

**REPORT OF THE SPECIAL TASK FORCE
ON INTERROGATION AND TRANSFER POLICIES**

INTRODUCTION AND SUMMARY

Executive Order 13491 directed the Special Task Force on Interrogation and Transfer Policies to undertake two missions: (1) “to study and evaluate whether the interrogation practices and techniques in Army Field Manual 2-22.3, when employed by departments and agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies”; and (2) “to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody and control.”¹

The Task Force established an Interrogation Working Group to address the first mission, and a Transfer Working Group to address the second mission. After meeting with agencies of the United States government, foreign officials, and representatives of non-governmental organizations, the Task Force reached a series of conclusions and formulated a set of recommendations relating to interrogation and transfer policy. These recommendations should be coordinated and integrated with those of the Detention Policy Task Force.

Interrogation:

General Conclusions

The Task Force’s mission was to determine whether any agency other than the military should be authorized to use any interrogation practice or technique not listed in Army Field Manual 2-22.3 (the “Army Field Manual” or “Manual”) in order to protect national security. The Task Force could not undertake that task in a vacuum, however, and therefore asked federal law enforcement and Intelligence Community agencies to nominate interrogation practices and techniques for consideration. No federal agency informed the Task Force that it believed that it was necessary or appropriate to national security to use any interrogation practice or technique not listed in the Army Field Manual or currently used by law enforcement. In particular, the Central Intelligence Agency (CIA) informed the Task Force that it did not seek to use the enhanced interrogation techniques it had developed after September 11, 2001, to question high-value detainees. The President has also announced that the United States would no longer use those techniques. Accordingly, although there may be some lawful and effective interrogation practices and techniques that are not listed in the Army Field Manual or currently used by law enforcement agencies, the Task Force did not consider whether it was appropriate or legal for any agency of the federal government to use any specific technique not contained in the Army Field Manual.

¹ Executive Order 13491 is attached as Appendix A.

Nevertheless, the Task Force studied U.S. interrogation practices as extensively as time would allow. Based on that study, it reached the following conclusions:

- The Army Field Manual's description of permissible interrogation practices and techniques provides appropriate guidance to both inexperienced and experienced military interrogators.
- Experienced intelligence and law enforcement interrogators do not rely solely on particular interrogation techniques but instead develop lawful interrogation strategies based on extensive knowledge of the detainee and his organization, guile and deception, the use of incentives, and other factors.
- Experienced interrogators believe that the separation of a high-value detainee from other detainees is often essential to effective interrogation and that the U.S. government should maintain a detention capability that allows control of the detention environment to support intelligence collection. The legal, policy, and oversight questions raised by the establishment of a detention facility in the U.S. or abroad are beyond the Task Force's mandate, however, and are currently under consideration by the Detention Policy Task Force.
- To train effective interrogators, the United States must give its interrogators opportunities and incentives to gain experience in interrogation, not simply train them in interrogation techniques.
- The Army Field Manual imposes appropriate limits on interrogation. Among other things, the Manual bans cruel, inhuman, or degrading treatment, outlaws several specific interrogation practices, and bars interrogators from using any interrogation technique that they would not wish to see used on a United States citizen.
- Additional research is needed on the science of interrogation and the potential to develop new and more effective lawful interrogation practices, approaches, and strategies, particularly interrogation techniques that have the potential to obtain information as efficiently as possible in situations posing the greatest threats to national security.

Recommendations

The Task Force also formulated four specific recommendations:

1. *Create a High-Value Detainee Interrogation Group (HIG):* The Task Force recommends the creation of an interagency group that would deploy interrogation teams composed of interrogators, subject matter experts, analysts, behavioral specialists, and linguists to conduct interrogations of high-value

terrorist detainees. The HIG's primary goal would be the collection of intelligence to protect national security. Where possible and consistent with this objective, it should collect intelligence in a manner that allows it to be used as evidence in a criminal prosecution.

2. *Increase Intelligence Community and Law Enforcement*

Cooperation: Determining whether any given interrogation should seek only the collection of intelligence or a statement that could potentially be used against the detainee in a criminal prosecution should be a pragmatic decision based on the needs of national security, and not the interests or goals of a particular agency. One purpose of the HIG would be to ensure that that decision is made pursuant to settled, consistently applied criteria. Those criteria would make clear that an interrogation of a high-value detainee would be primarily to collect intelligence necessary to protect national security and, where possible and consistent with this objective, to gather information to be used in a criminal prosecution. Of course, those goals are not mutually exclusive and should be pursued in tandem whenever possible.

3. *Establish and Disseminate Best Practices:* If created, a High-Value Detainee Interrogation Group will develop a set of best practices for interrogation. The HIG should identify and disseminate those best practices and use them to conduct training for other agencies engaged in interrogation.

4. *Establish a Scientific Research Program for Interrogation:* Prior to the September 11 attacks, the United States had not engaged in a systematic effort to study and improve interrogation techniques in nearly 50 years. Although some resources have been devoted to studying interrogation since September 11, the United States should engage in a concerted effort to study the effectiveness and propriety of existing interrogation practices, techniques, and strategies and should try to develop new ones that meet the requirements of domestic law and the United States obligations under international law. Resources should be devoted both within the U.S. government and in academic and research institutions to further this goal.

Transfer:

General Conclusions

The Task Force identified and considered seven types of transfers conducted by the U.S. government:² (1) extradition, (2) transfers pursuant to immigration proceedings, (3) transfers pursuant to the Geneva Conventions, (4) transfers from the Guantanamo Bay detention facility, (5) military transfers within or from Afghanistan, (6) military transfers within or from Iraq, and (7) transfers pursuant to intelligence authorities. The Task Force did not consider transfers into U.S. custody or transfers within U.S. custody to be part of its mandate under the Executive Order.

The Task Force began by identifying the legal and policy framework within which the seven categories of transfers take place. As a legal matter, the United States has taken the view that it is barred from transferring an individual from its territory where it is more likely than not that the person will be tortured by the country to which he is transferred. As a policy matter, the United States has applied the same standard to wholly extraterritorial transfers. The Task Force also examined U.S. policies and practices with respect to obtaining and evaluating assurances from other countries that they will not torture a person transferred from the United States.

The Task Force carefully considered the key criticisms of U.S. transfer practices, as well as the operational and policy interests that are served by existing practices. The Task Force concluded that, while the seven identified transfer scenarios present strikingly different considerations, important U.S. national security interests are at stake in all of them. Particularly (but not exclusively) in the area of counterterrorism, transfers are an important tool for the United States in situations where U.S. prosecution or detention is not available, but where an individual may present a real danger or have significant intelligence value. Accordingly, proposed changes to existing practice must be developed in a manner that permits the continued use of transfers consistent with relevant humanitarian considerations. Operating within the framework of this general conclusion, the Task Force considered what steps could be taken to better ensure that U.S. transfer practices comply with all relevant domestic laws and policies and all relevant international obligations.

Recommendations

The Task Force formulated a number of recommendations, some of which apply to all of the transfer scenarios and some of which are specific to particular transfer scenarios:

² In this report, the Task Force has used the term “transfer” to describe a variety of different scenarios in which the United States moves or facilitates the movement of a person from one country to another or from U.S. custody to the custody of another country. The report does not use the term “rendition” because that term has no generally agreed-upon meaning.

1. *Improving Assurances:* The Task Force makes several recommendations aimed at clarifying and strengthening U.S. procedures for obtaining and evaluating assurances and increasing the use of monitoring mechanisms to implement assurances.
2. *Improving partner nation detention facilities and capabilities:* In considering recommendations on correctional assistance, the Detention Policy Task Force should take into account that the potential for transfers is increased by better facilities in partner nations, particularly in the Middle East and South and Southeast Asia.
3. *Amending Department of Homeland Security regulations:* The Task Force recommends changes to the applicable regulations to reflect the shift in responsibility for evaluating diplomatic assurances from the Immigration and Naturalization Service under the Department of Justice to the Department of Homeland Security.
4. *Monitoring ISAF detainees in Afghanistan:* The Task Force recommends that the U.S. Embassy in Kabul should develop a risk mitigation plan to improve monitoring of the treatment of detainees transferred by U.S. members of the International Security Assistance Force to the Islamic Republic of Afghanistan, taking into account resource and other practical concerns.
5. *Providing comprehensive assistance to develop detention facilities in areas where large numbers of detainee transfers are expected:* The Task Force recommends using certain aspects of the U.S. experience with the Afghan National Detention Facility as a model in current and future conflicts where the United States expects to capture a significant number of detainees, and plans eventually to transfer them to the host government.
6. *Negotiating assurances with host governments in future conflicts:* The Task Force recommends that, in the future, where it appears likely that the Department of Defense will hold and ultimately seek to transfer significant numbers of detainees to a host state, the Department of Defense, in cooperation with the Department of State, should negotiate assurances with the host government to govern the treatment of transferred detainees at as early a stage in the process as possible.
7. *Establishing Department of Defense policies or directives:* The Task Force recommends that the Department of Defense should adopt policies or directives governing transfers consistent with the policy statement in section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (codified at 8 U.S.C. § 1231 note) (“FARRA”).
8. *Establishing Intelligence Community policies or directives:* The Task Force recommends that elements of the Intelligence Community that may be called upon to conduct or participate in transfers should adopt policies or

directives governing transfers consistent with the policy statement in section 2242(a) of the FARRA.

9. Additional recommendations applicable to the Intelligence Community:

The Task Force formulated three additional recommendations applicable to potential transfers conducted pursuant to intelligence authorities that are contained in a classified annex to the Task Force's report.

INTERROGATION

In light of the President's decision to prohibit the use of enhanced or coercive interrogation techniques used by the CIA, the Task Force broadened its mission to focus on ways to improve the United States' ability to interrogate high-value detainees. The Task Force's recommendations are as follows:

1. Establish a High-Value Detainee Interrogation Group

The United States government should establish and maintain a High-Value Detainee Interrogation Group for intelligence collection, bringing together the best interrogators and support personnel from the Intelligence Community, the Department of Defense, and law enforcement.

To ensure that the best available interrogation resources are directed against the nation's most high-value counterterrorism detainees, the Task Force proposes establishing a multi-agency High-Value Detainee Interrogation Group (HIG) that would use the best capabilities of intelligence and law enforcement, as well as allied military and civilian interrogation operations, with a focus on those interrogation practices and procedures that produce timely, reliable, and actionable results. The HIG would be a joint intelligence and law enforcement entity under the administrative control of the FBI. Subject to guidance from the Counterterrorism Security Group and based on pre-existing criteria, as well as information obtained from the Intelligence Community, the HIG would prepare to conduct interrogations by identifying individuals who should be the subjects of a specialized interrogation capability if detained by the U.S. government or otherwise become available for interrogation. Using the same process, the HIG would prepare to interrogate currently unknown members of specific terrorist organizations if they become available for interrogation. The HIG would coordinate the creation, and supervise the training, of Mobile Interrogation Teams (MITs) to conduct interrogations of the identified individuals, members of terrorist groups, or others who met its deployment criteria. The MITs would consist of experienced interrogators, subject matter experts, analysts, behavioral specialists, linguists, and others. The MITs would ordinarily deploy when the U.S. government detained or otherwise obtained the ability to interrogate a person who met the HIG's deployment criteria, subject to limitations described in the classified annex to this report. The deployment of a MIT would be subject to the approval of the Chief of Mission for the country in which the MIT would deploy and, when the detainee is in Department of Defense custody, the approval of the responsible geographic combatant commander. The HIG would also supervise the development of new methodologies for effective interrogation.

The HIG's priority would be intelligence collection to prevent terrorist attacks on the United States and its allies and otherwise protect national security. Evidence collection for prosecution (which may also protect national security) would remain an important consideration, and steps should be taken to ensure that intelligence collection proceeds in a manner that does not limit future law enforcement options. In cases where the interests of intelligence collection and preservation of evidence diverge, collecting intelligence to prevent a future attack would take precedence. Accordingly, use of the MITs would not carry a presumption that the detainee should be prosecuted in a criminal court in the United States or that *Miranda* warnings should be given during the interrogation.

Organization: The Task Force considered three organizational models for the HIG: (1) a free-standing interrogation capability; (2) a "federated" model in which the HIG would be organized with resources from across the U.S. government on a case-by-case basis; and (3) a "hybrid" model involving a small permanent nucleus of people modeled on the Foreign Emergency Support Team (FEST) and augmented on a case-by-case basis for individual deployments. The Task Force recommends the third, or hybrid, model. This small group would be drawn from agencies in the Intelligence Community and would be responsible for maintaining training and exercise programs, the administrative aspects of deployments, and managing an overall research program. This approach should provide greater stability and clarity of operational authority than the federated model, while maintaining flexibility by keeping resources in individual agencies.

Under the hybrid model, individual agencies would be expected to establish and maintain minimum standards of training for individuals who are serving in the HIG or who are identified to deploy in a MIT. Agencies would also be expected to participate fully in the development and implementation of the HIG concept. The HIG administrative office would be responsible for the following activities with guidance and direction from the National Security Council's Counterterrorism Security Group:

- Managing the MIT interrogation program;
- Establishing interrogation priorities for the MITs;
- Developing policy, doctrine, and procedures for interrogations of high-value detainees;
- Based on information obtained from the Intelligence Community, identifying high-value detainees subject to interrogation if detained by the U.S. government or otherwise available for interrogation;
- Deploying MITs to interrogate high-value detainees who are on the HIG list or meet the HIG's criteria;

- Ensuring that a participant in the interrogation is prepared to testify if a determination is made that United States prosecution is a possible objective for disposition of the detainee;
- Setting and enforcing interrogation and training standards for the MITs;
- Conducting exercises to strengthen HIG collaboration and cooperation and ensure smooth support to future operations;
- Sponsoring and coordinating interrogation research activities; and
- Disseminating research results to the U.S. government interrogation community.

While the HIG would provide the strategic and administrative backbone for the effort, other Intelligence Community and law enforcement agencies would provide operational capability, training, and research support.

Governance: The Task Force recommends that the HIG be subject to the administrative supervision and control of a single agency. After evaluating potential agencies, the Task Force recommends that the FBI serve as the administrative headquarters for this multi-agency effort. Although other agencies also have existing interrogation capabilities, logistical support for communications and transportation, or operational and analytical programs focused on terrorism, the Task Force concluded that putting the HIG within the FBI will strengthen the public perception of legal oversight of the activity and dovetail with the FBI's existing intelligence and law enforcement programs focused on terrorism suspects. The recommendation is intended to align the HIG with the FBI's intelligence functions; it is not intended to make the FBI's law enforcement function the primary purpose of the HIG. As set forth above, the HIG's priority would be intelligence collection to prevent terrorist attacks on the United States and its allies and otherwise to protect national security.

As an entity within the FBI, the HIG would have a chief drawn from that agency who would have over-all command of the HIG and supervision of the composition, training, and deployment of the MITs. To ensure input into the governance of the HIG from other components of the Intelligence Community, the Task Force recommends that its deputy should be drawn from another Intelligence Community agency. In addition, the HIG would be subject to oversight, as discussed below.

Oversight: The Task Force agreed that the HIG should be subject to oversight to ensure appropriate policy guidance, effective interagency coordination, and compliance with the rule of law. The Task Force recommends that this policy and coordination oversight should be exercised by the Counterterrorism Security Group (CSG) of the National Security Council and by the NSC Deputies and Principals Committees, as necessary and appropriate. Legal issues that arise concerning compliance with U.S. domestic law and international legal obligations regarding the interrogation and treatment

of detainees will be evaluated by the Department of Justice, in coordination with attorneys at the relevant agencies and the NSC/White House.

Mobile Interrogation Teams: A key element of the HIG is the establishment of Mobile Interrogation Teams (MITs) that would deploy to conduct interrogations of high-value detainees. A presumption would exist that the MITs would deploy to conduct the interrogation of a high-value detainee previously identified by the HIG, or who met the HIG's criteria, if the U.S. government detained or obtained the ability to interrogate the individual. The MITs would consist of interrogators, subject matter experts, analysts, behavioral specialists, and linguists drawn from existing programs, as needed. MIT interrogators would be U.S. government employees, would have specific expertise in interrogation, and would train to hone these skills and maintain current knowledge of terrorist groups, geographic regions, and relevant intelligence requirements. MIT subject matter experts, including law enforcement case agents and intelligence analysts with the greatest knowledge of a specific detainee or a specific subject matter, and others as needed, would provide detainee-specific and group-specific knowledge to the MIT during interrogation. The HIG would determine MIT membership for individual deployments based on available personnel from Intelligence Community and law enforcement agencies.

Individual agencies participating in high-value detainee interrogation operations would be required to:

- Establish and maintain current capabilities for interrogation;
- Train to standards set by the HIG;
- Maintain readiness to respond to HIG deployments;
- Participate fully in exercises, both operationally and administratively, as necessary;
- Provide onsite command and control where required; and
- Deploy and operate in accordance with guidance and objectives set by the HIG and the CSG consistent with existing laws, executive orders, directives, and interagency agreements that govern deployment and activities of the U.S. government executive branch employees overseas.

The Task Force concluded that the MITs must train and exercise together frequently to be effective. Several experienced interrogators told the Task Force that interrogation is less likely to succeed when an interrogator meets a supporting analyst or the interpreter immediately before an interrogation. Training should facilitate long-term working relationships and allow a MIT to develop interrogators who can work effectively with an interpreter and who know they can rely on the supporting subject-matter experts and analysts. In addition, by training and deploying together, MITs would develop the

most effective approaches to interrogation and be in the best position to provide input to researchers studying ways to improve interrogation.

The Task Force also considered whether the HIG could operate domestically by, for example, deploying an MIT to interrogate a high-value detainee or terrorism suspect captured in the United States. In the end, the Task Force concluded that the question whether the HIG would operate domestically was outside its mission, although it believes the question of domestic deployment warrants further consideration.

Logistical and Administrative Issues: The Task Force discussed several other administrative and logistical issues relating to the creation of the HIG and deployment of MITs. The Task Force determined, however, that these details were more appropriately addressed in an implementation plan.

2. Increase Intelligence Community and Law Enforcement Cooperation and Collaboration Against High-Value Detainees.

Leverage relevant authorities and capabilities to maximize both intelligence collection and potential criminal prosecution.

When the U.S. government detains or obtains access to a high-value detainee, it must often decide whether or not an interrogation of that detainee will have as an objective eliciting a statement that can be used against the detainee in a criminal prosecution in the United States or another country. The objectives of an interrogation may affect the course of the interrogation and the identity of the interrogator. Creating a consolidated team of interrogators with a variety of interrogation styles and experiences under unified leadership would make it possible to employ the most effective interrogation strategy for individual high-value detainees. Ideally, the MITs will know, in advance of deployment, the desired disposition of the detainee developed in the interagency planning process – U.S. or foreign prosecution, release, long-term detention, or deportation – and develop an interrogation plan that is tailored to the particular detainee and the desired disposition. By evaluating the potential for and possible interest in criminal prosecution prior to an interrogation, the HIG, with policy guidance from the CSG, can make appropriate decisions regarding the composition of the team, the strategy and sequence of the interrogation, and other issues that may affect the ability to prosecute the detainee. All planning and training should retain a significant degree of flexibility to account for the possibility of unforeseen developments in any capture and interrogation of a high-value detainee.

3. Establish Best Practices and Disseminate Them to the Interrogation Community

The HIG should continue to develop concepts of best practices and disseminate these to agencies that conduct interrogations.

The MITs will develop a set of best practices for interrogation. Those practices will include improved interrogation strategies, training regimes, and methods of organizing interrogation teams. In particular, because the MITs will be on the front lines of interrogation and will confront some of the most hardened and resistant terrorist suspects, they will be in the best position to develop new and effective interrogation practices as necessary.

For these reasons, the Task Force recommends that the HIG create a process for identifying and cataloging best practices. In addition, processes should be established for disseminating the fruits of the HIG's experience to other agencies that conduct interrogation. For example, the HIG could conduct regular training for other agencies. That kind of training would also allow for a healthy exchange of ideas between the HIG and other agencies, including law enforcement agencies.

4. Establish a Scientific Research Program to Develop Improved Techniques and Methodologies for Interrogation

Establish a program and corresponding budget to oversee a comprehensive scientific study to research and develop more effective interrogation methodologies.

There is little existing scientific research assessing current interrogation approaches, including those listed in the Army Field Manual. Although some research has addressed the effectiveness of interviewing and interrogation techniques used by law enforcement agencies, the conclusions of those studies are not necessarily applicable to the interrogation of high-value detainees. Nor does the United States have a systematic mechanism to capture lessons learned and develop case studies on interrogation.

To remedy these deficiencies, a long-term research program should be established to develop and oversee research on interrogation. Most Task Force members agree that the HIG would be the most effective entity to manage such a program, as the HIG would have the most significant substantive experience. It would house experts dedicated to ensuring that research is relevant and applicable to real-world interrogation. The research itself would be conducted by Intelligence Community members and academic and research institutions. The HIG should manage the study of foreign civilian and military intelligence and law enforcement methodologies to learn from the experience of foreign governments. The HIG should also ensure that the research would focus on the most difficult cases and issues.

Any such program would adhere to all applicable U.S. government guidelines for scientific experimentation and research. Topics of research could include the following:

- The standards and assumptions inherent in the Army Field Manual and law enforcement communities;
- The comparative effectiveness of interrogation approaches and techniques, with the goal of identifying the existing techniques that are most effective and developing new lawful techniques to improve intelligence interrogations; and

- Identification of additional lawful methods of obtaining information from an individual in the truncated timeframe that the United States may face in a crisis.

Research methods could involve the following:

- Substantive exchanges between practitioners on what worked and what did not, to document lessons learned and capture actual interrogation experiences. Research should study both successes and failures;
- Developing case studies and teaching tools for continuing education of current interrogators, as well as to train new interrogators; and
- Applying social science theories to interrogation. Studies of relevant subjects such as persuasion, sources of power, interests and identities, stress, resistances, and memory were identified by the Intelligence Science Board as being extremely relevant to interrogation.

Developing a research program and its corresponding budget would require significant resources. The Task Force recommends that as part of the creation of the HIG, funding for such a research program should be included for future budget requests.

TRANSFER

Transfers of people from U.S. custody to the custody of another government arise in a variety of contexts. Some of these transfers arise in contexts in which the international and domestic legal framework is well-established – such as extradition. Other transfers, though lawful, take place in contexts in which the legal framework is less well-defined. All of these transfers can raise important legal and policy issues. These issues relate primarily to the treatment of the person who is being transferred, but in some situations also include other issues such as whether the sovereignty of the country from which or through which a transfer takes place has been respected. Furthermore, U.S. policies on transfers must be developed in conjunction with U.S. policies on apprehension and detention, as these are inter-related elements of our counterterrorism efforts.

Critics of U.S. transfer practices have expressed a number of concerns. Some of these concerns have been focused primarily on transfers reportedly conducted or facilitated by elements of the Intelligence Community. For example, some have argued that the apparent lack of procedural protections involved in any secret transfer inevitably leads to cases of mistaken identity, resulting in the transfer of innocent people against their will. Others have expressed concerns about the lack of legal process for the individuals in the host or receiving state and about the implications for the sovereign rights of countries from which or through which secret transfers may take place.³

³ See, e.g., “Rendition and Secret Detention: A Global System of Human Rights Violations.” Amnesty International. (January 1, 2006), available at www.amnesty.org/en/library/info/pol30/003/2006. See also European Commission for Democracy Through Law (Venice Commission) Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners. (March 2006).

One concern that has been expressed about U.S. transfer practices across the full range of scenarios is whether the United States has taken adequate steps to protect against torture or other forms of mistreatment after the transfer has taken place. In particular, one aspect of U.S. transfer practice that has come under particular scrutiny is the use of assurances obtained from the receiving country as a safeguard against post-transfer mistreatment. Many groups have argued that assurances should never be used for this purpose. Others have advocated the imposition of controls on the use of assurances to make them more reliable. The groups that have taken these positions have expressed a number of concerns about the use of assurances to prevent mistreatment after transfer. First, critics of assurances point to a number of cases in which assurances appear to have failed to protect individuals who have been transferred. The Maher Arar case is frequently cited by critics of U.S. transfer practices, as are a handful of Guantanamo transfer cases involving Tunisia and Russia. Such critics argue that neither the transferring nor the receiving state has an incentive to report publicly that the receiving state has failed to respect the assurances it provided.

Second, some argue that assurances are inherently untrustworthy, because a transferring state would only seek assurances in cases in which it had some concern that the receiving state would engage in torture. A related point is that many of the countries where torture is a problem may be sincere in making a commitment not to torture but may lack the ability to follow through on the assurance. Third, torture is inherently difficult to discover because it is almost always done in secret. Those who engage in torture may be skilled at using techniques that do not leave visible marks, and a victim of torture may be afraid to report it, even if there is some monitoring of his or her case. Assurances, it is argued, do nothing to alleviate these problems, even if they include some kind of monitoring mechanism.

These criticisms about U.S. transfer practices, and in particular about the use of assurances, raise a number of significant concerns that need to be taken into account in shaping U.S. policy. However, they should be considered in light of several additional important points. First, while concerns about assurances not being respected must be taken seriously, the Task Force is unaware of any comprehensive study on state practice regarding implementation of and compliance with assurances. There have also been cases where assurances have been used successfully. For example, of the more than 550 detainees transferred or released from Guantanamo, there have been only a very few complaints about treatment that violated the assurances obtained by the USG. Thus the Task Force believes that the facts point toward the need for careful case-by-case assessments of assurances, rather than a blanket rejection of the practice.⁴

⁴ See also, for example, the conclusion of the UK Special Immigration Appeals Commission that, with regard to Algerians returned to Algeria, the “Algerian State has fulfilled to the letter, those parts of its assurances to the British Government which can be conclusively verified.” *U v. SSHD 37*, available at <http://www.siac.tribunals.gov.uk/outcomes.htm>.

Second, the criticism that countries willing to violate their binding obligations not to torture will by definition be willing to violate any non-binding bilateral assurances assumes that a generalized multilateral commitment is no different than a case-specific bilateral commitment. This assumption does not hold true in all cases. Particularly in the context of a multi-faceted bilateral relationship, a country may have a far greater incentive to live up to a specific bilateral assurance than to its obligations under the CAT generally. This is particularly true where a case-specific monitoring mechanism is part of the assurance.

Some have argued that the United States should never transfer someone who alleges any kind of fear of mistreatment in the receiving state. The Task Force concluded that this position was unworkable. Without undermining credible concerns about torture and United States' legal obligations with respect to transfers, transfers and assurances must be considered in the context of the practical reality in which transfers take place. Many of the detainees held by the United States would pose a significant threat if released into the United States, and many would be considered dangerous even if released into other countries. Moreover, for a variety of reasons, only a small percentage of these detainees held by the United States in recent years have been or can be prosecuted.

The United States also has a strong interest in transferring people in other circumstances, such as in the traditional extradition or deportation contexts. These types of transfers can raise many of the same issues as transfers that take place in the context of armed conflicts. Furthermore, even where U.S. prosecution is an available option, this only serves to delay the issue of transfer in many situations, rather than removing the need to consider it altogether. Unless prosecution results in the death penalty or life in prison, there is a strong chance that the United States will have an interest in transferring the person after he has completed his sentence (or if found not guilty, after trial) in order to avoid releasing a dangerous person into the United States. In fact, maintaining a robust transfer option may actually facilitate prosecutions in the sense that the USG may otherwise be reluctant to take custody of a person for prosecution if the expected result is that the United States will be unable to remove the person from the country after completion of his sentence.

Given the importance of transfers to the national security interests of the United States, while the use of assurances raises difficult questions, it will often be an important tool available to help balance competing considerations. In other words, transfers facilitated by credible assurances may be preferable to the other options available to the United States – releasing potentially dangerous people (or declining to capture them in the first place), returning people to foreign governments without assurances against mistreatment, or trying to detain them indefinitely. In this context, the Task Force has concluded that assurances are a tool that needs to be retained to facilitate necessary transfers while minimizing the chances of mistreatment.

I. General recommendations applicable to all types of transfers

A. Strengthening U.S. procedures for preventing transfers where torture is more likely than not

1. Clarify and strengthen procedures for obtaining assurances.

Recommendation: In situations where the appropriate entity within the USG decides that assurances should be obtained prior to conducting a transfer, the Task Force recommends that U.S. practice should at a minimum include the following requirements,:

-- The Executive Branch should seek a specific commitment from the receiving state that it will not torture the individual.

-- The assurances should refer to the receiving state's obligations under the Convention Against Torture (CAT) or comparable international obligations and, where appropriate, to the receiving state's domestic law (including relevant provisions criminalizing torture).

-- If an individual has raised a particularized, reasonable, and credible concern about torture (by a specific agency in the receiving state, for example), assurances should address that concern (for example, by having the receiving state agree that the individual will not be held by the agency of concern).

2. Improve USG capabilities to evaluate assurances

Recommendations:

-- If the agency responsible for making the transfer decision is not the Department of State, it should be required to consult with the Department of State or the Chief of Mission at an appropriate embassy in assessing the reliability and credibility of all assurances obtained, regardless of which agency obtained the assurances. (The only exception to this rule would be for military-to-military agreements for the transfer of detainees under the laws of war pursuant to coalition and bilateral operations.) While this evaluation may slow the process in some cases, the Task Force believes that the costs of such a delay are outweighed by the benefit of bringing the Department of State's expertise into the process of evaluating post-transfer treatment. The Department of State's involvement has a number of potential advantages. First, the Department has the most expertise within the USG on human rights conditions in other countries. Second, the Department has the broadest perspective on U.S. relations with other countries, which is useful in evaluating the context in which assurances may be given. Third, having one government agency evaluate all assurances would be beneficial insofar as the agency would develop a body of experience relevant to the evaluation of future assurances.

- While the Task Force recognizes that using diplomatic channels to obtain assurances is not always the most effective approach and should not be used in every case (except in extradition cases), it has concluded that the State Department should be involved in evaluating assurances in all cases.

- The Department of State should provide adequate guidance to Chiefs of Mission to ensure that they coordinate their involvement in these issues with Department of State headquarters. State also should ensure that it can provide rapid assistance to other agencies when it receives an urgent request to evaluate assurances.

- The Executive Branch should strengthen its internal structures for evaluating assurances by developing effective interagency information-sharing mechanisms, in order to ensure that all relevant agencies have timely access to available information about U.S. transfer experiences with the receiving states, including any available information on the implementation and monitoring of assurances.

- The final decision on whether to transfer someone in reliance on an assurance provided by the receiving state should be made by the head or deputy head of the agency responsible for the transfer or an appropriately senior designee or a Deputies Committee or Principals Committee.

- Factors that the United States should consider in evaluating the credibility and reliability of assurances include: (1) information concerning the judicial and penal conditions and practices of the country providing assurances; (2) U.S. relations with the receiving country, including diplomatic relations as well as military, intelligence, or law enforcement relations as appropriate; (3) the receiving state's capacity and incentives to fulfill its assurances; (4) political or legal developments in that country that would provide context for the assurances; (5) that country's record in complying with similar assurances previously provided to the United States or another country; (6) any information on the identity, position, or other relevant facts concerning the person providing the assurances that bear on the reliability of those assurances; and (7) the relationship between that person and the entity that will detain the person or otherwise monitor his activity.

- The Inspectors General of the Department of State, the Department of Defense, and the Department of Homeland Security should prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances. The report should, with due regard for confidentiality and classification of information, address the process for obtaining the assurances, the content of the assurances, the implementation and monitoring of the assurances, and the post-transfer treatment of the person transferred.

3. Increased use of monitoring mechanisms to implement assurances.

Recommendations:

-- In all cases in which the United States obtains assurances, the agency or department obtaining the assurances should insist on the inclusion of a monitoring mechanism in the assurances it seeks or otherwise establish a monitoring mechanism, unless there is a compelling reason not to do so. In general, such monitoring mechanisms should provide for consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining government.

-- The specific form of monitoring may depend on the circumstances. For example, in some cases, monitoring may be more appropriately done by the USG, although the appropriate agency to conduct the monitoring may vary based on the circumstances. In other cases, monitoring by an outside group may be more effective. Where appropriate, the agency obtaining the assurances should consider whether other countries have monitoring mechanisms in place that the USG could employ or use as a model. In some cases, it may be possible to work with another country to jointly use the same monitoring mechanism. The possibility of seeking intelligence to assist in monitoring should also be considered.

-- Agencies involved in obtaining and evaluating assurances should work together to develop guidelines for how to deal with countries that have failed to live up to their assurances, including when and how changes in circumstance should affect the USG's view of past failures to abide by assurances. This process should be coordinated by the National Security Council as necessary.

The three sets of recommendations set forth above related to Executive Branch processes for obtaining, evaluating and monitoring assurances are particularly important in light of the fact that, in some contexts, assurances have been held to not be subject to judicial review. *See Ahmad v. Wigen*, 910 F.2d 1063 (2d Cir. 1990), and *Kiyemba v. Obama* 561 F.3d 509 (D.C. Cir. 2009). *But see Khouzam v. Attorney General*, 549 F.3d 235 (3d Cir. 2008).

B. Maintain the standard for evaluating transfers

Recommendation: The United States should maintain its current legal and policy restrictions on transferring anyone from U.S. custody where it is more likely than not that the person will be tortured.

States traditionally have had broad latitude to craft their immigration policies, but they have accepted certain legal limitations regarding when they may deport or expel people from their territories. In particular, states such as the United States that are parties to the Convention Relating to the Status of Refugees or its Protocol generally may not

forcibly return a refugee to a place where his life or freedom would be threatened because of his race, religion, or political opinions, among other reasons. Similarly, the United States is a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”). Article 3 of the CAT states:

“1. No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”⁵

Pursuant to the treaty understanding approved by the U.S. Senate and included in the U.S. instrument of ratification, the United States interprets the phrase “where there are substantial grounds for believing that he would be in danger of being subject to torture,” as used in Article 3 of the CAT, to mean “if it is more likely than not that he would be tortured.”⁶ The Article 3 prohibition is absolute. Unlike non-refoulement in the refugee context, a potential transferee, no matter how dangerous, cannot be sent from the United States to another country if it is more likely than not that he or she will face torture there. These prohibitions on transferring a person to a foreign country based on the likelihood that the person would be subject to a specific harm in that country often are referred to collectively as the principle of “non-refoulement.”

The United States has previously interpreted Article 3 to impose legal obligations on the U.S. only with respect to individuals who are transferred from the territory of the United States.⁷ In light of the United States’ stated policy commitment not to send any person, no matter where located, to a country in which it is more likely than not that the person would be subject to torture, this report does not address the legal question whether

⁵ Convention Against Torture, Article 3.

⁶ Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990) at II.(2).

⁷ The United States has argued that this interpretation is consistent with the text of the Convention itself, the negotiating history, and the U.S. record of ratification, as well as the U.S. Supreme Court’s interpretation of similar language in the Refugee Convention. See *Sale v. Haitian Ctrs. Council*, 509 U.S. 153 (1993). Other states and international bodies, however, assert that Article 3 of the CAT applies to wholly extraterritorial transfers. Some take a broad view of the situations in which non-refoulement obligations legally attach – not just to expulsions, returns, or extraditions, but to any transfers of people from the custody of one state to another, wherever located. Yet others argue that, as a matter of customary law or by operation of Article 7 of the International Covenant on Civil and Political Rights, non-refoulement obligations extend to situations in which the sending state believes that the person may face cruel, inhuman, or degrading treatment or an unfair trial. (Article 7 of the ICCPR states, in part, that “[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” The U.S. has not agreed with the view that this text contains an implicit non-refoulement obligation nor with the view that the covenant applies extraterritorially.)

Article 3 applies to transfers conducted by the United States that are initiated outside of U.S. territory.

The Task Force considered whether, as a policy matter, the United States should adopt a different standard than the “more likely than not to be tortured” standard in evaluating potential transfers. In particular, the Task Force considered whether to recommend that the United States adopt a “cruel, inhuman, or degrading treatment” or “humane treatment” standard. However, the Task Force ultimately decided against recommending such a change in standard for several reasons. First, changing the standard would not respond to the criticism that the U.S. has failed effectively to enforce the existing standard. Second, such a change would create significant complications in at least some areas of U.S. transfer practice, such as extradition and immigration removal cases, where U.S. practice is subject to a complex and long-standing framework of international and domestic law and practice. Third, the Task Force concluded that the adoption of a new standard could have uncertain operational consequences. Accordingly, and in light of the other recommendations in this report and the understanding of the Task Force that agencies that conduct transfers have a practice of looking beyond the narrow, legal definition of torture in evaluating whether to transfer a person or in obtaining assurances, the Task Force concluded that a change of standard or practice is not warranted.

C. Improve partner nation detention facilities and capabilities

Recommendations:

-- In considering recommendations on correctional assistance, the Detention Policy Task Force should take into account that the potential ability to transfer is increased by better facilities in partner nations, particularly in the Middle East and South and Southeast Asia. In considering additional assistance in this area, the United States should consider whether other partner states are engaged in similar activities and ensure, to the greatest extent possible, that it works cooperatively with those states to avoid duplication of effort.

Perhaps the most important way to minimize U.S. concerns about transfers to foreign states is for those states of concern to develop safe and humane detention or prison facilities and a work force for these facilities that is well trained, adequately paid, and subject to appropriate oversight. Helping foreign governments – particularly in countries where it is reasonably likely that the United States will wish to transfer individuals in the future – improve their detention capabilities consistent with their human rights obligations is a worthwhile, albeit long-term, goal. Current U.S. law imposes certain limitations on the USG’s ability to provide foreign assistance to support foreign police and prisons, but such assistance is not barred.

D. Create a list of countries to which transfers are barred

Recommendation: The United States should not create a list of countries to which transfers will be barred.

The Task Force also considered whether the USG should create a list of countries with the worst records on treatment of detainees or a history of failing to honor assurances that the United States or other governments have obtained. Transfers to countries on this list would be barred. Such an approach would respond directly to the criticism that some countries' human rights records render their assurances inherently untrustworthy. It would also be a way to demonstrate that the United States takes the assurances process seriously and establish consequences for countries that violate assurances they have given.

However, this "black-listing" approach also has a number of disadvantages. First, the credibility and reliability of assurances is inherently context-specific. The person to be transferred, the government entity to which he is to be transferred, the prevailing political circumstances, and other factors all play critical roles in determining likely treatment after transfer. A black list is not well-suited to making such context-specific judgments. In addition, such a list may be difficult to alter and may not reflect the most up-to-date assessment by the USG of the likelihood that the country will live up to its assurances in future cases. For example, a change in the government of a country could increase confidence in that country's willingness to adhere to its assurances, but it may be politically impossible to remove the country from the list – thereby unnecessarily hampering the USG's ability to transfer to that country.

Even without such a blacklist approach, as a practical matter, if a country is found to have violated assurances it has given in connection with transfers, and no change in circumstance intervenes, the USG is unlikely to be able to rely on assurances to transfer anyone to that country again.

II. Specific recommendation for immigration proceedings

A. Update applicable regulations

Recommendation: Current regulations pertaining to the treatment of aliens entitled to protection under the CAT were implemented in 1999, before the Department of Homeland Security was created.⁸ The Task Force recommends changes to the applicable regulations to reflect the shift in responsibility for evaluating diplomatic assurances from the Immigration and Naturalization Service under the Department of Justice to Immigration and Customs Enforcement and U.S. Citizenship and Immigration Services under the Department of Homeland Security. The Department of Justice continues to adjudicate claims for CAT protection in formal removal proceedings through the Executive Office for Immigration Review (EOIR), a Department of Justice entity.

⁸ These regulations appear at 8 CFR 208.16 - 208.18 and 1208.16 – 1208.18.

Clarifying the decision-making roles of the different agencies is important to maintaining an open and transparent process.

III. Specific recommendations for military transfer scenarios

A. Improved monitoring of detainees transferred from ISAF to the Islamic Republic of Afghanistan.

Recommendation: The U.S. Embassy in Kabul should develop a risk mitigation plan to improve monitoring of the treatment of detainees transferred by U.S. forces acting under International Security Assistance Force (ISAF) to the Islamic Republic of Afghanistan (IROA), taking into account resource and other practical concerns.

The United States and ISAF partners concluded an agreement with the IROA that gives extensive access to detainees whom ISAF forces have transferred to the IROA. However, the U.S. government has yet to implement processes as robust as those the USG's ISAF partners have implemented with respect to the access provided by this agreement. The Task Force notes that in other military situations, the Department of Defense may be better situated to undertake monitoring in future conflicts.

B. Consider comprehensive training and infrastructure assistance projects to develop adequate detention facilities in areas where large numbers of detainee transfers are expected.

Recommendation: The Task Force recommends using elements of the USG experience with the Afghan National Detention Facility ("ANDF") as a model in current and future conflicts where the United States expects to capture significant numbers of detainees and eventually to transfer them to the host government.

In April 2007, the ANDF began operating near Kabul. The facility was renovated by the United States to assist Afghanistan in holding and prosecuting former Guantanamo and Bagram detainees. The USG also trained the guard force, and maintains a presence at the facility. On the whole, the Task Force believes that this facility has been quite successful in handling detainees without serious allegations of abusive treatment.⁹ A similar approach, particularly with respect to the training of the guard force and the U.S. presence at the facility intended to prevent abusive treatment, may facilitate transfers in other conflicts.

⁹ "It should be noted that at this writing, Human Rights First is aware of no evidence that Guantanamo or Bagram returnees in Block D are being mistreated by the Afghan government." Human Rights First, "Arbitrary Justice – Trials of Guantanamo and Bagram Detainees in Afghanistan." (April 2008), available at www.humanrightsfirst.org/us_law/detainees/reports/arbitrary-justice/exec_sum.html.

C. Negotiate assurances with host governments as early as possible in future conflicts.

Recommendation: The Task Force recommends that, in the future, where it appears likely that the Department of Defense will hold and ultimately seek to transfer a significant numbers of detainees in a situation where no other specific legal framework governing transfers applies (such as applicable provisions of the Geneva Conventions or a United Nations Security Council Resolution), the Department of Defense, in cooperation with the State Department, should negotiate assurances with the host government, if possible, at an early stage in the process to govern treatment of transferred detainees.

While concerns about torture usually arise in individualized contexts, there are situations in which the U.S. government may have serious concerns about whether a group of detainees captured during an armed conflict may be tortured, treated inhumanely, or otherwise mistreated if transferred to a particular government's detention system. In these situations, there may be a tension between the limitations imposed on the U.S. military presence in another country where that presence depends on the country's consent (including consent to detain), and the U.S. commitment to avoid transfers where it is more likely than not that the person to be transferred will be tortured. To address this problem, the Task Force believes that the issue of transfers should be confronted at an early stage in the military deployment.

D. Department of Defense policies or directives

Recommendation: The Department of Defense should promulgate policies or directives consistent with the policy statement in Section 2242(a) of the 1998 Foreign Affairs Reform and Restructuring Act. Such policies or directives should include an express statement that the Department of Defense may not transfer any person to a foreign entity where it is more likely than not that the person will be tortured.

As a matter of U.S. domestic law, Section 2242(b) of the 1998 Foreign Affairs Reform and Restructuring Act directed the heads of the appropriate agencies to prescribe regulations to implement the U.S. obligations under CAT Article 3.¹⁰ The Justice and State Departments promulgated regulations to implement these obligations in the immigration and extradition contexts, respectively.¹¹ Immigration and extradition are the two contexts in which the U.S. obligations under the CAT are engaged directly, as they involve transfers from U.S. territory to another state. Section 2242 also contains a policy

¹⁰ 8 U.S.C. § 1231 note.

¹¹ See 8 C.F.R. § 208.17 et seq. and 8 C.F.R. § 1208.17 et seq. (Department of Justice (and now Department of Homeland Security) regulations); 22 C.F.R. § 95.2 (Department of State regulations). (Note that the degree of procedural protection afforded in the immigration context is considerably greater than in the extradition context.)

statement that asserts, “[I]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.” This recommendation is to implement this policy directive.

IV. Specific recommendations for any transfers that may take place by or with the support of elements of the Intelligence Community

The Task Force formulated a number of recommendations that would apply to transfers conducted pursuant to intelligence authorities. With the exception of the recommendation that follows immediately below, these recommendations are found in the classified annex.

A. Intelligence Community policies or directives

Recommendations:

-- The Director of National Intelligence, in consultation with the relevant elements of the Intelligence Community, and subject to the direction and approval of the National Security Adviser, should draft and promulgate general policy guidance to the Intelligence Community concerning transfers. This guidance should be public and should be consistent with Section 2242(a) of the 1998 Foreign Affairs Reform and Restructuring Act.

-- Elements of the Intelligence Community that may be called upon to conduct or participate in transfers should adopt implementing regulations or directives for their conduct, including standards for secure and humane treatment of detainees during transportation, and an express statement that the Intelligence Community element may not transfer any person to a foreign entity where it is more likely than not that the person will be tortured and a requirement that the element will take appropriate steps to investigate any credible allegations that a transferred person has been subjected to torture by a foreign entity. The regulations or directives should make clear that these considerations are an express part of the review process required before approving a transfer conducted or facilitated by an element of the Intelligence Community.

APPENDIX A

Executive Order 13491

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release
2009

January 22,

EXECUTIVE ORDER

- - - - -

ENSURING LAWFUL INTERROGATIONS

By the authority vested in me by the Constitution and the laws of the United States of America, in order to improve the effectiveness of human intelligence-gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and to take care that the laws of the United States are faithfully executed, I hereby order as follows:

Section 1. Revocation. Executive Order 13440 of July 20, 2007, is revoked. All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order. Heads of departments and agencies shall take all necessary steps to ensure that all directives, orders, and regulations of their respective departments or agencies are consistent with this order. Upon request, the Attorney General shall provide guidance about which directives, orders, and regulations are inconsistent with this order.

Sec. 2. Definitions. As used in this order:

(a) "Army Field Manual 2-22.3" means FM 2-22.3, Human Intelligence Collector Operations, issued by the Department of the Army on September 6, 2006.

(b) "Army Field Manual 34-52" means FM 34-52, Intelligence Interrogation, issued by the Department of the Army on May 8, 1987.

(c) "Common Article 3" means Article 3 of each of the Geneva Conventions.

(d) "Convention Against Torture" means the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 (1988).

(e) "Geneva Conventions" means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

(f) "Treated humanely," "violence to life and person," "murder of all kinds," "mutilation," "cruel treatment," "torture," "outrages upon personal dignity," and "humiliating and degrading treatment" refer to, and have the same meaning as, those same terms in Common Article 3.

(g) The terms "detention facilities" and "detention facility" in section 4(a) of this order do not refer to facilities used only to hold people on a short-term, transitory basis.

Sec. 3. Standards and Practices for Interrogation of Individuals in the Custody or Control of the United States in Armed Conflicts.

(a) Common Article 3 Standards as a Minimum Baseline. Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340-2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture),

nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

(b) Interrogation Techniques and Interrogation-Related Treatment. Effective immediately, an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3 (Manual). Interrogation techniques, approaches, and treatments described in the Manual shall be implemented strictly in accord with the principles, processes, conditions, and limitations the Manual prescribes. Where processes required by the Manual, such as a requirement of approval by specified Department of Defense officials, are inapposite to a department or an agency other than the Department of Defense, such a department or agency shall use processes that are substantially equivalent to the processes the Manual prescribes for the Department of Defense. Nothing in this section shall preclude the Federal Bureau of Investigation, or other Federal law enforcement agencies, from continuing to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises.

(c) Interpretations of Common Article 3 and the Army Field Manual. From this day forward, unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government may, in conducting interrogations, act in reliance upon Army Field Manual 2-22.3, but may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation -- including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2-22.3, and its predecessor document, Army Field Manual 34-52 -- issued by the Department of Justice between September 11, 2001, and January 20, 2009.

Sec. 4. Prohibition of Certain Detention Facilities, and Red Cross Access to Detained Individuals.

(a) CIA Detention. The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.

(b) International Committee of the Red Cross Access to Detained Individuals. All departments and agencies of the Federal Government shall provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States Government, consistent with Department of Defense regulations and policies.

Sec. 5. Special Interagency Task Force on Interrogation and Transfer Policies.

(a) Establishment of Special Interagency Task Force. There shall be established a Special Task Force on Interrogation and Transfer Policies (Special Task Force) to review interrogation and transfer policies.

(b) Membership. The Special Task Force shall consist of the following members, or their designees:

- (i) the Attorney General, who shall serve as Chair;
- (ii) the Director of National Intelligence, who shall serve as Co-Vice-Chair;
- (iii) the Secretary of Defense, who shall serve as Co-Vice-Chair;
- (iv) the Secretary of State;
- (v) the Secretary of Homeland Security;
- (vi) the Director of the Central Intelligence Agency;
- (vii) the Chairman of the Joint Chiefs of Staff; and
- (viii) other officers or full-time or permanent part-time employees of the United States, as determined by the Chair, with the concurrence of the head of the department or agency concerned.

(c) Staff. The Chair may designate officers and employees within the Department of Justice to serve as staff to support the Special Task Force. At the request of the Chair, officers and employees from other departments or agencies may serve on the Special Task Force with the concurrence of the head of the department or agency that

employ such individuals. Such staff must be officers or full-time or permanent part-time employees of the United States. The Chair shall designate an officer or employee of the Department of Justice to serve as the Executive Secretary of the Special Task Force.

(d) Operation. The Chair shall convene meetings of the Special Task Force, determine its agenda, and direct its work. The Chair may establish and direct subgroups of the Special Task Force, consisting exclusively of members of the Special Task Force, to deal with particular subjects.

(e) Mission. The mission of the Special Task Force shall be:

(i) to study and evaluate whether the interrogation practices and techniques in Army Field Manual 2-22.3, when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies; and

(ii) to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.

(f) Administration. The Special Task Force shall be established for administrative purposes within the Department of Justice and the Department of Justice shall, to the extent permitted by law and subject to the availability of appropriations, provide administrative support and funding for the Special Task Force.

(g) Recommendations. The Special Task Force shall provide a report to the President, through the Assistant to the President for National Security Affairs and the Counsel to the President, on the matters set forth in subsection (d) within 180 days of the date of this order, unless the Chair determines that an extension is necessary.

(h) Termination. The Chair shall terminate the Special Task Force upon the completion of its duties.

Sec. 6. Construction with Other Laws. Nothing in this order shall be construed to affect the obligations of officers, employees, and other agents of the United States Government to comply with all pertinent laws and treaties of the United States governing detention and interrogation, including but not limited to: the Fifth and Eighth Amendments to the United States Constitution; the Federal torture statute, 18 U.S.C. 2340-2340A; the War Crimes Act, 18 U.S.C. 2441; the Federal assault statute, 18 U.S.C. 113; the Federal maiming statute, 18 U.S.C. 114; the Federal "stalking" statute, 18 U.S.C. 2261A; articles 93, 124, 128, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 893, 924, 928, and 934; section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd; section 6(c) of the Military Commissions Act of 2006, Public Law 109-366; the Geneva Conventions; and the Convention Against Torture. Nothing in this order shall be construed to diminish any rights that any individual may have under these or other laws and treaties. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

BARACK OBAMA

THE WHITE HOUSE,
January 22, 2009.

#Appendix B

Transfer Scenarios Considered by the Task Force

1. Extradition

In the extradition process, the Secretary of State is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country to face prosecution or to serve a sentence. Decisions on extradition where there is a potential issue of torture are presented to the Secretary (or by delegation, to the Deputy Secretary) pursuant to regulations at 22 C.F.R. Part 95.

In making the determination whether to surrender, the Secretary or Deputy Secretary considers whether a person facing extradition from the United States is “more likely than not” to be tortured in the state requesting extradition. Where allegations relating to torture are made or the issue is otherwise brought to the Department’s attention, appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary or Deputy Secretary on whether to sign the surrender warrant. The regulations provide that the Secretary or Deputy Secretary’s decision is not subject to judicial review. This regulatory bar currently is being challenged in litigation in California.¹²

Surrender may be conditioned on the requesting state’s provision of specific assurances relating to torture or to aspects of the requesting state’s criminal justice system that protect against mistreatment. Assurances of the latter kind may include, for example, commitments that the fugitive will have regular access to counsel and the full protections afforded under that State’s constitution or laws.

Assurances against torture have been sought in only a small number of extradition cases. These assurances are generally in writing, explicit as to protection against torture, include a monitoring mechanism, and are from a ministerial level official or above. If that official is the Minister of Foreign Affairs -- the normal channel for extradition -- they generally will not be acted upon until it has been directly confirmed with the officials who will be responsible for the individual while in custody that they are aware of the assurances provided and committed to complying with them.

Prior to negotiating a new extradition treaty, the United States undertakes a review of the potential treaty partner’s human rights record to determine if it will respect both the rule of law and an extradited individual’s human rights, including protections against torture. (It is in the U.S. Government’s interest to do so, as most of its modern extradition treaties envision that the United States will extradite U.S. nationals pursuant to appropriate extradition requests.) Although some extradition treaties predate this practice, in most cases there is thus a built-in screening mechanism in place in the

¹² *Trinidad v. Benov*, CV 08-7719 (C.D. CA February 13, 2009).

extradition context that reduces the likelihood that questions about torture in the requesting country will arise in the extradition context.

The Executive Branch acknowledges that it occasionally seeks assurances in extradition cases but typically declines to disclose whether it has sought assurances in specific cases and rarely reveals the contents of any assurances in the extradition context. Under the rule of non-inquiry, courts will generally not examine the fairness of the system to which the person will be extradited, and the United States has taken the position that its decisions in extradition cases involving torture allegations, including the existence and nature of assurances, are similarly non-justiciable.

2. Immigration proceedings

As with extradition, the CAT is the primary source on the limitation of removals where it is more likely than not that the transferee will face torture. In the immigration context, regulations codified at 8 C.F.R. § 208.18(c) and 1208.18(c) specifically contemplate that the United States may use diplomatic assurances where the person subject to removal raises a claim under the CAT. Those regulations provide that the Secretary of State may forward to the Secretary of Homeland Security assurances that the Secretary of State has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

In practice, the Department of State seeks assurances upon the request of the Department of Homeland Security (“DHS”) and exercises discretion in deciding in particular cases whether to seek assurances upon receiving such a request. If the Secretary of State obtains and forwards such assurances to the Secretary of DHS, the Secretary of DHS determines, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien’s removal to that country consistent with Article 3 of the CAT. Under the regulation, if the assurances are determined to be sufficiently reliable, the Secretary of DHS may then terminate any deferral of removal the alien had been granted as to that country and the alien’s torture claim may not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

Since implementation of the regulations in 1999, the Immigration and Naturalization Service and DHS have relied on diplomatic assurances to remove only three people. In contrast, approximately five thousand individuals have enjoyed protection in immigration proceedings through the withholding or deferral of removal on grounds that it was more likely than not that they would be tortured.

While assurances are tailored to the specific case, in general in the immigration context, they are in writing from the official or officials at the ministerial level (or above) who will be directly responsible for the individual while in the custody of that country, explicit as to protection against torture, and include a monitoring mechanism.

A recent case involving the removal of an Egyptian is worth noting. In this case, a Third Circuit panel held that due process under the Fifth Amendment requires that, to terminate an alien's deferral of removal on the basis of assurances, the alien must be given (1) notice and an opportunity to test the reliability of the assurances; (2) an opportunity to present before a neutral and impartial decision-maker evidence and an argument to make his case; and (3) an individual determination based on the record disclosed to the alien.¹³ The Third Circuit declined rehearing *en banc*; the U.S. Government decided against seeking certiorari.

Another high profile removal case is the case of Maher Arar. The Office of the Inspector General of DHS issued a report in March 2008 on the removal of Arar from the United States to Syria, where Arar claims to have been tortured. A brief discussion of this report is included in the classified annex.

3. Transfers pursuant to the Geneva Conventions

Armed conflicts present another scenario in which the United States may find itself in a position of wanting to transfer or repatriate people to other states. In international armed conflicts in which the 1949 Geneva Conventions apply, those treaties contain rules governing the transfer of particular categories of people between states.

The Third Geneva Convention contains two provisions relevant to transfers of prisoners of war ("POWs"). Article 118 provides, "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The article is silent about what should happen to a POW who genuinely fears repatriation. During the Convention's negotiations, no state condemned the notion of forced repatriation.¹⁴ Nevertheless, state practice related to Article 118 suggests a policy evolution in the meaning of the provision. After the Korean War, North Korea, China, and the USSR contended that the obligation to repatriate prisoners under Article 118 was absolute. In contrast, the UN Command (led by the United States) argued that forcible repatriation "was inconsistent with the . . . spirit of the Geneva Conventions."¹⁵ The issue also arose in the first Gulf War, where the United States and Saudi Arabia granted refugee status to some Iraqi POWs who opted not to return to Iraq. States thus appear increasingly willing to respect the concerns of POWs who fear returning to their states of nationality, though the issue has not arisen in about twenty years.¹⁶

¹³ *Khouzam v. Attorney General*, 549 F.3d 235 (3d Cir. 2008).

¹⁴ J.P. Charmatz & Harold M. Witt, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 *Yale L. J.* 391, 401 (1953).

¹⁵ Theodor Meron, *The Humanization of Humanitarian Law*, 94 *Am. J. Int'l L.* 239, 255; Christiane Shields-Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities* (1977).

¹⁶ It is worth noting that there are likely to be more options available for relocating a POW, particularly one whose conduct conformed to the laws and customs of warfare, than for relocating an unprivileged belligerent, whom many states will consider a security risk.

Article 12 of the Third Geneva Convention also is relevant to transfers. That article states, “Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” When pursuing resettlement or transfer options to third countries, the United States has sometimes concluded POW agreements pursuant to Article 12. These agreements often set forth the type of treatment the transferred POW will receive (i.e., treatment consistent with the Third Geneva Convention); grant the transferring state and the International Committee of the Red Cross (“ICRC”) access to the transferred detainee; and contain provisions governing the detainee’s repatriation or further transfer.

The Fourth Geneva Convention offers greater specific protections against “non-refoulement.” For individual “protected persons” in the territory of a party to the conflict, the Convention states, “In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”¹⁷

In the cases of U.S. transfers under the Third and Fourth Geneva Conventions, the United States transfer policies to date have, to the Task Force’s knowledge, met or exceeded the relevant U.S. treaty obligations.

4. Transfers from the Guantanamo Bay detention facility

To date, the United States has transferred more than 500 detainees from Guantanamo to their states of nationality or to third states. U.S. policy has been to seek humane treatment assurances with respect to all Guantanamo transfers in which it foresees that the receiving government will take post-transfer security measures to mitigate the threat a detainee poses.¹⁸ In situations in which the United States expects the detainee to be released after his transfer, fewer issues arise with respect to humane treatment. Accordingly, the United States has not always sought assurances in those cases.

The USG’s practice with regard to Guantanamo assurances has evolved over the years. The current practice is wherever possible to negotiate a “framework” document with each country that has a national at Guantanamo, and then to seek specific assurances prior to each individual transfer to which the framework will apply. The USG has negotiated framework assurances with every major country that has a detainee remaining at Guantanamo and where repatriation is seen as a possibility. Therefore, at this time, there is no expectation that new framework assurance negotiations will be required.

¹⁷ Fourth Geneva Convention, art. 45.

¹⁸ This paper considers “releases” to mean the full release without conditions of an individual. In contrast, the paper considers “transfers” to mean the transfer of an individual from the custody of the U.S. Government to the custody or control of a foreign government, whether for continued detention, the imposition of security measures, or other similar oversight.

Although the content of those assurances varies somewhat, to take into account the particular circumstances of the receiving countries (such as variable treaty obligations, or the absence or existence of ICRC access arrangements to detention facilities), they generally include: (1) an assurance that the transferee will be treated humanely and in accordance with the receiving country's obligations under the CAT (or under comparable international obligations when the receiving country is not a party to the CAT); and (2) an assurance that either the USG or a mutually-agreed third party will enjoy post-transfer access to the transferees to monitor their treatment. While the USG requests humane treatment and access assurances as a general rule, it insists on less-extensive assurances in cases where it determines that the risk of inhumane treatment, with or without assurances, is negligible.

The Department of State has taken the lead in bilateral negotiations to obtain assurances for Guantanamo transfers and in evaluating the sufficiency of the assurances obtained. In many cases, the United States has obtained assurances by means of an exchange of diplomatic notes or letters between senior government officials, but in other circumstances, the State Department has found assurances to be adequate when stated orally and reported by the receiving U.S. Embassy in an official cable or reduced to writing in the form of an agreed minutes of a conversation between meeting participants.

In addition, the ICRC has the opportunity to conduct exit interviews with detainees being transferred from Guantanamo. This process provides a further opportunity to explore possible concerns about post-transfer treatment.

There have been few complaints about mistreatment of Guantanamo detainees who have been transferred to their home states or third states. However, human rights groups have alleged that a few Guantanamo transferees sustained abuse after being transferred.¹⁹

As in extradition and (to date) immigration cases, the U.S. policy has been that the United States will not unilaterally make public the contents of the assurances it has sought in the Guantanamo context. As explained in several sworn declarations filed in various federal courts, this policy is designed to help "avoid the chilling effects of making such discussions public and the possible damage to our ability to conduct foreign relations... There also may be circumstances where it may be important to protect sources of information (such as sources within a foreign government) about a

¹⁹ "Ill-Fated Homecomings" Human Rights Watch (September 2007) (making allegations with regard to the post-transfer treatment of Abdullah al-Hajji Ben Amor and Lotfi Lagha, who were transferred to Tunisia from Guantanamo on June 17, 2007), *available at* www.hrw.org/en/reports/2007/09/04/ill-fated-homecomings. "The 'Stamp of Guantanamo.' The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the U.S.," Human Rights Watch (March 2007), *available at* www.hrw.org/reports/2007/russia0307.

government's willingness or capability to abide by assurances concerning humane treatment or relevant international obligations."²⁰

5. Military transfers within or from Afghanistan

During the conflict in Afghanistan, the United States – as part of both Operation Enduring Freedom (“OEF”) and the International Security Assistance Force (“ISAF”) – has detained large numbers of people. It has released some quickly; has held others in its detention facilities in Afghanistan; has transferred some to Guantanamo Bay; has transferred some to the Islamic Republic of Afghanistan (“IROA”); and has transferred some to their states of nationality.

Transfers within Afghanistan: In 2005, the USG negotiated a transfer framework with the IROA for transfers of detainees to the IROA for continued detention and prosecution. As part of this framework, the USG obtained humane treatment assurances, assurances against the use of torture, and assurances of U.S. or third party access. The USG considers the 2005 assurances to apply both to the transfer of individuals detained by U.S. forces as part of OEF and to the transfer of individuals detained by U.S. forces operating within the ISAF coalition. In 2007, the United States, with other ISAF partners, concluded a subsequent arrangement with the IROA that gives ISAF even greater access to detainees whom ISAF has transferred.²¹ The 2007 arrangement provides that officials from each signatory government will “enjoy access to Afghan detention facilities to the extent necessary to ascertain the location and treatment of any detainee transferred by that government to the Government of Afghanistan.” It also gives ISAF governments the opportunity to conduct private interviews with transferred detainees, and permits the ICRC and the Afghan Independent Human Rights Commission to gain access to IROA facilities. However, as a practical matter, USG monitoring of ISAF detainees transferred to the IROA has been far less robust than USG monitoring of OEF detainees transferred to the IROA because of the regular U.S. presence in the facilities to which OEF detainees are transferred.

Transfers from Afghanistan. Where the U.S. military detains third country nationals in the Afghanistan conflict and seeks to transfer those individuals to their home states, it applies the same non-refoulement policy that it applies to Guantanamo transfers, and where appropriate seeks third-country assurances prior to such transfers.

6. Military transfers within or from Iraq

The USG has not sought assurances from the Government of Iraq (“GOI”) concerning release within Iraq or transfer to Iraqi custody of Iraqi nationals detained by

²⁰ Declaration of Ambassador Clint Williamson, para. 6 (June 8, 2007), available at <http://www.state.gov/documents/organizations/116359.pdf>. Declaration of Pierre-Richard Prosper, para. 9 (March 5, 2005), available at <http://www.state.gov/documents/organizations/45849.pdf>.

²¹ Available at <http://www.afghanistan.gc.ca/canada-afghanistan/documents/detainee-detenu.aspx?lang=eng>.

the multinational force in Iraq (“MNF-I”). In December 2008, the United States concluded a new framework arrangement with the GOI pursuant to which the United States now conducts detentions in Iraq.

Transfers within Iraq. U.S. forces in Iraq currently operate under a Security Agreement (“SA”) that the USG concluded with the GOI in late 2008. The SA provides that “[i]n the event the United States Forces detain or arrest persons as authorized by this Agreement or Iraqi law, such persons must be handed over to competent Iraqi authorities within 24 hours from the time of their detention or arrest.” With regard to detainees who were being held by U.S. Forces on the date the SA entered into force, January 1, 2009, the SA provides: “Competent Iraqi authorities shall issue arrest warrants for [such] persons who are wanted by them. The United States Forces shall act in full and effective coordination with the Government of Iraq to turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant and shall release all of the remaining detainees in a safe and orderly manner, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this agreement.”

Although it would be politically difficult to refuse an Iraqi request for transfer, if the USG were to conclude that there was reason to believe that such a detainee was more likely than not to be tortured if he or she were transferred to Iraq, the matter could be raised with the GOI at the diplomatic level. Moreover, the Solicitor General in the USG’s *Munaf* and *Omar* briefs to the Supreme Court stated (prior to entry into force of the SA, but nevertheless still relevant to the above discussion), “The United States would object to the MNF-I’s transfer of Omar or Munaf to Iraqi custody if it believed they would likely be tortured.” Although the Supreme Court in *Munaf* held that it would not block the decision to transfer, the decision in *Munaf* reserved the “more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway.”²²

Transfers from Iraq. To date, MNF-I has not released or transferred large numbers of third country national detainees. Third country nationals detained by MNF-I were provided an opportunity (by way of a questionnaire) to express to the USG fears of persecution or mistreatment if transferred. An interagency group, including the U.S. Embassy and the Department of Defense, evaluated the detainees’ responses and made a recommendation to the Commander, who decided whether to transfer each individual. If appropriate, relevant assurances would be sought from the receiving country, although the Task Force is not aware of a case to date where this happened. Additionally, MNF-I notified the ICRC of the potential transfer and offered the ICRC the opportunity to conduct an exit interview in which the ICRC could explore the detainee’s possible fears of torture or persecution. However, the ICRC did not always avail itself of this opportunity to conduct exit interviews. Lack of an ICRC exit interview did not preclude the transfer of these detainees to the GOI or other states.

These types of transfers were suspended at the request of the GOI, which expressed a desire to prosecute all such third country nationals. Recently, the GOI has

²² *Munaf v. Geren*, 128 S. Ct. 2207 (2008).

issued arrest warrants for all third country nationals in MNF-I custody. MNF-I has started turning these third-country nationals over to the Iraqi Ministry of Justice pursuant to the SA.

7. Transfers of individuals from one country to another under intelligence authorities

There has been much public speculation regarding alleged transfers by elements of the Intelligence Community pursuant to intelligence authorities. The Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001 (hereinafter the "Joint Inquiry") found that such transfers, also referred to as "renditions," were an important tool against terrorism.²³ In a 2002 written statement to the Joint Inquiry, then-CIA Director George Tenet reported that, prior to September 11, 2001, the "CIA (in many cases with the FBI) had rendered 70 terrorists to justice around the world."

A transfer under intelligence authorities would occur under Section 503 of the National Security Act of 1947, as amended, which provides that the President may authorize "covert action" when "necessary to support identifiable policy objectives of the United States" and when "important to the national security of the United States."²⁴ A critical aspect of these covert action activities is that the role of the United States will not be apparent or acknowledged publicly. Because, by definition, covert action is not subject to public scrutiny, the National Security Act contains requirements for congressional notification. Furthermore, section 503(a)(5) specifies that the President "may not authorize any action that would violate the Constitution or any statute of the United States."²⁵

²³ S. Rep. No. 107-351, H.R. Rep. No. 107-792, Report of the Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, at 225 (December 2002).

²⁴ 50 U.S.C. § 413b.

²⁵ Id. § 413b(a)(5). *See also* S. Rep. No. 106-279 at 27 (2000) ("United States intelligence activities currently are subject to a comprehensive regime of U.S. statutes, regulations and presidential directives that provide authorizations, restrictions, and oversight. In addition, U.S. agencies involved in intelligence activities have extensive internal regulations and procedures governing appropriate levels of approval and authorization depending on the nature of such activities... It is important that the Intelligence Community be able to look at this clear and precise body of U.S. domestic law, regulation and procedures as the controlling source of authority for its activities." To do otherwise would restrict "intelligence activities that are otherwise entirely consistent with U.S. law and policy.").