue further that the MCA provided criminal immunity for acts involving harsh treatment of detainees that may have been illegal at the time they were committed.

In 2008, the Supreme Court decision in *Boumediene v. Bush* again affirmed—this time on a constitutional basis—the right of detainees at Guantánamo to challenge the basis for their detention by filing habeas claims in U.S. federal courts, owing to the failure of existing CSRT and CSRT appeals procedures to meet the habeas requirement.<sup>72</sup> The Supreme Court rejected the administration's argument that the claimants are not covered by the reach of the constitution and affirmed that habeas corpus can only be suspended by Congress in specific ways.<sup>73</sup> The Supreme Court found that the “complete jurisdiction and control” that the United States exercises over Guantánamo makes the U.S. Constitution applicable there, which guarantees the availability of habeas protections to Guantánamo detainees. The opinion noted, further, that the government may not “switch the Constitution on or off at will” when it exercises this level of control over a territory.

Having thus concluded that Guantánamo detainees were constitutionally protected by the writ of habeas corpus, the court examined whether the process established by the DTA for the judicial review of detention was an adequate substitute for habeas. The court held that the existing CSRT appeal process—in which the DC Circuit Court was limited to assessing whether the CSRT complied with its own rules—was not an “adequate substitute” for habeas because it failed to fulfill the writ's basic requirement that the detainee be allowed to challenge the factual basis of his detention. The Supreme Court had declared unconstitutional the aspects of the MCA that stripped Guantánamo detainees of habeas rights, but it did so without striking down either the Detainee Treatment Act or the CSRT process itself.

In the short term, the *Boumediene* opinion will likely result in a series of claims by Guantánamo detainees in federal court. These courts will have to resolve questions that the decision leaves unanswered, including the precise form that review must take. What due process protections should the detainees receive during the habeas proceedings? What kinds of claims should be allowed—for instance, may the detainees' habeas petitions address conditions of detention and transfers to foreign governments? What kinds of remedies may federal courts grant the detainees? Judges will have to determine whether military commissions in progress will be stayed or conducted alongside habeas petitions.<sup>74</sup> In October 2008, the first of these habeas claims was successful. A federal judge ruled that the seventeen Uighur detainees at Guantánamo Bay should be released and brought to the United States. DOJ filed an emergency appeal citing “national security and separation of powers concerns.”

In the longer term, the president and Congress will need to decide on what actions they should take to proactively address the range of detention policy questions that still remain unanswered. Even

with the *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* decisions, the Supreme Court carefully avoided opining on a range of important issues. And while Congress, with the MCA and DTA, authorized military commission trials and various review mechanisms, it conspicuously failed to provide much-needed guidance as to the legal basis of the detentions themselves. Such guidance would have been valuable, since many terrorism detentions fit neatly under neither criminal laws nor the laws of war. This means that if the United States captures a new group of detainees in the future, the president will again face many of the difficult choices the Bush administration faced after 9/11. Is further legislation needed to build a durable and credible terrorist detention regime for the future if Guantánamo is closed or if the United States suffers another major terrorist attack? What should be the substantive standards of proof for determining who may be detained in the conflict against al-Qaeda? On what basis should they be detained—criminal laws, the laws of war, or some hybrid regime altogether? What is the admissibility of evidence obtained from coercion? To what procedural rights should detainees be entitled to contest the basis of their detention and in trials? The political branches of government still need to make tough policy decisions about detention and interrogation.

### Adjustments to Detainee Treatment Policy: Supreme Court, Congressional, and Executive Activity

The Bush administration worked to correct a number of the policy errors and inconsistencies that resulted in the abusive treatment of terrorist suspect detainees. It launched several investigations into the abuses and, in a few cases, brought criminal charges or lesser administrative actions against a number of individuals who engaged in abuses.

Starting in 2003, the new head of the OLC began questioning the 2002 and 2003 memos that served as the legal basis for alternative or enhanced interrogation techniques. The memos were “legally flawed, tendentious in substance and tone, and overbroad.” They failed to respect separation of powers and give proper consideration to congressional authorities and prerogatives and a number of Supreme Court decisions. He also argued that “when one concludes that Congress is disabled from controlling the President, and especially when one concludes this in secret, respect for separation of powers demands a full consideration of competing congressional and judicial prerogatives, which was lacking in the interrogation opinions.”<sup>75</sup> DOJ replaced the 2002 memo in December 2004. The Department of Defense general counsel, upon being notified that the March 2003 memo was unreliable, stopped using it as a legal foundation for DOD’s interrogation policies.

Significantly, although the 2002 memo was withdrawn because its justification for enhanced interrogation techniques was considered unsound, the OLC had not concluded that the actual interrogation techniques approved by the Justice Department were illegal. The replacement memo stated that “we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.”<sup>76</sup>

At around the same time in 2003, the CIA—as disclosed for the first time by its director Michael Hayden in 2008 testimony before Congress—ceased waterboarding detainees, and the technique has not been used since then.

For its part, Congress passed the Detainee Treatment Act of 2005, largely in response to the Supreme Court’s *Hamdi* and *Rasul* decisions in 2004 and after the revelations of detainee abuse. The treatment provisions of the DTA, generally known as the McCain amendment, prohibit “cruel, in-

human, or degrading treatment (CIDT) or punishment...prohibited by the Fifth, Eighth, and Fourteenth Amendments” of any individual “in the custody or under the physical control of the United States Government, regardless of nationality or physical location.” The DTA, therefore, generally prohibits certain harsh techniques in the interrogations of all detainees in U.S. custody, including CIA prisoners. It also prohibited U.S. military officials from using interrogation techniques not listed in the Army Field Manual on interrogation and prohibited any officials from using nonlisted techniques when interrogating people in DOD facilities.

In the 2006 *Hamdan* decision, the Supreme Court determined that Common Article 3 of the Geneva Conventions applied to the U.S. conflict with al-Qaeda and that Guantánamo detainees must be accorded basic legal protections consistent with Common Article 3. The decision meant that the 1996 War Crimes Act, which criminalized violations of Common Article 3, applied to the U.S. treatment of al-Qaeda detainees.

Congress responded to *Hamdan* by passing the Military Commissions Act. Perceptions of the MCA are mixed. Some view it as an affirmation of Geneva protections for detainees, as the Supreme Court required in *Hamdan*. It defines and criminalizes grave breaches of Common Article 3 of the Geneva Conventions, including torture and cruel or inhuman treatment, biological experiments, murder, mutilation, serious bodily injury, rape, sexual assault, and the taking of hostages. The main legislative sponsors of the bill, Senators John McCain (R-AZ), John Warner (R-VA), and Lindsey Graham (R-SC), made clear in the legislative history their belief that many of the so-called enhanced interrogation techniques reportedly used by the CIA would violate Common Article 3. They argued, further, that the MCA ensures that the United States respects its commitments under the Geneva Conventions and the Convention against Torture by largely barring military commissions from considering evidence obtained by torture.

Critics of the MCA view many of those same provisions as obstacles to U.S. adherence to the Geneva Conventions. Under the 1996 War Crimes Act, any violation of Common Article 3 of the Geneva Conventions could be criminally prosecuted as a war crime. The MCA altered the definition of what constitutes a violation under the War Crimes Act so that only the enumerated “grave breaches” of Common Article 3 could be prosecuted. As a practical matter, this means that only the most severe violations of the Geneva Conventions are crimes under U.S. law, but that ostensibly lesser violations of Common Article 3—for example, “outrages upon personal dignity” or the passing of sentences by bodies other than regularly constituted tribunals—do not constitute crimes and are precluded from criminal prosecution. In addition, the MCA made the new definition retroactive to 1997, making it harder to criminally prosecute mistreatment of detainees occurring after 9/11 that would otherwise have violated the original War Crimes Act. Finally, although the MCA bars evidence derived from torture, it permits the use of evidence derived from coercion.

For its part, the Bush administration took a number of steps to align detainee treatment policies with the Supreme Court decisions requiring compliance with Common Article 3 and with the various detainee treatment provisions included in both the DTA and the MCA. In the fall of 2006, the Department of Defense issued the current version of the Army Field Manual on interrogation. It applies to all Department of Defense employees and prohibits individuals in DOD custody from being subjected to torture or cruel, inhuman, or degrading treatment or punishment, as these terms are defined by U.S. law. It prohibits the use of several of the abusive interrogation techniques that were used in Guantánamo, Abu Ghraib, and the CIA prisons, including waterboarding, sexual humiliation, and the use of dogs to coerce. In addition, the Department of Defense issued a July 2006 policy

memorandum instructing its personnel to review “all relevant directives, regulations, policies, practices, and procedures . . . to ensure that they comply with the standards of Common Article 3” with regard to “the conflict with al-Qaeda.”<sup>77</sup> The DOD’s September 2006 Directive 2310.01E required all DOD departments to abide by Common Article 3 in their treatment of prisoners and detainees.<sup>78</sup> General David Petraeus, who assumed command of the Multi-National Force-Iraq in February 2007, announced a zero-tolerance policy toward interrogations using torture in an open letter to his troops in Iraq, stating that “beyond the basic fact that such actions are illegal, history shows that they are also frequently neither useful nor necessary.”<sup>79</sup>

The CIA had not employed waterboarding since 2003, and in 2006, in response to the DTA and the MCA, prohibited its use. In his testimony before the House Intelligence Committee in 2008, CIA director Hayden indicated that “[waterboarding] is not included in the current program, and in my own view, the view of my lawyers, and the Department of Justice, it is not certain that that technique would be considered lawful under current statute.”<sup>80</sup>

Furthermore, President Bush issued Executive Order 13440 in July 2007, which aligns the CIA interrogation program with Article 3 of the Geneva Conventions and existing U.S. laws restricting CIDT and criminalizing torture, including the MCA, the DTA, and the 1996 and 1994 torture statutes.<sup>81</sup> Executive Order 13440 itself does not authorize specific techniques, but defines how the U.S. government interprets Common Article 3 as a treaty law matter, and requires that CIA techniques abide by treatment requirements pursuant to that definition.

Even though U.S. policy today accords all terrorist detainees the protections of Common Article 3—even those deemed unlawful enemy combatants, no matter where they are held or under what circumstances—significant controversy remains. The continued controversy stems from two factors. First, different techniques remain available for the military and intelligence communities. Second, the Bush administration viewed its interpretation of the treatment requirements as flexible and at its own discretion.

In 2005, President Bush made a point of issuing a signing statement that he would interpret the DTA and its treatment provisions “in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as commander in chief and consistent with the constitutional limitations on the judicial power.” On the one hand, the signing statement could be viewed as insignificant and almost perfunctory.<sup>82</sup> On the other, one could reasonably view the signing statement as part of an effort to limit the scope and applicability of the treatment provisions in legislation and preserve broad executive-branch latitude for aggressive techniques.<sup>83</sup> In 2007, the Department of Justice continued to express concern about the difficulty of complying with the requirements of Common Article 3, arguing that its terms—for instance, its prohibition against “outrages upon personal dignity, in particular, humiliating and degrading treatment”—were too ambiguous.<sup>84</sup> In 2008, the Bush administration continued to support the CIA’s use of a number of enhanced interrogation techniques.

The CIA’s separate program remains highly controversial. In the 2008 intelligence authorization bill, Congress sought to eliminate the CIA program by requiring the intelligence community to be governed by the Army Field Manual on interrogations. President Bush vetoed the bill. In 2007, the American Bar Association, various human rights groups, and a number of retired military officers criticized Executive Order 13440, arguing that it could be interpreted to allow detainee treatment that was inconsistent with U.S. legal obligations to treat detainees humanely.

## DETENTION, TRIAL, AND TREATMENT FINDINGS AND RECOMMENDATIONS

### Domestic Preventive Detention

*RECOMMENDATION* The aspects of a domestic preventive detention regime that already exist in law should be strengthened with greater civil liberties protections. Specifically, Congress should revise Section 412 of the Patriot Act to eliminate the possibility of indefinite preventive detention for aliens. It could do this by creating a requirement to try or release individuals held under the act as suspected terrorist aliens within a set time.

On 9/11, the United States lacked a coherent legal framework for domestic preventive detention, relying instead on various procedures from immigration, criminal laws, and the laws of war. Civil libertarians rightly decried various errors, overreaches, and abuses that accompanied those efforts. Nonetheless, emergency domestic preventive detention is an important tool that should be available to assist U.S. authorities to combat terrorism.

Civil libertarians and human rights groups are rightly cautious of the risks involved in establishing a preventive detention regime. There are numerous historic examples of rights abuses in various countries in the name of preventive detention and national security. Many argue that the mere existence of a preventive detention regime inherently undercuts U.S. civil liberties and strikes the wrong balance between security and liberty. This is a difficult and controversial issue, but the ability of transnational terrorism to threaten the homeland makes it prudent to consider whether preventive detentions can be made available as a security tool in a way that maintains the confidence of the public, is used in only rare and exceptional circumstances, is subject to meaningful oversight, and comports with important values.

Although the United States already possesses the beginnings of a domestic preventive detention framework in law, it lacks a clear framework that both strengthens security and provides adequate civil liberties protections. Section 412 of the Patriot Act has never been used and is viewed with suspicion by both the left and the right. Two of the most significant deficiencies of Section 412 are that it allows indefinite detention on a technicality and that it fails to provide adequate oversight from an authority outside the executive branch.

Instead of rejecting outright any conversation about domestic preventive detention, civil libertarians could leverage 412 as a vehicle to strengthen civil liberties protections. In the event of a future threat, a clear preventive detention statute with strong civil liberties protections is far preferable to risking a repetition of the rights violations and abuse that accompanied the ad hoc application of criminal and immigration laws after 9/11. Revising 412 could provide an opportunity to clearly establish and strengthen limits, controls, protections, oversight, and accountability so that future alien preventive detentions are grounded in a bedrock of civil liberties protections.

To ensure robust protections, a revised 412 should strengthen procedural and time limits on detentions, increase opportunities for judicial review (possibly via a new national security court, discussed later in this report), establish clear evidentiary rules, provide detainees with meaningful mechanisms to challenge their detention, protect against abuse during interrogations, and ensure access to legal representation.

To ensure the principled application of a revised federal domestic preventive detention statute and the consistent execution of federal domestic detentions generally, Congress must clarify how a revised 412 will interact with existing federal law enforcement and immigration statutes in a domestic

preventive detention context. Furthermore, a revised 412 should create incentives and requirements that the U.S. government prosecute these individuals, in that criminal law generally remains the recognized and preferred system for deciding that someone inside the United States be detained long term. It might do so, for instance, by creating an outer time limit in which the government must either try or release the individual.

*RECOMMENDATION* The United States should ensure that, in the future, it avoids the kind of indiscriminate preventive detentions of Muslims and Arabs that followed in the immediate aftermath of 9/11. To aid this effort, it should cultivate and strengthen relationships with U.S. Arab and Muslim communities.

The U.S. government should redouble efforts to address the concerns of Arab-American and Muslim-American communities regarding ethnic, religious, and racial profiling. Improved outreach to and relations with Arab and Muslim communities in the United States are vital to national security efforts because community relationships are often the best way to prevent or identify potential threats. The U.S. government should strengthen efforts to better engage Muslim Americans as partners in efforts to counter radicalization and to help improve security.

## Detention and Trial

*FINDING* Despite policy changes by the Bush administration, congressional legislation, various Supreme Court decisions, and now the Obama administration, the U.S. regime for detaining and trying al-Qaeda operatives remains a work in progress, in which critical issues remain unresolved. These issues have not been resolved by Supreme Court decisions regarding habeas rights for Guantánamo detainees and will not be resolved by closing Guantánamo. President Obama and Congress should address remaining policy gaps to ensure that the United States has effective, credible, and durable detention and trial policies that provide clear guidance on how to deal with terrorist detainees in the future.

*FINDING* As long as the United States remains, as a legal matter under the Authorization for the Use of Military Force, in a state of “armed conflict” with al-Qaeda around the globe, detainees can be held legitimately under the laws of war in military prisons and tried in military venues. As such, certain characteristics of the U.S. detention regime will remain largely at the discretion of the president, with the Supreme Court and Congress influencing policy in a reactive fashion.

Despite widespread criticism of the detention regime and significant unresolved issues, the Supreme Court has repeatedly affirmed that the United States is engaged in armed conflict with al-Qaeda and the Taliban, and that the laws of war apply to that conflict. This state of armed conflict has also been established and legitimized in statute by Congress. The Supreme Court affirmed the authority of the president to treat certain terrorist detainees (including U.S. citizens) as unlawful enemy combatants, and to detain them until the end of hostilities.<sup>85</sup> In the current situation, the exact form of detention and trial under the laws of war for foreign national detainees who lack a meaningful link to the United States is at the broad discretion of the executive so long as procedures and conditions satisfy applicable statutory, treaty, and constitutional obligations.<sup>86</sup>

*FINDING* Guantánamo is a unique case—it is *sui generis*—and certain rights conferred on Guantánamo detainees would not necessarily apply to future foreign detainees held elsewhere.

Supreme Court decisions about detainees held at Guantánamo have the potential to confuse discussions over the rights possessed by foreign detainees held overseas outside of Guantánamo. There is a difference between detainees held at Guantánamo and future foreign detainees captured overseas. The court concluded that the particular territorial status of Guantánamo triggered the right of detainees there to challenge the basis of their detention in federal courts in order to meet U.S. statutory and constitutional habeas requirements. Such rights do not necessarily extend to foreign detainees who the United States might capture overseas. The Supreme Court decisions related to Guantánamo detainees have undercut neither the propriety of holding foreign detainees in military custody nor the propriety of trying them in properly established military courts or transferring them to host country courts for trial.

*FINDING A firm commitment to close Guantánamo sends a strong message about a shift in U.S. detention policies and a recommitment to core values.<sup>87</sup> But its closure will be difficult and will not address critical policy questions about how the United States will detain and try terrorist suspects in the future.*

Guantánamo has become a powerful and negative symbol of overall U.S. detention policy and is a source of great international antagonism and distrust, even among America's allies. Its continued operation has hurt global counterterrorism efforts by acting as a drag on counterterrorism cooperation on intelligence, military, and law enforcement matters. Closing Guantánamo will signal a meaningful break from the controversial post-9/11 detention and trial regime. It will allow the United States to rebuild credibility regarding its commitment to human rights and civil liberties, credibility that has been severely damaged and is a critical component of many of America's most important foreign policy goals. Closing Guantánamo will provide a fresh start for building consensus and trust—both at home and abroad—in the U.S. counterterrorism detention regime.

When the United States closes Guantánamo, it will face two significant dilemmas, for which no easy solutions are apparent. First, what should be done with the remaining Guantánamo detainees who no longer pose a threat or who have been deemed no longer enemy combatants? Second, what should be done with the detainees who still pose a serious threat?

Unfortunately, the United States lacks straightforward options for releasing or transferring even those detainees whom it would *like* to release and who no longer pose a threat. In many cases, neither their home countries nor third countries have been willing to offer them residence and monitor their activities and movements as requested by the U.S. government. In other cases, the United States fears that released detainees will be subject to persecution or abuse in the countries that might be willing to receive them. To date, the United States and its allies have been reluctant to alleviate this problem by, for instance, granting them asylum status and admitting them into their countries. The advent of the new Obama administration and its commitment to close Guantánamo within a fixed time frame may ease efforts on this front. Countries that may have been less willing to work with the Bush administration may now display a greater willingness to receive Guantánamo detainees. Although there are no easy options for what to do with many individuals at Guantánamo who have been cleared for release, President Obama must work with Congress to develop viable solutions, so that these individuals will no longer face what, for all intents and purposes, amounts to indefinite detention.

Finding a legally and politically viable alternative detention for the Guantánamo detainees who remain a threat poses one of the greatest challenges to closing Guantánamo. Repatriation or finding a third country host poses similar problems to those discussed. Bringing still-dangerous detainees from Guantánamo into the United States into military or criminal detention facilities is feasible, but will be

politically difficult. Even if that were to occur, what regime should the government use to detain and possibly try them? The same questions would also apply to future detainees whom the United States might capture and bring into the country for detention and trial.

There is no single and best route to shut Guantánamo down and process the detainees currently held in the facility. Any solution must be on a case-by-case basis. This will involve returning some detainees to their home countries, transferring some to third countries, and holding some in the United States in military or federal venues and trying them as appropriate.

*RECOMMENDATION* The United States should address gaps and unresolved issues in current terrorist detention policy by establishing clear rules, at home and abroad, for how to detain and try future terrorism suspects, even after Guantánamo is closed. Minimum conditions should address widespread concerns that detainees should not face the prospect of erroneous or indefinite detention without a meaningful ability to challenge the basis for their detention or face trial.<sup>88</sup>

- As a general rule, detainees held by the United States who are U.S. persons or possess a link to the United States at the time of capture (for example, are captured inside of the United States) should be treated in accordance with U.S. criminal law and tried in federal criminal courts.
- The executive branch and Congress should conclusively determine what to do with foreign detainees captured overseas—both where it can hold them, and the processes to which they are entitled.
- As a legal matter, there are several ways that this could be achieved. Congress could revise the AUMF to narrow the ability of the executive branch to deal with suspected-terrorist detainees under the laws of war, and thereby, in military commissions. If Congress were to leave the current AUMF in place and not enact a new law on terrorist detention and trial, the executive branch could modify the current detention and trial regime largely at its own discretion, so long as it met relevant constitutional and statutory requirements. Or, Congress could create in statute a stand-alone terrorist detention regime that combines aspects of both criminal laws and the laws of war. Such a new regime should establish the minimum acceptable conditions for the detention and trial of terrorist detainees, no matter where they are held but with a particular focus on providing clear guidance on how to detain and try foreign terrorists captured overseas outside of active zones of combat.
- Continuing to use military commissions as presently constituted to try terrorist detainees would suffer from significant and widespread negative perceptions owing to the criticisms and controversy that accompanied their creation under the Bush administration and their evolution to their current form.<sup>89</sup> As a legal matter, continuing to use military commissions is a viable option. As a prudential matter, procedural changes strengthening detainee rights—regarding evidence, legal representation, etc.—would likely be necessary to make them politically sustainable.
- There is a wide range of alternatives to military commissions in which to try terrorist detainees. One option is to rely on some mix of already existing mechanisms. While not a legal requirement, this could—as a prudential matter—be a way to overcome the many criticisms that confront military commissions. The administration could seek to have foreign detainees tried in the courts of their home countries or in the countries of their capture. Risks associated with that option include potential human rights issues involved in overseas trials, as well as issues of uniformity and control, as the United States would effectively be relying on third countries to implement actions with a direct bearing on U.S. security interests. The United States could also increasingly rely on U.S. courts-martial, military venues with mature and long-standing procedures and rules in place (as distinct from the military commissions that were newly created after 9/11).

*Finally, the United States could rely on the U.S. federal criminal courts to try Guantánamo detainees. Critics of relying on criminal proceedings argue that such an approach would give alien detainees greater rights than they currently possess, potentially jeopardize classified evidence, and open proceedings to an even higher level of public scrutiny.*

- Another option worth examining is the creation of a new venue altogether—specialist national security courts that address some of the challenges faced by criminal courts to hear terrorism cases while at the same time avoiding some of the issues that currently confront military commissions. Such courts would combine aspects of both criminal laws and the laws of war and would need to be created in legislation.*
- Development of clear detention policies in a way that reaffirms the U.S. commitment to humane treatment and fairness would allow the United States to constructively reengage the international community to help lead international efforts to update and harmonize international standards for the detention of terrorist suspects.*

Post-9/11 U.S. policy for terrorist detention and trial has been characterized as “total disarray” and “lacking rhyme or reason as to who ends up in what system, save the convenience of the executive branch at any given time.”<sup>90</sup> In fact, a close examination of the record of terrorist detention and trials after 9/11 (Appendix B) shows a surprising level of consistency—despite significant fits and starts—in how the United States has ultimately dealt with detainees. Detainees held in the United States who are U.S. citizens or foreigners captured inside of the United States have ultimately been detained and tried under U.S. criminal law; foreign detainees lacking a link to the United States and held overseas have been detained in military prisons and subject to trials in military courts. (The lone exception is Yemeni citizen and U.S. permanent resident al-Marri, who, while held in military custody, has still had access to criminal courts.)

When Guantánamo is closed, however, this predictability will likely disappear for two reasons. First, Supreme Court decisions on Guantánamo detainees were tethered to the peculiarities of Guantánamo. Second, existing detention policies fail to provide clear guidance on what the United States would do with future foreign terrorist detainees captured overseas outside of zones of active combat. To what extent and by what process would they be able to contest the basis for their detention? Should the United States be able to detain them overseas in some place other than Guantánamo and presumably with the consent of the host government? If so, what rules should apply? If we brought such detainees to the United States, how would we detain and try them? What is the jurisdiction, if any, of federal courts over those detentions?

The United States should, as a prudential matter, accord all foreign non-POW detainees, wherever they are held, a meaningful opportunity to challenge the basis for their detention in full and fair status hearings that are tailored to the particularities of each conflict.<sup>91</sup>

When the United States decides to try detainees in noninternational armed conflicts (for example, conflicts that are not between nation-states), it should provide trial mechanisms that meet U.S. obligations under the Geneva Conventions, including Common Article 3. These trials could occur in military courts convened in the United States or overseas, in criminal courts in the United States, or in a new U.S. national security court if one were created in law. Alternatively, the United States could transfer the detainees for trial in the criminal courts of third countries (for example, a detainee’s host country or country of origin).

Establishing clear policies and guidelines for such mechanisms would put U.S. detention policy on a stronger footing for the future, even when Guantánamo is closed. It would help ensure that any

U.S. detention regime comports with U.S. values and is politically and diplomatically sustainable. Establishing such mechanisms in law would help mitigate international and other skepticism that U.S. detention and trial guidelines are simply the result of easily altered policy decisions.

A solution strongly advocated by the human rights community is to largely rely on federal criminal courts to try terrorism cases.<sup>92</sup> This makes sense and is already being done for post-9/11 detainees who are U.S. citizens or who were captured in the United States. To the extent that the criminal courts have been challenged to deal with terrorism cases, the United States has modified and expanded material support and conspiracy statutes to deal with dangerous individuals inside the United States who might pose a terrorist risk. To the extent that criminal courts face continued challenges in hearing terrorism cases owing to national security concerns, the White House should examine lessons learned and develop best practices derived from tactics successfully employed in past terrorism trials. It should determine if the challenges posed by terrorism trials are significant enough that they cannot be sufficiently addressed by the Classified Information Procedures Act and the adoption of best practices. It could also determine if it would be desirable to create a specialist national security court to handle certain terrorism trials that pose particularly difficult challenges.<sup>93</sup>

At the same time, it would go too far to argue that U.S. federal courts are the only suitable venue for terrorist trials. Access to federal criminal courts may not be appropriate for future foreign detainees lacking any prior connection to the United States. The basic principles of *Johnson v. Eisentrager*—that “in extending constitutional protections beyond the citizenry . . . it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act”—are still persuasive and the access to habeas relief in federal courts that was granted to Guantánamo detainees turned on the peculiarities of the Guantánamo facility itself and the procedural shortcomings of the CSRTs and CSRT review processes.<sup>94</sup> As a legal matter, properly constituted military bodies could serve as an appropriate venue—even within the United States—for detainees to challenge the basis of their detention and to face trial.

As an alternative, President Obama could seek to have foreign detainees tried on criminal charges in the country of their capture or their home country. Or, if overseas detainees were brought into the United States, they could be tried in courts-martial, federal criminal courts, or—if the government decided to create them—new national security courts. If the U.S. government does decide that it would be beneficial to create national security courts, the president and Congress should set forth clear guidelines for the conditions under which it would be appropriate to conduct terrorism trials there.

## Treatment

*FINDING Detainee interrogation and treatment policies and guidelines from 2002 to 2004 were based on flawed legal opinions. By defining torture narrowly and executive power expansively, the initial post-9/11 detention regime made treatment standards unclear, contributing to an environment in which detainee abuse was more likely to occur.*

*FINDING Detainee abuses and mistreatment at U.S. detention facilities resulted from a combination of permissive policies that eliminated what had previously been long-standing and clear standards of treatment, pressure to gather intelligence, and the mixing of guidelines for intelligence and military personnel.*

*FINDING* Following detainee abuse scandals and Supreme Court decisions, the United States has revised policies and law to more firmly ensure that treatment abides by prohibitions against torture and restrictions on cruel, inhuman, or degrading treatment. Despite this progress, significant issues remain unresolved.

- The military has revised its practices, procedures, and guidance and now has a framework for detainee interrogation and treatment that is consistent with (and in some areas exceeds) the Geneva Conventions. At the end of the Bush administration, enhanced techniques continued to be available to the CIA as long as they were consistent with Executive Order 13440, which defines how the U.S. government interprets Common Article 3 as a treaty law matter and requires CIA techniques to abide by that interpretation.<sup>95</sup>
- Controversy over the existence of different interrogation techniques for the CIA reflects past abuses and unresolved debates regarding which techniques constitute cruel, inhuman, or degrading treatment. It also reflects an abiding perception and mistrust that the administration may still feel justified in acting unilaterally to authorize certain coercive techniques—such as waterboarding—that approach CIDT and which may appear to many observers as torture.
- Despite the continued controversy over currently allowable CIA techniques, it is important to note that—as a result of legislation, Supreme Court decisions, and executive branch adjustment—a single government-wide standard for the interrogation and treatment of terrorist detainees currently exists: a requirement for all branches of government to abide by the Geneva Conventions, abide by U.S. law, and not engage in CIDT or torture.

*FINDING* Disputes over detainee treatment will not be resolved by competing claims over whether certain highly coercive interrogation techniques are effective or not.<sup>96</sup> Ultimately, the bottom line on detainee treatment will rest on the choices that the United States makes as a society about its values and about what is or is not acceptable. Policymakers will simply have to decide what techniques are or are not acceptable under U.S. law and what techniques, even if legal, are inconsistent with American values, ethics, and morality.

*RECOMMENDATION* The United States should reaffirm emphatically and unequivocally its commitment to abide by the Geneva Conventions regarding detainee treatment and interrogation and to not engage in CIDT or torture.<sup>97</sup>

President Obama will need to simultaneously ensure national security while sending a strong and unequivocal message that affirms America's commitment to fundamental values and human rights. President Obama should rescind the presidential signing statement that is appended to the Detainee Treatment Act and issue an executive order reiterating the absolute criminal ban on torture and prohibiting harsh treatment that constitutes CIDT.

*RECOMMENDATION* The United States should definitively resolve the lack of clarity on what constitutes cruel, inhuman, or degrading treatment in the U.S. interrogation and treatment of terrorist detainees.

While U.S. law firmly prohibits torture and affirms the U.S. commitment to Common Article 3 of the Geneva Conventions, there remains significant disagreement over what constitutes CIDT.<sup>98</sup> The United States should seek to resolve, to the greatest extent possible, the lack of clarity on standards for the interrogation and treatment of terrorist detainees.

At the center of the continued controversy is whether certain CIA techniques violate the prohibitions on CIDT in Common Article 3. While it remains unclear what those techniques are, since

they remain classified, the Bush administration argued that the techniques in the CIA program under 13440 were legal both under U.S. and international law and do not constitute CIDT. A number of critics, however, expressed concerns that Executive Order 13440 could be interpreted to allow treatment that could constitute CIDT.

The fear that the Bush administration remained engaged in or continued to tolerate interrogation techniques that are out of step with U.S. values and a commitment to human rights persisted for several reasons, in spite of the fact that many of the most controversial aspects of interrogation policy were revised or discontinued (the replacement of the flawed Justice Department memos, waterboarding, the use of dogs to intimidate detainees, and the like). First, enhanced techniques in the recent past did include harsh techniques that are widely perceived as CIDT or torture. Second, a broad range of subsequent Bush administration actions—such as the signing statement to the DTA and the veto of the 2008 intelligence authorization bill, among others—reinforced a view that the Bush administration persisted in keeping certain highly coercive techniques available, notwithstanding the steps it did take to adjust and modify interrogation policies. Third, given the different roles played by the military and the CIA, the different types of detainees they are likely to be holding, and the different objectives of military and intelligence interrogations, it is likely that CIA techniques are closer to the CIDT line than those currently permitted for the military. Fourth, disparities exist between the way the United States has interpreted the terms *cruel*, *inhuman*, and *degrading* and the way that some in the international community do. Although few states have defined with specificity what those terms mean—whether in their criminal laws or in their military manuals—there is concern that the United States has interpreted the terms to provide greater leeway to continue to permit aggressive interrogation.

This gap on what constitutes CIDT needs to be closed, and it is urgent that the Obama administration reestablish the credibility of the executive branch and its firm commitment to the humane treatment of detainees. This could be accomplished by replacing or rewriting Executive Order 13440 and indicating with greater clarity what techniques would and would not constitute CIDT.<sup>99</sup>

*RECOMMENDATION* Requiring the CIA to adhere to the Army Field Manual is one way to resolve the controversy surrounding allowable CIA interrogation techniques. Another option—similar to Congress's requirement that the military abide by the Army Field Manual on interrogations—is for Congress to explicitly require the CIA to abide by interrogation procedures established by the president and the CIA director, within the parameters of humane treatment as required by law.

The enhanced techniques currently available to the CIA for interrogating terrorist suspects remain classified, opaque even to many congressional leaders. That secrecy, plus the fact that past practices included waterboarding and were based on flawed and overly broad legal justifications, have led many people to perceive that the CIA may continue to allow treatment that approaches or qualifies as CIDT or torture. This comes at the cost of other countries perceiving, rightly or wrongly, that the United States condones and engages in cruel treatment as official policy.

To address this challenge and eliminate the possibility that CIA techniques might allow for detainee treatment that qualifies as CIDT or torture, a number of human rights advocacy groups and members of Congress have urged that the CIA be required to follow the requirements and restrictions placed on military interrogators and other personnel by the Detainee Treatment Act and the Army Field Manual on interrogation.<sup>100</sup> The DTA restricts the military from engaging in interrogation

techniques that are not specifically authorized and enumerated or that are expressly prohibited in the Army Field Manual.

Requiring government-wide adherence to the Army Field Manual is one way to restrict CIA interrogation techniques. It does not follow, however, that allowing different techniques for the CIA means that CIA techniques violate treatment requirements of Common Article 3 or the DTA. It is worth noting that a number of changes that constrain CIA techniques occurred during the Bush administration. The CIA prohibited the use of waterboarding in 2006 in response to legislation (the DTA and MCA) and Supreme Court decisions (*Hamdan*) requiring humane treatment in accordance with Common Article 3. Executive Order 13440 requires the CIA to treat detainees in accordance with Common Article 3, U.S. torture statutes, and the CIDT restrictions contained in the MCA and the DTA. In light of that, a single government-wide standard for interrogating and treating terrorist detainees already exists: a requirement for all branches of government to abide by the Geneva Conventions, abide by U.S. law, and not engage in CIDT or torture.

The Army Field Manual can be amended by the military at any time, and it does not generally make sense to have military officials in charge of determining the contours of policies and specifics of practices employed by nonmilitary executive branch agencies. The CIA, FBI, and DOD can legitimately use different interrogation techniques yet remain bound by good-faith interpretations of Common Article 3. Differences in techniques can represent the simple fact that personnel at each agency will have different levels of training, be dealing with different types of detainees, and be using the information gathered in different circumstances and for different purposes.<sup>101</sup>

An alternative solution is for Congress to require in law that CIA interrogations abide by guidelines established by the president and the CIA director, approved by the attorney general, and known to congressional leaders. This approach would mimic for the intelligence community what the DTA required of the military, and it would have the benefit of not forcing the CIA to follow rules developed and controlled by a different organization. Allowable and prohibited techniques for the CIA already exist as a matter of policy; having Congress explicitly bind the CIA's adherence to them would give them additional force in law and strengthen oversight.

*RECOMMENDATION* The president should work with Congress to establish a controlled process that gives congressional leadership a well-defined role in the temporary and case-by-case adoption of emergency measures, should they become necessary in rare situations.

To advance and strengthen an explicit requirement that the CIA abide by established interrogation and treatment standards that meet U.S. legal obligations banning torture and restricting CIDT, the president should be required to inform and engage congressional leadership when altering CIA techniques to allow more coercive measures. Specifically, the White House should be required to issue a presidential finding to inform the Gang of Eight—the Senate and House leadership of both parties and the chairmen and ranking members of both congressional intelligence committees—about the nature of and reason for changes to allowed CIA techniques in the event that the president decides to authorize, temporarily and on a case-by-case basis, additional techniques to address an exceptional circumstance.

Providing flexibility and discretion to the president to keep the nation secure is critical. At the same time, it is also critical to embed such flexibility in a framework of cooperation, disclosure, and shared responsibility with congressional leaders. Establishing a known mechanism that makes con-

sultation and disclosure a priority will go far to ensure that the potential use of certain coercive measures is rare and limited to truly emergency situations, warranted by case-specific intelligence on the nature, gravity, and imminence of the threat, and mutually agreed to by the nation's most senior leaders. Creating such a framework would help reduce the risk of normalizing highly coercive measures in everyday policy and prevent exceptions from becoming rules. The creation of clearly defined escalation procedures and promotion of shared accountability will serve as a powerful disincentive to engage in certain coercive techniques unless there is a clear demonstration of extreme urgency, necessity, proportionality, and appropriateness. This would ensure accountability at the most senior levels of government and that front-line operatives were not put at undue risk of potential prosecution when they implemented approved policies and procedures.

*RECOMMENDATION The United States should reaffirm emphatically and unequivocally its commitment to not render terrorist suspects to third countries for counterterrorism intelligence-gathering purposes when the individuals are more likely than not to face torture. In such cases, the United States should be willing to detain and interrogate terrorism suspects itself, under conditions that abide by U.S. obligations to not engage in CIDT or torture.*

*RECOMMENDATION The United States should ensure that military and intelligence interrogators are given the proper training and resources to conduct interrogations in a safe, responsible, and effective manner.*

## Domestic Intelligence

The U.S. intelligence and national security apparatus in existence on 9/11 largely reflected the strategic threat posed by the Communist bloc. The terrorist threat exemplified by al-Qaeda poses a dramatically different challenge. It is transnational and networked, with independent and self-starting terrorist cells inspired by al-Qaeda but often lacking clear operational links to it, and with terrorists operating within the borders of the countries they target.

To detect and prevent terrorist attacks in the United States, the government has significantly increased the amount of information that it gathers and analyzes inside the United States or about U.S. persons. The information used for such domestic intelligence efforts fall into two broad categories. The first is surveillance, in which the government monitors the activities of individuals and collects and analyzes the content of their written, telephone, and Internet communications. The second category is less direct. It relies not on the direct content of communications (“what did you discuss”), but rather on indirect indicators of behavior (“whom did you call,” “when did you call them,” “where did you travel,” or “what did you buy”). Since 9/11, there has been a dramatic increase in domestic intelligence activities, which has resulted in a sharp rise in the government’s gathering and analysis of personal information from third parties, the use of data mining and other computer-aided risk-assessment techniques, and significant growth in the use of government watch lists to screen for people who might pose a terrorist risk.

The expansion of domestic intelligence efforts after 9/11—in scope, in volume, and in terms of who runs them—has been highly controversial. Domestic intelligence programs have raised civil liberties concerns regarding privacy, free speech, and free association. There have been significant concerns over the secrecy, effectiveness, and limited oversight of domestic intelligence programs. The manner in which many of the new programs were created has also raised broader questions about the scope and limits of executive power. To the extent that new policies and programs are needed, how should they be developed? Could they be implemented within the framework of existing laws or is it necessary to craft new rules altogether? The process by which new programs are developed and implemented can significantly influence their legitimacy and durability.

### *DEFINING DOMESTIC INTELLIGENCE*

Whereas much of the post-9/11 domestic intelligence debate has focused on the legality of various means of collection and surveillance, it is important to address broader fundamental questions about the definition, scope, and purpose of domestic intelligence. Domestic intelligence presents civil liberties concerns that are absent or less relevant when intelligence agencies conduct foreign operations because the Constitution and U.S. laws are generally not applicable outside of the United States. Domestic intelligence confronts different legal, policy, and organizational questions than foreign intelligence.

The United States has historically struggled in how it deals with domestic intelligence. In past periods, as documented in the 1975 Church Committee Report, the lack of clear authorities for domestic intelligence resulted in abuses of authority involving the unsupervised collection of information on U.S. citizens. Reforms recommended by the Church Committee led to the development of many of the laws and rules on foreign and domestic intelligence collection that were in place on 9/11. These rules established a clear dividing line between foreign and domestic intelligence, and between criminal investigative activities and intelligence activities, distinctions that are often less clear-cut when dealing with the strategies and tactics employed by terrorist groups.

Given the importance of domestic intelligence efforts to the homeland, there is surprisingly little consensus on how to define domestic intelligence. New laws, policies, and strategies after 9/11 have not provided the kind of clarity that is needed. In part, this is due to what Secretary of State Condoleezza Rice has characterized as a historic and cultural “allergy to the notion of domestic intelligence.”<sup>102</sup> Richard Posner, law professor and judge at the Seventh Circuit Court of Appeals, describes domestic intelligence as “intelligence concerning threats of major, politically motivated violence, or of equally grievous harm to national security, mounted within the nation’s territorial limits, whether by international terrorists, homegrown terrorists, or spies or saboteurs employed by foreign nations.”<sup>103</sup> Other experts define it as “the secret collection of information by a government on its own citizens and residents.”<sup>104</sup> The Homeland Security Act of 2002 defines “homeland security information” as information that “(A) relates to the threat of terrorist activity; (B) relates to the ability to prevent, interdict, or disrupt terrorist activity; (C) would improve the identification or investigation of a suspected terrorist or terrorist organization; or (D) would improve the response to a terrorist act.” The Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 expanded the definition of “intelligence” as set forth in the National Security Act of 1947 to include “intelligence gathered within the United States.”

Although plainly related, these definitions differ significantly. For the purposes of this report, domestic intelligence will broadly mean intelligence and other information collected inside the United States or about a person inside the United States, which pertains to foreign-related threats that are domestic or transnational.<sup>105</sup>

## *AUTHORITIES FOR DOMESTIC INTELLIGENCE AND CIVIL LIBERTIES*

Historically, there have been clear limits on the ability of the government to collect information on its own citizens and within the United States. Three sets of laws are relevant to the expansion of domestic intelligence activities since 9/11. These include those governing domestic surveillance, those regulating military activity within the United States, and those governing the federal government’s use of personal information.

Surveillance activity within the United States has traditionally been governed by two distinct legal regimes, one for foreign intelligence and another for criminal law enforcement. The Foreign Intelligence Surveillance Act of 1978 governed foreign intelligence gathering and constrained intelligence activities against U.S. persons and within the United States. Under FISA, national security surveillance was, with certain exceptions, permitted only with a judicial warrant and under strict time limits and minimization procedures. In 1981, Executive Order 12333, which broadly regulated the activities of the intelligence community, further reinforced limits on foreign intelligence gathering against

U.S. persons and within U.S. borders.<sup>106</sup> In response to the IRTPA, President Bush amended this order in July 2008. The revision unifies intelligence functions more coherently under the director of national intelligence (DNI) and reaffirms the responsibilities of the intelligence agencies. The DNI will now set goals for the intelligence community, issue guidelines on information collection and sharing, and play a more integral role in the selection of senior intelligence officers.

The legal authority for wiretaps in domestic criminal cases is in Title III of the 1968 Omnibus Crime Control and Safe Streets Act. It regulates surveillance, establishing time limits and requirements for exceeding those time limits. It requires efforts to minimize eavesdropping on innocent parties, regulates the use of information obtained through such surveillance, and sets requirements for judicial oversight.

Military activity within the United States is restricted by the Posse Comitatus Act of 1878 and the Insurrection Act of 1807. Posse Comitatus generally restricts the military from acting in a law enforcement capacity within the United States. The Insurrection Act regulates the federal government's use of the military to quell rebellion and lawlessness.

The collection and use of personal information by federal agencies is governed by myriad rules, derived from constitutional principles, statutes, executive orders, regulations, and policies. These include the Privacy Act of 1974 and Executive Order 12333. Other requirements derive from constitutional principles and applicable statutes, including the E-Government Act of 2002, the Foreign Intelligence Surveillance Act of 1978, the Right to Financial Privacy Act of 1978, and the Electronic Communications Privacy Act of 1986, among others. The implementation of these requirements is further guided by agency-specific regulations and policies; it is overseen by agency-level general counsel and inspectors general.

The Privacy Act governs the collection, retention, maintenance, use, and dissemination of personal information by the federal government. It stipulates that the creation of any database collecting information on U.S. citizens and permanent residents should be recorded in the *Federal Register*, and that individuals should be able to access and review any files that record information about them (with certain law enforcement and intelligence exceptions). It also regulates the government's disclosure of such information and the interagency sharing of records. A 1988 amendment further increased the regulation of information sharing through computer-matching programs, establishing more rigorous reporting standards (to the individual whose information is being shared) and mandating the creation of data protection boards to oversee such activities. The E-Government Act attempted to move from a paper-based record-keeping system to an electronic model to improve both the public's access to government services and intergovernmental coordination of functions. It introduced new E-government-specific information security standards to prevent unauthorized access of computerized databases.

Executive Order 12333 established requirements for procedures—sometimes referred to as U.S. person rules—to ensure that activities by the intelligence community protect privacy and civil liberties interests. Specifically, it requires that the collection, retention, or dissemination of information concerning U.S. persons is carried out in accordance with “procedures established by the head of the agency concerned and approved by the attorney general.”<sup>107</sup>

Historically, roles and responsibilities have been clearly divided between intelligence and law enforcement. The National Security Act of 1947 created the CIA but restricted it from undertaking “police, subpoena, or law enforcement powers, or internal security functions.” Additional reforms in the 1970s reaffirmed those provisions by generally confining the CIA to collecting intelligence

abroad on foreign powers, and made the FBI the primary organization for law enforcement and intelligence collection within the United States. Attorney-general guidelines and separate wiretap rules for foreign intelligence versus criminal investigations further reflected the distinction. In general, foreign intelligence activities had a different review process based on finding, among other things, that the target was an agent of a foreign power, while law enforcement efforts generally needed a criminal predicate—for example, a reasonable suspicion that an individual or organization is involved in a violation of U.S. criminal laws—as a threshold trigger to initiate monitoring activities.

As discussed earlier, the stark differentiation between law enforcement and intelligence can be an impediment in the context of counterterrorism. Since 9/11, the lines of demarcation between intelligence and law enforcement activities have blurred.

The need to increasingly blend intelligence and law enforcement for domestic intelligence is further complicated by the fact that domestic intelligence is governed by a disparate collection of authorities scattered across myriad statutes, agency rules, and executive orders. Domestic intelligence rules were “developed piecemeal over time, often adopted quickly in response to scandal or crisis and sometimes in secret” and lack the coherence and consistency needed to best confront the threat of international terrorism.<sup>108</sup>

Similarly, privacy and civil liberties protections for gathering, handling, and sharing information on U.S. persons vary widely and comprise a disparate collection of rules scattered throughout federal and state law, as well as private sector rules and policies.

### *NEW DOMESTIC INTELLIGENCE ORGANIZATIONS*

The aftermath of 9/11 also saw the creation of a number of new federal organizations with domestic intelligence roles. The FBI established a new National Security Branch in 2005 as its primary organ for dealing with intelligence and counterterrorism activities. It also revised its investigative guidelines in 2002 and 2003 to strengthen its ability to preempt and prevent terrorist threats. In addition, it created specialized units for such things as terrorism financing and weapons of mass destruction, and it implemented a broad training program to strengthen its intelligence capabilities. The Department of Homeland Security, established in law in 2002, has its own intelligence directorate. The Office of the Director of National Intelligence (ODNI) was established in law in 2004 as a new coordinating agency for the entire intelligence community. The FBI’s Terrorist Screening Center (TSC) and the ODNI’s National Counterterrorism Center were created to facilitate the coordination, sharing, and federation of counterterrorism data. The Department of Defense built Northern Command (NORTHCOM) within the United States with its own intelligence unit.

A number of these new organizations have started to develop elements of a strategy for domestic intelligence. The FBI and the DHS continue their efforts to bridge the gap between law enforcement and intelligence. Both organizations are wrestling with how to integrate third parties outside the federal government—state and local authorities and the private sector—into counterterrorism efforts. The ODNI released a National Intelligence Strategy in 2005, but the guidance and practices in it remain nascent. The DNI continues to face the challenge of how to best coordinate efforts of non-intelligence community elements that play an important role in domestic counterterrorism, including nonfederal actors like state, local, and private sector officials; DHS component agencies like Customs and Border Protection, Immigration and Customs Enforcement, and the Transportation Security Administration (TSA); and federal civilian agencies like the Department of the Treasury.

The FBI faces a number of challenges as it seeks to strengthen its counterterrorism domestic intelligence capabilities. It continues to struggle with the shift from a law enforcement gun-and-badge culture—in which intelligence analysts are of lower standing than agents—to an organization focused on preemption and prevention. According to a recent internal study, the FBI needs to address high rates of turnover among intelligence analysts, a lack of clarity regarding the types of information to be collected, the quality and availability of intelligence sources, and quality-control issues in its counterterrorism analysis.<sup>109</sup>

Its continued attempts to revise investigative guidelines to make it easier to identify and address terrorist threats have been controversial. In 2008, the attorney general unveiled revised guidelines for the FBI to permit certain investigative techniques, including physical surveillance in public areas and source recruitment, to be used in the assessment of national security threats, even when a crime has not yet been committed.

### *INFORMATION SHARING*

Domestic intelligence after 9/11 has been affected not just by existing law and existing and new institutions. It has also been affected by government-wide efforts to enhance information sharing. This effort has been undertaken in several realms: between federal law enforcement and intelligence authorities, and between the federal government and third parties like state and local law enforcement and the private sector.

New laws and executive orders after 9/11 established a government-wide mandate to improve information sharing for counterterrorism purposes. The Intelligence Reform and Terrorism Prevention Act of 2004 established the Office of the Program Manager for the Information Sharing Environment. This office, which now resides in the ODNI, has developed early-stage strategies to help guide information sharing among federal and nonfederal organizations and among intelligence and nonintelligence components within the federal government. But these strategies are nascent and have yet to mature as standard practice.

There has also been significant growth in organizations to share information related to counterterrorism beyond the federal government. Today, the FBI has more than one hundred Joint Terrorism Task Forces that it uses to better coordinate FBI efforts with state and local police. There are more than fifty fusion centers to facilitate information sharing both horizontally between federal agencies such as the CIA, FBI, and Department of Justice, and vertically between the federal government and state and local authorities. To facilitate information sharing with the private sector, a number of industry groups have worked with the federal government to establish Information Sharing and Analysis Centers and Sector Coordinating Councils.

### *OVERSIGHT AND NEW CIVIL LIBERTIES BODIES*

Reorganization efforts have also resulted in new institutions in the executive branch whose specific mandate is to address civil liberties concerns. There are a growing number of privacy and civil liberties offices, established in law, throughout the federal government. The departments of Homeland Security and Justice, the FBI, and the ODNI created internal privacy offices and civil liberties officers to assess the government's disclosure of personal information, oversee the privacy of information systems, and ensure the legal and secure collection of data.

The Intelligence Reform and Terrorism Prevention Act created the White House Privacy and Civil Liberties Oversight Board, consisting of five presidential appointees whose role is to ensure that privacy and civil liberties concerns are considered in the implementation of national security laws, regulations, and executive branch policies related to counterterrorism. Congress, in the Implementing Recommendations of the 9/11 Commission Act of 2007, reconstituted the board as an independent body outside the White House. The board is required to submit semiannual reports with findings and recommendations to the president and relevant congressional committees, and directs the board to work with the privacy and civil liberties officers of individual agencies. It also allows the board to request the attorney general to subpoena information from individuals outside of the executive branch. The bill also aims to increase the independence and objectivity of the board by removing it from the White House and re-creating it as an independent agency within the executive branch. It requires that board members be confirmed by the Senate and equally represent both political parties.

The President's Foreign Intelligence Advisory Board (PFIAB)—established in 1956 and renamed the President's Intelligence Advisory Board (PIAB) in 2008—provides independent advice and analysis to the president on the effectiveness of U.S. intelligence and counterintelligence programs. Its Intelligence Oversight Board (IOB), established in 1976, offers guidance on the legality of intelligence activities. These bodies possess powerful investigative tools and the authority to oversee the general counsel and inspectors general of each agency in the intelligence community.

Critics have argued that the IOB under President Bush was not as active in providing oversight as it might have been, especially in light of the broad range of new and highly controversial counterterrorism intelligence efforts pursued after 9/11. The IOB's membership was not put into place until the second year of the Bush administration, and it submitted no reports to the attorney general until 2007. In February 2008, President Bush issued Executive Order 13462, modifying aspects of the PIAB/IOB's oversight activities in recognition of the newly created ODNI's integrative function within the intelligence community. Some critics have expressed concern that the executive order could signal a diminution of the independent oversight provided by the PIAB/IOB as the ODNI increases its oversight role. Despite these concerns, the mission of the IOB under the new executive order remains unchanged: to report on "intelligence activities that the IOB believes may be unlawful."

## *SURVEILLANCE*

### **Terrorist Surveillance Program**

The most controversial domestic intelligence program pursued since 9/11 is the NSA's Terrorist Surveillance Program (TSP), which was created in 2001 by presidential authorization. The program allowed the surveillance, without court order, of communications between U.S. persons and individuals overseas reasonably believed to be connected to al-Qaeda or related terrorist organizations. In 2005, when media reports first revealed the program's existence, the TSP was believed to have monitored the emails and telephone calls of nearly five hundred individuals, including U.S. persons.<sup>110</sup>

Former U.S. attorney general Alberto Gonzales argued that the TSP was "necessary and lawful."<sup>111</sup> Several of the 9/11 terrorists are known to have been in communication with contacts in the United States while planning the attacks. According to the attorney general, the underlying logic of the program is that "if . . . someone here in the United States is communicating with al-Qaeda . . . the United States Government needs to know why."<sup>112</sup> Some senior Bush administration officials have

asserted that the Terrorist Surveillance Program helped foil the plot to blow up the Brooklyn Bridge and the planned fertilizer bomb attacks in Great Britain, but those claims have been disputed by British counterterrorism officials and the FBI.

Generally, critics of the program have questioned its effectiveness, legality, and secrecy. For instance, the TSP has been criticized for inundating the FBI with unproductive leads that diverted limited resources. According to critics, the constant flow of leads provided by the NSA required substantial manpower to process, and only a limited number led to helpful intelligence leads.

The 1978 Foreign Intelligence Surveillance Act prohibited government electronic surveillance activities against U.S. citizens and resident aliens (collectively U.S. persons) within U.S. territory without the approval of the FISA Court, a group of highly qualified judges with special expertise in foreign intelligence matters. Under the statute, the FISA Court conducted strict oversight through case-by-case evaluation of individual applications for wiretap surveillance. In addition, the court conducted retroactive reviews of surveillance activity within seventy-two hours if conditions warranted an expedited commencement of surveillance; it also conducted periodic retroactive reviews to ensure that continued surveillance was justified.

Although many aspects of the TSP remain classified, it is clear that there was significant disagreement within the Bush administration—in particular between the White House and the Department of Justice—over the legal foundations of the program. At least until media reports disclosed the existence of the program in 2005, the White House deliberately chose to avoid compliance with the judicial review requirements of FISA. Similar to the Office of Legal Counsel's memos on interrogation, the Bush administration justified the Terrorist Surveillance Program with overly broad assertions of executive power and flawed legal opinions. It chose an approach to creating the program that gave preference to secrecy over consultation within the executive branch, with Congress, and with the FISA Court.<sup>113</sup> Even NSA lawyers were prevented from seeing the Department of Justice's legal justification for the TSP.

Media reports and congressional testimony indicate that in March 2004, activities under the TSP, or closely related to it, were up for reauthorization. White House Counsel Alberto Gonzales and Chief of Staff Andrew H. Card Jr. favored reauthorization, but Deputy Attorney General (at the time, acting attorney general) James B. Comey and Attorney General John Ashcroft were unwilling to certify the legality of the program as it was constituted at that time. Ashcroft and Comey believed that the program lacked both an adequate legal basis and sufficient oversight, and were prepared to resign over the issue.

As a result of the disagreements, the White House agreed to make modifications to the program such that it was “on a footing where [the Department of Justice] could certify to its legality.”<sup>114</sup> The Department of Justice did so, justifying the TSP by arguing that the 1978 Foreign Intelligence Surveillance Act allowed for surveillance to be regulated by other congressionally authorized statutes—in this case the Authorization for the Use of Military Force—and that the president was within his inherent commander-in-chief authority under the U.S. Constitution.

Before media revelations about the TSP beginning in 2005, the White House limited its congressional briefings on the program to the Gang of Eight—which comprises the Senate and House leadership of both parties and the chairmen and ranking members of both congressional intelligence committees—and the leadership of the Senate Appropriations Committee Defense Subcommittee. Only after the public revelation of the program did the Bush administration brief the broader membership of the congressional intelligence committees.<sup>115</sup>

Critics argue that the initially limited nature of the briefings hampered Congress's ability to conduct effective oversight of the program. Also at question is whether the limited briefings complied with the requirement, under the National Security Act of 1947, that the president keep Congress, through its two intelligence committees, "fully and currently informed" of all intelligence activities.

A number of TSP-related lawsuits have been filed against both the government and the telecommunications companies that participated in the program. Civil lawsuits have asserted that the program violated First Amendment freedoms of speech, press, and association and the Fourth Amendment guarantee against unreasonable search and seizure. The Bush administration has attempted to use the State Secrets Privilege—in which the government asks the court to exclude evidence from trial proceedings based on the assertion that disclosure of such information would pose a risk to national security—to have at least four lawsuits filed against the government either dismissed or put on hold, and has been partially successful in its efforts. The future of these cases depends on the interpretation of the FISA Amendments Act of 2008; for example, a circuit court has already sent a lawsuit against AT&T back to the district court for reconsideration under the FISA Amendment Act's provisions.

In January 2007, the administration brought TSP activities under FISA court order. For its part, Congress eventually revised FISA in two stages, through the 2007 Protect America Act, which expired in February 2008, and the FISA Amendments Act of July 2008. An examination of provisions in each act provides insight into the most controversial concerns regarding domestic surveillance and civil liberties.

Proponents of the Protect America Act argued that the law effectively modernized an outdated FISA in two ways. First, it amended the definition of electronic surveillance to better accommodate changes in the global telecommunications infrastructure since the original FISA statute was passed in 1978. Second, it eliminated the strict geographic restrictions of FISA, which prohibited warrantless electronic surveillance inside the geographic United States or against U.S. persons, but which had become less salient and increasingly cumbersome. The statute allowed the warrantless interception of phone calls within the United States, even if a U.S. person were involved, so long as the surveillance was directed at a person who was reasonably believed to be outside the country and a significant purpose of the surveillance was foreign intelligence collection. This allowed the NSA to more easily monitor conversations between two overseas parties for exclusively foreign intelligence purposes even if the conversation happened to be routed through the continental United States. Under the original statute, much of this would have required FISA approval because the collection was occurring domestically.

Opponents of the Protect America Act argued that the law made it too easy to spy on U.S. citizens without court approval. They also argued that it provided insufficient mechanisms for independent oversight. The law reduced the FISA Court's role in case-by-case review and in the preapproval of surveillance activities. The director of national intelligence and the attorney general were allowed to authorize intercepts for up to one year by submitting—under seal—written certifications to the FISA Court. The act gave the attorney general four months to submit to the FISA Court the procedures that were used to determine the legality of the acquisitions. The ability of the court to review the government's acquisition of information was limited to ex-post determinations of whether the actions taken were "clearly erroneous."

The Protect America Act relied on the attorney general to audit and monitor abuses and to report any instances of noncompliance with the prescribed procedures for issuing certifications. Critics ar-

gued that the DOJ inspector general would provide more appropriate and effective independent oversight.

The FISA Amendments Act replaced the Protect America Act after it expired in 2008. Many of the changes to the original FISA contained in the FISA Amendments Act amount to useful updates to address changes in technology or technical limitations of the original FISA statute. For example, changes to the largely geography-based restrictions in the 1978 FISA statute and the grant of greater flexibility to intelligence officials are commonsense changes that were overdue.

The original FISA statute addressed circuit-switched communications. It treated wired and wireless communications differently, and generally allowed much greater surveillance of wireless communications. This benefited the intelligence community in the 1960s and 1970s when most of the international calls into and out of the United States occurred over satellites. Today, most calls are digital, packet-switched, and travel over fiber-optic cables. Under the original FISA, monitoring in the United States of international transit calls required a warrant if they passed over fiber optic, but not if they were transmitted using satellites.

If a Los Angeles FBI agent monitors Internet conversations between a suspected terrorist in Lahore and someone using a computer with a Las Vegas IP address, and if the chat room is hosted by an ISP in Luxembourg, is the intelligence being gathered inside the United States or outside, and does it involve a U.S. person? Extensive technological changes in the three decades since the original FISA statute was written made it increasingly difficult to maintain rules for national security and civil liberties that hinged on technical distinctions that were increasingly tortured and much less salient. Even before 9/11, intelligence professionals had struggled to adapt Cold War-era rules to the modern realities of terrorism and global communications technologies.

The FISA Amendments Act now gives equal treatment to international calls that happen to transit through the United States; if a U.S. person is not targeted they do not require an individualized warrant. The new act protects all communications known to be occurring between parties within the United States. International calls, both wired and wireless, require an individualized court order only if the government is targeting a U.S. person (e.g., citizen, legal resident, or corporation), whether within the United States or overseas.

The FISA Amendments Act provides some new protections that did not exist under the original FISA. It expands protections to U.S. persons overseas, restricting surveillance on targets that are U.S. persons, regardless of their location. It gives the FISA Court the authority to review applications for individual acquisitions targeting U.S. persons abroad, and stipulates that emergency surveillance must end within seven days if the FISA Court does not give its approval. Further, the act does not allow surveillance under its broader authorization procedures (discussed below) to be intentionally targeted at any person residing within the United States. It also states that the broad authorizations provided by the attorney general and director of national intelligence “may not intentionally target a person reasonably believed to be located outside the United States” if the main purpose of such acquisition is “reverse targeting” and indirectly or surreptitiously surveilling a person reasonably believed to be in the United States.

In other areas, the FISA Amendments Act, like the Protect America Act, provides fewer protections than the 1978 FISA Act. The new act does not require individual warrants from the FISA Court for each acquisition when the target is a non-U.S. person located outside the United States. In such cases, the FISA Court no longer reviews each application. Instead, its oversight is more general and takes the form of what are known as basket warrants. These authorizations can last up to one year.

The act does not specify the breadth of the surveillance they can approve, leading some to characterize the authorization as monitoring plans.

The FISA Court also reviews certifications from the administration that precede these authorizations. Such certifications put forward the targeting and minimization procedures to be adopted during surveillance, and they certify that Fourth Amendment protections would be in place and that a “significant purpose of the acquisition is to obtain foreign intelligence information.” This is a significant change for this class of cases from the original FISA requirement that the FISA Court examine each individual wiretap application, with details about the duration, location, etc., to ensure the legality of each acquisition. The government has seven days to provide its certification to the FISA Court after beginning emergency surveillance. The government may continue its surveillance during the thirty-day period that the FISA Court uses to review the certification, and—if the case goes to appeal—the sixty days that the court of review is given to determine whether some or all of the acquisition may continue pending its review.

The FISA Amendments Act also provides retroactive immunity to telecommunications providers that participated in the NSA’s Terrorist Surveillance Program. In the future, under the FISA Amendments Act, participating companies may not be brought to court for their assistance with foreign intelligence acquisitions. They are also given the right to challenge a directive from the government by filing a petition with the FISA Court.

The FISA Amendments Act addressed many of the criticisms directed at the Protect America Act. In general, the FISA Amendments Act provides significantly more procedural and privacy protections than the Protect America Act: it contains more expansive judicial review provisions; allows for more internal and congressional oversight; and increases the role of the congressional intelligence and judiciary committees and the inspectors general in reviewing compliance with targeting, minimization procedures, and past surveillance. Although these are positive developments, critics of the new FISA Act point out that it provides fewer procedural safeguards and looser oversight provisions than were provided by the original FISA regime, which could increase the risk of error and abuse in authorizing wiretaps.

### **DOD Domestic Intelligence for Force Protection**

Parts of the Department of Defense—outside of intelligence community components like the NSA, which runs the TSP—have been deeply involved in a range of other domestic intelligence efforts. DOD has been one of the leading experimenters and users of data mining techniques. Able Danger was a pre-9/11 military intelligence program that sifted through open-source information to identify terrorist suspects and intelligence leads linked to al-Qaeda and other terrorist organizations. After 9/11, the Defense Advanced Research Projects Agency (DARPA) ran a program called Total Information Awareness (TIA), which sought to analyze commercial data to identify terrorists. There are plans to use military satellite imagery to assist domestic authorities in border security, critical infrastructure protection, and disaster recovery. Northern Command was created in 2002 to provide homeland security support to federal, state, and local authorities and has a robust intelligence function that maintains a staff of 252 intelligence analysts. This section addresses DOD surveillance programs beyond NSA; data mining programs are addressed later.

DOD domestic intelligence activities include efforts to protect military personnel and facilities. In 2002, the Pentagon created the Counterintelligence Field Activity (CIFA) to develop and manage

DOD counterintelligence programs and support force protection efforts. The U.S. Air Force created a program based on a neighborhood watch model to identify potential threats in communities around military installations. The Marine Corps collects, retains, and disseminates information on U.S. persons who are “reasonably believed [to] threaten the physical security of DOD employees, installations, operations or official visitors.”<sup>116</sup>

Over time, CIFA shifted from simply coordinating security efforts to undertaking investigations of active security threats. A 2005 presidential commission on intelligence recommended that CIFA be given new law enforcement capabilities to investigate such crimes as espionage, treason, and terrorism.

CIFA’s most widely known initiative was its Threat and Local Observation Notice (TALON) program. The program monitored, documented, and reported on potential terrorist-related activity directed at DOD assets and provided “non-validated domestic threat information” to other segments of the military in an online information-sharing network.<sup>117</sup> TALON also used “leading edge information technologies and data harvesting” of commercial information to aid its efforts.<sup>118</sup>

In December 2005, it was revealed that TALON had been improperly collecting information on the activities of environmental and antiwar groups engaged in activities unrelated to the security of military facilities.<sup>119</sup> This extended much beyond TALON’s mandate to collect information on threats to military assets and personnel and raised concerns over First Amendment rights to freedom of speech and association. Reacting to the controversy created by the disclosure, the Department of Defense conducted a review of policies and procedures. It was found that the program did not have proper controls and that a number of reports were inappropriately included in the CIFA database contrary to intelligence rules and DOD guidelines. CIFA discarded 1,131 files after the review, most of which did not meet reporting or retention criteria. Of 243 incidents that were found to be unrelated to a national security threat, 186 maintained records on antiwar rallies, and twenty made specific references to U.S. persons.<sup>120</sup>

The acting director of CIFA acknowledged that policies had been unclear and that the public controversy had undermined the credibility of a program that had been built to isolate legitimate terrorist targets and leads. Undersecretary of Defense for Intelligence James Clapper eventually shut down the TALON program in August 2007, arguing that it was “important that the proper balance be struck between the counterintelligence mission on one hand, and the protection of civil liberties, on the other.”<sup>121</sup> In August 2008, the Department of Defense closed down CIFA itself.<sup>122</sup>

Expanded DOD counterterrorism activities inside the United States pose a challenge to long-standing restrictions on the U.S. military’s law enforcement capacity within the United States, as dictated by the Posse Comitatus Act of 1878. Efforts to address this new domestic role and its related challenges have been limited. A 2005 study commissioned by the U.S. intelligence community regarding plans to expand the use of DOD satellite assets for domestic homeland security and potentially for law enforcement purposes did note that “there is little if any policy guidance or procedures regarding the [DOD’s] collection, exploitation and dissemination” of domestically collected intelligence.<sup>123</sup> To address the gap, an August 2007 directive on DOD intelligence activities advocated a “special emphasis” on the “protection of the constitutional rights and privacy of U.S. persons.”<sup>124</sup> The directive largely continued to rely on surveillance definitions from the 1978 FISA and had not been updated to fully reflect the latest domestic surveillance rules passed by Congress in 2008.

## *BUSINESS RECORDS, COMPUTER-AIDED RISK ANALYSIS, AND WATCH LISTS*

### **National Security Letters**

The rules surrounding subpoenas for law enforcement purposes typically include demonstration of cause, judicial approval, and a requirement to notify the individuals affected by the subpoena. The rules for subpoenas related to foreign intelligence are different and include fewer legal and operational restrictions. Pre-9/11 statutes allowed the FBI to issue national security letters, which do not require court authorization or the showing of probable cause. An NSL could be issued upon certification to its recipient that the subject of the information being sought was an agent of a foreign power or that the information was needed for counterintelligence purposes.<sup>125</sup> NSLs also imposed a gag order on letter recipients—typically financial institutions and communications providers—such that they could not reveal the content, or even the receipt of an NSL, to the subject of the inquiry.

After 9/11, the USA PATRIOT Act loosened the procedures for issuing NSLs. The government only needed to assert relevance to an intelligence investigation related to international terrorism or espionage, and certain types of NSLs can now be issued by any government agency engaged in terrorism-related investigations. For example, the DOD increased its use of national security letters to obtain records from banks, credit card companies, and other financial institutions, with plans to integrate this information into a database called Portico, which would contain all DOD-acquired intelligence leads. Congress further expanded the reach of certain types of NSLs by broadening the definition of financial institution to include, for example, car dealers, real estate companies, and the United States Postal Service.

The USA PATRIOT Improvement and Reauthorization Act of 2005 provided for greater judicial participation in the NSL process. It permitted judicial enforcement of requests and allowed companies to be penalized for contempt of court if they failed to comply. At the same time, it explicitly authorized judicial review, allowing NSL recipients to petition the courts to modify or reject the letter request or the nondisclosure requirement (or gag order).

The Bush administration argued that NSLs have been effective at identifying links between targeted individuals and terrorist suspects. Information obtained using NSLs has been shared with other government agencies, the Joint Terrorism Task Force, and foreign governments. According to the inspector general, NSLs have been effective in aiding the collection of evidence for NSA surveillance requests to FISA, establishing link analyses between targeted individuals and terrorist suspects, and isolating sources of terrorist finance. FBI director Robert Mueller notes the particular success of NSL-related link analysis in facilitating the breakup of terrorist cells like the Lackawanna Six and Northern Virginia Jihad. Despite these successes, only one terrorism conviction has been the direct result of intelligence gained through NSLs.

The expanded use of NSLs has been highly controversial. Their use, and the increased interagency sharing of information gathered through their use, raises Fourth Amendment privacy concerns. In a September 2007 ruling, a New York district court judge found that gag orders (and the absence of judicial oversight of gag orders) were a violation of the First Amendment and the separation of powers doctrine.<sup>126</sup> The Second Circuit ruled on the government's appeal in December 2008. It found that such gag orders were enforceable but that the FBI, not the recipient of the letter, is responsible for initiating judicial review.

The increased use of NSLs has also been accompanied by a number of instances of poor management, mistakes, and abuse. In a review of the use of NSLs between 2003 and 2005, the DOJ inspector general found that the FBI issued 143,074 NSLs and that the use of NSLs during that time suffered from errors, poor record keeping, poor audits and oversight, and mismanagement. The IG found that these problems hampered the accuracy and expediency of investigations and diminished the analytical intelligence gained from the requested records.<sup>127</sup>

Incorrect data entries resulted in record requests on individuals who were not suspected of terrorism or espionage. There were errors in identifying targeted individuals as U.S. or non-U.S. persons. Requests filed at FBI field offices were not documented in the central files of the Office of General Counsel. The inspector general also noted several instances in which the FBI improperly sent exigent letters to telecommunications companies to bypass NSL or subpoena processes and improperly expedite records acquisition. Many of the letters stated that federal grand jury subpoenas had been requested for the records, when, in fact, that was not the case. The exigent letters were frequently signed by officers who did not have enough seniority to sign NSLs. Issuing officials often failed to document the nature of the emergency circumstances prompting the request, and in certain cases there was, in fact, no emergency related to the documents requested.

A 2008 IG report reveals that the FBI has actively reformed its procedures to reduce the likelihood of future instances of incorrect and unfair information collection. It has issued guidance related to the legal authorities and restrictions that govern the use of NSLs, and provided the relevant training to its personnel. The use of exigent letters has been disallowed, and specific procedures have been crafted to identify and investigate abuses. In fact, the FBI has created a new Office of Integrity and Compliance to monitor such abuses with regard to NSLs and to other activities of the bureau. Finally, the FBI has developed an automated system of regulating NSL requests to streamline the issuance of requests and improve data accuracy.

### **Financial Records and Terrorist Finance Tracking**

In June 2006, media reports revealed that the Society for Worldwide Interbank Financial Telecommunication, a Belgium-based clearinghouse for records of international transactions between more than eight thousand financial institutions in more than two hundred countries, had responded to compulsory administrative subpoenas from the U.S. Treasury Department and shared financial transaction records with U.S. authorities in their efforts to track terrorist finances.

Treasury has called its Terrorist Finance Tracking program a “powerful investigative tool,” that has “generated many leads that have been disseminated by counterterrorism experts in intelligence and law enforcement agencies around the world.”<sup>128</sup> EU authorities found that SWIFT’s cooperation with U.S. authorities violated European privacy and data protection regulations. The Treasury Department has sought to address concerns of EU officials by guaranteeing that the information gathered will be used only for strictly counterterrorism purposes, and that records obtained will be destroyed after five years.

### **Data Mining and Data Analysis Techniques**

Data mining is the process of searching large data sets for previously unidentified patterns and links and using them to show relationships that can help predict future outcomes. In the private sector, for

example, credit card companies mine volumes of transaction data for spending patterns—a sudden increase in the purchase of luxury goods or consumer electronics—that might indicate fraud or a stolen card.

The use of advanced data mining techniques for counterterrorism purposes was revealed in 2002 with press stories on the Pentagon's Total Information Awareness project.<sup>129</sup> TIA was a research and development effort that intended to create systems that could aggregate and analyze volumes of personal information—for example, finance, travel, education, and health records—to identify potential terrorists. After significant public criticism of the civil liberties implications of TIA, Congress eliminated funding for the program in 2004. However, many of the program's components were transferred to other government agencies, where they are still used.

A number of other important counterterrorism programs also use computer-aided data analysis techniques. They typically augment government information with personal and commercial data obtained from the private sector to assess potential security risks posed by travelers, immigrants, or other individuals. Travel-related programs like the Computer Assisted Passenger Prescreening System II (CAPPS II) and the Automated Targeting System (ATS) have come under significant scrutiny over privacy concerns. The Government Accountability Office was highly critical of CAPPS II, and Congress canceled it in July 2004. CAPPS II has been replaced by Secure Flight, which is due for implementation in early 2009. In addition, the FBI's System to Assess Risk program was created to identify non-U.S. person terrorist suspects using both government and open-source information, and to assign risk scores to these individuals.

The government's use of data mining and other data analysis techniques for counterterrorism purposes is in its infancy. As the practice grows, it raises significant concerns about whether such techniques are effective, how such activities are governed, how data is acquired from third parties, how the accuracy and security of data is ensured, and how to protect against errors and abuse. It also raises the likelihood that information may be used for purposes unrelated to counterterrorism.

The civil liberties concerns posed by the extensive use of commercial data for counterterrorism risk analysis do not stem just from the government's acquisition and analysis of third-party data. Third-party data is not inherently protected by the Fourth Amendment; expectations of privacy are diminished because the data is in many senses publicly held, and the government has historically been free to obtain and inspect data from third parties so long as it is relevant to investigative activity.<sup>130</sup>

Civil liberties concerns over the extensive use of commercially available personal data stem from three factors. First, the volume of information on individual behavior that is available from commercial sources has become vast with the growth of the Internet. Combined with ever cheaper and more powerful processing power, the government's ability to gather, analyze, and store personal information is unprecedented and revolutionary. It marks not just a change in volume, but a change in kind, which raises privacy concerns that did not exist previously. The concern, therefore, is over the breadth of information being analyzed, the new information about an individual that is created as a result of the analysis of that data, and how that new information is used. In effect, the traditional line between intelligence collection and analysis is blurred, so much so that new types of analysis end up amounting, in effect, to new forms of collection.

This concern arises from the fact that extensive data analysis is being conducted on many individuals who are explicitly not subjects of an investigation. Critics argue that computer-aided, pattern-based analyses of large data sets turn the traditional intelligence process on its head. Instead of collecting information on identified suspicious individuals, pattern-based queries collect and analyze

information on individuals not otherwise under suspicion to identify the risks they may pose. The intelligence approach taken by data mining “views entire communities rather than specific individuals as potentially suspect.”<sup>131</sup> The approach risks wrongfully creating suspects out of innocent individuals based on coincidental correlations in information, inaccurate data, or faulty analysis. Individuals may be placed under suspicion because aspects of their behavior correspond with certain elements of what has been determined as terrorist activity. When behavioral indicators are inaccurate or the data being relied upon is false or outdated, matches run the risk of being purely coincidental. As a result, data mining can lead to a significant number of false positives. In addition, data mining programs suffer from false negatives, that is, when the system fails to recognize indicators of actual terrorist activity.

The risk of false positives in data mining and risk profiling is significant. The Automated Targeting System, which is used by DHS’s Customs and Border Protection to screen individuals entering or leaving the United States, processed 431 million people in 2005. Even if ATS were 99 percent accurate, which is a highly unrealistic assumption, it would create more than 4 million false alarms every year. Individuals who are flagged by such systems as posing a terrorism risk are not allowed to know their risk scores or to dispute the data. Risk scores and personal profiles, if shared with other agencies and other governments (state, local, and foreign), could wrongfully prevent someone from getting a job, visa, loan, or other benefit.

An additional concern is that the government’s large-scale collection and storage of commercial data may increase the likelihood of the data being abused, misused, lost, or stolen, thereby exposing innocent individuals to identity theft, fraud, and crime. Comprehensive safeguards against such privacy and security risks are minimal.

Aspects of these activities and concerns are covered by the Privacy Act of 1974, the 1988 Privacy Act amendment, and the E-Government Act of 2002. The Privacy Act established guidelines for maintaining, handling, and sharing government records, and upheld the individual’s right to query government records for any information maintained on his person, and to request a report on how this information has been used. The 1988 amendment governed the use of computers for name matching. The E-Government Act established requirements that agencies conduct privacy impact assessments on electronic information systems and how they handle individual data, particularly personally identifiable information.

However, after 9/11 there was little legal framework in place to govern counterterrorism data mining efforts, an absence that put civil liberties concerns in sharp focus. This is mostly a result of the relative newness of its initiatives—they have been made possible only by recent changes in the cost and capabilities of technology, and in the availability of large commercial data sets. In 2007, Congress passed the Federal Data Mining Reporting Act to begin to address these concerns. It requires federal agencies to report all pattern-based data mining initiatives to Congress annually. While this is an important step, there is a significant opportunity to build a more comprehensive framework embedded in statute to address the civil liberties challenges posed by the use of commercial data for counterterrorism purposes.

## Watch Lists

Terrorist watch lists are used to identify individuals who may pose a terrorist risk. The largest and most comprehensive is the consolidated terrorist watch list—the Terrorist Screening Database

(TSDB)—managed by the FBI’s Terrorist Screening Center, which was created in 2003. The TSC has reported that, as of 2008, the consolidated watch list comprises up to 400,000 individuals. The TSC provides information on terrorist watch-list queries to other federal agencies and state and local authorities. Airlines receive information from the watch list via the TSA. Other private sector entities may receive watch-list information from the TSC in the future—as envisioned by Homeland Security Presidential Directive HSPD-6—but procedures to implement this have not yet been put into place.

The TSDB comprises data from nearly a dozen other government watch lists and databases; it is, in effect, a list of lists. The lists that feed the consolidated terrorist watch list serve purposes particular to the agencies that run them, and they contain some data that is related to terrorism that is shared with the TSDB, as well as information unrelated to terrorism that is not in the TSDB. The TSA’s no-fly and selectee lists are used to screen individuals who may pose a security risk to domestic commercial aviation; the no-fly list bars individuals from boarding flights, and the selectee list results in additional searches and questioning. Such individuals can also be denied admission at ports of entry into the United States. There is a range of proscribed conduct besides terrorism that might result in an individual’s inclusion on a no-fly list. The FBI’s Violent Gang and Terrorist Organization File database includes a number of records unrelated to terrorism, such as gang membership, which are not included in the TSDB.

Post-9/11 watch-list initiatives have been the subject of significant public and congressional criticism. The major complaint against such programs is their capacity for error and the difficulty of correcting errors. In a number of highly publicized instances individuals were mistakenly identified and triggered false-positive “hits” because they possessed the same or a similar name to someone on the watch list. Notable misidentifications include Senator Edward Kennedy, singer Cat Stevens, former Senator Ted Stevens’s wife, a number of Muslims whose names resemble those of suspected terrorists, and young children.

Watch-list errors can have dire consequences far beyond travel inconveniences for mistakenly identified individuals. Canadian citizen Maher Arar was placed on the U.S. terrorist watch list on the basis of information provided by Canadian authorities. In 2002, he was seized at John F. Kennedy Airport and then rendered to Syria, where he was detained for a year and reportedly tortured.

Arar was cleared by a Canadian federal inquiry in 2006 of any links to terrorism. The inquiry found that the information that was passed to U.S. authorities by the Royal Canadian Mounted Police incorrectly described him as an “Islamic extremist individual” with suspected links to al-Qaeda. In the inquiry’s findings, the presiding Canadian judge noted that “the potential consequences of labeling someone an Islamic extremist in post-9/11 are enormous.”<sup>132</sup>

U.S. authorities, however, have not removed Arar’s name from their master watch list. They continue to deny him access to the United States, and argue that even updated risk assessments continue to warrant his placement on terrorist watch lists, even after correcting the previous mistaken information provided by the Canadian authorities. Critics view U.S. actions as hypocritical—the United States continues to target Canadian citizens like Arar yet expects the full cooperation of Canadian authorities in sharing international travel records.

Correcting mistakes and seeking redress for errors in a timely fashion pose significant challenges for domestic intelligence efforts. Senator Kennedy’s efforts to remedy the misidentification took three weeks and during that time airport officials continued to stop him for questioning. In 2007, the TSC led the establishment of an interagency memorandum of understanding to formalize redress procedures government-wide. TSA has sought to improve redress mechan-

isms with its automated Redress Management System. The program was launched in October 2006 and received and processed approximately 20,000 requests by the end of the year, though it was soon shut down as a result of the serious security breaches it suffered. TSA then launched the DHS Traveler Redress Inquiry Program (DHS TRIP) in February 2007. As of August 31, 2008, the program has processed over 22,000 applications.

The lack of consistency in TSA procedures indicates the need for more training. New employees do not receive adequate initial guidance on the job, and make mistakes that are exacerbated by unclear policy and legal authorities. Their training is particularly important at international airports; foreign perceptions of the United States are significantly influenced by the treatment of international visitors at U.S. borders.

Additional concerns exist over whether ethnic and racial profiling play some role in watch-listing efforts. In 2004, an Amnesty International study reported that racial profiling of citizens and visitors of Middle Eastern and South Asian descent, others who appear to be from these areas, and members of the Muslim and Sikh faiths increased substantially after 9/11. Homeland Security Secretary Michael Chertoff has strongly denied racial bias in risk screening and watch-listing programs, arguing that “it’s behavior which is the best test of someone’s intentions. . . . We want to focus on behavior and not prejudice.”<sup>133</sup> Proponents of watch-listing and computer-based screening argue that such programs can, in fact, help reduce the instances of ethnic bias or profiling by providing a common set of risk indicators that may be more objective or neutral than case-by-case judgments by individual homeland security officials in the field.

## DOMESTIC INTELLIGENCE FINDINGS AND RECOMMENDATIONS

*FINDING Robust and effective domestic intelligence capabilities are critical to protecting the U.S. homeland against terrorism, and they should be calibrated based on rigorous assessments of the domestic terrorist threat and a commitment to protecting civil liberties.*

The intentions, strategies, and tactics employed by transnational terrorist groups justify an increased focus on domestic intelligence strategies and capabilities for counterterrorism purposes. The reach and scope of domestic intelligence programs should be calibrated based on rigorous assessments of the magnitude of the threat posed within the United States. As a general rule, the United States should treat individual liberties and traditional national security equally when crafting domestic intelligence policies and programs.

*FINDING Many intelligence collection rules were obsolete before 9/11.*

The transnational nature of terrorism and changes in technology and globalization rendered obsolete the geography-based assumptions of many of the intelligence collection rules in place on 9/11. For example, national security surveillance statutes (FISA) and rules (U.S. person restrictions) needed updating even before September 11, 2001, to reflect globalization and changes in technology.

*FINDING The United States lacks a coordinated and coherent approach to domestic intelligence; a piecemeal approach will not work.*

The United States lacks, first, a comprehensive and coherent framework of rules, roles, and oversight for the protection of civil liberties in relation to domestic intelligence and, second, a well-

defined process for coordinating domestic intelligence efforts. A piecemeal approach to protecting civil liberties in the conduct of counterterrorism-related domestic intelligence increases the risk of errors and abuse, which can erode public trust in and undermine the durability of important domestic intelligence efforts. For example, in the absence of clear guidelines and best practices for data mining activities, extensive experimentation has occurred—especially within DOD and DHS—which has led to errors and overreach.

*FINDING Despite serving, to date, as the focal point of controversy over domestic intelligence issues, the FISA debate is only one of a number of domestic intelligence issues that need to be addressed.*

Although the FISA Amendments Act of 2008 resolved certain important issues regarding domestic intelligence, many unresolved issues remain. These include, among other things, the need for a comprehensive U.S. domestic intelligence strategy, designation of a lead organization for coordinating a domestic intelligence strategy across multiple agencies, the strengthening of domestic intelligence oversight, clarification and delimitation of the role of DOD in domestic intelligence, and development of a stronger legal regime to govern the use of third-party data for counterterrorism purposes.

*FINDING The oversight of domestic intelligence and civil liberties has been weak.*

Robust oversight is a critical part of any domestic intelligence enterprise. Effective oversight of a number of post-9/11 domestic intelligence efforts has been hampered by a number of factors. These include the newness of many of the programs, limited visibility by Congress and agency-level oversight bodies into new programs, the immaturity and limited effectiveness of many new oversight bodies, and the lack of a coordinated government-wide oversight effort for domestic intelligence. The lack of independent and effective oversight on the nature and effectiveness of counterterrorism programs undermines the legitimacy and sustainability of potentially valuable programs over the long term.

Privacy and civil liberties bodies, though valuable, have a mixed record in providing oversight and effectively addressing civil liberties concerns, especially at a strategic and cross-agency level. Agency-level privacy offices and inspectors general lack the ability to address civil liberties concerns at a strategic and cross-agency level.

*FINDING Independent oversight is critical for domestic intelligence programs; it is inadequate and inappropriate for the executive branch itself to provide the primary means of oversight for domestic intelligence programs.*

For several years, the Terrorist Surveillance program relied almost exclusively on executive branch oversight. By providing more meaningful independent oversight by Congress, inspectors general, and the courts, the FISA Amendments Act marks significant progress in protecting civil liberties, especially in comparison with previous FISA reforms, such as the Protect America Act.

*FINDING The creative use of technology can strengthen both counterterrorism and civil liberties, but valuable new techniques lack clear guidelines and best practices.*

Data mining and automated data analysis techniques are important technologies that can assist in counterterrorism efforts, but they also raise significant civil liberties concerns. The government's data mining and other data analysis techniques for counterterrorism lack adequate guidance—in statute, coordination of strategies, development of best practices, and definition of roles and responsi-

bilities—and the necessary level of professionalization and training to ensure that programs are well managed and that civil liberties concerns are addressed satisfactorily.

*RECOMMENDATION Develop a comprehensive national strategy for domestic intelligence.*

The United States should develop a national strategy for domestic intelligence. Piecemeal fixes and adjustments to individual laws and programs will not provide the comprehensive vision and level of coordination that the United States needs for domestic intelligence. A new domestic intelligence strategy should establish national priorities for domestic intelligence, clarify roles and responsibilities among agencies, and set forth an implementation plan.

*RECOMMENDATION Designate the Office of the Director of National Intelligence as the lead organization for coordinating domestic intelligence efforts across the agencies and for clarifying domestic intelligence roles and responsibilities among members of the intelligence community. The director of national intelligence should designate within the ODNI a lead official for domestic intelligence.*

Individual agencies—like DHS, the FBI, and DOD—should continue to manage specific programs and activities within their organizations. The ODNI, in coordination with the National Counterterrorism Center, should be the lead authority for ensuring the coordination of domestic intelligence efforts. The ODNI should identify unique intelligence requirements for homeland security, develop guidelines for collection and analysis methods, and ensure that relevant organizations are meeting the objectives of the national strategy.

To ensure consistent focus and attention on the coordination of domestic intelligence activities government-wide, the DNI should designate a lead official for domestic intelligence inside the ODNI. One option for doing this could be to dual-hat—in a manner similar to the dual appointment in 2007 of the undersecretary of defense for intelligence as director of defense intelligence in the ODNI—the DHS undersecretary for intelligence as director of domestic intelligence in the ODNI.

*RECOMMENDATION Create a training and professional development program for domestic intelligence and civil liberties.*

Domestic intelligence requires a unique multidisciplinary combination of skills and knowledge in foreign intelligence collection, domestic law enforcement, traditional intelligence analysis, open-source collection and analysis, and emerging computer-aided analytical techniques, as well as privacy and civil liberties laws and practices. The DNI should lead the development of a training and professional development program that addresses these components as well as education on the sources of terrorist radicalization, terrorist tactics, and best practices for sharing, disseminating, and retaining information. It should be a requirement for any employee in the federal government engaged in the domestic intelligence enterprise, regardless of whether he or she is officially within the intelligence community, to receive domestic intelligence and civil liberties training.

*RECOMMENDATION Clearly establish the limits of DOD's role in domestic intelligence.*

– The creation of NORTHCOM, the imperative for greater domestic intelligence, and the fact that the country's most robust intelligence capabilities reside largely within the Department of Defense, have all created a lack of clarity about the proper limits of DOD's role in domestic intelligence, given Posse Comitatus restrictions, and provisions within DOD's homeland security strat-

egy that limit its domestic homeland security role to providing civil support to other federal authorities, including DHS and DOJ.

- DOD components outside of the intelligence community should generally be prohibited from engaging in domestic intelligence unless such activities are specifically related to force protection.
- DOD intelligence community components should generally be prohibited from engaging in domestic intelligence unless such activities are either incidental to collection for primarily foreign intelligence purposes (for example, NSA domestic surveillance); or performed in accordance with a homeland-security civil support function at the request or under the direction of properly authorized domestic agencies (for example, use of DOD satellite imagery to assist in disaster relief).
- DOD intelligence activities undertaken for the purpose of homeland defense should be conducted only pursuant to appropriate authorization. Such activities should be carefully examined by Congress and the DNI for their impact on privacy and civil liberties. As part of the development of a national strategy for domestic intelligence, Congress and the DNI should set clear limits on what types of DOD homeland defense intelligence activities are and are not allowable within the United States.
- The Department of Defense should update the recently issued directive regarding DOD intelligence activities, Number 5240.01, to better reflect statutory changes regarding domestic surveillance and to better address the challenges of globalization and pervasive mobile and Internet technologies.
- The executive branch should regularly provide comprehensive reports to Congress on the scope, nature, effectiveness, and civil liberties impact of DOD domestic intelligence activities within the United States.

*RECOMMENDATION Congress should undertake a comprehensive review of U.S. domestic intelligence. It should create a congressional task force to perform a comprehensive review of domestic intelligence laws and activities. Based on its findings, it should develop recommendations for new legislation and proposals for oversight.*

*RECOMMENDATION To improve accountability for domestic intelligence programs, the president should make it a priority to work with Congress to streamline intelligence oversight.*

To allow for more holistic treatment and effective oversight of domestic intelligence, it might be ideal to give primary jurisdiction for domestic intelligence to a single committee in each of the houses of Congress. Because that is unlikely given overlapping committee jurisdictions and the inability of Congress, on its own, to significantly streamline intelligence oversight, the president should make it a priority to work with congressional leaders to find a practical solution in the absence of an official committee reorganization. One way to do this would be for committee chairmen to agree to generally seek to limit the ODNI to testifying before the intelligence committees, the attorney general and the head of the FBI to testifying before the judiciary committees, and the secretary of homeland security to testifying before the homeland security committees. Congress should pair this with an effort to hold more joint-committee hearings. In return for consolidating and streamlining the schedule of hearings, agency heads could be made available for longer periods of time to provide more in-depth testimony.

*RECOMMENDATION* Congress should establish a new Privacy Act to provide consistent principles and clear guidance for the government's use of personal data provided by third parties and of computer-aided data analysis to assess the homeland security and terrorism risk posed by U.S. persons.

Congress should update or replace the loose confederation of laws that currently govern the use of private data, especially data acquired from third parties. A new Counterterrorism and Homeland Security Privacy Act should govern the use of private data for counterterrorism and homeland security purposes. It would establish clear guidelines for the government's acquisition and analysis of third-party data for such purposes; for the use, handling, and retention of such data; and for ensuring the protection of civil liberties in programs that rely on such data. Although biometrics are not explicitly addressed in this report, a new Counterterrorism and Homeland Security Privacy Act could also establish guidelines for collecting, analyzing, using, handling, and retaining biometric data for counterterrorism and homeland security purposes.

New legislation should ensure that private data gathered for purposes of counterterrorism should be used exclusively to further counterterrorism-related activities. Congress should establish civil and criminal penalties for misuse of such data for purposes unrelated to counterterrorism.

New legislation should limit the ability of non-intelligence community components of DOD to collect and use commercial data on U.S. persons for domestic intelligence purposes other than force protection. DOD components that are part of the intelligence community should be prohibited from engaging in data mining activities for domestic intelligence purposes, unless they can demonstrate a reasonable connection between such activities and foreign intelligence activities, as established by the new FISA statute.

Congress should mandate that federal agencies store watch-list and third-party data used for computer-aided risk analysis in encrypted form. Further, this information should be shared, where feasible, in anonymized form to protect against inadvertent disclosure, loss, or intentional misuse of personally identifiable information.

To address the risk of false positives or other errors that might result from data analysis techniques, Congress should limit the immediate consequence of computer-aided risk profiling to further investigation; for example, indicators of terrorist risk generated by data analysis should not, on their own, be grounds for detention.

If additional investigation is required, escalation procedures should be established that allow for administrative approvals to de-anonymize data and open a law enforcement investigation or counterterrorism intelligence effort against the individual. Procedures should include strong audit mechanisms that identify the requester, approver, and rationale for viewing personally identifiable data.

The United States should institute robust government-wide training programs to ensure that government data acquisition and analysis efforts for counterterrorism purposes are conducted with and governed by consistent policies and sound best practices.

Congress should revise and strengthen the Federal Agency Data Mining Reporting Act of 2007 to require annual reports on the number of instances where personally identifiable data has become and continues to be part of a law enforcement or intelligence effort related to counterterrorism. If personally identifiable data ceases to be relevant to ongoing intelligence activities or criminal investigations, there should be a record-keeping requirement and guidelines that require such information to be deleted within a fixed period.

A new privacy act could also create performance-based oversight and accountability for watch lists. Although executive agencies have taken significant steps to strengthen redress programs and procedures, greater efforts should be made to reduce the repetition of known incorrect watch-list matches, especially after mistakenly identified individuals have successfully challenged the errors in previous instances. Guidelines should be established to ensure that watch-list errors are resolved system-wide within a fixed number of days or after a fixed number of repetitions of the same error, with prescribed penalties for noncompliance. Congress should require the executive branch to provide annual reports on the number and nature of watch-list errors and on the performance of redress mechanisms.

*RECOMMENDATION Executive branch oversight bodies should be further strengthened.*

The president should create a cross-agency committee consisting of the chief privacy and civil liberties officers and inspectors general of all agencies involved in counterterrorism. Providing a common forum for discussing civil liberties issues will strengthen the ability of oversight officials to identify trends, risks, and best practices regarding the protection of civil liberties across the range of domestic intelligence programs.

Although Congress has taken steps to make the Privacy and Civil Liberties Board more effective and independent, it is up to President Obama to leverage it more fully and to help ensure that it is a valuable and energized body. Similarly, President Obama should more fully leverage the PIAB/IOB as a valuable, independent, and nonpartisan resource to aid in the evolution of the intelligence community as it continues to develop its goals, priorities, and organizational structure to address the challenge of transnational terrorism while safeguarding civil liberties.

## Conclusion: The President, Congress, and the Way Forward

Notable examples exist throughout history of democratic governments being challenged to achieve security while ensuring liberty in response to national security threats. In Great Britain and France, counterterrorism policies evolved over decades from the 1960s and 1970s to confront the terrorist threats particular to each country. Government authorities found it necessary to choose the right posture between forward-leaning and proactive executive detentions characterized by limited procedural protections, on the one hand, and the need to align new security measures with each country's legal traditions, prevailing conceptions of values and procedural fairness, and broad-based political and public support, on the other. In the United States, there is clear historical precedent for the president to do what he believes is necessary to protect the country in an emergency. Past U.S. presidents have exercised extraordinary powers, restricted civil liberties, and acted at the edges of the law in a manner that conflicted with constitutional traditions. During the Civil War, President Abraham Lincoln suspended habeas corpus to quash antiwar and Confederate sympathies. President Woodrow Wilson urged the passage of the Sedition Act of 1918, which outlawed criticism of the president, the government, the military, or the flag during World War I. President Franklin D. Roosevelt mandated the forced internment of thousands of Japanese Americans during World War II.

How do post-9/11 efforts to address the threat of al-Qaeda compare with these historical examples when it comes to their impact on civil liberties?

On the one hand, there are distinct parallels. The executive branch exercises extraordinary measures to confront the threat, often at the expense of civil liberties in the first few years of implementation. Congress (by its deliberative nature) and the courts (by the nature of referral) eventually react—typically within three to five years—and assert themselves to rein in perceived excesses and moderate any executive branch overreach. This pattern has generally held true since 9/11. The executive branch took the initiative and led the creation of new counterterrorism policies and tactics between 2001 and 2004. Starting in 2004, the Supreme Court and Congress became increasingly involved to address perceived flaws and overreach. Public pressure has also encouraged self-corrective action by the executive branch.

Others argue that post-9/11 counterterrorism policies and the manner in which they were pursued by the Bush administration represented a marked departure from the past. They believe that these efforts were characterized by a greater encroachment on civil liberties, deeper disputes regarding the authorities and constitutional prerogatives of the branches of government, and a lower level of consultation and cooperation between the president and Congress than in the past, especially in light of the treaty and statutory obligations on detainee treatment that arose after World War II and the statutory framework for privacy and surveillance that arose after Watergate and the Church Committee reforms of the 1970s.

Although both arguments have merit, what is certain is that policymakers justifiably felt an extreme sense of urgency and anxiety after 9/11. They feared that another catastrophic attack was imminent and knew little about al-Qaeda and its workings. Complicating matters was the fact that

existing laws and policies were, in many ways, not ideally suited to address the novel threat of mass-casualty transnational terrorism. That combination of fear, urgency, and uncertainty, along with legacy policy and legal tools not designed to address transnational terrorism, created a unique environment in which the pressure to do everything possible to prevent the next attack was extraordinary. This combination of factors justified the need for creativity, innovation, and aggressiveness to meet the threat. And, as in other national security emergencies throughout history, the duty and responsibility to be proactive and forward-leaning to secure the nation falls on the commander in chief.

But the manner in which executive authority is exercised is of enormous importance. When a president exercises extraordinary powers to craft new policies to confront a new threat, he faces a dilemma. He has a responsibility to protect the nation and a responsibility to abide by the law, and the two imperatives may not always align. As former assistant attorney general Jack Goldsmith said of his time in office, “Whether and how aggressively to check the terrorist threat, and whether and how far to push the law in so doing, are rarely obvious, especially during blizzards of frightening threat reports, when one is blinded by ignorance and desperately worried about not doing enough.”<sup>134</sup>

A combination of urgency, fear, and lack of information can create enormous pressure to push the edges of the law when the country is faced with a national security emergency that demands innovation and decisive action. The great challenge to presidential leadership in such situations is to exercise executive authority in a way that keeps the country safe while maintaining the nation’s trust and the mantle of U.S. leadership and credibility in the world. The president’s skill must extend beyond simply assessing the threat and crafting an effective response. The country is best served and new policies are more durable when the president makes it a priority to engage the public, the other branches of government, and important international partners in the process of innovation, building consensus around the necessity of the chosen measures, and bolstering trust by agreeing to measures that provide meaningful and independent oversight and accountability. This requires effective and diplomatic communication, meaningful consultation and bipartisan collaboration with Congress, cooperation with allies, and sustained efforts to win public support. Doing this will help strengthen the credibility and sustainability of controversial policies, and also reduce the likelihood of grave errors and overreach in policy.

In addition, policies are more sustainable when the government exercises restraint and is no more aggressive than necessary when dealing with secret activities that have the potential to conflict with existing laws, such as U.S. torture statutes and the Foreign Intelligence Surveillance Act. In a way, there is an implicit social contract when it comes to national security. The public and Congress trust the executive branch to engage in certain conduct without informing them of too many details, but in return, they expect the executive branch to stay within certain guidelines and to pursue activities that, if exposed, they would consider consistent with the U.S. commitment to the rule of law and core U.S. values. If this trust is broken, there will likely be strong pressure to refocus on explicit restrictions in order to regulate executive actions. This can significantly burden the kind of innovation and creativity in risk taking that the United States would generally want from its intelligence and military operatives and the executive branch to successfully check new threats. When that happens, oversight shifts from what it should be in an ideal state—enabling—and instead begins to be restrictive.

This report’s discussion of the tactics and approach taken by the Bush administration to constructing counterterrorism policies is not intended as a critique for its own sake. To be sure, any adminis-

tration has substantial discretion to exercise executive authority as it sees fit to respond to a national security threat. What an examination of post-9/11 measures provides, however, is a better understanding of the context in which many decisions were made, and insight into the challenges that the United States faces today as it seeks to move forward with greater national consensus on how to respect core values and protect civil liberties in detention policies and domestic intelligence programs crafted to thwart transnational terrorism.

After 9/11, the Bush administration's overriding focus was to prevent the next attack. That civil liberties and core values might have to take a back seat while urgent measures were taken to confront the threat—as they had under Lincoln, Roosevelt, and other presidents, and in other democratic countries faced with terrorism—does not fully explain the level of distrust and rancor that has come to surround U.S. counterterrorism policies for detention and domestic intelligence.

Collaboration and moderation in the Bush administration's counterterrorism efforts were complicated by the goal, on the part of certain senior administration officials, to expand executive power for its own sake.<sup>135</sup> The particular approach to justify detention, treatment, and domestic intelligence programs influenced the administration's counterterrorism efforts following 9/11, and helps explain some of the contours of the policies chosen and the manner in which they were pursued. First, the Bush administration adopted a strategy of self-reliance to develop new counterterrorism policies. Second, the legal arguments supporting a number of these actions were broader and more aggressive than necessary to justify and support the activities being pursued. Third, the administration undervalued the importance of consultation and persuasion in its engagement and consultation across the executive branch, with Congress, with the public, and with the international community. Fourth, the administration paid too little attention to the long-term consequences of its counterterrorism approach for the sustainability and durability of these procedures and programs.

Within the Bush administration, policy development and decision-making on a number of critical counterterrorism programs took place within a very small circle. For example, at the direction of the White House, the Justice Department's Office of Legal Counsel did not solicit input from the State Department as it developed the controversial August 2002 opinion on enhanced interrogation techniques.<sup>136</sup> In another example, NSA lawyers were not given access to the OLC's legal memoranda on the NSA's activities related to the Terrorist Surveillance Program. Getting counterterrorism policies right after 9/11 was hampered by the administration's strategy of self-reliance at a time when presidential actions and counterterrorism policy could have been strengthened by a more meaningful involvement of Congress. Greater transparency and a more sustained effort to work with Congress could have helped mitigate the controversies that have undermined and hampered U.S. counterterrorism policies, provide a more solid legal basis for counterterrorism efforts, and defend against criticisms regarding the legitimacy of many new policies.

Military and intelligence personnel are highly attuned to ensuring that their activities comply with existing rules and guidelines. But to do so with confidence, the rules and guidelines that they follow must be clear. The Bush administration's approach to policy development after 9/11 called into question a number of existing guidelines without providing firm guidance and clarity on the rules that governed new detention and domestic intelligence programs and initiatives. Many diligent government personnel faced a dilemma after 9/11. They faced enormous pressure to innovate and prevent another attack at all costs. And they felt pressure to abide by the rules at the same time that they were being told that the rules were changing. Together, these elements created an environment in which there was a heightened risk of errors and overreach.

Efforts to maximize presidential power to prevent terrorist attacks in the short term eventually proved counterproductive. High levels of secrecy and limited collaboration with Congress acted as a chill on healthy national debates about the complexity and implications of how we responded to the terrorist threat. This heightened the level of partisanship and perceptions of scandal when policies inevitably ran into problems. The Bush administration's general strategy of self-reliance was perceived as unilateralism by important allies and challenged effective congressional oversight. This eroded trust between the political branches of government in the United States. At home, it generated deep rifts over counterterrorism policies. Overseas, it created deep suspicion and doubts about the U.S. commitment to core values and individual liberties, even among America's closest allies.

Those rifts, suspicions, and lack of trust continue today, as evidenced by the rancor over the revision of FISA, the future of Guantánamo detainees and Guantánamo military commissions, and CIA interrogation techniques. In light of diminished trust, one could interpret Supreme Court decisions in *Hamdi* and *Hamdan* as restrictive reactions to the Bush administration's approach to policymaking in the area of detention. It is more likely that Supreme Court decisions that challenged important aspects of detention policy might have been avoided had the policies enjoyed greater congressional input and approval earlier on, as well as broader and more robust consultation within the executive branch.

It is true that U.S. citizens hold the president ultimately accountable for national security, but it is also true that when the president shares the burden of accountability with others, tough decisions and controversial policies gain credibility and legitimacy and become more sustainable. U.S. policy is strongest and most effective when it enjoys the broad support of Congress and the public. It is likely that many post-9/11 counterterrorism programs could have been strengthened by greater cooperation between the executive and legislative branches and by enabling legislation from the outset, not as a legal requirement, but as a prudential matter. Broader consultation, both within the administration and with Congress, and greater independent oversight of counterterrorism programs could have moderated the risk of overreach and errors in the realms of both detention and surveillance.

This does not mean, however, that counterterrorism policies would have avoided errors and overreach altogether had Congress been involved earlier and had the courts had a greater role in oversight. For example, some will argue that the Military Commissions Act, coupled with the *Boumediene* decision, illustrate that the United States still hasn't gotten it right, even when Congress and the executive branch have acted in concert.

Indeed, even despite increased engagement since 2004 by Congress and the Supreme Court, as well as policy adjustment by the Bush administration, significant gaps and inconsistencies remain that need to be resolved.

The involvement of Congress to strengthen counterterrorism policies and civil liberties protections has occurred in fits and starts. Congress has tended to approach the strategic threat posed by transnational terrorism in a piecemeal and reactive fashion, often being too willing to wait to react to presidential actions, court decisions, and media revelations. For advocates of strong executive branch leadership on counterterrorism matters, Congress's mixed record of leadership and creativity has contributed to the general air of mistrust.

The United States will not end up with comprehensive and sustainable counterterrorism policies by simply tweaking various aspects of existing policy. A piecemeal approach will not suffice. Revising FISA did not result in a comprehensive strategy for domestic intelligence or for the protection of civil liberties. Requiring the CIA to follow the Army Field Manual, closing Guantánamo, or insisting that military commissions be replaced in certain instances with terrorist trials in U.S. criminal courts

could be helpful in the evolution of counterterrorism policy; they may in fact be necessary. But taking many of these steps will not be enough, because a host of critical issues regarding terrorist detention, treatment, and trial will remain unanswered. Success will require concessions and compromises on all sides. It will require that independent oversight of counterterrorism programs enables and strengthens policy instead of simply restricting it. It will require a willingness to develop solutions that creatively leverage elements from both the laws of war and criminal laws to ensure that U.S. counterterrorism efforts are tough, forward-leaning, and nimble at the same time that they are crafted and controlled in a way that comports with both necessity and American values.

In the end, controversies about civil liberties and national security will be resolved only by greater comity, genuine collaboration, and joint leadership by the president and Congress. Together, they need to make tough strategic choices and provide policy and moral leadership on how to confront al-Qaeda and the threat of mass-casualty transnational terrorism it poses. At the same time, they will need to ensure that counterterrorism policies have two coequal goals in mind: the achievement of national security and the protection of individual liberty. Any policy that consistently prioritizes one goal over the other will eventually fail the country on both counts.

The president and Congress need to work together to ensure that detention and domestic intelligence policies, laws, institutions, and programs comprise a comprehensive, coherent, and sustainable strategy to confront transnational terrorism over the long term while ensuring that civil liberties and human rights are systematically protected. General bipartisan agreement exists on closing Guantánamo and abiding by Common Article 3 of the Geneva Conventions. These areas of common ground can serve as a catalyst for building trust and making even more bipartisan progress.

Strong leadership from Congress is essential to developing greater national consensus around counterterrorism policies. At the same time, presidential leadership remains indispensable. At home, the president is uniquely positioned to act as a catalyst and convener of an important national dialogue on how the United States remains true to its values while doing everything possible to confront the terrorist threat. Abroad, the words and actions of the president are an emblem of America's commitment to respect individual liberties and the rule of law while it aggressively seeks to eliminate the threat posed by al-Qaeda to the United States, to its allies, and to Muslim and Arab communities around the world that have borne so many of the casualties of al-Qaeda attacks. The president must make it an urgent priority to counteract the widely held perception that America's commitment to individual liberties and the rule of law is less than steadfast and has been sacrificed in pursuit of security. The president must unambiguously affirm the U.S. commitment to its core moral values, individual liberties, and the principles of fairness and the rule of law. He must affirm that America's values are on an equal footing to its national security and not of subsidiary importance.

Moves in this direction will allow the United States to overcome the devastating lack of trust and credibility, both at home and abroad, that has come to be associated with U.S. counterterrorism policies. We need to return to an environment where America's actual and perceived commitment to individual liberties in the pursuit of counterterrorism policies is steadfast and sincere. And, in cases where more coercive measures may warrant consideration, the test of leadership is not self-reliance, but the ability to galvanize broad-based support and build trust across the political branches, across the political spectrum, with the U.S. public, and among allies.

Reaffirming the long-standing commitment of the United States to the fair and humane treatment of prisoners and its commitment to individual liberties will bolster the credibility of America's moral message in the fight against al-Qaeda. Reaching national consensus on counter-

terrorism policies and the protection of individual liberties will allow the United States to end its war *about* terror and remove what is now a damaging and self-imposed obstacle to achieving broader U.S. foreign policy objectives abroad.



## Appendixes



## Appendix A

### DETENTION AND TRIAL VENUES FOR SELECTED AL-QAEDA DETAINEES

PERSON/ GROUP	U.S. LINK	CITIZENSHIP	LOCATION OF CAPTURE	DETENTION VENUE	CRIMINAL TRIAL VENUE
Yaser Esam Hamdi	U.S. citizen (citizenship since renounced)	American/ Saudi Arabian	Afghanistan	Guantánamo, military facilities in the United States	U.S. Supreme Court, deported to Saudi Arabia
José Padilla	U.S. citizen captured in the United States	American	United States	Federal prisons and military facilities in the United States	U.S. federal court
Ali Saleh Kahlah al-Marri	U.S. permanent resident captured in the United States	Yemeni	United States	Federal prison, military facility in the United States	UEC with no criminal trial pending, habeas claim pending
Lackawanna Six	U.S. citizens captured in the United States	American	United States	U.S. federal prison	U.S. federal court

<i>PERSON/ GROUP</i>	<i>U.S. LINK</i>	<i>CITIZENSHIP</i>	<i>LOCATION OF CAPTURE</i>	<i>DETENTION VENUE</i>	<i>CRIMINAL TRIAL VENUE</i>
Iyman Faris	U.S. citizen captured in the United States	American	United States	U.S. federal prison	U.S. federal court
John Walker Lindh	U.S. citizen	American	Afghanistan	Overseas mili- tary facilities (Afghanistan, naval ships), U.S. federal prison	U.S. federal court
Richard Reid	Captured in the United States	British	United States	U.S. federal prison	U.S. federal court
Zacarias Moussaoui	In the United States	French	United States	U.S. federal supermax prison	U.S. federal court
Salim Ahmed Hamdan	None	Yemeni	Afghanistan	Guantánamo	Military commission conviction

<i>PERSON/ GROUP</i>	<i>U.S. LINK</i>	<i>CITIZENSHIP</i>	<i>LOCATION OF CAPTURE</i>	<i>DETENTION VENUE</i>	<i>CRIMINAL TRIAL VENUE</i>
David Hicks	None	Australian	Afghanistan	Guantánamo, Australian prison	Military com- mission convic- tion as a result of a pretrial agreement
Mohammed al-Qahtani	None	Saudi Arabian	Afghanistan	Guantánamo	UEC with no criminal trial pending (military commission charges with- drawn without prejudice, habeas petition reinstated)
Ramzi bin al-Shibh	None	Yemeni	Pakistan	CIA prison, Guantánamo	Military commission trial pending
Khalid Sheikh Mohammed	None	Kuwaiti	Pakistan	CIA prison, Guantánamo	Military commission trial pending

<i>PERSON/ GROUP</i>	<i>U.S. LINK</i>	<i>CITIZENSHIP</i>	<i>LOCATION OF CAPTURE</i>	<i>DETENTION VENUE</i>	<i>CRIMINAL TRIAL VENUE</i>
Walid Muhammad Salih Mubarek bin Artash	None	Saudi Arabian	Pakistan	CIA prison, Guantánamo	Military commission trial pending
Ali Abd al-Aziz Ali	None	Kuwaiti	Pakistan	CIA prison, Guantánamo	Military commission trial pending
Mustafa Ahmed Adam al-Hawsawi	None	Saudi Arabian	Pakistan	CIA prison, Guantánamo	Military commission trial pending
Abu Zubaydah	None	Saudi Arabian	Pakistan	CIA prison, Guantánamo	UEC with no criminal trial pending
Hambali	None	Indonesian	Thailand	CIA prison, Guantánamo	UEC with no criminal trial pending

## Appendix B

### *TIMELINE OF CIVIL LIBERTIES AND NATIONAL SECURITY SINCE 9/11*

2001	September 11	Terrorist attacks against the World Trade Center and Pentagon.
	September 18	Congress enacts Authorization for the Use of Military Force.
	October 26	President George W. Bush signs into law the USA PATRIOT Act of 2001.
	November 1	Yaser Esam Hamdi, a U.S. citizen, is captured in Afghanistan and designated as an illegal enemy combatant.
	November 13	President Bush issues an executive order to authorize the use of military commissions to try terrorist suspects.
	November 19	The Aviation and Transportation Security Act is signed into law. It creates the Transportation Security Administration and mandates the use of the Computer Assisted Passenger Prescreening System II (CAPPS II) to profile and assess the risk of domestic passengers.
	December	9/11 suspect and al-Qaeda member Mohammed al-Qahtani is captured.
	December 11	Zacarias Moussaoui, al-Qaeda member, is indicted on conspiracy charges—of helping to plan the September 11 attacks. He is the only individual to date who has faced a federal trial in connection with the September 11 attacks.
	December 12	Yemeni citizen Ali Saleh Kahlah al-Marri is arrested as a material witness in connection with the attacks of September 11. He is transferred to military custody in 2003, and is currently the only person to be held as an enemy combatant within the United States.

2001	December 22	Shoe bomber Richard Reid, a British citizen, attempts to set off a bomb on an American Airlines flight from Paris to Miami.
2002	January	The Defense Advanced Research Projects Agency (DARPA) creates the Information Awareness Office (IAO) under the leadership of Vice Admiral John Poindexter. The IAO initiated the first terrorism-related data mining program, the Total Information Awareness program (later renamed the Terrorism Information Awareness program).
	January 11	First detainees arrive at Camp X-Ray in Guantánamo Bay, Cuba.
	January 11	Department of Justice, responding to Freedom of Information Act request, reveals information about domestic detention following September 11. More than 710 individuals were arrested in connection with immigration violations, and 108 were held on criminal charges.
	January 17	The International Committee of the Red Cross visits Camp X-Ray.
	February 7	President Bush issues a presidential order that al-Qaeda and Taliban detainees do not qualify for protections under the Geneva Conventions.
	April 28	Camp X-Ray is shut down.
	May 8	U.S. citizen José Padilla is arrested at Chicago's O'Hare International Airport on a material witness warrant. He is later declared an enemy combatant and held in military custody for three and a half years.
	July 16	The National Strategy for Homeland Security is released.
August 1	Jay S. Bybee, head of the Office of Legal Counsel of the Department of Justice, submits what becomes known as the torture	

2002

- memo to Alberto Gonzales, then White House general counsel.
- September 11 Suspected 9/11 plotter Ramzi Bin al-Shibh is captured.
- September 14 The FBI announces the capture of the Lackawanna Six, a group of local al-Qaeda suspects who were naturalized U.S. citizens of Yemeni origin.
- September 26 Syrian-born Canadian citizen Maher Arar is detained in the John F. Kennedy International Airport on his way back from a vacation, and is eventually rendered to Syria, where he alleges he was tortured during interrogation. He is released and allowed to return to Canada a year later.
- October 1 The U.S. Northern Command is established.
- October 27 First detainees—three Afghans and a Pakistani—are released.
- November Department of Treasury releases Anti-Terrorist Finance Guidelines.
- November 25 The Homeland Security Act of 2002 is signed into law. It establishes the Department of Homeland Security.
- December 17 The E-Government Act of 2002 is signed into law.

2003

- January 13 A military policeman presents army investigators with a computer disk containing photographs of the abuse of Iraqi prisoners at Abu Ghraib prison.
- January 16 Central Command issues a press release announcing an investigation into the mistreatment of Iraqi prisoners.
- March 1 Suspected 9/11 plotter Khalid Sheikh Mohammed is captured in Rawalpindi, Pakistan.

2003	March 14	Deputy Assistant Attorney General John Yoo submits a memo on the legal standards governing the interrogation of unlawful enemy combatants to William J. Haynes II, general counsel of the Department of Defense.
	May	Justice Department confirms that it held close to fifty material witnesses after September 11.
	July 3	President Bush designates six suspected al-Qaeda terrorists eligible for military tribunals—the first since World War II.
	September 16	President Bush issues Homeland Security Presidential Directive-6 to consolidate the pre-9/11 watch lists of different agencies into one master terrorist watch list. The FBI's Terrorist Screening Center is given the authority to monitor this Terrorist Screening Database.
	September 24	Congress cancels funding for the Terrorism Information Awareness Program and shuts down the Information Awareness Office.
	December 31	Lebanese-born German citizen Khaled El-Masri is detained by Macedonian border officials. He is eventually rendered to Afghanistan, where he alleges he faced harsh treatment and coercion.
2004	January	US-VISIT, a biometric screening process of foreign visitors, is launched.
	January 19	Brigadier General Janis Karpinski, commander of the 800th Military Police Brigade in Iraq, is suspended from duty. Lieutenant General Ricardo Sanchez, the senior commander in Iraq, authorizes an investigation into the army's prison system. Major General Antonio Taguba is asked to conduct the review.

2004	February	Release of a highly critical Government Accountability Office report on the CAPPS II program.
	February 26	Taguba Report on the abuse of detainees at the Abu Ghraib prison is completed.
	April 28	<i>60 Minutes II</i> broadcasts on the Abu Ghraib scandal.
	April 30	Six soldiers are charged by a military court for the abuse of prisoners at Abu Ghraib.
	May 25	Secretary of Defense Donald Rumsfeld commissions a comprehensive review of interrogations conducted by the Department of Defense. Authored by Vice Admiral Albert T. Church III, the naval inspector general, an executive summary of the report is released in March 2005. The full report is made public in June 2006, in response to a Freedom of Information Act request submitted by the American Civil Liberties Union.
	June 28	The Supreme Court rules in <i>Rasul v. Bush</i> that Guantánamo Bay detainees are entitled to argue their claims in U.S. federal courts since the United States has full jurisdiction over the base.
	June 28	The Supreme Court rules in <i>Hamdi v. Rumsfeld</i> that the AUMF allowed for the detention of citizens and noncitizens alike as enemy combatants. However, it declares Hamdi's indefinite detention illegal and upholds his due process rights.
	July 16	DHS announces that the CAPPS II passenger prescreening program will not continue.
	July 22	The 9/11 Commission Report is released.
	July 30	Pentagon creates Combatant Status Review Tribunals to review the enemy combatant status of each Guantánamo Bay detainee.

2004	August 25	A report is released by an independent panel led by former secretary of defense James R. Schlesinger on detainee abuses, their causes, and recommendations on how to prevent them.
	August 26	Results of an investigation by Major General George R. Fay and Lieutenant General Anthony R. Jones are released. The report examined the activities of the 205th Military Intelligence Brigade in Iraq and other military officials in connection with the detainee abuses at Abu Ghraib.
	August 26	The Transportation Security Administration announces Secure Flight, a passenger prescreening program to replace CAPPs II. Its implementation is delayed several times.
	August 27	President Bush establishes the National Counterterrorism Center to analyze and integrate counterterrorism functions and data.
	November 24	The <i>New York Times</i> reports on a leaked confidential report by the ICRC on coercion “tantamount to torture” at Guantánamo.
	December 17	The Intelligence Reform and Terrorism Prevention Act of 2004 is signed into law.
2005	February 17	Ambassador John Negroponte is named the first director of national intelligence.
	April 1	Lieutenant General Randall M. Schmidt and Brigadier General John T. Furlow issue a report detailing the results of their investigation into FBI allegations of detainee abuse at Guantánamo.
	May	A published report—later retracted—alleges copies of the Koran were mishandled by guards at Guantánamo, sparking worldwide protests. U.S. authorities later confirm five cases of mishandling.

2005	May 11	The Real ID Act is signed into law. It creates a nationwide standardized set of procedures relating to the issuance of state identification cards and driver's licenses.
	June 22	The first day of enrollment for Registered Traveler, a voluntary threat-assessment program.
	June 24	Italian judge issues arrest warrants for thirteen CIA officers involved in a rendition case.
	August	Reauthorization of the USA PATRIOT Act—fourteen provisions that were due to sunset were made permanent.
	October 5	The Detainee Treatment Act is signed into law. It prohibits the torture and cruel, inhuman, or degrading treatment of prisoners, but does not grant them habeas corpus rights.
	October 25	President Bush issues an executive order that establishes the Information Sharing Environment that was mandated by the Intelligence Reform and Terrorism Prevention Act of 2004.
	October 26	The National Intelligence Strategy of the United States of America is released.
	November 2	A <i>Washington Post</i> story reveals that the CIA has established secret prisons in third-party countries for the incarceration and interrogation of high-level terrorist suspects.
	November 22	José Padilla is removed from military custody. He is charged by a Miami district court with providing material support to terrorism and conspiring to kill and maim people in a foreign country.
	December 14	NBC reveals that the Department of Defense's Counterintelligence Field Activity (CIFA) office has been collecting data on antiwar and other activist groups.

2005	December 16	The <i>New York Times</i> reveals the NSA's wire-tap surveillance of telephone and email communications that either begin or end in the United States.
2006	March 9	The USA PATRIOT Improvement and Reauthorization Act of 2005 is signed into law.
	March 14	The Privacy and Civil Liberties Oversight Board is sworn in. The board was recommended by the 9/11 Commission Report and established by the Intelligence Reform and Terrorism Prevention Act of 2004.
	May 3	Zacarias Moussaoui is sentenced to life in prison without parole.
	May 24	<i>Doe v. Ashcroft</i> challenges the gag order on NSL recipients.
	June 10	Three detainees in the Guantánamo Bay detention facility commit suicide.
	June 23	The <i>New York Times</i> reveals that SWIFT, a Belgium-based clearinghouse for international financial records, had shared financial records with the U.S. Department of Treasury in response to compulsory administrative subpoenas.
	June 29	The Supreme Court rules in <i>Hamdan v. Rumsfeld</i> that military commission procedures violate the Uniform Code of Military Justice and all four Geneva Conventions.
	July 7	DOD issues an internal memo requesting all its officials to abide by the Geneva Conventions in the treatment of prisoners.
	August 17	In <i>ACLU v. NSA</i> , a U.S. District Court judge rules the Terrorist Surveillance Program unconstitutional under the First and Fourth Amendments to the U.S. Constitution.
	September 6	President Bush acknowledges the existence of secret CIA prisons in locations outside

2006		the United States, and the CIA's use of an alternative set of interrogation methods.
	September 6	The Army releases a new version of its field manual on interrogation—Field Manual 2-22.3, “Human Intelligence Collector Operations.”
	October 6	The Transportation Security Administration launches the Redress Management System, which allows passengers to request corrections to the no-fly and selectee lists.
	October 17	The Military Commissions Act of 2006 is signed into law.
2007	November 2	A system of records notice is published in the Federal Register explaining the risk-assessment features of the Automated Targeted System. It elicits a highly critical response from the European Union regarding privacy restrictions on European records shared with U.S. authorities.
	January 17	Attorney General Alberto Gonzales announces that the FISA Court has issued an order approving ongoing NSA surveillance similar to that conducted under the TSP.
	January 31	A German prosecutor indicts thirteen CIA officials for their roles in the rendition of German citizen Khaled El-Masri.
	February 14	The European Parliament issues a report outlining secret CIA flights and detention facilities within the EU.
	February 16	An Italian judge indicts twenty-six U.S. government officials for their roles in the rendition of Egyptian cleric Hassan Mustafa Osama Nasr.
February 21	The Department of Homeland Security launches DHS Traveler Redress Inquiry Program (DHS TRIP).	

2007	March 21	The inspector general of the Justice Department releases his report on the use of national security letters. According to the review, the FBI may have violated NSL regulations as many as three thousand times since 2003.
	March 31	A military commission convicts David Hicks, a Guantánamo detainee and Australian citizen, of material support to terrorism. The conviction was a result of a plea bargain that allowed him to serve his sentence in Australia.
	April 20	First annual report of the Privacy and Civil Liberties Oversight Board is submitted to Congress.
	April 24	The Department of Defense announces the cancellation of the controversial TALON program.
	June 11	The Fourth Circuit Court of Appeals holds that Ali Saleh Kahlah al-Marri has the right to file a habeas petition in a U.S. federal court.
	June 27	The EU and United States reach a long-term agreement on the sharing of airline passenger data.
	July 20	President Bush issues Executive Order 13440, which presents his administration's interpretation of Common Article 3 of the Geneva Conventions as it related to the CIA detention and interrogation program.
	August 5	The Protect America Act is enacted. It amends the Foreign Intelligence Surveillance Act by removing FISA Court jurisdiction over communications that begin or end in a foreign country. The bill has a six-month sunset clause.
	August 16	A federal jury finds José Padilla guilty of terrorism conspiracy charges. He is sentenced to life in prison.

2007	October 31	President Bush announces a new National Strategy for Information Sharing.
	December 6	The CIA acknowledges that it has destroyed videotapes of interrogations of top terrorist suspects Abu Zubaydah and Abd al-Rahim al-Nashiri.
2008	February 5	CIA director Michael Hayden acknowledges that three high-level al-Qaeda suspects were subjected to waterboarding.
	February 11	The Department of Defense files charges against six chief 9/11 suspects, to be tried by military commission.
	March 8	President Bush vetoes H.R. 2082, the FY2008 Intelligence Authorization bill, which upheld the use of the same standards of interrogation for the military and the CIA.
	March 13	The inspector general of the Department of Justice submits a report on the FBI's efforts to correct mistakes and abuses detailed in the 2007 IG report.
	June 12	The Supreme Court releases its decision on <i>Boumediene v. Bush</i> , upholding the right of Guantánamo detainees to challenge the basis for their detentions by filing habeas claims in U.S. federal courts.
	July 10	H.R. 6304, the FISA Amendments Act of 2008, becomes public law.
	July 15	The Fourth Circuit Court of Appeals releases its decision upon rehearing Ali Saleh Kahlah al-Marri's case en banc. It upholds the government's detention of al-Marri as an enemy combatant, but also declares that he had not been given sufficient process to challenge this classification.
July 30	President Bush issues Executive 13470, which significantly amends Executive Order 12333, the main framework for intelligence authorities in the United States.	

2008	August 4	The Department of Defense shuts down its Counterintelligence Field Activity agency, which in December 2005 was found to be collecting data on antiwar and other activist groups.
	September 12	The Department of Justice releases new guidelines for FBI investigations, which allow criminal investigative tactics to be used to investigate national security and foreign intelligence threats.
	October 7	In the first successful habeas claim by Guantánamo detainees, a federal judge orders the release, into the United States, of seventeen Uighur detainees at Guantánamo Bay. DOJ files an emergency appeal citing “national security and separation-of-powers concerns.”
	November 4	Barack Obama is elected president of the United States.
	November 20	A federal judge rules that five Algerian Guantánamo detainees have been held on unreliable evidence, and should be released.
	November 25	Salim Hamdan, who was convicted by a military commission on charges of material support of terrorism, is sent back to Yemen, his home country, to serve out his sentence.
2009	January 8	Salim Hamdan is released by Yemeni authorities.
	January 22	President Obama signs three executive orders reversing Bush administration detention and interrogation policies.
	January 29	Military judge refuses to suspend military commission trial of Guantánamo detainee and USS <i>Cole</i> bombing suspect Abd al-Rahim al-Nashiri.

## Endnotes

1. William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), p. 218.
2. Pew Research Center for the People and the Press, "Increasing Optimism about Iraq: Obama Has the Lead but Potential Problems Too," February 28, 2008, <http://people-press.org/report/?pageid=1258>.
3. Frank E. Gizzard Jr., ed., *The Papers of George Washington: Revolutionary War Series Volume 8* (Charlottesville: University Press of Virginia, 1998).
4. Robert H. Jackson, "Crimes in the Conduct of War," Opening Speech [Day Two] for the Prosecution at Nuremberg, <http://www.yale.edu/lawweb/avalon/imt/proc/11-21-45.htm>.
5. National Security Council, "Strategy for Eliminating the Threat from the Jihadist Networks of al Qida: Status and Prospects," December 2000, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB147/clarke%20attachment.pdf>, attached to memorandum from Richard A. Clarke, counterterrorism coordinator, to Condoleezza Rice, national security adviser, "Presidential Policy Initiative/Review—The Al-Qida Network," January 25, 2001, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB147/clarke%20memo.pdf>.
6. Rohan Gunaratna, "Strategic Counter-Terrorism; Getting Ahead of Terrorism; Part II: The Ideological Response," Jebens Center for Counter-Terrorism Studies, Research Briefing Series 2, no. 2, November 2007, pp. 6–7, [http://fletcher.tufts.edu/jebenscenter/pdfs/JCCTS\\_ResearchSeries\\_2.2\\_Gunaratna\\_11-2007\\_FINAL.pdf](http://fletcher.tufts.edu/jebenscenter/pdfs/JCCTS_ResearchSeries_2.2_Gunaratna_11-2007_FINAL.pdf); Peter Bergen, email message to author on October 13, 2008.
7. Tom Jackman, "U.S. a Battlefield, Solicitor General Tells Judges," *Washington Post*, July 20, 2005.
8. U.S. Department of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," January 19, 2006, <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.
9. Kenneth Anderson and Elisa Massimino, "The Cost of Confusion: Resolving Ambiguities in Detainee Treatment," Stanley Foundation, March 2007, p. 3, [http://www.stanleyfoundation.org/publications/other/Mass\\_Ander\\_07.pdf](http://www.stanleyfoundation.org/publications/other/Mass_Ander_07.pdf).
10. Jeremy Shapiro, "Detention of Terrorism Suspects in Britain and France," written testimony before the Commission on Security and Cooperation in Europe, July 15, 2008, [http://www.brookings.edu/testimony/2008/0715\\_terrorism\\_shapiro.aspx](http://www.brookings.edu/testimony/2008/0715_terrorism_shapiro.aspx).
11. The courts were highly controversial, as trials were secretive and lacked rights of appeal. They were eliminated in the 1980s after the opposition Socialists came to power.
12. Numerous examples exist of a state declaring war on a nonstate actor—typically a state declaring war against a rebel movement, such as the government of Colombia declaring war against the Revolutionary Armed Forces of Colombia (FARC).
13. According to CIA director Michael Hayden, in testimony before the Senate Intelligence Committee in 2008, the circumstances immediately after 9/11 were "fairly unique" and "historic." "Very critical to those circumstances was the belief that additional catastrophic attacks against the homeland were imminent. In addition to that, my agency and our community writ large had limited knowledge about al-Qaeda and its workings. Those two realities have changed . . . the circumstances under which we are operating, we believe, are, frankly, different than they were in late 2001 and early 2002. We also have much more extensive knowledge of al-Qaeda. . . . And although the threat continues, the imminence of the attack is not apparent to us." Senate Select Committee on Intelligence, "Annual Worldwide Threat Assessment," hearing transcript, February 5, 2008, [http://www.dni.gov/testimonies/20080205\\_transcript.pdf](http://www.dni.gov/testimonies/20080205_transcript.pdf). Furthermore, Attorney General Michael Mukasey recently recommended that Congress pass a bill explicitly restating that the United States remains in armed conflict with the Taliban and al-Qaeda and can detain enemy combatants for the duration of the conflict. Although the idea has been criticized by some civil libertarians, the positions proposed have been affirmed by the Supreme Court, with caveats regarding the prospect of indefinite detention.
14. The Pew Global Attitudes Project, "Global Unease with Major World Powers," June 27, 2007, pp. 3, 4, 13, <http://pewglobal.org/reports/pdf/256.pdf>.
15. Cofer Black, "European Cooperation With the United States in the Global War on Terrorism," testimony before the Senate Foreign Relations Committee, Subcommittee on European Affairs, March 31, 2004, <http://www.state.gov/s/ct/rls/rm/2004/30983.htm>.
16. After 9/11, China has pegged its crackdown on Uighur separatists to the international conflict against terrorism, citing similarities with U.S. counterterrorism efforts. Chinese authorities have expanded their detention of members of this minority, and have restricted their religious rights. Similarly, Russian officials have countered criticism of executions, torture, and arbitrary arrests in Chechnya by invoking the global war on terrorism.
17. See, for example, Jacob Weisberg, "Fishing for a Way to Change the World," *Newsweek*, January 28, 2008. Weisberg writes: "In Iran, the Nobel Peace Prize-winning human rights lawyer Shirin Ebadi complained that Bush's advocacy was setting her cause back."
18. Not-for-attribution personal interviews with officials from the British military and U.S. State Department.

19. For example, on the loss of cooperation from the population in Afghanistan, see Eliza Griswold, "The Other Guantánamo," *New Republic*, May 7, 2007.
20. See, for example, Matthew Waxman, "The Smart Way to Shut Gitmo Down," *Washington Post*, October 28, 2007. Waxman writes: "For example, the continued controversy over Guantánamo Bay has hampered cooperation with our friends on such critical counterterrorism tasks as information sharing, joint military operations and law enforcement. I know: As a State Department official, I often spent valuable time and diplomatic capital fruitlessly defending our detention practices rather than fostering counterterrorism teamwork. Guantánamo Bay leaves us playing defense and hinders our ability to play effective offense."
21. Colin Powell, "Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan," Memorandum to the counsel to the president and assistant to the president for national security affairs, January 25, 2002, p. 2, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>.
22. Colin Powell, interview by Tim Russert, *Meet the Press*, NBC, June 10, 2007, <http://www.msnbc.msn.com/id/19092206/>; Colin Powell, letter to John McCain, September 13, 2006, <http://graphics8.nytimes.com/packages/pdf/politics/PowellLetter.pdf>.
23. Colum Lynch, "U.N. Human Rights Chief to Leave Post," *Washington Post*, March 3, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/02AR2008030202118.html>.
24. See, for example, the Alien Enemies Act of 1798.
25. *United States v. Salerno*, 481 U.S. 739, 755 (1987), <http://supreme.justia.com/us/481/739/case.html>.
26. It is again worth pointing out that the United States is not at war with most of the countries of origin of Guantánamo detainees (Yemen, Saudi Arabia, Tunisia, and so on).
27. Amnesty International, "Amnesty International's concerns regarding post September 11 detentions in the USA," March 14, 2002, p. 1, <http://www.amnesty.org/en/library/info/AMR51/044/2002>.
28. Human Rights Watch and American Civil Liberties Union, "Witness to Abuse: Human Rights Abuses in the Material Witness Law since September 11," *Human Rights Watch*, Vol. 17, no. 2, June 2005, p. 1, <http://www.hrw.org/reports/2005/us0605/us0605.pdf>.
29. New York University School of Law, Center on Law and Security, "Terrorist Trial Report Card: U.S. Edition," September 11, 2006, p. 2, <http://www.lawandsecurity.org/publications/TTRCCComplete.pdf>.
30. In *Zadvydas v. Davis*, the Supreme Court notes that domestic preventive detention that served to protect the community "[has been] upheld . . . only when limited to especially dangerous individuals and subject to strong procedural protections. [When] preventive detention is of potentially *indefinite*, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger." It also concluded that foreign citizens who are marked for deportation, but whom no country would admit, should not be subjected to indefinite detention. *Zadvydas v. Davis et al.*, 533 U.S. 678 (2001), <http://www.law.cornell.edu/supct/pdf/99-7791P.ZO>.
31. UN Security Council Resolution (UNSCR) 1546 provided the relevant legal framework for conducting security detentions. The UNSCR was bolstered by more specific rules contained in CPA Orders and Memoranda.
32. Ashley Deeks, "Starting from Here," *International Law & Military Operations*, Naval War College (forthcoming fall 2008).
33. Army Regulation 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees," October 1, 1997.
34. Prisoners of war have extensive rights under the Third Geneva Convention, including a basic threshold standard of accommodation, access to reading materials, and clothing. They are also protected from the use of any form of coercion to elicit information. Most civilians in armed conflict and during occupation are protected by a panoply of rights as "protected persons" under the Fourth Geneva Convention; they may not be detained unless "absolutely necessary" for the security of the detaining nation.
35. Major Elizabeth Robbins, "Release Ceremony for Almost 500 Detainees Overseen by Iraqi PM," Operation Iraqi Freedom, official website of Multi-National Force—Iraq, November 8, 2007, [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=15133&Itemid=128](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=15133&Itemid=128).
36. In the main, court decisions have not affected U.S. detentions and procedures in Iraq and Afghanistan.
37. 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, <http://www.usdoj.gov/oig/special/0306/index.htm>.
38. Unlike the rest of the Geneva Conventions provisions, Common Article 3 applies to situations of noninternational armed conflict, which many believe means a conflict that occurs entirely within one state.
39. Robert K. Goldman and Brian D. Tittmore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights under International Humanitarian and Human Rights Law," American Society of International Law, Task Force on Terrorism, December 2002.
40. This view was in conflict with other aspects of the Geneva Conventions that granted certain rights to even non-POW detainees. Some have argued that the Fourth Geneva Convention protects all those who do not have POW status and have fallen into the hands of enemy forces. Some argue, for instance, that those classified as "unlawful combatants" in the war in Afghanistan fall under this rubric, and qualify for the corresponding protections in the Fourth Geneva Convention. The ICRC has claimed, in fact, that "every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status." ICRC *Commentary*, Fourth Geneva Convention, 1958, <http://www.icrc.org/ihl.nsf/COM/380-600007?>

OpenDocument. There is also a widely held view that Common Article 3 has become customary international law, so that its protections applied to all persons held in custody during wartime, regardless of their status.

41. The most recent version of the Army Field Manual is FM 2-22.3.
42. According to the Army Field Manual, "Several articles of the GPW [Geneva Conventions] apply to HUMINT collectors and interrogation operations. Excerpts from some of the most relevant articles of the Geneva Conventions are listed below. Although the following excerpts are specific to EPWs [enemy prisoners of war], service members must treat all detainees captured during armed conflict consistent with the provisions of the GPW unless a determination to the contrary is made. Moreover, U.S. policy requires that U.S. forces apply the principles of the Geneva Conventions, during military operations."
43. Jay S. Bybee, "Memorandum for Alberto R. Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," U.S. Department of Justice, August 1, 2002, [http://www.humanrightsfirst.org/us\\_law/etn/gonzales/memos\\_dir/memo\\_20020801\\_JD\\_%20Gonz\\_.pdf](http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf).
44. John Yoo, "Memorandum for William J. Haynes II, General Counsel, U.S. Department of Defense Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States," U.S. Department of Justice, March 14, 2003.
45. William J. Haynes II, "Counter-Resistance Techniques," memorandum to Donald Rumsfeld, secretary of defense, November 27, 2002, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>.
46. "Annual Worldwide Threat Assessment Hearing," testimony before the Senate Select Committee on Intelligence, February 5, 2008, [http://www.fas.org/irp/congress/2008\\_hr/020508transcript.pdf](http://www.fas.org/irp/congress/2008_hr/020508transcript.pdf).
47. George Tenet, *At the Center of the Storm: My Years at the CIA* (New York: HarperCollins, 2007), p. 256.
48. Michael Hayden, "Director's Statement on Lawful Interrogation," Central Intelligence Agency, February 13, 2008, <https://www.cia.gov/news-information/press-releases-statements/directors-statement-on-lawful-interrogation.html>.
49. George W. Bush, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," speech delivered at the White House, September 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>. President Bush also asserted that the CIA interrogation program has helped uncover and prevent terrorist plots to attack a marine camp in Djibouti, the U.S. consulate in Karachi, buildings in Los Angeles, and the airport and other buildings in London. See George W. Bush, "President's Radio Address," March 8, 2008, <http://www.whitehouse.gov/news/releases/2008/03/20080308.html>.
50. "Instructions to GTMO interrogators," email to T.J. Harrington, May 10, 2004, [http://www.aclu.org/torturefoia/released/t3131\\_3133.pdf](http://www.aclu.org/torturefoia/released/t3131_3133.pdf).
51. President Bush wrote, "I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al-Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" George W. Bush, "Humane Treatment of al Qaeda and Taliban Detainees," memorandum from the White House, February 7, 2002, [http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf).
52. Jack Goldsmith, *Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton, 2007), p. 144.
53. Major General Antonio M. Taguba, "Article 15-6 Investigation of the 800th Military Police Brigade," May 2004, [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf).
54. Abu Ghraib inquiries have been led by Major General Antonio Taguba, Lieutenant General Anthony R. Jones, and Major General George R. Fay, and the International Committee on the Red Cross. Guantánamo investigations have been conducted by Lieutenant General Randall Mark Schmidt and Brigadier General John Furlow, and the ICRC. Broad investigation and analysis of DOD detention operations in Abu Ghraib, Guantánamo, and Afghanistan were undertaken by Vice Admiral Albert T. Church III and a commission led by James R. Schlesinger.
55. Condoleezza Rice and Jack Straw, interview by James Naughtie, *Today Program with James Naughtie*, BBC Radio 4, March 31, 2006, <http://www.state.gov/secretary/rm/2006/63978.htm>.
56. "Ghost Prisoner: Two Years in Secret CIA Detention," *Human Rights Watch* 19, no. 1 (G), February 2007, <http://www.hrw.org/reports/2007/us0207/us0207web.pdf>.
57. Robert M. Chesney and Jack L. Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models," *Stanford Law Review* 60, no. 4, February 2008.
58. The act regulates the use of classified information in the trial, requiring courts to ensure that classified portions of presented evidence are kept confidential, that adequate substitutes are provided without releasing sensitive information, and that only those with security clearances have access to classified material.
59. 18 U.S.C. § 2339B makes it a felony to provide "material support or resources to a designated foreign terrorist organization (FTO)." The 1996 law includes personnel in the definition of material support. After 9/11, the DOJ began to interpret the personnel definition as covering not just recruitment activities, but also *membership* in an FTO. In 2004, Congress amended the definition of material support to specifically include *membership* in an FTO as a form of material support. Broad conspiracy provisions exist in 18 U.S.C. § 956 (a), which forbids conspiracies to commit acts of murder or kidnapping in a foreign country. The court in *Rumsfeld v. Padilla* found that the law did not require that the prosecution "prove the identity of any specifically contemplated victim . . . or the specific location outside the United States where the [harm] was to occur." Chesney and Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models."
60. Goldsmith, *Terror Presidency*, p. 131.
61. See, for example, "United States of America: Justice delayed *and* justice denied? Trials under the Military Commissions Act," *Amnesty International*, March 22, 2007, <http://www.amnesty.org/en/library/asset/AMR51/044/2007/en/dom>

- AMR510442007en.pdf; Anthony D. Romero, statement for the John Adams Project, American Civil Liberties Union, <http://www.aclu.org/safefree/detention/34773res20080403.html>.
62. *Ex Parte Quirin*. 317 U.S. 1 (1942).
  63. Justice Sandra Day O'Connor said, "[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on long-standing law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) p. 13, <http://www.law.cornell.edu/supct/pdf/03-6696P.ZO>.
  64. As Justice O'Connor said, the Supreme Court has "long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." *Hamdi v. Rumsfeld*, pp. 26, 29, 32.
  65. "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved." *Hamdi v. Rumsfeld*, p. 31.
  66. See the Supreme Court's 1950 precedent in *Johnson v. Eisentrager*, which states that "no instance where a court, in this or any country where the [habeas] writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction." *Johnson v. Eisentrager*, 339 U.S. 763 (1950), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=339&invol=763>.
  67. The treaty agreements between the United States and Cuba regarding the base at Guantánamo grant the United States "complete jurisdiction and control" over Guantánamo Bay, and, if it chooses to do so, the United States may continue that exclusive control of Guantánamo Bay permanently.
  68. Gordon England, "Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba," U.S. Department of Defense, September 14, 2004, <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>.
  69. The decision relied on the court's analysis that because al-Qaeda was not a nation-state, the conflict with al-Qaeda satisfied the Common Article 3 condition that it applies to "armed conflict not of an international character." The reasoning relied further on the fact that the conflict was occurring within the territory of Afghanistan, a signatory to the Geneva Conventions. "There is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories. Common Article 3, which appears in all four Conventions, provides that, in a 'conflict not of an international character occurring in the territory of one of the High Contracting Parties [i.e., signatories], each Party to the conflict shall be bound to apply, as a minimum,' certain provisions protecting '[p]ersons . . . placed hors de combat by . . . detention,' including a prohibition on 'the passing of sentences . . . without previous judgment . . . pronounced by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples.'" *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), p. 6, <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>.
  70. In addition, Common Article 3 of the Geneva Conventions prohibits, in the course of armed conflict, "violence to life and person" (including murder, mutilation, cruel treatment, and torture) and "humiliating and degrading treatment."
  71. Though some critics also point to the fact that the MCA prohibited detainees from invoking the Geneva Conventions as a source of rights in any proceedings to which the United States was a party, including military commission trials, it is important to note that many state parties to the Geneva Conventions (including this and past administrations) do not see those conventions as providing rights of action for those detained.
  72. It is important to point out that the statutory basis (*Rasul*) and constitutional basis (*Boumediene*) for allowing foreign detainees at Guantánamo to access federal courts to contest the basis of their detention relies on the territorial status of Guantánamo and does not necessarily extend beyond Guantánamo. It is also worth pointing out that the *Boumediene* decision leaves open the possibility that Congress could strip the habeas right of foreign detainees at Guantánamo by issuing a suspension of the writ of habeas.
  73. The opinion declares that a formal suspension of the writ of habeas corpus is the only means by which the petitioners can be denied habeas protections. It stresses that Congress has submitted no such formal suspension, and thus mandates that Guantánamo detainees be allowed to immediately file habeas claims in federal courts, which would provide them the "means to correct errors" in their CSRT determinations.
  74. Note that a federal court refused to stay Hamdan's military commission while it considered his habeas petition, for example.
  75. Goldsmith, *Terror Presidency*, pp. 149, 151.
  76. Daniel Levin, "Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A," memorandum opinion for the deputy attorney general, U.S. Department of Justice, December 30, 2004, <http://www.usdoj.gov/olc/18usc23402340a2.htm>.
  77. Gordon England, "Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense," U.S. Department of Defense, July 7, 2006, <http://www.defenselink.mil/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf>.
  78. U.S. Department of Defense, Directive 2310.01E, September 5, 2006, <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>.
  79. Gen. David Petraeus, speech delivered at the headquarters of the Multi-National Force-Iraq, May 10, 2007, [http://www.globalsecurity.org/military/library/policy/army/other/petraeus\\_values-msg\\_torture070510.pdf](http://www.globalsecurity.org/military/library/policy/army/other/petraeus_values-msg_torture070510.pdf).

80. Michael Hayden, "Director's Statement on Lawful Interrogation," Central Intelligence Agency, February 13, 2008.
81. Executive Order 13440, "Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency," *Federal Register* 72, no. 141, July 20, 2007, p. 40707, <http://www.fas.org/irp/offdocs/eo/eo-13440.htm>.
82. Shortly after the DTA was signed into law, it was reported that the president had challenged nearly 750 statutes in his signing statements.
83. Scott Shane, David Johnston, and James Risen, "Secret U.S. Endorsement of Severe Interrogations," *New York Times*, October 4, 2007, <http://www.nytimes.com/2007/10/04/washington/04interrogate.html>.
84. U.S. Department of Justice, Office of Legislative Affairs, "Responses to Questions for the Record for Attorney General Alberto Gonzales; Senate Judiciary Committee; DOJ Oversight Hearing on July 18, 2006," July 18, 2007, pp. 115–117, <http://www.cnss.org/SJC%20QFRs%20-%20July%2018%202006%20Hearing%20Responses-DOJ%20FINAL-011807.pdf>.
85. Justice O'Connor suggested, in *Hamdi*, that she might revisit this conclusion if the conflict in Afghanistan started to look indefinite. Prisoners of war do not receive trials, but their detention ends at the termination of the war. When detainees are neither captured on traditional battlefields nor treated as traditional war captives, there is no clear end to the conflict, and thus, without trial, there is the potential for erroneous capture without remedy.
86. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
87. On Jan 22, 2009, President Obama issued an executive order vowing to close the Guantánamo Bay detention facility within one year from the date of the executive order.
88. Status determinations and trials should exclude illegally obtained evidence, provide a reasonable opportunity for detainees and counsel to review evidence used against them that does not compromise sensitive national security information, and provide detainees with the ability to present evidence in their defense.
89. On January 22, 2009, President Obama issued an executive order directing the secretary of defense to temporarily halt military commission proceedings at Guantánamo Bay for 120 days pending the results of a review.
90. Indeed, the detention review processes for Guantánamo, Iraq, and Afghanistan are all different. Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin Press, 2008), 155–6.
91. When the United States is fighting in a traditional international armed conflict, the existing Article 5 tribunal process continues to serve as an appropriate mechanism by which to determine if an individual is entitled to POW status.
92. Richard B. Zabel and James, J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (Washington, DC: Human Rights First, May 2008).
93. A national security court could oversee domestic preventive detentions of the kind envisioned by Section 412 of the Patriot Act. It could administer status review hearings for foreign terrorist suspects, thereby replacing the current CSRTs. It could conduct trials of foreign terrorist suspects, replacing the current military commissions; and conduct trials for U.S. person terrorist suspects that pose significant challenges to the criminal justice system. A national security court could provide more robust procedural safeguards for the detention and trials of non-U.S. person terrorist suspects than are currently offered by CSRTs and military commissions. On the other hand, it would also have distinct disadvantages. It would significantly reduce the procedural and evidentiary protections offered by traditional federal courts, which in turn would reduce the burden on the government to prove the defendant's guilt, potentially leading to a greater risk of errors in conviction. As there are few criteria with which to effectively gauge the national security expertise of judges, terrorist courts may by default be staffed by political appointees who are not lawyers or judges, which could detract from the fairness of the trials.
94. *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *op. cit.*, in which the Supreme Court states that "no instance where a court, in this or any other country where the [habeas] writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."
95. Executive Order 13440 itself did not authorize specific techniques. It defined how the U.S. government, under the Bush administration, interpreted Common Article 3 as a treaty law matter, and required that the CIA techniques stay within that definition. President Obama rescinded 13440 on January 22, 2009.
96. The public can only rely on anecdotal evidence to argue for or against the use of coercive procedures. Some, notably former CIA Director George Tenet, cite the successful use of "rough techniques" on Khalid Sheikh Mohammed. Others point to the faulty information provided under coercion on ties between al-Qaeda and Saddam Hussein. The most widely cited studies, including the Intelligence Science Board's "Educating Information: Interrogation: Science and Art," are inconclusive.
97. On January 22, 2009, President Obama issued an executive order affirming Common Article 3 of the Geneva Conventions as the minimum baseline for the treatment of all terrorist suspect detainees.
98. The DTA demands compliance with Common Article 3 of the Geneva Conventions, and that such standards be applied to detainees regardless of nationality, where or by which agency they are held, or under what circumstances. The MCA prohibits the U.S. government from engaging in acts that constitute cruel, inhuman, or degrading treatment. The War Crimes Act and 18 U.S.C. 2340 both prohibit the use of torture in the treatment of detainees.
99. On January 22, 2009, President Obama issued an executive order rescinding Executive Order 13440 and making CIA interrogation techniques comply with the Army Field Manual. A task force will conduct a review of the Army Field Manual interrogation guidelines to determine whether different or additional guidance is necessary for the CIA.
100. Congress attempted to do this with such a requirement in the Fiscal Year 2008 intelligence authorization bill. President Bush vetoed it. More recently, Sen. Dianne Feinstein (D-CA) introduced the "Restoring America's Integrity Act," which also seeks to uphold the Army Field Manual as a single standard and prohibits interrogation by contractors (<http://www.govtrack.us/congress/bill.xpd?bill=s110-3437>).

101. For example, military techniques set forth in the Army Field Manual will generally be geared toward having to deal with prisoners of war. CIA officers will rarely handle “run of the mill” prisoners, but more often handle more high-value detainees like Khalid Sheikh Mohammed. The FBI interrogations are geared toward gathering intelligence to provide criminal leads and information that is admissible in criminal courts.
102. Condoleezza Rice, testimony before the National Commission on Terrorist Attacks Upon the United States, Ninth Public Hearing, April 8, 2004, <http://news.findlaw.com/hdocs/docs/terrorism/911comm40804tran.html>.
103. Richard A. Posner, *Remaking Domestic Intelligence* (Stanford, CA: Hoover Press, 2005), p. 1.
104. Kate Martin, “Domestic Intelligence and Civil Liberties,” *SAIS Review*, Vol. XXIV, no. 1, Winter–Spring 2004, p. 1, <http://www.cnss.org/KM%20SAIS%20Article1.pdf>.
105. Special thanks to Jim Dempsey of the Center for Democracy and Technology and Suzanne Spaulding of the Bingham Consulting Group for their thoughts and input on how best to define domestic intelligence.
106. Intelligence agencies can only collect, retain, and disseminate information about a U.S. person if permitted by applicable law, if the information fits within one of the enumerated categories under Executive Order 12333, and if it is permitted under that agency’s implementing guidelines approved by the attorney general.
107. Executive Order 12333 defines a United States person “a United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments.” Executive Order 12333, “United States Intelligence Activities,” *Federal Register* 46, December 4, 1981, p. 59941, <http://www.fas.org/jirp/offdocs/eo12333.htm>.
108. Suzanne Spaulding, “Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting American’s Privacy Rights,” testimony before the House Committee on the Judiciary, September 5, 2007.
109. Siobhan Gorman and Even Perez, “FBI Wrestling With Remake as Intelligence Agency,” *Wall Street Journal*, September 16, 2008.
110. The *New York Times* first revealed the details of the program in December 2005. James Risen and Eric Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts,” *New York Times*, December 16, 2005, <http://www.nytimes.com/2005/12/16/politics/16program.html>.
111. Alberto Gonzales, “Wartime Executive Power and the NSA’s Surveillance Authority,” testimony before the Senate Committee on the Judiciary, February 6, 2006, [http://judiciary.senate.gov/hearings/testimony.cfm?id=1727&wit\\_id=3936](http://judiciary.senate.gov/hearings/testimony.cfm?id=1727&wit_id=3936).
112. Alberto Gonzales, interview by Jim Lehrer, *NewsHour with Jim Lehrer*, PBS, January 23, 2006, [http://www.pbs.org/newshour/bb/law/jan-june06/gonzales\\_1-23.html](http://www.pbs.org/newshour/bb/law/jan-june06/gonzales_1-23.html).
113. Goldsmith, *Terror Presidency*, p. 181, “top officials in the administration dealt with FISA the way they dealt with other laws they didn’t like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.”
114. James Comey, “Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part IV,” testimony before the Senate Committee on the Judiciary, May 15, 2007, p. 22, [http://gulcfac.typepad.com/georgetown\\_university\\_law/files/comey.transcript.pdf](http://gulcfac.typepad.com/georgetown_university_law/files/comey.transcript.pdf).
115. Letter from DNI John Negroponte to Dennis Hastert, speaker of the House of Representatives, May 17, 2006.
116. Commandant of the Marine Corps, “Oversight of Intelligence Activities,” Marine Corps Order 3800.2B, Department of the Navy, April 30, 2004, p. 2, <http://www.marines.mil/news/publications/Documents/MCO%203800.2B.pdf>.
117. Paul Wolfowitz, “Collection, Reporting, and Analysis of Terrorist Threats to DoD Within The United States,” May 2, 2003, <http://wikileaks.org/leak/us-talon-memo.pdf>.
118. U.S. Department of Defense, “RDT&E Budget Item Justification,” Exhibit R-2 to the budget for Research, Development, Test, and Evaluation programs, February 2004, <http://www.dtic.mil/descriptivesum/Y2005/OSD/0305146D8Z.pdf>.
119. Lisa Myers, Douglas Pasternak, and Rich Gardella, “Is the Pentagon Spying on Americans?” *NBC*, December 14, 2005, <http://www.msnbc.msn.com/id/10454316/>.
120. U.S. Department of Defense, “Review of the TALON Reporting System,” February 2006, [http://www.aclu.org/pdfs/safefree/talon\\_review\\_20070117.pdf](http://www.aclu.org/pdfs/safefree/talon_review_20070117.pdf).
121. James Clapper, “Advance Questions for Lieutenant General James Clapper USAF (Ret.) Nominee for the Position of Under Secretary of Defense for Intelligence,” submitted to Senate Armed Services committee for nomination hearing, March 27, 2007, p. 19, <http://armed-services.senate.gov/statemnt/2007/March/Clapper%2003-27-07.pdf>.
122. However, DOD created a new intelligence organization within the Defense Intelligence Agency known as the Defense Counterintelligence and Human Intelligence Center. It will assume many of CIFA’s functions, but unlike CIFA, will not undertake any law enforcement activities.
123. “Civil Applications Committee Blue-Ribbon Study,” final report of an independent study group, December 2005, p. 31, <http://www.fas.org/jirp/eprint/cac-report.pdf>.
124. U.S. Department of Defense, “DoD Intelligence Activities,” Directive No. 5240.01, August 27, 2007, <http://www.dtic.mil/whs/directives/corres/pdf/524001p.pdf>.
125. Right to Financial Privacy Act of 1978, Public Law 95-630, 95th Cong., 2d sess., 1978.
126. *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007).
127. U.S. Department of Justice, Office of the Inspector General, “A Review of the Federal Bureau of Investigation’s Use of National Security Letters,” March 2007, <http://www.usdoj.gov/oig/special/s0703b/final.pdf>.
128. “Processing of EU originating Personal Data by United States Treasury Department for Counter Terrorism Purposes—

- 'SWIFT': Terrorist Finance Tracking Program," *Official Journal of the European Union*, C166, July 20, 2007, p. 19, [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/c\\_166/c\\_16620070720en00180025.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/c_166/c_16620070720en00180025.pdf).
129. Its name was changed subsequently to "Terrorist Information Awareness" to counter some of the outcry against a Big Brother government.
  130. *United States v. Miller*, 425 U.S. 435 (1976); *Smith v. Maryland*, 442 US 735 (1979).
  131. Kate Martin, "Domestic Intelligence and Civil Liberties," p. 15.
  132. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Report of the Events Relating to Maher Arar: Analysis and Recommendations," p. 25, [http://www.ararcommission.ca/eng/AR\\_English.pdf](http://www.ararcommission.ca/eng/AR_English.pdf).
  133. Michael Chertoff, interview by Wolf Blitzer, *The Situation Room*, CNN, August 8, 2005, <http://transcripts.cnn.com/TRANSCRIPTS/0508/08/sitroom.01.html>.
  134. Goldsmith, *Terror Presidency*, p. 175.
  135. Goldsmith, *Terror Presidency*, pp. 89–90. "Vice President Cheney and David Addington—and through their influence, President Bush and Alberto Gonzales—had no qualms on this subject. They shared a commitment to expanding presidential power that they had long been anxious to implement. It is not right to say, as some have done, that these men took advantage of the 9/11 attacks to implement a radical pro-President agenda. But their unusual conception of presidential prerogative influenced everything they did to meet the post-9/11 threat."
  136. Goldsmith, *Terror Presidency*, p. 167.

## About the Author

**Daniel B. Prieto** is adjunct senior fellow for counterterrorism and national security at the Council on Foreign Relations. He is also vice president and senior fellow for homeland security and intelligence at IBM's Global Leadership Initiative. Mr. Prieto is coauthor of several books and monographs, including *Global Movement Management: Strengthening Commerce, Security and Resiliency in Today's Networked World* and *Neglected Defense: Mobilizing the Private Sector to Support Homeland Security*. He has served on the professional staff of the Homeland Security Committee in the U.S. House of Representatives and has testified before the U.S. Senate, and his commentary and analysis have appeared widely, including in the *Wall Street Journal*, *USA Today*, *Washington Post*, and *New Republic*, and on MSNBC, CNN, and NPR. Mr. Prieto received a BA from Wesleyan University and an MA from the Johns Hopkins University School of Advanced International Studies (SAIS). The views, judgments, and recommendations expressed in this report are solely the author's and do not reflect the opinions or positions of any of the organizations with which he is affiliated.

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