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USA: Detainees continue to bear costs of delay and lack of remedy

Minimal judicial review for Guantánamo detainees 10 months after *Boumediene*

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1. Summary

While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing
US Supreme Court, *Boumediene v. Bush*, 12 June 2008

The US administration is committed to closing the Guantánamo detention facility by 22 January 2010 under an executive order signed by President Barack Obama on 22 January 2009. However, the future remains uncertain for the detainees still held there as the executive review of their cases and of US detention policy ordered by the President gets underway. This uncertainty will continue to cause distress, as a military review of detention conditions ordered by President Obama has acknowledged. "Not knowing when they might depart Guantánamo has almost certainly increased tension and anxiety within the detainee population", the review concluded in February 2009. It is now nearly six years since the International Committee of the Red Cross (ICRC) first revealed its concern about the negative psychological impact the indefinite detentions were having on large numbers of the individuals held at Guantánamo. The impact on families of the detainees has likewise been serious.

While the Guantánamo detentions receive yet more executive review, which to date has remained largely non-transparent under the new administration as under its predecessor, the detainees are entitled to judicial review. Yet 10 months after the US Supreme Court ruled, in *Boumediene v. Bush* on 12 June 2008, that the detainees were entitled to a "prompt" habeas corpus hearing to challenge the lawfulness of their detention, only a handful of them have received a hearing on the merits of their challenges. Moreover, indefinite detention has continued even in cases where judges have ordered the immediate release of detainees after such hearings. Having so far resisted the release into the USA of detainees who cannot be returned to their own countries, including detainees whose detention has been ruled unlawful by the US courts, the new administration's default position to date appears to have been to expect other governments to accept such detainees, with whatever delays negotiations to this end may entail. In the case of 17 Uighur detainees who would face possible torture and execution if returned to China, the diplomatic negotiations have been unsuccessful for years and they were still in Guantánamo in early April 2009, six months after a judge ruled their detention unlawful and ordered their immediate release into the USA.
At the time of the presidential inauguration on 20 January 2009, there were some 245 men still held at Guantánamo, about 200 of whom had habeas corpus petitions pending in District

Court. Between inauguration and early April 2009, one detainee was released from Guantánamo, and the rest remained in indefinite detention there. Amnesty International considers it unacceptable that any Guantánamo detainee continues to be held without charge or trial, and calls for each detainee to be either charged with a recognisable criminal offence for trial under fair procedures in existing federal courts or released immediately.

In the *Boumediene* ruling, which came six and a half years after detentions began at Guantánamo (see **Appendix 2**), the Supreme Court rejected the Bush administration's arguments that these men, as non-US nationals held outside the sovereign territory of the USA, were beyond the reach of the fundamental legal protection of habeas corpus. Neither their designation as "enemy combatants" nor their presence at Guantánamo Bay barred them from seeking habeas corpus, and the Court declared as unconstitutional attempts by the administration and Congress, through the 2006 Military Commissions Act (MCA), to strip the detainees of this right. It dismissed as deficient the substitute scheme established to replace habeas corpus proceedings. That scheme consisted of Combatant Status Review Tribunals (CSRTs), panels of three military officers empowered to review the detainee's "enemy combatant" status, with limited judicial review of final CSRT decisions under the 2005 Detainee Treatment Act (DTA). The CSRTs, established by the Bush administration more than two years after the Guantánamo detentions began, could rely on secret and coerced information in making their determinations on the status of detainees who were not entitled to legal representation for the CSRT hearings.

Regrettably, the Supreme Court made no mention of international human rights law in its *Boumediene* ruling, thereby missing an opportunity to call the government to account for its invocation of a global "war" to disregard its international human rights obligations. The right under international law of anyone deprived of their liberty, in any manner or on any grounds, to take proceedings before a court to challenge the lawfulness of their detention and be ordered released if it is found to be unlawful is a right that not only safeguards the right to liberty. It also provides protection against a variety of human rights violations, including the right not to be subjected to enforced disappearance, secret detention, arbitrary detention, unlawful transfer, torture and other cruel, inhuman or degrading treatment, and the right to a fair trial by an independent and impartial tribunal established by law. Anyone whose rights have been violated must be able to seek effective remedy, including through the courts.[1] Even in an emergency which threatens the life of the nation, "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished".[2] The continuing delay faced by the Guantánamo detainees in having effective access to judicial review violates this principle.

The new administration appears to be rejecting "war on terror" as the catchphrase for US counter-terrorism efforts, and has dropped use of the term "enemy combatant" in the Guantánamo detainee litigation. However, it does not yet seem to be rejecting the substance of the insidious global war framework developed by its predecessor and, like the latter, is citing the Authorization for Use of Military Force (AUMF), a broadly worded congressional resolution passed after the attacks of 11 September 2001, as the basis for detentions. As **Chapter 2** of this report argues, the USA should ensure that whatever label it chooses for its counter-

[1] See International Covenant on Civil and Political Rights (ICCPR), articles 9(4) and 2.
[2] Human Rights Committee General Comment 29, UN Doc: CCPR/C/21/Rev.1/Add.11 (2001), para. 16.

terrorism strategy, it must be accompanied by policies that place respect for human rights and international law at the centre of government actions. The USA must accept that it is subject to international human rights obligations at all times, in all places and in respect of all persons over whom it exercises control. In keeping with its position that all Guantánamo detainees be charged or released immediately, Amnesty International urges the USA to rely only on criminal justice grounds, and not the AUMF or other vague purported legal authority, in seeking to justify any continued detention of any of the detainees in habeas corpus proceedings.

Chapter 3 describes how the Bush administration responded to the *Boumediene* ruling by seeking to preserve as much executive control over the detainees as possible. Its use of national security arguments, resort to its global "war" paradigm, and its extensive reliance on classified information, ensured delays in habeas corpus proceedings. In the seven months between *Boumediene* and the presidential inauguration, only one judge ruled on the merits of habeas corpus petitions challenging detainees' indefinite custody as "enemy combatants". Of the nine detainees on whose cases he ruled during that time, he found six were unlawfully detained and should be released immediately. The other three, he said, could remain in detention. Earlier, 17 Uighur detainees, no longer considered "enemy combatants" by the Bush administration, had been ordered released into the USA by another District Court judge.

Chapter 4 outlines the executive review of detentions ordered by President Obama and illustrates how post-*Boumediene* judicial review has continued to face delays into the new administration's term. For example, in the case of detainees charged by the Bush administration for trial by military commission, the new administration has been seeking to have their habeas corpus petitions dismissed on the grounds that the charges against them are still pending, even though the military commissions have been suspended. Amnesty International is also concerned by the statement filed by the government in March 2009 in District Court that "at the direction of the Secretary of Defense, the Department of Defense continues to investigate and evaluate cases for potential trial by military commission". The organization is calling on the administration to abandon the commissions permanently, and to facilitate speedy habeas corpus review for any detainee seeking it.

As listed in **Appendix 3**, during the first two and a half months of the new presidency, only three detainees received rulings on the merits of their habeas corpus petitions, including one whose case was heard under the previous administration. By early April 2009, the 17 Uighurs and four other detainees whose release had been judicially ordered remained in Guantánamo. In February 2009, in *Kiyemba v. Obama*, the Court of Appeals overturned the District Court's release order on the Uighurs. As described in **Chapter 4**, a brief filed in early March suggested that the new administration was interpreting that ruling as supporting the notion that when a District Court orders the immediate release of a detainee from Guantánamo, the administration only need comply only to the extent that negotiations with other governments on the case allow. Lawyers for the Uighurs have appealed to the US Supreme Court to intervene, arguing that to allow the *Kiyemba* ruling to stand would "eviscerate" the *Boumediene* ruling.

In *Boumediene*, the Supreme Court declared as unconstitutional Section 7 of the MCA, or at least that part of it which purported to strip the detainees of their right to habeas corpus. Section 7 consists of two parts, however. As **Chapter 5** of this report outlines, the Bush administration argued in District Court, with some success, that the *Boumediene* ruling had

left intact Section 7's second part – that "no court, justice, or judge shall have jurisdiction to hear or consider any other action... relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of anyone held as an "enemy combatant" by the USA. Thus, according to the Bush administration, the courts remained stripped of jurisdiction to consider challenges to any aspect of detention other than what it called the "core habeas" question of the lawfulness of detention. Given the backdrop to the detentions – including torture and other ill-treatment, unfair trial proceedings, secret detainee transfers and health-related consequences of years of indefinite confinement in harsh conditions – this is of acute concern. The new administration has adopted the same position as its predecessor on MCA Section 7. Yet under international law, anyone whose rights have been or are being violated in custody must be able to seek effective remedy, including through the courts. The importance of judicial review – to challenge the lawfulness *and* conditions of detention – is illustrated by three case examples provided in **Appendix 1** to this report.

As **Chapter 6** describes, and is further illustrated by two of the three cases in **Appendix 1**, those Guantánamo detainees previously held in the secret detention program authorized by the previous administration and operated by the Central Intelligence Agency (CIA) face particular obstacles in pursuing post-*Boumediene* habeas challenges to their detention and judicial remedy for the human rights violations committed against them. The Bush administration exploited secrecy in its pursuit of unchecked executive power in the context of its "war on terror", as well as legislative measures that furthered this end. President Obama has taken substantial steps to end the CIA's use of secret detention, and has committed his administration to "creating an unprecedented level of openness in Government", and to changing "the culture of secrecy". Positive developments in this regard have been the public release of several Justice Department legal memorandums written under the previous administration and the issuing of guidelines promising more openness in relation to requests by the public for government information under the Freedom of Information Act (FOIA).[3]

Amnesty International has urged the new administration, not only to expressly reject and prohibit *all* use of secret detention by *any* US agency, but also to ensure that classification of information is no longer permitted, by design or effect, to facilitate human rights violations or block accountability and remedy. As outlined in **Chapter 7**, hopes for a more transparent approach, including in relation to accountability and remedy, were dealt a blow in federal court on 9 February 2009, when the Justice Department invoked the "state secrets privilege" in the same way as it had under the Bush administration to seek dismissal of a lawsuit brought by detainees who allege they were subjected to various human rights violations as part of the USA's program of 'rendition' and secret detention.

Chapter 7 also addresses the stance adopted by the new administration in a case brought against various former military officials by four UK nationals previously held in Guantánamo. In March 2009, the Justice Department asserted that the *Boumediene* ruling had not altered the legal landscape as far as such a lawsuit was concerned, that the recent ruling by the Court of Appeals in the *Kiyemba* case had clarified that "aliens held at Guantánamo do not have due process rights", and that such lawsuits brought by foreign nationals against US military

[3] Department of Justice news releases, 2 March 2009, http://www.usdoj.gov/opa/pr/2009/March/09-ag-181.html, and 19 March 2009, http://www.usdoj.gov/opa/pr/2009/March/09-ag-253.html.

officials should be dismissed on the purported basis that allowing the courts to hear actions in relation to "aliens detained during wartime would enmesh the courts in military, national security, and foreign affairs matters that are the exclusive province of the political branches".

In sum, post-*Boumediene* litigation over the first two and a half months of the new administration raises a number of concerns in terms of progress towards the USA's compliance with its international obligations. The celebrations prompted by President Obama's executive orders of 22 January 2009 have given way to disquiet about some of the positions adopted by the new administration, including in relation to the detentions at Guantánamo, to remedy and accountability, and to the detentions at the US airbase in Bagram in Afghanistan, on which the new administration has adopted wholesale its predecessor's post-*Boumediene* arguments for denying them access to the courts.[4] It is not yet clear if this lack of progress can be attributed to inefficiencies inherent in the handover between administrations, or to the new administration adopting a "holding" position while it reviews its policy options on detentions, or perhaps even to the temporary absence of high-level policy directives handed down to personnel in the Justice Department and Pentagon held over from the previous administration.

Meanwhile, Amnesty International is concerned by the continued delays in judicial review for those Guantánamo detainees seeking it. Ordinarily in habeas corpus proceedings, government authorities are required to bring an individual physically before the court and show legal grounds for their detention. If the government is unable to do so promptly (i.e. within a matter of days), the individual is entitled to be released. This is the bedrock guarantee against arbitrary detention; if it is not fully respected by the government and courts in a national legal system, the right to liberty is gravely undermined.

Resolution of the Guantánamo cases – as well as legislative and policy initiatives to ensure accountability and remedy – are already years overdue. Each day that passes without the full and clear rule of law being applied to each detainee's case is a day that compounds the years of unlawful US conduct. Amnesty International has welcomed the new administration's initial moves on detention and interrogation policy, but is concerned to ensure that the necessary urgency and resources are applied to ending the Guantánamo detentions swiftly and in a manner that complies with international law. The organization has provided the administration with detailed recommendations in this regard.

2. Human rights law denied: 'Enemy combatants' and global 'war'

I don't think there's any question but that we are at war. And I think, to be honest, I think our nation didn't realize that we were at war when, in fact, we were... We should not have waited until September the 11th of 2001 to make that determination.

Eric Holder, Attorney General designate, confirmation hearing, January 2009

[4] Amnesty International has addressed the Bagram detentions in other documents. See: Out of sight, out of mind, out of court? 18 February 2009, http://www.amnesty.org/en/library/info/AMR51/021/2009/en; Urgent need for transparency on Bagram detentions, 6 March 2009, http://www.amnesty.org/en/library/info/AMR51/031/2009/en. Administration opts for secrecy on Bagram detainee details, 12 March 2009, http://www.amnesty.org/en/library/info/AMR51/034/2009/en. Federal judge rules that three Bagram detainees can challenge their detention in US court, 3 April 2009, http://www.amnesty.org/en/library/info/AMR51/048/2009/en.

A central policy choice of the US administration after the attacks of 11 September 2001 was to frame its response largely in terms of "war" rather than law enforcement. The resulting global war doctrine has been used to facilitate human rights violations, including against those subjected to detention, without the due process and other human rights protections required under international law, at the US Naval Base in Guantánamo Bay, Cuba.

The Bush administration developed this global war framework and over the years received a degree of endorsement for it from Congress and from within the federal judiciary. The administration responded to the Supreme Court's *Rasul v. Bush* ruling in 2004 – in which the Court ruled that under federal law the District Courts could consider habeas corpus petitions filed on behalf of Guantánamo detainees – by adopting litigation tactics that blocked habeas review and by establishing the Combatant Status Review Tribunals to affirm detainees' "enemy combatant" status, the purported legal justification for indefinite detention without charge. The CSRTs were effectively endorsed by Congress when it passed the Detainee Treatment Act of 2005. Following the *Hamdan v. Rumsfeld* ruling of the Supreme Court in 2006, the administration sought and obtained legislation – the Military Commissions Act – which it claimed effectively re-endorsed the global war paradigm, and which backdated this "war" to before 11 September 2001. The administration sought to have this war framework again bolstered in the wake of the *Boumediene* ruling, but ran out of time.[5]

Soon after taking office, President Barack Obama was asked about his predecessor's broad framing of the "war on terror" and responded that "the language we use matters". [6] Amnesty International would agree, and would stress that the pervasive use of the term "war" in relation to virtually every counter-terrorism measure adopted since the attacks of 11 September 2001 has gone far beyond rhetoric; indeed it has distorted and continues to distort the approach that some governments, courts and others have taken to the relationship between human rights and the measures taken in the name of countering terrorism.

Seeking to justify his agency's resort to secret detention, for example, the then Director of the CIA, General Michael Hayden, said in 2007 that "we believe we are in a state of armed conflict with al-Qaeda and its affiliates, that this conflict is global in scope".[7] The Bush administration asserted that "as part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities", including in secret detention if it was deemed necessary. It argued to international treaty monitoring bodies – arguments which the latter rejected – that the law of war, and not international treaties such as the Convention against Torture or the International Covenant on Civil and Political Rights, "is the applicable legal framework governing these detentions".[8]

[5] A month after *Boumediene*, Attorney General Mukasey urged Congress to recognize that the USA "remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations" and "reaffirm that for the duration of the conflict the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations." Remarks at the American Enterprise Institute for Public Policy Research, 21 July 2008.
[6] Interview with al-Arabiya, 26 January 2009.
[7] Transcript of CIA Director General Michael Hayden's Interview with Charlie Rose, 24 November 2007.
[8] E.g. UN Doc.: CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008. Comments by the Government of the USA on the concluding observations of the Human Rights Committee.

In their final weeks in office, Bush administration officials continued to stress their war paradigm, as if it could be a justification for what they had authorized. Vice President Cheney, for example, said: "What we did after 9/11 was make a judgment that the terrorist attacks we were faced with were not a law enforcement problem, they were, in fact, a war. It was a war against the United States – and therefore, we were justified in using all the means available to us to fight that war".[9] In a series of interviews in the weeks before he left office, the Vice President sought to justify various human rights violations, including secret detention and interrogation techniques constituting torture under international law.[10] This refrain from former officials has continued since the new administration took office. A former member of the Justice Department closely associated with the Bush administration's "war on terror" detention and interrogation policies has suggested that the new President is "returning America to the failed law enforcement approach to fighting terrorism that prevailed before Sept. 11, 2001".[11] In similar vein, former Vice President Cheney told CNN that "When you go back to the law enforcement mode, which I sense is what they're doing, closing Guantánamo and so forth ... they are very much giving up that center of attention and focus that's required, that concept of military threat that is essential if you're going to successfully defend the nation against further attacks".[12] President Obama has rejected the former Vice President's criticisms.[13]

At least within the Pentagon, there had been a shift in language before the new administration took office. By 2008, the Pentagon had taken to calling the "war on terror" the "Long War", which would only return to a law enforcement model at some unspecified time in the distant future. Its National Defense Strategy issued in 2008, for example, states that "for the foreseeable future, winning the Long War against violent extremist movements will be the central objective of the US". This struggle, the Pentagon stated, "will not end with a single battle or campaign", but will be won when the targeted groups have been reduced "to the level of nuisance groups that can be tracked and handled by law enforcement capabilities".[14] The Pentagon's quadrennial report to Congress, published on 29 January 2009, makes references to both "the Long War" and the "Global War on Terror", but such terminology is less prevalent than previously. In the preface to the report, Secretary of Defense Robert Gates, who was re-appointed to this office by President Obama, states only that "since September 2001, our Nation has been engaged in a multi-theater, long-term conflict against militant extremists"

[9] Interview of the Vice President by Chris Wallace, FOX News, 19 December 2008.
[10] USA: Vice President seeks to justify torture, secret detention and Guantánamo, 23 December 2008, http://www.amnesty.org/en/library/info/AMR51/157/2008/en.
[11] Obama made a rash decision on Gitmo. John Yoo, Wall Street Journal, 29 January 2009. Among the legal opinions authored by John Yoo as Deputy Assistant Attorney General in the Bush administration was one that argued that even "if interrogation methods were inconsistent with the United States' obligations under [the UN Convention against Torture], but were justified by necessity or self-defense, we would view these actions still as consistent ultimately with international law". Military interrogation of alien unlawful combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, 14 March 2003.
[12] Cheney says Obama's policies 'raise the risk' of U.S. terror attack, CNN, 15 March 2009.
[13] For example, "I fundamentally disagree with Dick Cheney...I think he is, that attitude, that philosophy has done incredible damage to our image and position in the world. I mean, the fact of the matter is after all these years how many convictions actually came out of Guantánamo?... It hasn't made us safer. What it has been is a great advertisement for anti-American sentiment." CBS '60 Minutes', 22 March 2009.
[14] National Defense Strategy, US Department of Defense, June 2008.

who use "irregular and asymmetric means".[15] The language in this preface seemed to reflect a turning away from the "war on terror" catchphrase.[16]

A change in language was also indicated in a memorandum filed in US District Court on 13 March 2009 by the US Justice Department. The memo sets out the new administration's view of its authority to detain those still held at Guantánamo. In an accompanying press release, the Justice Department emphasized that, in the case of these particular detainees, it was dropping the "enemy combatant" label which had been attached to them by the Bush administration.[17] The withdrawal of the "enemy combatant" label would appear to be largely cosmetic, however.[18] The administration's underlying claim to authority to hold these detainees seems to be substantially the same as its predecessor's and does not jettison the overarching law of war framework or expressly recognize the applicability of international human rights law to these detentions.[19]

The 13 March memorandum was filed as part of ongoing litigation on the Guantánamo cases that has followed the *Boumediene v. Bush* ruling.[20] In that ruling, the Supreme Court did not address whether the President has authority to hold the Guantánamo detainees. This and other questions regarding the lawfulness of their detentions, it said, were to be resolved in the first instance by the District Court. Among these questions would be the formal articulation by the government, and assessment by the court, of the purported legal basis for the detention of those the administration had labelled "enemy combatants".

Under the Bush administration's July 2004 Order establishing Combatant Status Review Tribunals (CSRTs) for use at Guantánamo, an "enemy combatant" was defined as:

> "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.

[15] Quadrennial roles and missions review report, US Department of Defense, January 2009.
[16] See Obama team drops 'war on terror' rhetoric, Reuters, 31 March 2009 ("US Secretary of State Hillary Clinton said on Monday the Obama administration had dropped 'war on terror' from its lexicon...").
But see also US Department of Defense briefing with Pentagon spokesperson Geoff Morrell, 25 March 2009, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4385. (Referring to "war on terror": "I don't avoid it. I don't seek it out. If it's appropriate, I'll use it. I could be wrong, but I think the President has used it... I know of no directive prohibiting the use of that term").
[17] See also USA: Different label, same policy? Administration drops 'enemy combatant' label in Guantánamo litigation, but retains law of war framework for detentions, 16 March 2009, http://www.amnesty.org/en/library/info/AMR51/038/2009/en.
[18] The new administration charged in federal court the only "enemy combatant" held on the mainland. Amnesty International has written to the US authorities welcoming that Ali al-Marri is no longer held in indefinite military detention. See also Urgent Action update, 3 March 2009, http://www.amnesty.org/en/library/info/AMR51/032/2009/en.
[19] Indeed, the dropping of the "enemy combatant" term might have gone largely unnoticed in the media had it not been for the emphasis placed on it by the Justice Department's press release.
[20] The reach of the memorandum is expressly limited to the current Guantánamo detentions. It is not, "at this point, meant to define the contours of authority for military operations generally, or detention in other contexts". In the US airbase in Bagram in Afghanistan, for example, there are more than 500 detainees currently being held as "enemy combatants", as far as Amnesty International is aware.

> This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

This definition of "enemy combatant" was the one chosen by the first District Court judge to make such a decision in the post-*Boumediene* litigation. In an order in October 2008, Judge Richard Leon said that he had resisted "the temptation" to engage in "judicial craftsmanship" and that he believed it was not for the judiciary to draft definitions of "enemy combatant". Instead he said that the judiciary's "limited role" was to determine whether definitions formulated by the executive or legislative branches of government were "consistent with the President's authority under the Authorization for Use of Military Force (AUMF, see below) and his war powers under Article II of the Constitution". Judge Leon said that the definition that had been formulated by the administration for the CSRT scheme four years earlier had been "blessed by Congress" when it passed the MCA. He therefore said that he would apply this definition to the cases before him.[21]

This definition – global in reach and not limited to individuals directly engaged in a particular international armed conflict as that term is understood in international law, or indeed in any hostilities whatever – casts a broad net. This is shown by the fact that among those Guantánamo detainees affirmed as "enemy combatants" by CSRTs were people detained far from any international "battleground" as traditionally understood, and not in the territory of a state at war with the USA: detainees were taken from, among other countries, Azerbaijan, Thailand, Bosnia and Herzegovina, Indonesia, United Arab Emirates, Djibouti, Kenya, Gambia and Mauritania, as well as others arrested in houses and streets in Pakistan. Others were taken in Afghanistan, both in and outside of situations of combat. In its definition, and consequences under US law, the concept of "enemy combatant" invoked by the USA at the time went far beyond the limited concept of 'combatant' as that term is understood by international law as applicable in situations of actual armed conflict.

The 13 March memorandum came in response to requests by several District Court judges to be provided by the new administration with any revision to its predecessor's position on the "enemy combatant" question. In the memorandum, the Justice Department proposed a revised "definitional framework" for the purposes of the post-*Boumediene* Guantánamo litigation:

> "The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harboured those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces".

The Justice Department stressed that the concept of "substantial support" does not justify the detention at Guantánamo of individuals "providing unwitting or insignificant support" to the organizations in question. This would seem to rule out, for example, a person whose charitable donation, unbeknownst to them, ended up being diverted to such organizations.[22] The definition still describes a broad detention power, however, that risks bypassing the ordinary

[21] *Boumediene v. Bush*. Memorandum Order, US District Court for DC, 27 October 2008.

systems of criminal justice and human rights in a manner not contemplated by international law (notwithstanding the assertion by the administration that the laws of war, by analogy, support the definition).[23]

Evidence of whether an individual was "part of" al-Qa'ida or Taleban forces, the Justice Department states, "might range from formal membership, such as through an oath of loyalty, to more functional evidence, such as training with al-Qaida (as reflected in some cases, by staying at al-Qaida or Taliban safehouses that are regularly used to house militant recruits) or taking positions with enemy forces". In each case, "judgments about the detainability of a particular individual will necessarily turn on the totality of the circumstances". The memorandum suggests that the precise contours of "substantial support", as well as of "associated forces", as grounds for detention will require further development on a case-by-case basis in the habeas corpus proceedings.

A month earlier, the new administration had sought to put off a decision on the "enemy combatant" question. Following President Obama's executive order of 22 January 2009, requiring the closure of the Guantánamo detention facility within a year, District Court Judge John Bates had invited the Justice Department to submit to him "any refinement" by the new administration of the "appropriate definition" of "enemy combatant". In its response on 9 February 2009, the Justice Department urged Judge Bates not to address the question of "enemy combatant" definition "in the abstract" but only at the merits stage of habeas corpus proceedings in any particular case. It pointed to the interagency review of the Guantánamo cases ordered by President Obama in his executive order, which "will result in the release, transfer, prosecution, or other disposition of the detainees". The administration told Judge Bates that both that review and the review of "prospective US detention policy" ordered by President Obama in another executive order signed on 22 January, would be considering "the proper legal bases" for detaining any of the Guantánamo detainees "who are not transferred, released, or prosecuted at the completion of their reviews".

[22] In 2005, a District Court judge concluded that the Bush administration's overbroad definition of "enemy combatant", with its use of the word "includes", showed that the government considered that it could subject to indefinite detention even individuals who had never committed a belligerent act or who never directly supported hostilities against the USA or its allies. During an earlier hearing, the judge had asked the government a series of hypothetical questions to ascertain how broadly it interpreted its detention powers. The government responded that it could subject to indefinite detention: "'A little old lady in Switzerland who writes cheques to what she thinks is a charity that helps orphans in Afghanistan, but [what] really is a front to finance al-Qaeda activities'; a person who teaches English to the son of an al-Qa'ida member; and a journalist who knows the location of Osama Bin Laden, but refuses to disclose it to protect her source." In a subsequent hearing in front of another judge, the Principal Deputy Associate Attorney General suggested that, in the example of the Swiss woman, he had been misquoted and that what he had said was that "in the fog that is often the case in these situations that it would be up to the military applying its process and in going through its classification function to determine who to believe. If in fact this woman, there was some reason to believe this woman did know she was financing a terrorist operation, that would certainly merit a detention both theoretically and practically". The government's position would still be that she could be held indefinitely without charge or trial or judicial review.

[23] A federal judge has noted that the new definition is "broad" and one "under which mere 'support' of forces engaged in hostilities can justify an 'enemy combatant' designation." The administration said "a broad definition is necessary to provide the Executive with the kind of operational flexibility needed in the ongoing armed conflict." *Al Bakri v. Bush*, US District Court for DC, 2 April 2009 (Judge John Bates).

The new administration argued that if the District Court were only to address the legal basis for detention on a case-by-case basis, it would "potentially avoid unnecessarily ruling on important issues regarding the scope of the President's detention authority". This approach would be wise, it suggested, given that the number of habeas corpus cases might be reduced by the executive review ordered by the new President. The new administration seemed to be seeking, like its predecessor, to put off judicial decision-making on the Guantánamo cases while it sought to retain executive control over the final disposition of the detainees.

On 11 February 2009, almost eight months to the day after the Supreme Court, in its *Boumediene* ruling, said that the Guantánamo detainees were entitled to a prompt habeas corpus hearing, Judge Bates issued an order in which he noted that "the date by which the parties and the Court will need to begin wrestling with the merits of these cases is fast approaching" (emphasis in original). He wrote that "well before" such hearings the parties and the court "must have a clear, uniform understanding of the key legal standard to be applied". In these cases this would be the "core controlling legal standard of 'enemy combatant' to be applied to the specific facts in each individual detainee's case". He stated that the new administration's rationale for delay on the definitional issue was "not persuasive", and he rejected its contention that the "scope of the Government's detention authority" should be made on a case-by-case basis, adding that "the definition of the central legal term 'enemy combatant' is not a moving target, varying from case to case" (emphasis in original). He ordered the administration to submit any change to the government's proposed definition of "enemy combatant" by 13 March 2009. This, he said, would be the government's last opportunity to do so. If it chose not to advise the court of any change in its position, the government would be bound by the definition of "enemy combatant" submitted by the Bush administration.[24] The Justice Department's 13 March 2009 memorandum is the result.

The extent to which the new administration has adopted the global "war" paradigm in this memorandum, for these detentions, is not entirely clear. The document mainly focuses on the conflict in Afghanistan, referring to "Operation Enduring Freedom" (OEF), the military campaign which began in Afghanistan in October 2001, and to the fact that the "United States and its coalition partners continue to fight resurgent Taliban and al-Qaida forces in this armed conflict". OEF was seen as part of a global "war on terror" by the Bush administration. As noted above, those held in Guantánamo – to whom this memorandum applies – were originally detained in a range of countries around the globe, including Afghanistan.

According to the Justice Department's memorandum, the organizations covered by the government's detention authority in this context are not limited to *al-Qa'ida* or the Taleban, and neither is its detention authority limited to individuals "captured on the battlefields of Afghanistan". Rather, substantial support provided by someone to *al-Qa'ida* forces "in other parts of the world" is "sufficient to justify detention" at Guantánamo. Here the memorandum cites the case of Belkacem Bensayah whom Judge Leon concluded was lawfully held in military custody in Guantánamo, under the "enemy combatant" label developed by the Bush administration, despite being seized in Bosnia and Herzegovina seven years earlier, "over a thousand miles away from the battlefield in Afghanistan", as Judge Leon himself put it.[25] In

[24] *Hamlily v. Obama*, Order. US District Court for DC, 11 February 2009.

[25] USA: Federal judge orders release of five of six Guantánamo detainees seized in Bosnia in 2002, 20 November 2008, http://www.amnesty.org/en/library/info/AMR51/141/2008/en.

addition, the Justice Department's new memorandum states that it would be irrelevant that "that someone who was part of an enemy armed group when war commenced may have tried to flee the battle or conceal himself as a civilian in places like Pakistan". Precisely what the scope of the phrase "places like Pakistan" includes is not clear.

There is reason to believe that the global war paradigm may persist despite the change in administration. Both the Attorney General – the US government's chief law enforcement officer – and its Solicitor General – responsible for representing the US government in federal appellate court litigation – apparently take the view that the USA is involved in a global "war".

At his confirmation hearing in front of the Senate Judiciary Committee in January 2009, Attorney General-designate Eric Holder stated categorically that the USA is "at war". He went further, by saying that he thought "our nation didn't realize that we were at war when, in fact, we were". He went on to say that, looking back at the 1990s – and specifically the bombings of two US embassies in East Africa in 1998, and the bombing of the USS Cole in Yemen in 2000, "we as a nation should have realized that, at that point, we were at war. We should not have waited until September the 11th of 2001, to make that determination."[26] He was then asked the following question: "If our intelligence agencies should capture someone in the Philippines that is suspected of financing Al Qaida worldwide, would you consider that person part of the battlefield, even though we're in the Philippines, if they were involved in an Al Qaida activity?" The Attorney General-designate responded that he would. Elana Kagan, confirmed to the post of US Solicitor General on 19 March 2009, had been asked the same question at her confirmation hearing in February 2009, and had given the same answer.

Reliance on AUMF, a dangerously over-broad congressional resolution

In its 13 March 2009 memorandum, the new administration stated that, at least in relation to the current Guantánamo detainees, it was not seeking to rely on the President's constitutional authority as Commander-in-Chief of the Armed Forces to justify the detentions. Instead, it was basing its detention authority on the Authorization for Use of Military Force (AUMF), a resolution passed by US Congress in the immediate aftermath of the attacks of 11 September 2001. The AUMF authorized the President to "use all necessary and appropriate force" against anyone involved in the attacks "in order to prevent any future acts of international terrorism against the United States".

While the Justice Department's position on the congressionally approved AUMF may go some way to assuaging domestic concern about the health of the constitutional "checks and balances" system of the USA's three-branch government after a period in which some startling claims to presidential authority have been made, it does not in itself bring the USA any closer to compliance with its human rights obligations under international law.[27] Indeed, in post-

[26] As already noted, the MCA effectively "backdated" the "war on terror" to before the attacks of 11 September 2001. Several individuals held in Guantánamo were charged by the Bush administration with "war crimes" in relation to their alleged involvement in the Cole and embassy bombings.

[27] The Bush administration did not consider it needed congressional approval for its actions. See 'The President's constitutional authority to conduct military operations against terrorists and nations supporting them.' Memorandum opinion for Timothy Flanigan, the Deputy Counsel to the President, From John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001 (The AUMF cannot "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method timing, and nature of

Boumediene litigation, the Bush administration had similarly sought to justify the Guantánamo detentions by reference to the AUMF. It told Judge Leon, for example, that he "need look no further than the AUMF itself for the authority to detain persons who were members or supporters of al-Qaida". The Bush administration emphasised that "the AUMF is extremely broad. Its sweeping scope does not limit the use of force against state actors, and it also authorizes force against 'organizations'. It does not limit the geographic scope or duration of the authorizations." The government said that "by seeking to limit the authority of the United States to detain militarily al-Qaida members, supporters, and associates captured away from a traditional battlefield", lawyers for the detainees were "fundamentally question[ing] the legitimacy of prosecuting the global war against al-Qaida terrorism as a war, rather than as a police operation seeking criminal charges".[28]

It is true that the AUMF is broad and sweeping. It gives the President the freedom to decide who was connected to the attacks of 11 September 2001, who might be implicated in future attacks, and what level of force could be used against them. At the same time, he is unconfined by any temporal or geographical limits. In May 2008, a federal judge described the AUMF as "the most far-reaching bestowal of power upon the Executive since the Civil War… The broad language of the AUMF, literally construed, gives the President *carte blanche* to take any action necessary to protect America against any nation, organization, or person associated with the attacks on 9/11 who intends to do future harm to America."[29]

The Bush administration exploited the AUMF to argue that a range of actions, which constituted violations of human rights, were lawful under US law, including the Guantánamo detentions. The military order signed by President Bush on 13 November 2001, providing for trials by military commission as well as indefinite detention without charge, trial or judicial review, cited the AUMF as a supporting authority. A Justice Department memorandum dated 1 August 2002 justifying torture of "enemy combatants" cited the AUMF as among those authorities that "recognized" the President's constitutional power to use force to defend the USA. When President Bush re-authorized the CIA's secret detention and interrogation programme in 2007 – a programme in which enforced disappearance and torture, crimes under international law, had already occurred – he cited the AUMF as supporting law. The AUMF was also cited by the administration in defending President Bush's authorization of a secret wiretapping programme by the National Security Agency.

Because of the abuses that have been committed in the name of the AUMF, Amnesty International has called since 2006 for its revocation. The organization has called on the new administration to clarify that it will not interpret the AUMF as representing any intent on the part of Congress to authorize violations of international human rights or humanitarian law, or as otherwise providing authority for such violations.

Given the new administration's use of the AUMF as a purported legal basis for the continued indefinite detention of these detainees, it is worth reflecting on how this resolution came into being. The AUMF was passed by Congress on 14 September 2001 by 516 votes to 1 after

the response. These decisions, under our Constitution, are for the President alone to make").

[28] *Boumediene v. Bush*, Respondents' memorandum addressing the definition of enemy combatant. In the US District Court for DC, 22 October 2008.

[29] *Al-Marri v. Pucciarelli*, US Court of Appeals for the Fourth Circuit, 15 July 2008, Judge Gregory, concurring in the judgment.

little genuine debate. Indeed, there seemed to be considerable confusion among legislators as to whether they were voting for a declaration of war or not; some felt the resolution did not go far enough, others felt it went too far; some opined that the President had all the power he needed without a resolution; others stressed the limiting effect of the resolution and the need for continuing congressional oversight.

One legislator said that she would be voting for the resolution "with great reservations" because "to be honest, I do not know what this means. The language of this resolution can be interpreted in different ways". Another who voted for the resolution admitted that "the literal language of this legislation can be read as broadly as executive interpreters want to read it, which gives the President awesome and undefined power". Despite the apparent concerns and confusion, legislator after legislator voted for the resolution. One congressman speaking in favour of the resolution described such support as "join[ing] the choir".[30] The resulting resolution has been a central part of establishing a legal vacuum in which individuals were denied the rights to which they would ordinarily be entitled under national and international laws. During the AUMF debate, only one member of the US House of Representatives, out of more than 400, referred to international law, and then only in a passing assurance that subsequently remained unmet. Amnesty International regrets the absence of any reference to human rights obligations in the Justice Department's memorandum of 13 March 2009.

The memorandum does hold out the possibility of future substantive change in US detention policy, however. Referring to the executive reviews ordered by President Obama on 22 January 2009, it puts the District Court on notice that "the Executive Branch has, at the President's direction, undertaken several forward-looking initiatives that may result in further refinements".

Amnesty International has called on the new administration to make it clear that it will rely on ordinary criminal offences and procedures alone to justify detention of individuals who are unconnected to any ongoing international armed conflict and are accused of essentially criminal conduct. The concept of "enemy combatant" – whether so named or not – as grounds for detention under international law must be reserved in its application to situations recognized by international humanitarian law (the law of war) as constituting international armed conflicts. In respect of non-international armed conflicts, legal grounds for detaining individuals must be clearly set out in national laws of the territory in question, laws that themselves comply with the state's international human rights obligations, and those laws should be the basis for review of the lawfulness of such detentions.

Even where international humanitarian law does apply, it does not displace international human rights law. Rather, the two bodies of law complement each other. In a resolution adopted as long ago as 1970, the UN General Assembly affirmed the "basic principle" that "fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict". The International Court of Justice (ICJ) has stated that the protection of the International Covenant on Civil and Political Rights [ICCPR] and other human rights conventions "does not cease in times of armed conflict, except through the effect of provisions for derogation". The UN Human Rights Committee has stated that "even during an armed conflict measures derogating from the

[30] For references, see USA: Many words, no justice: Federal court divided on Ali al-Marri, mainland 'enemy combatant', August 2008, http://www.amnesty.org/en/library/info/AMR51/087/2008/en.

[ICCPR] are allowed only if and to the extent that the situation constitutes a threat to the life of the nation". The USA has made no such derogation. In any event, there can be no derogation from the prohibition of torture or other ill-treatment, or arbitrary detention, even in a time of public emergency of any sort.[31] In addition to protecting the right of all persons to be free from arbitrary deprivations of liberty, judicial review also protects other fundamental non-derogable human rights, including the right not to be subjected to abduction, enforced disappearance, secret detention, torture or other cruel, inhuman or degrading treatment or punishment. Even in an emergency which threatens the life of the nation, "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished".[32] The continuing delay faced by the Guantánamo detainees in having effective access to judicial review violates this principle.

Whatever label, if any, the new administration chooses to attach to its counter-terrorism strategy, it must come with substantive change in policy that puts respect for human rights and international law at its centre. It must accept that it is subject to international human rights obligations at all times, in all places and in respect of all persons over which it exercises control, as treaty monitoring bodies have expressly called on it to do.[33]

Meanwhile, the various District Court judges conducting habeas corpus proceedings in the Guantánamo detainee cases will make decisions as to what detention authority the government has in relation to these detainees. They are not bound by the new administration's "definitional framework".

3. Delay tactics. Bush administration response to *Boumediene*

We are disappointed with the Court's decision... The Department is reviewing the decision and its implications on the existing detainee litigation
US Justice Department's public response to *Boumediene v. Bush*, 12 June 2008

In late 2001, the administration's detention policy – inextricably linked to its broader interrogation policy – was to keep foreign nationals detained abroad away from the scrutiny of the courts. This lay behind its choice of Guantánamo Bay in Cuba as a location for a strategic interrogation and detention facility. In the words of a former head of the Justice Department's Office of Legal Counsel (OLC), "because [Guantánamo] was technically not a part of US

[31] See ICCPR, Article 4 and Human Rights Committee General Comment No. 29 on States of Emergency (Article 4), UN Doc: CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras 3, 7, 11 and 16.
[32] *Ibid.*, para. 16. Only detainees recognised and treated under the Third Geneva Convention as prisoners of war, captured in a specific international armed conflict and detained only until the end of that particular conflict, may not have the same right as other detainees to court review of the lawfulness of their detention. However, prisoner of war status has not been applied to the detainees in Guantánamo, and this is unlikely to change, given that there is no longer an international armed conflict in Afghanistan (and never was in the other countries where and when they were picked up).
[33] In May 2006, the UN Committee Against Torture urged the USA to "recognize that the Convention [against Torture] applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction". In July 2006, the UN Human Rights Committee called upon the USA to "review its approach and interpret the [ICCPR] in good faith" and to "acknowledge the applicability of the Covenant in respect of individuals under its jurisdiction and outside its territory, as well as in times of war".

sovereign soil, it seemed like a good bet to minimize judicial scrutiny".[34] The Pentagon had asked the Justice Department for legal advice on this question, and was advised that the federal courts could not "properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantánamo Bay Naval Base, Cuba".[35] The first planeload of 20 detainees arrived at Guantánamo from Afghanistan on 11 January 2002, "less than 5 days after the order was given to build a detention facility to house 100 captured enemy combatants". [36] It took another six and a half years – a period which saw US forces engage in human rights violations such as torture and other ill-treatment, enforced disappearance, secret detainee transfers, as well as arbitrary detention – for this OLC opinion to be judicially consigned to history by the *Boumediene* ruling of the Supreme Court. Yet even then the Bush administration continued to cling to the wreckage of its unlawful detention policies.

Following the *Boumediene v. Bush* decision on 12 June 2008, the Guantánamo detainee cases were remanded to the District Court for the District of Columbia (DC). The Supreme Court's decision left room for litigation under US law on precisely what it would mean for the detainees, and the Bush administration responded with litigation tactics that sought to limit the scope of the ruling and delay its impact. Aspects of this response outlined below illustrate why, by the time of the Presidential inauguration on 20 January 2009, so little progress had been made in obtaining judicial rulings on the merits of the detainee's habeas corpus petitions.

The response of the Bush administration to the *Boumediene* ruling was consistent with its response to earlier decisions by the Supreme Court relating to the Guantánamo detentions. Following *Rasul v. Bush* in 2004 and *Hamdan v. Rumsfeld* in 2006, the Bush administration had pursued litigation and legislative strategies that blocked or delayed justice and remedy for the detainees, culminating in the passage of the MCA in the latter part of 2006.[37] After the *Boumediene v. Bush* ruling, the administration publicly expressed its disappointment with the opinion, and signalled that it would seek to minimize its impact rather than adopt a fresh approach to the detentions that would finally respect international law.

The Justice Department's immediate response was to stress that the ruling "did not concern military commission trials" which would "therefore continue to go forward".[38] That the Bush administration was seeking the narrowest possible interpretation of the *Boumediene* ruling became clearer in the case of Salim Hamdan, the Yemeni detainee who was due to become the first person to face trial by military commission under the MCA. Hamdan's lawyers sought a postponement of the trial to allow full consideration of the impact of the ruling on Hamdan's case and the proceedings he was facing. Hamdan's lawyers raised a number of constitutional

[34] Jack Goldsmith. *The Terror Presidency: Law and judgment inside the Bush administration*. W.W. Norton, 2007, p.108.
[35] Memorandum for William Haynes, General Counsel, Department of Defense, 28 December 2001, from Patrick Philbin and John Yoo, Office of Legal Counsel, US Department of Justice.
[36] Review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Office of the Inspector General, US Department of Justice, May 2008.
[37] For example, see pages 44-66 of USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power, May 2005, http://www.amnesty.org/en/library/info/AMR51/063/2005; and pages 31-44 of USA: No substitute for habeas corpus: six years without judicial review in Guantánamo, November 2007 http://www.amnesty.org/en/report/info/AMR51/163/2007.
[38] Justice Department news release, 12 June 2008.

protections that they argued should now apply to Hamdan given the *Boumediene* ruling that the Constitution reached those held in Guantánamo – such as the right to due process, the right to equal treatment, the right to call witnesses, the right to speedy trial, and the right not to be compelled to incriminate himself.[39] The government opposed the delay, however, emphasising that *Boumediene* was a "narrow holding", and that "justice must proceed"[40] (see also Chapter 4).

While the government opposed any delay in the military commission trials for the purpose of taking into account the potential impact on them of the *Boumediene* ruling, it adopted a different approach in relation to habeas corpus, and sought as much time as possible for itself. In a letter to the District Court two weeks after the ruling, the Justice Department stressed that the government's "factual returns" – the factual basis on which it was holding the detainees – required "updating". It explained that "in the four years since most of the Combatant Status Review Tribunals (CSRTs) were conducted, intervening court decisions [had] recently and significantly changed the legal landscape". The Justice Department said that in order for the government to be able to "present its best case for the detention of persons found to be enemy combatants", this "necessarily includes being able to take into account legal and intelligence developments since CSRTs were conducted." The development of its factual returns, it said, "will be highly time-consuming for the Department of Justice, the Department of Defense, and any affected intelligence agencies".[41]

1Prior to the *Rasul*, *Hamdan* and *Boumediene* rulings, as it sought to persuade the courts to allow it to keep the detentions from judicial review, the Bush administration had emphasised the "comprehensive interagency process", the "ongoing processes", the "multiple review processes", and the "comprehensive series of review processes" it was operating to review the status of detainees held at Guantánamo.[42] Faced with the order by the Supreme Court that the detainees should have a "prompt" habeas corpus hearing and should no longer be made to bear the costs of delay, the administration suddenly claimed that its detainee files required updating from four years earlier. Such inconsistency did not go unnoticed by the District Court. At a hearing on 21 August 2008, for example, a District Court judge noted the government's assertion that it was "constantly reviewing" each Guantánamo detainee's case, and he pointed out that this was "inconsistent" with the administration's inability to inform him whether the detainees in question were "enemy combatants" or not.[43]

Soon after the new administration took office, the quality and integrity of the detainee files became a point of dispute. It was reported that the new administration found a dearth of comprehensive government files on many of the detainees, and "a senior administration official" was quoted as saying that the information is "scattered throughout the executive branch". A Pentagon spokesperson (held over from the previous administration) nevertheless said that "the individual files on each detainee are comprehensive and sufficiently organized", although adding that the quantity of information "makes a comprehensive assessment a time-

[39] *USA v. Hamdan*, Defense motion for continuance of trial date, 19 June 2008.
[40] *USA v. Hamdan*, Prosecution response to defense motion for additional continuance, 20 June 2008.
[41] Letter to District Court Judges Lamberth and Hogan from Gregory G. Katsas, Acting Assistant Attorney General, US Department of Justice Civil Division, 30 June 2008.
[42] See Appendix 2 of USA: No substitute for habeas corpus, *op. cit.*
[43] See USA: Justice Years Overdue: Federal court hearing for Uighur detainees in Guantánamo, 7 October 2008, http://www.amnesty.org/en/library/info/AMR51/110/2008/en.

consuming endeavour". Members of the previous administration said that their successors were merely now facing the complexity of the issue.[44] Amnesty International emphasises that whatever the reason may be for the administration not to have appropriate information to justify detention of an individual, no detainee must be made to bear the burden. If the government does not have readily available information that would establish minimal legal and factual grounds for detaining a person, the international prohibition of arbitrary detention requires that the person be released.

Soon after the *Boumediene* ruling, at meetings on 18 and 25 June 2008, the Chief Judge of the DC District Court met with lawyers for the detainees and for the Justice Department to explore the way forward, and to discuss various "security and procedural issues" common to the cases. The government wanted development and coordination of procedures by a single judge, with lawyers for the detainees saying that this would be a recipe for delays. However, it was decided that a single judge, Senior District Judge Thomas Hogan, would develop and coordinate procedures and issues common to the cases before transferring them to the District Court's various judges to hear the merits of each individual's challenge to his detention. Only two judges, Judge Richard Leon and Judge Emmet Sullivan, declined to allow the cases over which they were presiding to be included in that process of coordination. They went forward with their cases separately. Until 31 March 2009, Judge Leon was the only judge to have ruled on the merits of a habeas corpus petition challenging the lawfulness of detention.

On 11 July 2008, Judge Hogan issued a Scheduling Order in which the government was ordered to file "factual returns and motions to amend factual returns on a rolling basis at a rate of at least 50 per month". He ruled that the first 50 factual returns and motions were due by 29 August 2008. He further ruled that until further order of the Court, the government need not file returns for those detainees who had been charged under the MCA.

By 29 August 2008, the government had filed only 10 factual returns in the cases before Judge Hogan, causing the lawyers for the detainees to protest to the judge that "no private party would dare treat the Court's deadlines as merely aspirational or be allowed to do so... The Court must do more than tell [the government] to go and sin no more".[45] Counsel for the detainees took issue with the fact that the government had "waited until literally the last minute on August 29, 2008 to file their motion for relief [from the schedule]" despite the fact that it must have known well before this deadline that it would be unable to meet it. On 29 August, the government had told Judge Hogan that it was unable to meet the deadline, including because it could not get the classified information in the factual returns cleared by the CIA in time.

The Bush administration said that the "CIA must review virtually every classified document involved in these cases, regardless of the apparent origination of that document, to determine whether its dissemination outside the Executive Branch would implicate national security

[44] Guantánamo case files in disarray. Washington Post, 25 January 2009. In early 2009, a DC District Court Judge noted the "incredible" admission by the US government that it had "no formal system in place for tracking court orders" on Guantánamo, and that it "simply relied on receiving emails from individual lawyers working at the Department of Defense or at the Department of Justice to issue reminders to comply with the orders". *Al-Adahi v. Obama*, Memorandum opinion, 10 February 2009.

[45] In re: Guantánamo Bay detainee litigation. Petitioners' response to respondents' motion for relief from scheduling order. US District Court for DC, 9 September 2008.

concerns not immediately apparent to the other agencies involved in that process".[46] The Director of the CIA asserted that without the CIA's "deliberative review process", the unauthorized disclosure of classified information by private (security-cleared US) lawyers representing the Guantánamo detainees would be "inevitable". The CIA's "subject matter experts" would have to conduct a "line-by-line review" of documents determined by the Pentagon and the Department of Justice to be pertinent to a detainee's status as an "enemy combatant" to determine whether the document could be provided "in redacted form" to the detainee's lawyer, or if it could be provided "only to the Court", or "possibly not at all".[47] The CIA Director maintained that for the CIA "to cut corners" in this review process could result in "exceptionally grave damage to the national security of the United States, particularly to the CIA's primary goal of protecting the country from terrorist attacks". The basis for this assertion was elaborated in a classified declaration provided to the District Court.

The Justice Department asked for, and was granted, another 30 days to file the first 50 returns, arguing that "although the Supreme Court in *Boumediene* noted that detainee habeas proceedings should occur expeditiously, the Court did not say that inappropriate burdens on national security should be borne by the American public".[48] Thus the Bush administration continued to turn to national security arguments to seek to justify delaying the detainees' day in court yet further. It accused counsel for the detainees of demonstrating a "cavalier attitude" toward the protection of classified information and an "overly simplified view of the risks and methods associated with dissemination of such information". The lawyers, the Justice Department said, apparently wanted to "force the Government to choose between following procedures designed to appropriately safeguard classified information from disclosure that will harm national security interests and making its best possible case in the circumstances for the continued detention of enemy combatants to prevent their return to the battlefield". Imposing sanctions on the government, the Department claimed, "would force the American people to shoulder the burden, either in the form of increased risk of the erroneous release of individuals whom the government has determined are enemies of the United States, or in the form of reckless and inappropriate dissemination of classified information without careful review and vetting by the intelligence agencies charged with protecting American interests".[49]

By 31 December 2008, more than six months after the *Boumediene* ruling, the government had filed 165 "factual returns" in the cases before Judge Hogan, seven in the cases before Judge Sullivan and 18 before Judge Leon. On 5 February 2009, lawyers for Majid Khan, a detainee previously held in secret CIA custody (see Appendix 1) protested at the continuing delays in getting to the merits of the cases, arguing that "the government continues its dilatory tactics, attempting to delay for as long as possible any meaningful review – tactics that, for nearly eight months after the *Boumediene* decision, have successfully prevented a single detainee case now coordinated before [Judge Hogan] from reaching a merits conclusion".[50]

[46] In re: Guantánamo Bay detainee litigation, Respondents' motion for partial and temporary relief from the court's July 11, 2008 scheduling order. In the US District Court for DC, 29 August 2008.
[47] In re: Guantánamo Bay detainee litigation. Declaration of Michael V. Hayden, Director, Central Intelligence Agency. In the US District Court for DC, 29 August 2008.
[48] *Ibid*.
[49] In re: Guantánamo Bay detainee litigation. Respondents' reply memorandum in support of motion for partial and temporary relief from the Court's July 11, 2008 Scheduling Order, US District Court for DC, 15 September 2008.
[50] *Khan v. Obama*. Motion for reconsideration, In the US District Court for DC, 5 February 2009.

Separate to the question of scheduling, Judge Hogan had ordered the parties to brief him on issues relating to the procedural framework that they wanted to see applied to the Guantánamo habeas corpus proceedings, such as the scope of discovery (particularly, the right of detainee's lawyers to see all relevant information in the possession of the government), the standard for obtaining an evidentiary hearing, the standard governing hearsay evidence, the burden of proof required to justify detentions, and the rules governing witness testimony. Lawyers for the detainees argued that "habeas corpus entitles a petitioner to a searching, independent inquiry into the lawfulness of his detention".[51] In contrast to this, the Bush administration argued that review should be narrow, emphasising that these cases involved "wartime" status determinations in the case of "aliens captured and held abroad as enemy combatants".[52] It argued, for example, that the detainees had no right to discovery. The "point of habeas", the government argued, "is to provide the court with evidence to justify the detention (and to provide petitioners the opportunity to submit their evidence that detention is unlawful); the purpose is not to provide alien enemy detainees an opportunity to obtain additional materials from the Government in a time of war that go beyond that showing". The Bush administration argued that an evidentiary hearing with live testimony posed "heightened risks and burdens" on the government's interest in "protecting sources and methods of intelligence gathering", and such hearings should be "granted only rarely (if at all)" and "only as a last resort". Hearsay, the government argued "will be the norm, not the exception", and either side could submit it. There should be a presumption in favour of the government's evidence, it suggested. In contrast to the argument of the lawyers for the detainees that the government's evidentiary basis for detention must be "clear and convincing", the Bush administration argued that the burden on it should be to present evidence that was "credible" enough to justify detention.

The Bush administration accused the lawyers for the detainees of "envision[ing] an expansive quasi-criminal proceeding to challenge their detention with wide-ranging discovery and a panoply of procedural rights nowhere contemplated by the Supreme Court…The procedures they propose trivialize both the unique circumstances these habeas cases present – where judges will be evaluating the intelligence and information that leads to military actions taken overseas during an active military conflict – and the weighty national security interests that the Supreme Court has repeatedly recognized must be part of the balance".[53] For their part, the detainees' lawyers urged the District Court to "resist the temptation to establish a rigid, inflexible procedure unconnected to the facts and circumstances of individual cases".[54]

On 6 November 2008, five months after the *Boumediene* ruling, Judge Hogan set the common rules for the 113 habeas corpus petitions before him, involving nearly 200 detainees. Among the rules were that: the government would have to prove by "a preponderance of the evidence" – a relatively low standard – that a detainee's detention was lawful; there would be a presumption in favour of the government's evidence; the government must provide the

[51] In re: Guantánamo Bay detainee litigation. Petitioners' joint memorandum of law addressing procedural framework issues. In the US District Court for DC, 25 July 2008.
[52] In re: Guantánamo Bay detainee litigation. Government's brief regarding procedural framework issues. In the US District Court for DC, 25 July 2008.
[53] In re: Guantánamo Bay detainee litigation. Government's response to petitioners' filing on framework procedural issues. In the US District Court for DC, 1 August 2008.
[54] In re: Guantánamo Bay detainee litigation. Petitioners' joint reply memorandum of law addressing procedural framework issues. In the US District Court for DC, 1 August 2008.

definition of "enemy combatant" on which it was relying; it would have to disclose "all reasonably available evidence in its possession that tends materially to undermine the government's justification" for the detention; if the information to be disclosed to the detainee was classified, the government would have to provide the detainee with an "adequate substitute", and unless granted an exception on national security grounds by the judge after an *in camera* hearing, provide the classified information to the detainee's (security-cleared) US lawyer; and hearsay evidence that was "material and relevant" to the legality of the detention and shown to be reliable could be admitted by either party.[55]

On 18 November 2008, the Justice Department filed a challenge to Judge Hogan's case management order on a number of grounds, including that its rules would place extraordinary burdens upon government agencies "prosecuting the present war", and would "risk serious damage to national security". Earlier, then Attorney General Michael Mukasey had claimed that "a lot of the information supporting the detention of enemy combatants held at Guantánamo Bay is drawn from highly classified and sensitive intelligence... For the sake of national security, we cannot turn habeas corpus proceedings into a smorgasbord of classified information for our enemies."[56] The subsequent Justice Department brief argued that Judge Hogan's order presented "grave national security and separation of powers concerns". Noting that its cases were "heavily dependant upon classified intelligence information", it argued that there was "no legal authority requiring the Government to provide an 'adequate substitute' of classified discovery information to wartime enemy combatants", and that this requirement would place "an unworkable burden on the Government", a burden that "will be overwhelming, will divert limited resources, and will sidetrack the Nation's military and intelligence agencies from performing other critical national security duties during a time of war".[57] The administration filed a number of declarations from senior Pentagon and intelligence officials in support of its argument that Judge Hogan's case management order would be burdensome and a threat to national security. The government asked Judge Hogan to amend his case management order or refer the issue up to the US Court of Appeals for the DC Circuit.

On 21 November 2008, Judge Hogan issued an order lifting the deadlines he had imposed in his 6 November case management order while he considered the government's challenge to it. This effectively further delayed the pending habeas corpus proceedings. Notwithstanding the Bush administration's assertions that it was "mindful of the Supreme Court's desire that 'prompt' habeas review be provided to the detainees" and that the government had committed "an unprecedented amount of legal resources to respond to these cases", the fact was that six months after the *Boumediene* ruling, the vast majority of the Guantánamo detainees had yet to have their habeas corpus petitions reviewed on the merits.[58] The Bush administration's challenge to the case management order fitted a pattern of it seeking to maintain as much

[55] In re: Guantánamo Bay detainee litigation. US District Court for DC, Case Management Order, 6 November 2008.

[56] Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at the American Enterprise Institute for Public Policy Research, Washington, DC, 21 July 2008.

[57] In re: Guantánamo Bay detainee litigation. The government's motion for clarification and reconsideration of this Court's November 6, 2008 Case Management Order and supplemental amended orders or, in the alternative, motion for certification for appeal pursuant to 28 USC § 1292(b) and to stay certain obligations pending resolution of the motion and any appeal. In the US District Court for DC, 18 November 2008.

control over the detainees as possible, for as long as possible, and using its global war paradigm and national security arguments to do so.

On 16 December 2008, Judge Hogan handed the administration some of what it had asked for, by reducing the amount of information that the government would have to provide to the detainees or their lawyers.[59] For example, the government would no longer have to provide any "substitute" version of classified information to the detainee. Lawyers for the detainees – providing they had the appropriate security clearance – would be allowed to see the classified information upon which the government was seeking to rely, but the lawyers would not be able to discuss it with the detainee himself. The detainee would therefore be excluded from being able to assist in challenging such information, with the result that a detainee could remain in detention without knowing what information the government was relying upon to keep him there. Furthermore, Judge Hogan amended his original order to allow the government to exclude even the lawyers from seeing the information if it could persuade the court that there should be an exemption from disclosure in relation to any particular classified information.

Aside from the practical difficulties of representing individuals held on an offshore military base, the greatest difficulty faced by lawyers representing Guantánamo detainees in habeas corpus proceedings is the government's substantial use of classified information. The lawyers are required to follow procedures set out in a "protective order" issued by the District Court. Only lawyers who have received the necessary security clearance (to the SECRET level or higher) can have access to detainees at Guantánamo and to classified information, and can only view that information in a secure location, where it is stored. The lawyers may only discuss classified information within the secure area, and may not discuss it by telephone or email. Security-cleared lawyers are prohibited from disclosing any classified information to anyone who does not have such security clearance. Lawyers are also prohibited from disclosing any classified information to a detainee that has not been provided to them by that detainee. Lawyers are required to treat any information obtained from any detainee, oral or written, as classified information. After any meeting with a detainee, any notes produced are sealed and may be sent for classification review.[60]

In its post-*Boumediene* litigation, the Bush administration said that much of the information upon which the Pentagon relied in making its "enemy combatant" determinations against those held in Guantánamo, and upon which the Department of Justice was intending to rely in defending the detentions in habeas corpus proceedings, "derives from classified CIA intelligence reports".[61] According to the Director of the CIA, much of the classified CIA information implicated by the post-*Boumediene* litigation was provided to the CIA by foreign

[58] For example, In re: Guantánamo Bay detainee litigation. The government's motion for clarification and reconsideration of this Court's November 6, 2008 Case Management Order, 18 November 2008, *op. cit*.
[59] In re: Guantánamo Bay detainee litigation. Order. US District Court for DC, 16 December 2008.
[60] In re: Guantánamo Bay detainee litigation. Protective order and procedures for counsel access to detainees at the US Naval Base in Guantanamo Bay, Cuba. US District Court for DC, 11 September 2008. At the time of writing, the new administration was seeking amendments to this protective order and the protective order on detainees previously held in secret CIA custody, to close what the Justice Department argued were loopholes that could lead to unauthorized disclosure of classified information.
[61] In re: Guantánamo Bay detainee litigation, Respondents' motion for partial and temporary relief from the court's July 11, 2008 scheduling order. In the US District Court for DC, 29 August 2008.

intelligence or security services under confidential intelligence-sharing agreements. Much of the information concerns the foreign relations and foreign activities of the USA, and much of it was collected through clandestine intelligence activities, sources, and methods.[62]

In a ruling on 6 March 2009, a three-judge panel of the US Court of Appeals for the DC Circuit appears to have expanded the possibility for the Guantánamo detainees to challenge the government's basis for holding them. While not directly related to Judge Hogan's case management order issued on 6 November 2008 and amended on 16 December 2008, the ruling by the Court of Appeals offers guidelines on the question of secret information.[63]

The Court of Appeals recalled that the *Boumediene* ruling had said that the court conducting the habeas corpus proceeding "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain". The Court of Appeals considered this instruction in the context of the government's redaction of information from factual returns it filed in the cases of Guantánamo detainees. In such returns, the lawyers for detainees were provided with unclassified versions of the factual returns, while the court was provided with the full classified versions of the returns. The Bush administration had said that the redacted information fell into two categories: (1) information pertaining to individuals other than the detainee in question; and (2) "especially sensitive source-identifying information". At the same time it said that the redacted information did not support a determination that the detainee in question was not an "enemy combatant", and so the unclassified version of the factual return was all the lawyers for the detainees needed to have access to.

The Court of Appeals rejected this. The "naked declaration" by the government that a detainee's lawyer did not need to see the redacted information "simply cannot resolve the issue". Rather, "as the unredacted material was submitted to the court, it is the court's responsibility to make the materiality determination itself". Moreover, even if it was true that the redacted information does not support a determination that the detainee is not an "enemy combatant", the Court of Appeals stated that "that is not the only ground upon which information may be material in the habeas context". For example, there may be concern or evidence that "a source is biased or that his testimony was the product of coercion". Information that is "not exculpatory on its face", the Court said, "may also be material if it contains the names of witnesses who can provide helpful information". The Court of Appeals suggested a framework, analogous to criminal proceedings under the USA's Classified Information Procedures Act (CIPA), in which the District Court would consider the materiality of the withheld information and an analysis of whether alternatives short of access to full unredacted information – such as a summary of the information – would suffice.

The ruling represents an affirmation of judicial authority. In practical terms, however, it is not clear what its impact will be as there would need to be potentially time-consuming litigation on a case-by-case basis.

[62] In re: Guantánamo Bay detainee litigation. Declaration of Michael V. Hayden, Director, Central Intelligence Agency. In the US District Court for DC, 29 August 2008.
[63] *Al Odah v. USA*, US Court of Appeals for the DC Circuit, 6 March 2009.

4. New administration: Delays in judicial review and remedy persist

The delay the government seeks here is, as in all executive detention habeas cases, a substantive and not procedural matter. Delay means more indefinite detention, and that itself is the harm that this petition was filed to remedy
US lawyer for Mohammed Kamin, habeas corpus proceedings, 12 March 2009[64]

Forty-eight hours after taking office, President Barack Obama issued an executive order directing that the detention facility at Guantánamo be closed within a year. Amnesty International has welcomed the priority given to this issue by the new administration at the start of its term in office. However, the Guantánamo detainees, some of whom have been held without charge or trial for more than seven years, still face delays and uncertainty, as the executive review of their cases ordered by President Obama to determine what should happen to them – release, transfer, prosecution or some other as yet unidentified disposition – gets underway.

Early hopes for rapid resolution of the detentions have been somewhat dampened, as officials have taken to emphasizing the complexity of closing the Guantánamo detention facility. For example, six weeks after signing the order committing to closure, President Obama said that "for us to have tried to have done that in less than a year would have been completely unrealistic. And even doing it within a year is requiring an enormous amount of attention and focus".[65] While Amnesty International has no reason to doubt the President's commitment to ending the Guantánamo detentions, the organization is concerned to ensure that his administration applies all due urgency and the necessary resources to resolving all the cases swiftly and in full compliance with international law. On 30 January 2009, the organization sent the administration recommendations to this end, and urged it not to let its executive review delay habeas corpus proceedings for those detainees seeking such judicial review.[66]

President Obama's executive order on Guantánamo noted that the detainees held there have the constitutional right to challenge the lawfulness of their detention, following the US Supreme Court's June 2008 *Boumediene v. Bush* ruling. The order did not reveal how the administration foresaw the post-*Boumediene* judicial review interacting with the interagency review ordered by the new President. In any event, there have been delays in habeas corpus proceedings as a result of the change in administrations. For example, in an emergency motion filed on 20 January 2009 with one of the District Court judges with Guantánamo cases pending before him, the Justice Department said it needed at least two weeks to assess how to proceed given the change in administration. The judge granted the motion, cancelled all the "status hearings" in the Guantánamo cases scheduled before him, and ordered the administration to tell him by 4 February how it intended to proceed. On 4 February, the administration requested another two weeks. The judge denied the request, instead asking lawyers for the detainees to tell him by 9 February which of them would oppose the

[64] In re: Guantánamo Bay detainee litigation, Petitioner Kameen's opposition to respondents' for extension of time to file factual return, In the US District Court for DC, 12 March 2009.
[65] Interview with New York Times aboard Air Force One, 7 March 2009. See Obama ponders outreach to elements of the Taliban, The New York Times, 8 March 2009.
[66] See USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en.

government's request for a delay. By that date, lawyers for three detainees filed their opposition to the delays, and the judge deemed the "silence" of the others "to constitute consent" to the government's request for a delay.[67]

In a motion filed in the District Court on 30 January 2009 before another judge, the Justice Department similarly said that it was assessing how to proceed with the Guantánamo detainee litigation, "in light of the change in Administrations and the requirements of the Executive Order. Time is needed to make that assessment and determination".[68] In another brief filed in District Court on 9 February 2009, the new administration said that it might seek a postponement of habeas corpus proceedings in any number of cases "to permit sufficient time for the interagency Review to go forward".[69] On 27 February, the administration sought additional time in a number of habeas corpus cases, stating that "time is needed to make [the] assessment and determination" of how to proceed in the habeas cases in question.[70]

The review of conditions of detention conducted under President Obama's executive order on Guantánamo found that the continued detention even of those whose release had been ordered by District Court judges was causing "extreme frustration" on the part of these detainees. By the time President Obama signed the Guantánamo order on 22 January 2009, there were 20 individuals still held in the base whose detentions had already been ruled unlawful by federal judges, and whose immediate release from the base had been ordered. It seems that their cases, too, have gone into the executive review. In early October 2008, for example, District Court Judge Ricardo Urbina had ordered the immediate release into the USA of 17 Uighurs held at Guantánamo. Amnesty International called in January 2009 on the new administration to move to dismiss the previous administration's appeal against this order and to release the Uighurs.[71] However, no such motion was filed, the Court of Appeals for the DC Circuit reversed Judge Urbina's order in mid-February, and in early April 2009 the Uighurs remained in indefinite unlawful detention in Guantánamo. [72] The ruling by the Court of Appeals does not prevent the administration from releasing the Uighurs into the USA, and Amnesty International has continued to call for this outcome.[73] Asked on 7 March about the prospect of the Uighurs being released into the USA, President Obama responded that he did not want to "prejudge the reviews".[74] In late March, members of the executive review team went to Guantánamo to interview the Uighur detainees, reportedly in order to assess whether they could be released.[75]

[67] *Nasser v Obama*, Order, US District Court for DC, 10 February 2009.
[68] In re: Guantánamo Bay detainee litigation. Respondents' status report and motion for extension of time to file factual returns and legal justification. In the US District Court for the District of Columbia (DC), 30 January 2009.
[69] *Hamlily v Obama*, Government's response to the court's order of January 22, 2009 regarding the definition of enemy combatant. In the US District Court for DC, 9 February 2009.
[70] In Re: Guantanamo Bay detainee litigation. Respondents' status report and motion for extension of time to file factual returns and legal justification, 27 February 2009.
[71] See, USA: The promise of real change, *op. cit*.
[72] See USA: Right to an effective remedy – Administration should release Guantánamo Uighurs into the USA now, 19 February 2009, http://www.amnesty.org/en/library/info/AMR51/023/2009/en.
[73] See AI Urgent Action, 19 February 2009, http://www.amnesty.org/en/library/info/AMR51/027/2009/en.
[74] Interview with New York Times aboard Air Force One, 7 March 2009.
[75] Chinese inmates at Guantánamo pose a dilemma. New York Times, 1 April 2009. Obama team at Guantánamo talking to 17 ethnic Uighurs cleared in war on terror. Miami Herald, 1 April 2009.

In early April 2009, four months after their detention was ruled unlawful by a federal judge and their immediate release ordered, Lakhdar Boumediene and Saber Lahmer, seized in Bosnia and Herzegovina in January 2002, were still in the Guantánamo detention facility. More than two months after the same judge concluded that Mohammed el Gharani was unlawfully detained at Guantánamo, and ordered his immediate release, this Chadian national was also still being held there. Now in his seventh year at Guantánamo, he was taken into custody by Pakistani forces in Pakistan in late 2001, at the age of 14, handed over to US authorities and taken to Kandahar air base in Afghanistan, before being transferred to Guantánamo. The USA has an ongoing international obligation to ensure full recognition of and requisite action in relation to his age at the time of being taken into custody.[76] On 3 March 2009, his lawyer filed a motion in the District Court seeking to have the judicial release order enforced. Two weeks later, the administration said that it had decided not to appeal the release order to the Court of Appeals, and had on 18 March 2009 moved Mohammed el Gharani from the harsh conditions of Camp 5 to the lower security Camp Iguana. It said that it was engaging in diplomatic efforts to arrange for Mohammed el Gharani's "ultimate transfer", but by early April he was still held in the base. The administration opposed enforcement of the judicial order for his immediate release from Guantánamo. Its filing on this issue revealed that despite the judicial order, Mohammed el Gharani's case had still been subjected to the executive review ordered by President Obama, although in light of the judicial order, the task force conducting the review had made this case "one of its first priorities".[77]

President Obama's executive order on Guantánamo drew the outline for the interagency review of the detentions in the following terms:

> "The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source."[78]

The review will then, "on a rolling basis and as promptly as possible", determine which detainees can be transferred or released, which should be prosecuted by the USA, and what lawful alternative to these outcomes exists for those whom the review determined could neither be charged nor released from US custody. In this regard, the review is required to "identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States", and to work with US Congress "on any legislation that may be appropriate". President Obama's executive order on

[76] See AI Urgent Action, 19 February 2009, http://www.amnesty.org/en/library/info/AMR51/026/2009/en.
[77] *El Gharani v. Obama*, Respondent's opposition to petitioner's motion to enforce judgment and for parole, In the US District Court for DC, 18 March 2009. See Amnesty International Urgent Action update 20 March 2009, http://www.amnesty.org/en/library/info/AMR51/040/2009/en.
[78] Review and disposition of individuals detained at the Guantánamo Bay Naval Base and closure of detention facilities. Executive Order 13492, §4(c)(1). Fed. Reg., Vol. 47, p. 4897, 22 January 2009.

Guantánamo suggested that "new diplomatic efforts" could bear fruit in resolving detainee cases, and instructed the US Secretary of State to "expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments". In a brief filed by the new administration in late February 2009, the Justice Department included a reiteration of the Bush administration's position that "any judicial review of a transfer decision by the United States Government or the diplomatic dialogue with a foreign government concerning the terms of transfer could seriously undermine our foreign relations"[79] (see also Chapter 5).

On 23 February 2009, Attorney General Holder said that "the friendship and assistance of the international community is vitally important as we work to close Guantanamo". [80] In early April 2009, the USA formally asked the European Union to take released detainees. Amnesty International reiterates that to release into the USA the Uighurs or others for whom there is no immediate, safe, lawful and appropriate third country solution would serve to show that the USA is prepared to play its part in bringing an end to the Guantánamo detentions "as soon as practicable", as President Obama has ordered.

Attorney General Holder's statement on the need for international assistance accompanied the announcement of the transfer from Guantánamo to the United Kingdom of Binyam Mohammed, a former UK resident held in US custody since 2002 and charged by the Bush administration for trial by military commission. The announcement stated that this was the first case to be reviewed under President Obama's order. While Amnesty International welcomes Binyam Mohammed's release (see also Chapter 7), it is not clear why his case was first to be reviewed.

The inner workings of the interagency review remain non-transparent. However, on 9 March 2009, the Justice Department filed a memorandum in District Court in the post-*Boumediene* habeas corpus litigation revealing something of the administration's approach.[81] The memorandum stated that "heightened priority" was being given to the cases of detainees who had been approved for transfer or release under the executive review processes operated by the Bush administration. At least 57 detainees had been approved for transfer or release from Guantánamo by the time of the presidential inauguration (Binyam Mohammed, above, was not among them).[82] In the court filing, the Justice Department argued that habeas corpus proceedings in such cases should be stayed while the interagency review body made a determination of their disposition "as promptly as possible". In the event that this review resulted in re-approval of transfer, the Justice Department continued, the detainee's habeas challenge would likely be rendered moot on the grounds that the court could not order any further remedy beyond that approved by the executive – that is, release from the base.

This is an argument that appears to perpetuate a notion of judicial authority ultimately being subject to override by executive discretion. Once a detainee had been cleared for transfer to another country under the interagency review process ordered by President Obama, the Justice Department asserted, "in many cases a detainee will have received the only relief the [District]

[79] Declaration of Clint Williamson, Ambassador-at-Large for War Crimes Issues, 8 June 2007. See, In re: Petitioners seeking habeas corpus relief in relation to prior detention at Guantánamo Bay. Government's response to petitioners' consolidated brief regarding jurisdiction over habeas petitions of petitioners transferred from Guantánamo Bay, 23 February 2009.

Court can provide with respect to the fact of the detainee's detention". It pointed to the February 2009 *Kiyemba v. Obama* ruling by the Court of Appeals in the case of the 17 Uighurs which had overturned the October 2008 District Court order requiring their immediate release into the USA.[83] The Justice Department stated that because the ruling by the Court of Appeals "forecloses the possibility of a court order directing the Government to transfer a detainee into the United States, in many cases there will be no relief as to the fact of detention available beyond already mandated diplomatic efforts to find an appropriate receiving country". This is tantamount to an assertion that the executive may ignore an order for release of a detainee judicially determined to be unlawfully held and for as long as it takes to negotiate a return to his country of origin or to find a third country solution. This would strip the detainees of their right to meaningful judicial review, and the authority of the court, "without delay", to order the release of a detainee unlawfully held, as required under Article 9(4) of the International Covenant on Civil and Political Rights, and the right to an effective remedy for anyone whose rights under the Covenant have been violated (Article 2 of the ICCPR). In the case of the Uighurs, such diplomatic efforts have been unsuccessful for years.[84]

In a petition dated 3 April 2009, lawyers for the Uighur detainees appealed the *Kiyemba* ruling to the US Supreme Court. If allowed to stand, they argued, the decision would "eviscerate" the *Boumediene* ruling. In *Kiyemba*, the Court of Appeals had stated that the government had "represented that it is continuing diplomatic attempts to find an appropriate country willing to admit [the Uighurs], and we have no reason to doubt that it is doing so. Nor do we have the power to require anything more". The appeal to the Supreme Court argues that:

> "The *Kiyemba* majority's taxidermy would hang *Boumediene* as a trophy in the law library, impressive but lifeless. For *Kiyemba*'s practical result is that while every Guantánamo prisoner enjoys the privilege of habeas corpus, none can obtain a judicial remedy... [W]ithout the fallback of judicial power to order release, even imprisonments that the Executive concedes have no legal justification will continue at the discretion of the Executive, while the habeas court will be reduced to powerless irrelevance...

[80] Department of Justice news release, 23 February 2009. Under the Bush administration, all news releases announcing the release or transfer of Guantánamo detainees were issued by the Pentagon.
[81] *Al Sanani v. Obama*, Repondents' memorandum in support of a stay of proceedings involving petitioners who were previously approved for transfer. In the US District Court for DC, 9 March 2009.
[82] In re: Guantánamo Bay detainee litigation. Errata – Corrections to respondents' exhibits to their January 21, 2009 filing. In the US District Court for DC, 4 February 2009
[83] *Kiyemba v. Obama*, US Court of Appeals for the DC Circuit, 18 February 2009.
[84] Justice Years Overdue: Federal court hearing for Uighur detainees in Guantánamo, 7 October 2008, http://www.amnesty.org/en/library/info/AMR51/110/2008/en; Federal judge orders release of Uighurs held at Guantánamo, government appeals, 8 October 2008, http://www.amnesty.org/en/library/info/AMR51/111/2008/en; US Court of Appeals blocks release of Guantánamo Uighurs as government resorts to 'scare tactics', 10 October 2008, http://www.amnesty.org/en/library/info/AMR51/113/2008/en; Indefinite detention by litigation: 'Monstrous absurdity' continues as Uighurs remain in Guantánamo, 12 November 2008, http://www.amnesty.org/en/library/info/AMR51/136/2008/en. Right to an effective remedy – Administration should release Guantánamo Uighurs into the USA now, 19 February 2009, http://www.amnesty.org/en/library/info/AMR51/023/2009/en.

> Recent press accounts have suggested that the Executive may be considering consensual release of some of the Uighurs to the United States [see above]... In a constitutional sense, the President's discretionary release of a prisoner is no different from his discretionary imprisonment: each proceeds from his unchecked power. The question presented here is whether the Third Branch [the judiciary] may check the Second [the executive] at all. If habeas review may be shelved because one President may some day undo what his predecessor did, then the law is whatever the sitting President says it is, and the judiciary is the handmaiden of the political branches. Habeas and the separation of powers cannot wait for politics. Without the [Supreme] Court's intervention now..., all relief would hereafter be diplomatic, and located entirely and completely within the discretion of the jailer himself."[85]

The petition to the Supreme Court points out that recent government briefs indicate that the Justice Department aims to extend its use of the *Kiyemba* ruling beyond the Uighur cases, to the other Guantánamo detainees.[86] At stake, the petition argues, is whether *Boumediene* will remain as a landmark ruling or end up as "a curiosity".

The only two judges, by early April 2009, to have ordered the release of detainees who were challenging the lawfulness of their detention as "enemy combatants" (the Uighurs were no longer considered "enemy combatants" by the Bush administration), used wording in their release orders that may have compounded the problem. In the case of the seven detainees whose detention they ruled unlawful, Judge Richard Leon and Judge Ellen Segal Huvelle ordered the government to "take all necessary and appropriate diplomatic steps to facilitate the release" of the detainees in question. At the same time, their orders have stated that the releases should happen "forthwith", that is, immediately. The administration would seem to be focussing on the former phrase to the detriment of the latter word.

Judge Leon's orders have certainly not led to immediate releases (Judge Huvelle's release order was made on 31 March 2009). For example, it was nearly a month after his order of 20 November 2008 for the immediate release of five men seized in Bosnia and Herzegovina nearly seven years earlier before three of the men were freed from the base. Announcing the transfer, the Pentagon said that "following the court's decision, *the government determined* that the detainees should be transferred to their country of citizenship" (emphasis added).[87] As noted above, the other two detainees who were the subject of this release order, Lakhdar Boumediene and Saber Lahmer, remained in Guantánamo in early April 2009, as did Mohammed el Gharani, whose release "forthwith" Judge Leon had ordered in January.

The Justice Department argued in its brief of 9 March 2009 that "even if a court ruling would make a detainee more attractive to a prospective receiving country", the detainee's "reputational interest in a ruling that he has not been lawfully held as an 'enemy combatant'

[85] *Kiyemba v. Obama*, On petition for writ of certiorari to the US Court of Appeals for the DC Circuit. In the US Supreme Court, 3 April 2009.
[86] On 6 April 2009, the Justice Department argued in briefs filed in the Court of Appeals that the *Kiyemba* ruling blocked the contempt-of-court claims recently brought against the US Secretary of Defense by lawyers for the Uighur detainees for failing to carry out judicial orders on their cases.
[87] Detainee transfer announced. US Department of Defence news release, 16 December 2008.

would not support continued jurisdiction" of the court over the case. Yet, part of the difficulty in finding solutions for those detainees who cannot be returned to their own countries has been the taint upon them of being held in Guantánamo and branded as "enemy combatants". This could be described as a "collateral consequence" of the detention, to use the US Supreme Court's wording. In 1968, the Court ruled that a habeas corpus petition filed by a prisoner was not necessarily rendered moot upon release of the individual in question if as a consequence of his imprisonment he continued to suffer "disabilities or burdens".[88] The consequences of having been held at Guantánamo not only follow a detainee after his release, but also can contribute to delays in effecting his release once it has been authorized. Failure of the government to act promptly to ensure a solution must be challengeable in the courts with the power to enforce a remedy, including release into the USA.[89]

Despite its assertion that a stay in habeas corpus proceedings in those cases of detainees who have previously been cleared for release from Guantánamo by executive processes would "permit the Government, the Court, and counsel representing other detainees to focus exclusively" on the habeas cases of detainees who had not received such clearance for transfer, the new administration has also sought delays in habeas proceedings in the case of detainees who have not had any approval for transfer or release. For example, it has sought to have dismissed or held in abeyance the habeas corpus petitions for detainees who had been charged for trial by military commission by the previous administration. This is despite the fact that the commission proceedings have been suspended until at least 20 May 2009, while the new administration conducts its interagency review. The Justice Department has argued that because the charges under the MCA have not been withdrawn, habeas corpus proceedings should be stayed "to avoid the possibility of improper interference with prosecutions and other risks arising from duplicative proceedings".[90]

The additional arbitrary factor that this policy threatens to inject into already arbitrary detentions is illustrated by the case of one of the detainees whose habeas corpus petition the new administration sought to have dismissed or held in abeyance. The case is that of 'Abd al-Rahim al-Nashiri, a Saudi Arabian national held in secret US custody for nearly four years – during which time he was tortured – before being transferred to Guantánamo in September 2006.[91] 'Abd al-Nashiri was charged under the MCA by the Bush administration. On 29 January 2009, a military judge at Guantánamo, unlike other judges overseeing other military commission cases, had denied the prosecution's request to suspend proceedings pursuant to President Obama's executive order of 22 January. The new administration responded by withdrawing the charges against 'Abd al-Nashiri. This meant that the argument used in other

[88] *Carafas v. Lavallee*, 391 U.S. 234 (1968).
[89] The new administration has argued that the "collateral consequences" doctrine should not apply to former Guantánamo detainees on the basis that "enemy combatant" designation is "not a criminal conviction, and that "any moral stigma, damage to reputation, loss of employment prospects, or impact on current or future criminal proceedings" are not sufficient to keep from becoming moot after their release their habeas petitions filed before release. Government's response to order of January 12, 2009 regarding petitioners transferred or released from Guantánamo Bay, District Court, 6 February 2009.
[90] In re: Guantánamo Bay detainee litigation, Respondents' status report and motion for extension of time to file factual returns and legal justification, In the US District Court for DC, 27 February 2009.
[91] USA: Capital charges sworn against another Guantánamo detainee tortured in secret CIA custody. 2 July 2008, http://www.amnesty.org/en/library/info/AMR51/071/2008/en.

cases to seek dismissal of the habeas petition was no longer sustainable, and the government withdrew its motion to dismiss in al-Nashiri's case.

By seeking to have these habeas corpus petitions dismissed, the new administration was again adopting its predecessor's position. As noted in Chapter 3, the Bush administration's response to the *Boumediene* ruling had included seeking to keep the military commission cases from habeas review. Lawyers for Ahmad Mohammad Al Darbi, a Saudi Arabian national arrested by civilian authorities in Baku, Azerbaijan, in 2002 and transported to Guantánamo via Bagram in Afghanistan, had been among those appealing for a delay in commission proceedings after *Boumediene*. The question of military commission jurisdiction over an individual arrested far from any battlefield should be answered before any such trials took place, they argued.[92]

The Bush administration had opposed any delay, citing Section 3 of the MCA purporting to eliminate the District Court's jurisdiction to consider any claim "relating to the prosecution, trial, or judgment of a military commission..., including challenges to the lawfulness of procedures of military commissions". Under the MCA and Detainee Treatment Act, exclusive jurisdiction was reserved to the Court of Appeals, the government continued, and then "only after a final decision of the military commission has been reviewed by the Court of Military Commission Review". The *Boumediene* ruling, it said, "only applies to claims of detention" and "has no bearing" here.[93] The government added that for the District Court to put the military commissions on hold would "hamper the government's war efforts, not to mention constitute a significant intrusion into areas within the province of the Executive Branch". Remarkably, given its years-long failure to conduct trials as it prioritized interrogations and detentions without charge, it also asserted that "the public has a strong interest in seeing such individuals brought to justice as soon as possible".[94]

In late November 2008, the Bush administration sought to have the habeas petitions filed on behalf of two Kuwaiti detainees dismissed pending completion of the military commission proceedings against them. District Court Judge Colleen Kollar-Kotelly noted that charges against Fouad Mahmoud al Rabiah and Fayiz Mohammed Ahmen al Kandari had not yet been referred on for trial and that it could yet be the case that the military commission Convening Authority would dismiss the charges (as had occurred in other cases). Noting that there was no deadline on the Convening Authority to make a decision, Judge Kollar-Kotelly ruled that she could not "interfere with the findings or rulings of a military commission that does not, and may never, exist. The Court also finds that it owes no deference to a system that may never be implicated by the charges against Petitioners". Therefore she entered a stay of the habeas

[92] *Hamdan v. Gates*, Brief of amici curiae Omar Khadr and Ahmad Mohammad al Darbi in support of petitioner's motion for preliminary injunction, In the US District Court for DC, 14 July 2008.
[93] *Hamdan v. Gates*, Respondents' opposition to petitioner's motion to enjoin military commission proceedings. In the US District Court for DC, 14 July 2008.
[94] In the *Hamdan* case, District Court Judge James Robertson agreed with the government that that a 1975 Supreme Court decision (*Schlesinger v. Councilman*) "requires the courts to respect the balance that Congress has struck in creating a military justice system", and that the Military Commissions Act deserved judicial deference because it was "designed... by a Congress that... act[ed] according to guidelines laid down by the Supreme Court". Judge Robertson refused to stop the trial even though the commissions departed from US federal court or court-martial trials in basic ways, including the "startling" departure that coerced information could be admitted into evidence.

corpus cases, but ordered that the stay would only commence when and if the charges against the detainees were referred on for trial. Until that point, the habeas cases would proceed.[95]

Four days before the presidential inauguration – on the Bush administration's last "business day" – the Justice Department moved for dismissal of the habeas corpus petitions of a number of detainees whose charges had been referred on for trial under the MCA. They included Ahmad al Darbi. Six days later, President Obama signed his executive order on Guantánamo which required the Secretary of Defense to take the necessary steps to ensure that all military commission proceedings at Guantánamo were halted and that no more charges under the MCA were sworn against detainees or referred on for trial, during the period of executive review. On 26 January 2009, Ahmad al Darbi's lawyers asked the new administration to withdraw the motion to dismiss his habeas petition in light of the suspension of the military commission hearings. The government responded that it was not in a position to do so. The judge granted more time while the government considered its position.

On 26 February 2007, the Justice Department filed in District Court its brief maintaining the previous administration's position, arguing that although commission proceedings were now suspended until at least 20 May 2009, "the charges against petitioner remain pending". Thus, the brief argued, "the Court should dismiss Mr Al Darbi's habeas petition".[96]

On 7 April 2009, Chief Judge Royce Lamberth denied the government's motion. Given the suspension of the military commissions, "Al Darbi can no longer exhaust his criminal proceedings because he has no active proceedings scheduled". To grant the motion to dismiss his habeas corpus petition would, the judge said, leave Ahmad al Darbi "in limbo".[97]

Still in limbo at the time of writing was Mohammad Jawad, an Afghan national taken into custody in Kabul in December 2002 at the age of 16 or 17.[98] Charged for trial by the Bush administration under the MCA, his habeas corpus petition had been among those that that administration had sought to have dismissed in the motions it filed on its last Friday in office. On 18 February 2009, his lawyers filed a brief opposing the government's motion:

> "To permit dismissal or even a stay of Mr Jawad's habeas case – ...after more than six years of executive detention without due process – would compound the injustice Mr Jawad has suffered already and deny him his constitutional right to swift judicial review of the government's basis for detention".

On 26 February 2009, however, the Justice Department pursued the action initiated by the Bush administration, and continued to seek dismissal of Mohammed Jawad's habeas corpus petition on the grounds that he had previously been charged for trial by military commission and that these charges remained pending. The government's motion to the District Court argues that to allow the habeas corpus challenge to continue during "the relative brevity" of the 120-day suspension of the military commissions "presents the potential for duplicative proceedings".[99] Amnesty International is deeply concerned that Mohammed Jawad continues to be denied prompt judicial review of his detention, not least in view of the un-remedied

[95] *Al Odah v. Bush*, Memorandum Opinion, US District Court for DC, 6 January 2009.
[96] *Al Darbi v. Obama*, Respondents' reply in support of motion to dismiss habeas petition without prejudice... In the US District Court for DC, 26 February 2009.
[97] *Al Darbi v. Obama*, Order, US District Court for DC, 7 April 2009.
[98] USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child "enemy combatant," August 2008, http://www.amnesty.org/en/library/info/AMR51/091/2008/en

human rights violations to which he has been subjected since being taken into custody. A US military judge, for example, has found that he was subjected to torture in Afghan custody, and to "cruel and inhuman treatment" in US custody.[100] By early April 2009, no ruling had been made on the government's motion to dismiss his habeas corpus petition or hold it in abeyance, and no date had been set for a hearing on the merits of Mohammed Jawad's challenge to his detention. He has now spent a quarter of his life in US military detention.

Even if the District Court denies the government's motion in such cases, as in Ahmad al Darbi's case, the litigation over this issue will have caused further delays in habeas corpus review. Amnesty International is also concerned that "at the direction of the Secretary of Defense, the Department of Defense continues to investigate and evaluate cases for potential trial by military commission".[101] The organization is calling on the administration to abandon the commissions permanently, and to facilitate speedy habeas corpus review for any detainee seeking it. In the first two and a half months of the new administration only three more Guantánamo detainees received rulings in the DC District Court on the merits of their challenges to the lawfulness of their detention, including in one case heard before inauguration. Excluding the 17 Uighurs (see above), this brought to 12 the number of detainees who had received such a decision on their cases; seven were ordered released as unlawfully held; five were ruled lawfully held (see Appendix 3).

Amnesty International is concerned at the continued delay in judicial review for those detainees seeking it. Ordinarily in habeas corpus hearings, government authorities are required to bring an individual physically before the court and show legal grounds for their detention. If the government is unable to do so promptly (i.e. within a matter of days), the individual is entitled to be released. This is the bedrock guarantee against arbitrary detention; if it is not fully respected by the government and courts in a national legal system, the right to liberty is gravely undermined.

5. Resisting judicial review beyond lawfulness of detention

Many detainees have complained of brutal treatment, lack of medical care, and long placements in solitary confinement. To this Court's knowledge, none of these allegations, or the Government's denials, have been fully tested and subjected to the rigors of cross-examination in open court. They may never be.
US District Court Judge Gladys Kessler, 10 February 2009

To allow independent judicial oversight on the fact of detention while denying it on the question of treatment can only facilitate human rights violations and block accountability and remedy for them. The USA's international obligations require that detainees have access to an

[99] In re: Guantánamo Bay detainee litigation. Respondents' reply in support of motion to dismiss habeas petitions without prejudice or, alternatively, to hold petitions in abeyance pending completion of military commission proceedings, In the US District Court for DC, 26 February 2009.

[100] See *USA v. Jawad*, D-022, Ruling on defense motion to suppress out-of-court statements of the accused to Afghan authorities, 28 October 2008; and USA: Remedy and accountability still absent: Mohammed Jawad subjected to cruel and inhuman treatment in Guantánamo, military judge finds, 1 October 2008, http://www.amnesty.org/en/library/info/AMR51/109/2008/en.

[101] In re: Guantánamo Bay detainee litigation. Declaration of Major Heath E. Wells, Operational Law Attorney at the Criminal Investigation Task Force, 10 March 2009.

effective remedy in respect of both the fact of detention and the conditions and treatment while detained.[102]

As already noted, the Bush administration chose Guantánamo as a location to hold foreign nationals captured abroad in the "war on terror" because it believed it could keep their detentions, treatment and trials away from independent judicial scrutiny. The Guantánamo detentions began about two weeks after the Justice Department advised the Pentagon that "the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo]".[103]

The Pentagon had also asked the Justice Department for advice about "the potential legal exposure" if the District Courts were able to exercise habeas corpus jurisdiction over the Guantánamo detainees. The Justice Department responded that "there is little doubt that such a result could interfere with the operation of the system that has been developed to address the detainment and trial of enemy aliens". It advised that a habeas corpus petition would allow a detainee, among other things, to challenge "the legality of his status and treatment under international treaties, such as the Geneva Convention and the International Covenant on Civil and Political Rights", as well as "the use of military commissions and the validity of any charges brought as violation of the laws of war under both international and domestic law".[104]

The Supreme Court ruled in *Hamdan v. Rumsfeld* in 2006 that the habeas-stripping provisions of the Detainee Treatment Act (DTA) did not apply to Guantánamo detainee habeas corpus petitions then pending, that the military commission system established by President Bush was unlawful and that, contrary to the government's argument that detainees at Guantánamo enjoyed no rights under international law, at the very least Article 3 common to the four Geneva Conventions was applicable to the treatment and trial of those captured in Afghanistan. The Bush administration responded to the *Hamdan* ruling by seeking and

[102] See, e.g., International Covenant on Civil and Political Rights, article 2(3); UN Convention against Torture, articles 13, 14 and 16, as well as Committee against Torture General Comment no 2, UN Doc CAT/C/GC/2 (24 January 2008), paras 3 and 13; UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, UN General Assembly resolution 43/173 (9 December 1988), Principles 4 and 33(4) and the definition of "a judicial or other authority".

[103] Memorandum for William Haynes, General Counsel, Department of Defense, 28 December 2001, from Patrick Philbin and John Yoo, Office of Legal Counsel, US Department of Justice.

[104] *Ibid*. The Pentagon and White House further asked the Justice Department for advice on "the effect of international treaties and federal laws" on the treatment of *al-Qa'ida* and Taleban suspects taken into custody abroad. The Justice Department responded that neither the USA's War Crimes Act nor the Geneva Conventions would apply to the detention conditions of such detainees. It noted that "some may take the view that even if the Geneva Conventions, by their terms, do not govern the treatment of al Qaeda and Taliban prisoners, the substance of these agreements has received such universal approval that it has risen to the status of customary international law." The Justice Department advised, however, that customary international law "does not bind the President or the US Armed Forces in their decisions concerning detention conditions of al Qaeda and Taliban prisoners". The ill-treatment of detainees transported to Guantánamo and denied access to the courts ensued. Procedures for trials by military commission which did not meet international fair trial standards were developed and put into operation under executive order. Application of treaties and laws to al Qaeda and Taliban detainees. Memorandum for Alberto Gonzales, Counsel to the President, and William Haynes, General Counsel of the Department of Defense, 22 January 2002, from Jay Bybee, Office of Legal Counsel, US Department of Justice.

obtaining the MCA to do by legislation what it had previously attempted to do by executive policy and, latterly, the DTA. On the question of judicial review, Section 7 of the MCA read as follows:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

In its *Boumediene* ruling, the US Supreme Court stated that "the only law we identify as unconstitutional is MCA §7". It did not expressly distinguish between the two parts of Section 7 – nor did it say whether the second paragraph of Section 7 remained intact – instead stating that, "we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement." In other words, the Court left open a door for the administration to oppose challenges to its treatment of detainees beyond the fact of their detention. The Bush administration chose to step through it. A month after the *Boumediene* ruling, the Justice Department argued that the Supreme Court

> "did not hold that there is jurisdiction over actions brought by Guantánamo detainees challenging their conditions of confinement. Nothing in *Boumediene* suggests that that limitation on the jurisdiction of the federal courts is invalid. The Court, in fact, explicitly declined to address whether conditions-of-confinement claims are part of the Guantánamo detainees' constitutional right to habeas".[105]

The Bush administration argued that the *Boumediene* ruling is limited to the first paragraph of Section 7 of the MCA, and then only to the "core habeas function" of challenging the legality of detention, and that the second paragraph of Section 7 "remains operative". It argued that the federal courts are prevented from considering challenges, in habeas corpus petitions or any other action, "to any aspect of a detainee's detention apart from the core habeas function of inquiring into the lawfulness of that detention".[106]

Even as to evaluating whether the government can point to factual and legal grounds for the detention, the tests to be applied by courts in exercising the 'core habeas function' have remained vaguely, inconsistently, and arbitrarily defined – a situation that would ordinarily require that the detainee be ordered released. The government's purported legal basis for the detentions has invoked a variety of grounds, always relying on tenuous and distorted claims

[105] *Paracha v. Bush*, Respondent's motion to govern further proceedings, In the US Court of Appeals for the DC Circuit, 10 July 2008.

[106] In re: Guantánamo Bay detainee litigation, Repondents' opposition to petitioners' motion for temporary restraining order and preliminary injunction, In the US District Court for DC, 11 July 2008.

about the international law of armed conflict, rather than conceding the appropriate primary role for the solid legal foundations of the ordinary criminal justice system. [107]

It bears repeating that, in any event, the arbitrariness of the deprivation of liberty of Guantánamo detainees has only been one aspect that has left the USA on the wrong side of its international obligations – detainees have also been subjected to unlawful treatment, trial procedures, and transfers, and these violations have been an integral part of a detention regime engineered to maximize executive discretion. Over the years of the Guantánamo detentions, in the absence of independent judicial oversight,

- detainees have been unable to pursue their right to remedy for violations committed against them prior to or since their transfer to Guantánamo;
- detainees have been transported in cruel, inhuman and degrading conditions;
- detainees are reported to have been held in secret CIA detention at the base, in cases that amounted to enforced disappearance, a crime under international law;[108]
- interrogation techniques and detention conditions have been authorized and used that have violated the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and the obligation on states to treat all detainees with humanity and respect for the inherent dignity of the human person;
- detainees on hunger strike are alleged to have been subjected to cell extractions, force-feeding and the use of restraint chairs in ways which have amounted to excessive force and violations of the prohibition of torture and other ill-treatment;
- child detainees have been denied their right to be treated according to their age;
- independent medical care has been denied;
- access to legal counsel, relatives and human rights monitors has been blocked or limited;
- trial procedures have been developed and employed that fail to comply with international law;

[107] In May 2006, the USA told the UN Committee Against Torture that the detainees were held pursuant to the Military Order signed by President Bush on 13 November 2001. This was contrary to what it had argued in District Court in *Rasul v. Bush*, when it categorically denied that the detainees were held under the Order, asserting that they were held more generally under the President's Commander-in-Chief powers.

[108] Four of the 14 detainees previously held in secret CIA custody and transferred to Guantánamo in September 2006 (see Chapter 6) told the ICRC in October 2006 that they believed they had previously been held in Guantánamo "for periods ranging from one week to one year during 2003/2004". See case of Abu Zubaydah in Appendix. The existence of a secret CIA facility at Guantánamo was reported in 2004. See, for example, At Guantánamo, a prison within a prison. Washington Post, 17 December 2004. See also Testimony of Lieutenant General Randall M. Schmidt, taken 24 August 2005 at Davis Mountain Air Force Base, Arizona, for Department of the Army Inspector General, Virginia (CIA had "unfettered access to people they wanted to have and they had their own area [at Guantánamo]. They didn't use our [Department of Defense] interrogation facilities because they used their own trailer operation").

- human rights violations have been compounded by discrimination on the basis of national origin and religion;
- detainees have been transferred to situations of real risk of torture or other ill-treatment, and other similar violations of their human rights;[109]
- the numbers and identities of detainees, and who was transferred into and out of the base, remained unknown for years, leaving room for unpublicized transfers of unidentified detainees;
- the purported legal justification for the detentions has shifted.

Under the Bush administration, the Justice Department argued that "a habeas action has historically been understood as a vehicle for challenging one thing only: the fact of detention or its duration. Nothing else."[110] As noted above, this is not what the Justice Department had advised the Pentagon in December 2001 when it said that if a US court were able to exercise habeas jurisdiction this would allow a Guantánamo detainee to challenge "the legality of his status *and treatment* under international treaties, such as the Geneva Convention and the International Covenant on Civil and Political Rights" (emphasis added), as well his trial by military commission. Such treaties prohibit not only arbitrary detention, but also, among other things, torture and other cruel, inhuman or degrading treatment or punishment, discrimination, and unfair trial, and require access to remedy for anyone whose rights have been violated.

In August 2008, Judge Ricardo Urbina said that the government's bid to keep conditions of detention from judicial review was "supported in large part by the ambiguity created by the Supreme Court's latest effort to provide guidance on the rights of the Guantánamo detainees", that is, the *Boumediene* ruling.[111] Judge Urbina noted that the Supreme Court had said that it was not addressing "the reach of the writ with respect to claims of unlawful conditions of treatment or confinement" and he therefore concluded that *Boumediene* had only invalidated the first paragraph of Section 7 of the MCA. The government had argued to him that the detainees' challenge to their conditions of detention "indisputably fall outside the *Boumediene* holding because they do not concern the core habeas function. They do not challenge the legality of the petitioners' detention, but rather the ancillary issue of the conditions of their confinement. Jurisdiction is therefore lacking and the motion must be denied."[112]

The Bush administration argued that even if the District Court did have jurisdiction, the motion should be denied on the grounds that "courts are understandably reluctant to intervene in the

[109] On 6 September 2006, President Bush said that "many" of those "terrorists" held in US secret detention, once the USA had determined that they had "little or no additional intelligence value", had been "returned to their home countries for prosecution or detention by their governments". Some, for example, are reported to have been transferred to Libyan custody. See Off the Record: US responsibility for enforced disappearances in the 'war on terror', June 2007, http://www.amnesty.org/en/report/info/AMR51/093/2007.

[110] In re: Guantánamo Bay detainee litigation, Repondents' opposition to petitioners' motion for temporary restraining order and preliminary injunction, In the US District Court for DC, 11 July 2008.

[111] In re: Guantánamo Bay detainee litigation. Memorandum opinion. US District Court for DC, 7 August 2008.

[112] In re: Guantánamo Bay detainee litigation. Respondents' opposition to petitioners' motion for temporary restraining order and preliminary injunction. In the US District Court for DC, 11 July 2008.

management of detention facilities and to second-guess the security judgments made by trained personnel". It added that "deference to the considered judgment of Guantánamo staff is particularly appropriate under the unique circumstances here, involving enemy combatants detained by the military in a time of war".[113] In his decision in favour of the government, Judge Urbina agreed that "courts are reluctant to second-guess day-to-day operations of domestic prison facilities, especially when doing so intrudes upon the military and national security affairs".[114] On 22 September 2002, Judge Hogan issued a memorandum opinion in another case – that of Adnan Abdul Latif, whose lawyers had sought access to his medical records and an order from the District Court ordering the Guantánamo authorities to provide Latif with a blanket and mattress in his cell. Judge Hogan ruled that he had no jurisdiction to consider the claim, because it had been "extinguished" under the second paragraph of MCA Section 7 (see also case examples of Abu Zubaydah and Ahmed Zuhair, below).[115]

Amnesty International regrets that the previous US administration's bid to keep alive the second paragraph of Section 7 of the MCA met with some success in the District Court. As a result, while the detainees continue to wait to have their habeas corpus rights made a reality after many years of detention, their right to have judicial review go beyond the lawfulness of their detention to the question of the lawfulness of their treatment remains almost as remote as it was before the *Boumediene* ruling. This was again demonstrated in a ruling on 10 February 2009 in a case of Guantánamo detainees seeking relief from ill-treatment they said they were facing as a result of hunger-strikes they had embarked upon to protest their prolonged detention without judicial scrutiny. DC District Court Judge Gladys Kessler wrote:

> "The detainees at Guantánamo Bay have waited many long years (some have waited more than seven years) to have their cases heard by a judge so that the legality of their detention could be adjudicated in a court of law. During that time they, like all prisoners, have remained at the mercy of their captors. From all accounts – those presented in classified information the Court has had access to, in affidavits of counsel, and in reports from journalists and human rights groups – their living conditions at Guantánamo Bay have been harsh. There have been several episodes of widespread protests by the detainees, and many of them have engaged in hunger strikes of both short-term and very long-term (5 years and more) duration. Many detainees have complained of brutal treatment, lack of medical care, and long placements in solitary confinement. To this Court's knowledge, none of these allegations, or the Government's denials, have been fully tested and subjected to the rigors of cross-examination in open court. They may never be."[116]

The second paragraph of Section 7 remained valid, Judge Kessler ruled, although she noted that "the issue is not absolutely clear-cut". This was due to a sentence in the *Boumediene* ruling that she said would support the argument that the Supreme Court had invalidated the

[113] *Ibid*.
[114] In re: Guantánamo Bay detainee litigation. Memorandum Opinion. US District Court for DC, 7 August 2008.
[115] In re: Guantánamo Bay detainee litigation. Memorandum Opinion, US District Court for DC, 22 September 2002.
[116] *Al-Adahi v. Obama*, Memorandum opinion, US District Court for DC, 10 February 2009.

entirety of Section 7.[117] Nevertheless, she ruled that the MCA had stripped her court of jurisdiction and that she therefore did not have the authority to grant the remedy requested.[118]

Due to the persistence of the US lawyers representing the Guantánamo detainees, a route has been opened up for some limited judicial intervention into conditions of detention to the extent that it impacts on the health of a detainee and therefore on his ability to assist his lawyers in his habeas corpus challenge. This is described further in the case of Abu Zubaydah and Ahmed Zuhair in the Appendix to this report, as well as in the case that follows here.

To date, the new administration has adopted its predecessor's approach in relation to Section 7 of the MCA, as illustrated by developments in the case of Syrian national Muhammed Khan Tumani, who has been in US custody since he was 17 years old. He has been held in Guantánamo since early 2002 after being handed over to the USA by Pakistan forces. He has alleged that he was subjected to torture or other ill-treatment in Pakistani and US custody.

Muhammed Khan Tumani's lawyers have described his declining mental health over the years that they have been representing him. In December 2007, he reportedly sent several letters through the legal mail system that had been smeared with and contained human faeces. In March 2008, his lawyers received reports from other detainees that he was banging his head against the walls of his cell and that he was smearing his cell with excrement. By December 2008, his condition had deteriorated to the point that he cut one of his wrists.

On 6 February 2009, Muhammed Khan Tumani's lawyers filed an emergency motion in US District Court, asserting that their client was "mentally and physically at a breaking point", and seeking to end his isolation in the harsh conditions of Camp 6. The motion also sought access to his medical records and for his psychological and physical health to be independently evaluated. The government opposed the motion, arguing that it was a "conditions of confinement" claim that, due to the second paragraph of Section 7 of the MCA, the court did not have jurisdiction to consider. Thus it was maintaining the position of the Bush administration. The Justice Department's brief added that, in any event, Muhammed Khan Tumani was "not suffering from a mental illness" and was only trying to "manipulate Guantánamo Bay personnel into transferring him to a less restrictive facility".

On 23 February 2009, Judge Urbina noted that in previous cases the District Court had already determined that the *Boumediene* ruling had not invalidated the second paragraph of MCA Section 7. He therefore denied the requests for Muhammed Khan Tumani to be transferred out of Guantánamo's Camp 6; to have his allegedly coercive interrogations stopped; and for him to have access to the fellow detainee he considers to be his father. However,

[117] The line in question is "Therefore §7 of the Military Commissions Act of 2006 (MCA) operates as an unconstitutional suspension of the writ". She suggested that "any ambiguity in that sentence" might be explained by the fact much of the litigation on the Guantánamo detentions "has taken place under enormous time pressures. Occasionally, a sentence in a written opinion, even from the Supreme Court, may slip through that is not quite as tightly crafted as, from hindsight, might be desirable".

[118] She also said that even if she did have jurisdiction, under US law the detainees would not prevail. She said that the legal standard under US law was whether the detainee was being treated by his or her captors with "deliberate indifference to a substantial risk of serious harm" to the inmate, and that at the same time "courts facing these issues must be mindful of the limits of their expertise in evaluating prison policies". She also noted that under recent Supreme Court jurisprudence the detainee would have to "show that success on the merits and irreparable harm are likely, not merely possible".

Judge Urbina noted that a detainee challenging the lawfulness of his detention must have meaningful access to counsel, which includes the ability for lawyer and client to communicate, and that the requests for an independent medical examination and access to medical records "fall into a category of relief over which the court has jurisdiction". He said that "because counsel's efforts to communicate with [Muhammed Khan Tumani] have become increasingly ineffective due to purported psychological stress, the court, in furtherance of its responsibility to ensure adequate, effective, and meaningful access to court, orders that [the government] produce [Tumani's] medical records dating back to January 2007." Judge Urbina concluded, however, that "an independent medical examination is not necessary at this time".[119]

On 4 March, the government asked the judge to reconsider his order and to restrict it to "mental health records" only, and then only to those from December 2007 or later. Opposing this in a motion filed on 10 March, the lawyers for Muhammed Khan Tumani included a declaration from a psychologist who had reviewed the litigation materials and concluded that restricting release of records in this way would "interfere with the ability to make a reasonable judgment regarding Mr Khan Tumani's mental state and ability to cooperate with [his lawyers]." On 13 March, Judge Urbina denied the government's motion to reconsider, ruling that it had "not persuaded the court that it is in the interest of justice to amend its previous order." Judge Urbina also rejected the government's argument that the production of medical records would be burdensome, although he gave them an additional week to produce them.

Amnesty International urges the new administration to take a difference stance in litigation from its predecessor, by not opposing "conditions of detention" challenges on jurisdictional or other procedural grounds. Ultimately, the Military Commissions Act should be repealed or amended so that it complies with international law, including by full revocation of Section 7.

Court of Appeals issues decision on transfers from Guantánamo

In September 2005, three years before the Supreme Court's *Boumediene* ruling, the District Court issued an order requiring the US government to provide the court with 30 days notice of its intent to transfer a detainee out of Guantánamo. Judge Ricardo Urbina wrote that "the government is well aware of this court's concern that the government may remove petitioners from GTMO in the near future, thereby divesting (either as a matter of law or *de facto*) this court of jurisdiction". The case had specifically been brought on behalf of Uighurs held in Guantánamo, who feared return to and torture or execution in China, but the order was also applicable to other detainees. The Bush administration appealed.

On 7 April 2009 the Court of Appeals vacated the District Court's order.[120] However, before dealing this blow, the Court of Appeals rejected the Justice Department's argument that the MCA had stripped the District Court of jurisdiction to consider anything but the "core" habeas issue of lawfulness of detention, including the question of a detainee's potential transfer out of Guantánamo. The Court of Appeals said that in the *Boumediene* decision, the Supreme Court "did not draw (or even suggest the existence of) a line between 'core' and 'ancillary' habeas issues". On the government's theory that the second paragraph of Section 7 of the MCA had stripped the District Court of jurisdiction, it ruled that the detainees' claims on the transfer issue "are not in the nature of an action barred by [MCA Section 7, paragraph 2]." Instead, the

[119] *Tumani v. Obama*, Memorandum opinion. US District Court for DC, 23 February 2009.
[120] *Kiyemba v. Obama*, US Court of Appeals for the DC Circuit, 7 April 2009.

Court of Appeals said, "it is clear they allege a proper claim for habeas relief [under US statutory law], specifically an order barring their transfer to or from a place of incarceration".

However, even though the Court of Appeals said that federal court jurisdiction over the issue was still intact, it ruled that the detainees could not prevail on the merits of their challenge. On the question of the potential transfer of a detainee to a country where he would face torture, the Court of Appeals said that under US Supreme Court precedent this was an issue "to be addressed by the political branches, not the judiciary". The Court of Appeals noted the US government's stated policy not to transfer a detainee to a country where he is likely to be tortured, "the upshot [of which] is that the detainees are not liable to be cast abroad willy-nilly without regard to their likely treatment in any country that will take them." It ruled that the District Court "may not question the Government's determination that a potential recipient country is not likely to torture a detainee", and given the government's policy, "a detainee cannot prevail on the merits of a claim seeking to bar his transfer based upon the likelihood of his being tortured in the recipient country".

This is disturbingly deferential to executive discretion, given the USA's record of detainee transfers conducted in the absence of judicial oversight in recent years. The USA has repeatedly failed to comply with its international obligations. The practice of secret transfers of detainees without independent oversight ("renditions") and invocation of 'diplomatic assurances' in the face of real risk of human rights violations have resulted in an unknown number of individuals being transferred to secret US custody at unknown locations or to the custody of other governments where they have faced human rights violations.

Amnesty International's concern in this regard is compounded by the fact that US law falls short of the requirements of Article 3 of the UN Convention against Torture (UNCAT), which prohibits the forcible transfer of anyone to another country "where there are substantial grounds for believing that he would be in danger of being subjected to torture". The USA conditioned its ratification of UNCAT on the understanding that the phrase "substantial grounds" means "if it is more likely than not" that the person would be tortured, a higher standard of proof than is required under the Convention and therefore a lower protection.[121] The USA's international human rights obligations also require it to ensure that detainees have an opportunity to challenge before a judicial authority any pending transfer to a state where the detainee alleges he may face a risk of torture, before the transfer takes place.[122] The judgment of the Court of Appeals would seem effectively to deprive the Guantánamo detainees of such opportunity.

Even in domestic US terms, the Court of Appeals has somewhat jumped the gun, as the new administration has not yet formulated its policy on this issue. One of the executive orders signed by President Obama on 22 January 2009 establishes a Special Task Force on Interrogation and Transfer Policies whose remit includes the study and evaluation of "the practices of transferring individuals to other nations in order to ensure that such practices

[121] See Committee against Torture, General Comment no. 1; Human Rights Committee, Concluding Observations on the United States of America (2006), UN Doc CCPR/C/USA/CO/3/Rev.1, para 16.
[122] See Committee against Torture, Concluding Observations on the United States of America (2006), UN Doc CAT/C/USA/CO/2, 25 July 2006, para 20; and *Agiza v Sweden* (2005) UN Doc CAT/C/34//D/233/2003, paras 13.7-13.8. Human Rights Committee, *Alzery v Sweden* (2006) UN Doc CCPR/C/88/D/1416/2005, para 11.8.

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". The Task Force is to report back to the President within 180 days from 22 January 2009, unless the Attorney General determined that an extension was necessary.

The Court of Appeals also held that US constitutional precedent barred relief to detainees seeking to prevent their transfer to a situation of continued detention or prosecution under another country's laws. The Court ruled that to require the government to provide pre-transfer notice "interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees". As the case before it involved Uighurs no longer designated by the USA as "enemy combatants" and were cleared for release, the Court of Appeals did not address the transfer of a detainee to a situation of continued detention on behalf of or at the request of the USA. One of the three judges took issue with this. In a dissent, Judge Thomas Beall Griffith wrote:

> "The constitutional habeas protections extended to these petitioners by *Boumediene* will be greatly diminished, if not eliminated, without an opportunity to challenge the government's assurances that their transfers will not result in continued detention on behalf of the United States".

Given the ruling by the Court of Appeals, Amnesty International here reiterates its recommendations relating to releases from Guantánamo, which it sent to the new administration on 30 January 2009.[123]

- If the detainee wishes to be transferred to a particular country, and that country is willing to accept him, he should be immediately transferred to that country for release.
- Otherwise, if the detainee can be repatriated to his home country for release, without facing a real risk of torture or other ill-treatment, flagrant denial of justice, or other serious human rights violation, he should be immediately transferred to that country for release.
- If neither of the above is possible, but another state has offered to provide international protection to the detainee, without real risk of torture or other ill-treatment, flagrant denial of justice, or other serious human rights violations, the detainee should be transferred to that state.
- If none of the above is already possible at this time, without delay the detainee should be offered the opportunity to live in the USA until such time as the risks he faces in his country of origin are eliminated or he can be transferred to safety in another country, and released accordingly.
- In all of the above cases, the detainee transfer and/or release must not be made subject to the imposition of prohibitive conditions on the detainees' liberty or freedom of movement that would themselves be inconsistent with the individual's human rights. At minimum, any such conditions must be subject to fair procedure, including

[123] USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en.

substantive judicial review and supervision. Any restrictions that would amount to essentially criminal sanctions, such as house arrest, must not be imposed without a full and fair criminal trial.

- In all cases the USA should ensure the detainee is provided with the necessary support to successfully integrate into the community, including adequate medical and psychological care.
- Detainees and their legal counsel must be provided with sufficient notice of any intended transfer and an opportunity to raise in judicial proceedings any objections to the transfer, including on grounds of real risk of torture etc. No detainee may be transferred before appeals have been exhausted.

Diplomatic assurances against torture or other ill-treatment or other similar human rights violations, which are inherently neither enforceable nor reliable, should not be used to justify transfers of individuals to countries where they would face a real risk of such violations.

The new administration should work with Congress to withdraw all limiting conditions, declarations and reservations attached to the USA's existing ratification of human rights treaties, including its understanding relating to Article 3 of the Convention against Torture.

6. Former secret detainees facing particular obstacles

[redacted]

Redacted. Top Secret/SCI

The *Boumediene* ruling left it to the District Court, in the first instance, to answer the question as to how to use "its discretion to accommodate to the greatest extent possible the Government's legitimate interest in protecting sources and intelligence gathering methods" in order to "reduce the burden habeas proceedings will place on the military, without impermissibly diluting the writ's protections". The cases of those individuals who have been held in the USA's secret "High Value Terrorist Detainee Program" operated on foreign soil since 2001 or 2002, under the auspices of the CIA, are illustrative of a problem that emerges in a context where the USA's intelligence-gathering methods have included torture and enforced disappearance, crimes under international law.[124] President Obama has taken substantial steps towards ending the use of secret detention and torture by the CIA.[125] The consequences for individuals who were previously held in the secret detention program are still very much alive, however.

At least 16 so-called "high-value" detainees now in Guantánamo were held for up to four and a half years in the secret detention program operated by the USA, prior to being transferred to the US naval base in Cuba in or since early September 2006.[126] By the time of the presidential inauguration on 20 January 2009, seven of them had been charged for trial by

[124] USA: Law and executive disorder: President gives green light to secret detention program, August 2007, http://www.amnesty.org/en/report/info/AMR51/135/2007. Cruel, inhuman or degrading treatment of individuals protected by international humanitarian law also constitute crimes under international law.
[125] See USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en.

military commission under the MCA, with the former administration intending to pursue the death penalty against six of them. The other nine remained in indefinite detention without charge. All 16 are believed to be in single-cell isolation in Guantánamo's Camp 7 (see case of Abu Zubaydah in Appendix 1).

As noted in Chapter 3, on 16 December 2008 Judge Hogan amended his 6 November 2008 Case Management Order in a way that would allow the government to rely upon classified information that the Guantánamo detainee, and possibly his lawyer, could not see, to justify an individual's continued detention. Those held in the USA's secret detention program who were transferred to and remain in the Guantánamo detention facility, and those whose detentions are in any way based on information obtained from detainees held in that program, may face particular obstacles in challenging the lawfulness of their detention in habeas corpus proceedings or in otherwise seeking remedy in the courts. This is because the operating methods – including interrogation techniques – that have been used in the secret detention program remain classified at the highest level of secrecy.

Where these detainees were held prior to their transfer to Guantánamo and how they were treated in secret custody is information that has been classified TOP SECRET, on the purported grounds that unauthorized public disclosure of such information could "reasonably be expected" to cause "exceptionally grave damage" to national security.[127] Specifically, information related to the CIA program has been placed in a "tightly compartmented TOP SECRET//SCI Program" (SCI stands for Sensitive Compartmented Information). Anyone who comes into contact with the detainees, including their lawyers, has to obtain TOP SECRET//SCI security approval.[128]

Beyond the bare details of the secret program that the previous administration belatedly chose to reveal, the former Director of the CIA said that the government was "unable to tell a quarter billion Americans what it is we're doing on their behalf".[129] Secrecy has thereby prevented "a quarter billion Americans" from learning the details of the torture and other ill-treatment and enforced disappearance which their government authorized in their name, and with which

[126] The 16 are: 'Ali 'Abd al-'Aziz 'Ali; Ahmed Khalfan Ghailani; Hambali; Mustafa Ahmad al-Hawsawi; Mohammed Nazir bin Lep (Lillie); Majid Khan; 'Abd al-Rahim al-Nashiri; Abu Faraj al-Libi; Abu Zubaydah; Ramzi bin al-Shibh; Mohd Farik bin Amin (Zubair); Walid bin Attash; Khalid Sheikh Mohammed; Gouled Hassan Dourad; Muhammad Rahim al-Afghani; and Abd al-Hadi al-Iraqi. Others were subjected to 'rendition' prior to being taken to Guantánamo. They include Mohamedou Ould Slahi, a Mauritanian national taken from Mauritania to Jordan before his eventual transfer to Guantánamo. USA: Rendition – torture – trial? September 2006, http://www.amnesty.org/en/report/info/AMR51/149/2006.

[127] Under Executive Order 13292, "national security" means "the national defense or foreign relations of the United States."

[128] The ICRC, which was denied access to the "high value" detainees when they were held in secret detention, has access now they are held in Guantánamo because the organization maintains a policy of confidentiality. *Khan v. Gates*, US Court of Appeals for the DC Circuit, Declaration of Wendy M. Hilton, Associate Information Review Officer, National Clandestine Service, Central Intelligence Agency, 28 March 2008. As detailed further below its report has been leaked. An ICRC spokesman has confirmed the authenticity of the report and said that the ICRC "deplores that what was to be a confidential report has been made public." Report Calls CIA Detainee Treatment 'Inhuman'. Washington Post, 7 April 2009.

[129] Transcript of Director Hayden's Interview with Charlie Rose, 24 November 2007, *op. cit*.

governments it formed alliances in conducting an internationally unlawful detention program.[130]

Although the Bush administration chose to reveal that in 2002 and 2003 at least three of the detainees held in the secret program were subjected to the form of torture known as water-boarding, it maintained that the *unauthorized* public disclosure of information about interrogation techniques and detention conditions employed in the program could cause grave damage to national security by allowing "al Qaeda and other terrorists" to train to resist such techniques. Moreover, it asserted, the foreign governments which have been involved in the detainee program, including "hosting of foreign detention facilities", were promised secrecy.[131] Foreign governments, the CIA maintained, "have provided critical assistance to CIA counterterrorism operations, including but not limited to hosting of foreign detention facilities, under the condition that their assistance be kept secret". Statements by those held in the secret detention program about where they were held "would damage the CIA's relations with those foreign governments and could cause them to cease cooperating with the CIA on such matters". Any "disclosures" by the detainees concerning "foreign cooperation" could frustrate "CIA efforts to obtain vital national security information required to protect the American people".

The existence of information already in the public domain about the secret detention program did not cause the former administration to amend its position. Although individuals other than the "high-value" detainees now at Guantánamo made statements about their alleged detention in the CIA program, the government responded that it had never acknowledged whether these individuals were held in the program or confirmed whether "media speculation" about the program is correct.[132] It asserted that it must be allowed to continue to treat all statements about the program by those detainees now in Guantánamo as classified Top Secret//SCI.

Until early January 2009, an overarching issue in relation to these particular detainees was that no post-*Boumediene* "protective order" governing procedures for legal counsel had been entered in their cases. The absence of such an order meant that, six months after the *Boumediene* ruling, security-cleared US lawyers for these former CIA detainees had no access to their clients for the purpose of representing them in habeas corpus. On 9 January 2009, Judge Hogan signed a protective order in the case of four of the ex-CIA detainees whose cases were among the approximately 200 before him for coordination.[133]

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[130] On 17 September 2001, President Bush gave the CIA broad authorities to conduct clandestine operations, including recruiting foreign intelligence services to act as surrogates for the USA. Several intelligence services were listed, including Egypt, Jordan and Algeria. See pages 107-109 of USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004.

[131] *Khan v. Gates*, The Hilton Declaration, 28 March 2008, *op. cit.*

[132] See, for example, USA: A case to answer. From Abu Ghraib to secret CIA custody: The case of Khaled al-Maqtari, March 2008, http://www.amnesty.org/en/library/info/AMR51/013/2008.

[133] In re: Guantánamo Bay detainee litigation. Amended protective order for habeas corpus cases involving top secret/sensitive compartmented information and procedures for counsel access to detainees at the United States Naval Base in Guantanamo Bay, Cuba, in habeas cases involving Top Secret/Sensitive Compartmented Information. US District Court for DC, Judge Hogan, 9 January 2009. At the time of writing this order was the subject of litigation (see note 60 above)

Under the protective order, the lawyers for these detainees "shall not disclose the contents of any classified documents or information, including counsel in related cases brought by Guantánamo Bay detainees in this or other courts, except those persons authorized by this TS/SCI Protective Order, the Court, and counsel for the government with the appropriate clearances and need to know that information". Although the lawyer can seek, on a case-by-case basis, authorization from the relevant government agency to disclose classified information to appropriately cleared lawyers in related Guantánamo cases, this provision of the order places substantial limitations on habeas counsel.

Lawyers for the "high-value" detainees are required to treat all information learned from his or her client, written or oral, as classified at the Top Secret/SCI level. All notes from detainee/lawyer meetings are sealed and may be sent for classification review. Even if unclassified when taken into such meetings, "all materials brought out of meetings with detainees and counsel are presumptively TS/SCI". Telephone access to these detainees by their lawyers "normally will not be approved". If a lawyer breaks the terms of the protective order – including disclosing allegations of human rights violations related to them by their clients – they can be held in contempt of court or face prosecution for disclosing state secrets. Such an order effectively, then, denies detainees any real prospect of appropriate investigation of and effective remedy for human rights violations they have suffered such as torture or other ill-treatment or enforced disappearance.

Judge Hogan's elimination of the requirement on the government to provide the detainee with a substitute of any classified information (see Chapter 3) could mean that the lawyer for an ex-CIA detainee would be unable to discuss the basis of the detention with his or her client. If, for example, the factual return were to say that the detainee had made a confession, and if that alleged confession was information new to the lawyer, the lawyer would have no mechanism through which to discuss the allegation with the detainee. Both the lawyer and his or her client would be operating in the dark. This would make a mockery of habeas corpus review.

Effective review of detentions by an independent judiciary serves to promote transparency of government action as well as the protection of detainees from government abuse. These ex-CIA detainees have personal knowledge relating to the human rights violations, including enforced disappearance, torture and other cruel, inhuman or degrading treatment, that have been committed as a part of the secret detention program. To put it another way, their treatment has transformed them from detainees whom the US government claimed had high intelligence value relevant to preventing attacks or locating *al-Qa'ida* leaders into, whatever else they may or may not be, eyewitnesses to and victims of crimes under international law for which the USA, and its individual agents, must be held responsible. However, they cannot make public what they know, blocking their ability to challenge their detention or to obtain redress.

The CIA has asserted that the detainees held in the CIA program "have been exposed to classified intelligence methods, including the CIA's methods of questioning, conditions of confinement while in CIA custody, and certain intelligence disclosed during the course of questioning". It has claimed that any disclosure of such information could cause "exceptionally grave damage to national security by making it more difficult for the CIA to obtain the information it needs to help protect the American people".[134] The "exposure" of these detainees to the CIA's interrogation methods and detention conditions was not

[134] The Hilton Declaration, 28 March 2008, *op. cit*.

something they had control over, however. This is not equivalent to a case of an individual who enters into an agreement with the government, such as an employment contract, not to disclose classified information to which he or she becomes party. Neither is it like a case of a person who obtains such information by illicit methods. The US authorities *deliberately, knowingly and without the recipient's consent* provided the detainees with such knowledge when the government subjected them to this internationally unlawful program. It then sought to censor this knowledge. Its censoring of these detainees has been dependent on being able to keep them from the media or any other public outlet – and the refusal of the authorities to bring them to a proper court and allow them to say what happened to them.

The USA's secret detention program, coupled with the use of classification to keep secret its operational details, has breached a number of rights and obligations under international law:

- Secret detention violates international law, including the right of anyone deprived of their liberty to be able to challenge the lawfulness of their detention in a court of law and to have effective access to legal counsel for this purpose. It can also violate the right of the individual to recognition everywhere as a person before the law. Prolonged secret detention, *per se*, constitutes torture or other cruel, inhuman or degrading treatment or punishment, in violation of international law. It can also, and frequently does, constitute enforced disappearance, like torture, a crime under international law. In the case of the 14 detainees transferred from secret CIA custody to Guantánamo in September 2006, the ICRC, the only international organization to have had access to them in the naval base, has concluded that "the totality of the circumstances in which the fourteen were held [in CIA custody] effectively amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law".[135]
- The detaining government has an obligation to ensure a prompt and impartial effective investigation into any allegations of torture or other ill-treatment of individuals in its custody, and to make the findings public. If the torture or other ill-treatment (including in the form of secret or prolonged incommunicado detention) is alleged to have occurred on the territory of a country other than that of the detaining authority, the government of that host country must also conduct such an investigation. Wherever investigations reveal acts of torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killing or enforced disappearance, the state must ensure perpetrators are brought to justice. Especially as regards torture and enforced disappearance, international law expressly requires the state to submit the case to its competent authorities for the purpose of prosecution if it does not extradite the accused to another state willing to do so.
- Anyone whose human rights have been violated has the right to effective remedy.
- Alleged victims of torture and their legal representatives shall have access to all information relevant to the investigation of the allegation.
- Anyone who alleges torture, whether victim or witness, must be protected from any form of ill-treatment or intimidation as a consequence of their statements.

[135] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, February 2007, page 24. This leaked report is available at http://www.nybooks.com/icrc-report.pdf.

- Everyone has the right to impart information regardless of frontiers, through any medium, subject only to certain restrictions as are provided in law and are necessary, including under legitimate national security considerations.
- Anyone charged with a criminal offence has the right to a trial complying with international fair trial standards, which includes the right, in full equality, to examine, or have examined, the witnesses against him or her.
- No statement obtained under torture or as a result of other ill-treatment may be invoked as evidence in any proceedings, except against a person accused of the abuse as evidence that the statement was made.

Under international law, national security concerns – including a public emergency which threatens the life of the nation – cannot be invoked as justification for torture or other ill-treatment, abduction or enforced disappearance, arbitrary detention (including through denial of effective court review of the lawfulness of detention), or deviation from fundamental principles of fair trial. It follows, therefore, that classification cannot lawfully be used to block public scrutiny and appropriate inquiry into allegations of such violations.

Secrecy by governments facilitates abuse and any use of secrecy must be subject to stringent oversight to determine its clearly lawful justification. The Bush administration exploited secrecy to facilitate and perpetuate unlawful policies. President Bush, for example, confirmed the existence of the secret detention program in September 2006 because it suited his administration's broader goals to do so (the passage of the MCA). Prior to this, despite substantial evidence in the public domain pointing to the operation of such a program, the administration had refused to confirm or deny such reports. In addition to confirming the existence of the CIA program, another secret which the Bush administration chose to reveal related to the authorization and use of "water-boarding", an interrogation technique which President Obama and Attorney General Eric Holder have stated, rightly, is torture.[136] The former administration never explained why it chose to make this information public after years of claiming that to reveal its interrogation techniques would gravely threaten national security. However, the revelation came a few weeks after the CIA Director confirmed that in 2005 the CIA had destroyed videotapes of interrogations conducted in 2002. He said he had acknowledged the destruction of the tapes because he had been informed that the press were about go to public with this revelation, and he said that he wanted to pre-empt any "misinterpretations of the facts in the days ahead" (see case of Abu Zubaydah, in Appendix 1).

While the Bush administration asserted that it was not using classification to hide unlawful government conduct, what it considered lawful was clearly at odds with international law.[137] An illustration of this was the very existence and operation of the secret detention program itself.

[136] At a Senate hearing in 2008, the CIA Director confirmed that three men held in the CIA program – Abu Zubaydah (detained March 2002), 'Abd al-Nashiri (detained November 2002) and Khalid Sheikh Mohammed (detained March 2003) – were subjected to this form of torture. See also USA: Torture acknowledged, question of accountability remains, 14 January 2009, http://www.amnesty.org/en/library/info/AMR51/003/2009/en.

[137] Under Executive Order 13292, information cannot be classified in order to (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of the national security.

As two UN treaty monitoring bodies – the Committee Against Torture and the Human Rights Committee – told the US government, secret detention violates the USA's international obligations. The US government dismissed such calls, justifying its resort to secret detention under its global war paradigm and concomitant rejection of international human rights law as the "applicable legal framework".[138] Amnesty International considers not only that the secret detention program was always unlawful, but also that any use of classification that conceals acts of torture or other ill-treatment, facilitates impunity, blocks remedy, and hinders full and fair trials is itself unlawful under international law.

Under an Executive Order signed by President Bush in March 2003, there is a general presumption that classified information requires continued protection from unauthorized disclosure. In "exceptional cases", however, "the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified".[139] Amnesty International emphasizes that there is an international legal obligation upon all governments, in addition to an overwhelming public interest, to ensure full accountability for human rights violations, including bringing perpetrators to justice and ensuring that victims have access to effective remedy and reparation. All governments also have the legal duty to ensure that anyone in detention has a meaningful opportunity to challenge the lawfulness of their detention in court. Those charged with criminal offences must be brought to fair trial in line with international standards, and afforded full opportunity to confront the allegations and evidence against them. The use of classified information must not diminish realization of these rights.

7. Remedy denied: New administration blocks detainee lawsuits

At the outset, we note that Boumediene cannot possibly change this Court's holding that plaintiff's claims must be dismissed
US Justice Department, in the US Court of Appeals, March 2009[140]

President Obama has committed his administration to an "unprecedented level of transparency in government" on the grounds that "transparency promotes accountability and provides information for citizens about what their Government is doing". Amnesty International is calling on the new administration and Congress to ensure accountability and remedy for human rights violations committed in the name of counter-terrorism, as well as for all current detention and interrogation policies and practices to be brought into line with international law.[141] All branches of government are under the international obligation to ensure access to remedy for detainees.

[138] Responding to the UN Human Rights Committee's call in 2006 to "immediately cease its practice of secret detention and close all secret detention facilities", the USA responded that "the United States is engaged in an armed conflict with al Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants... The law of war, and not the [ICCPR], is the applicable legal framework governing these detentions... In certain rare cases, the United States moves enemy combatants to secret locations". UN Doc: CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008.
[139] Executive Order 13292 of 25 March 2003. Further amendment to Executive Order 12958, as Amended, Classified National Security Information.
[140] *Rasul v. Rumsfeld*, Supplemental brief for appellees/cross-appellants, In the US Court of Appeals for the DC Circuit, March 2009.

The question of access to remedy for released and current detainees who seek to sue US officials and others for violations committed in the context of the USA's counter-terrorism detentions is currently before the US Court of Appeals, providing early indications of how, if at all, the new administration will differ from its predecessor on such questions.

New administration seeks dismissal of detainee lawsuit

A case currently before the US Court of Appeals for the DC Circuit concerns Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed and Jamal al-Harith, four nationals of the United Kingdom who were held without charge or trial in Guantánamo for two years from 2002 to 2004. Seven months after their repatriation in March 2004 they filed a lawsuit in the District Court in Washington, DC, in which they sought damages for their unlawful treatment at Guantánamo. Their complaint stated that they had suffered prolonged arbitrary detention, torture and other cruel, inhuman or degrading treatment in violation of the Geneva Conventions, customary international law, and the US Constitution, and discriminatory treatment on the basis of their religious beliefs in violation of US federal law. Then Secretary of Defense Donald Rumsfeld, former Chairman of the Joint Chiefs of Staff General Richard Myers, former commander of the Guantánamo detentions, General Geoffrey Miller, and then Commander of US Southern Command, General James Hill, were among the officials named as defendants in the lawsuit.

In US law, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act) confers immunity on individual government employees deemed to have been acting within the scope of their "office or employment" at the time of the alleged acts.[142] The District Court examined the question of whether the individual defendants in the *Rasul* case had been acting within the scope of their employment when the alleged torture or other ill-treatment and arbitrary detention took place. Judge Ricardo Urbina noted that it was undisputed that the named officials had "initially acted" pursuant to a memorandum signed by Secretary of Defense Rumsfeld on 2 December 2002. Since Judge Urbina's consideration of the *Rasul* lawsuit, the US Senate Armed Services Committee has concluded that Secretary Rumsfeld's December 2002 authorization "was a direct cause of abuse" at Guantánamo, and had contributed to abuse of detainees in US custody in Afghanistan and Iraq.[143] In the memo, Secretary Rumsfeld had authorized interrogation techniques such as stripping, hooding, prolonged isolation, exploitation of individual phobias, stress positions and forced grooming for use against detainees held at Guantánamo. Secretary Rumsfeld subsequently rescinded that authorization, but the lawsuit maintained that the ill-treatment had continued (the Senate Armed Services Committee report noted that despite the rescission, Secretary Rumsfeld's initial approval "continued to influence interrogation policies"). In the *Rasul* lawsuit, the Bush administration argued that any continuation after rescission should be considered as "incidental to the conduct authorized", which under US federal law would also constitute action within the scope of the individual official's employment.

[141] See USA: Investigation, prosecution, remedy. Accountability for human rights violations in the 'war on terror', December 2008, http://www.amnesty.org/en/library/info/AMR51/151/2008/en

[142] *Rasul v. Rumsfeld*, Memorandum opinion granting in part and deferring ruling in part on the defendants' motion to dismiss. US District Court for DC, 6 February 2006.

[143] Senate Armed Services Committee inquiry into the treatment of detainees in US custody. Executive summary and conclusions, released in December 2008, http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf.

Judge Urbina agreed with the government and granted its motion to dismiss the international law claims. He found that the AUMF (see Chapter 2) had authorized the military to carry out the detentions. He found that torture, though "reprehensible", was a "foreseeable consequence of the military's detention of suspected enemy combatants". He said that there was no evidence to lead him to believe that the alleged torture and other ill-treatment "had any motive divorced from the policy of the United States to quash terrorism around the world". Judge Urbina ruled therefore that the individual defendants had been acting, "at least in part, to further the interests of their employer, the United States". He ruled that the conduct was foreseeable: "the heightened climate of anxiety, due to the stresses of war and pressures after September 11 to uncover information leading to the capture of terrorists, would naturally lead to a greater desire to procure information and, therefore, more aggressive techniques for interrogations".

Under the Westfall Act, once individual government officials are deemed to have been acting within the scope of their employment, the US government is substituted as the defendant in their place. This substitution, Judge Urbina said when making it in the *Rasul* case, "effectively grants the defendants absolute immunity for violations of international law". The Westfall Act then directs that the pursuit of remedy for wrongful conduct committed by government employees must be conducted under the Federal Torts Claims Act (FTCA). Under the FTCA, a lawsuit may not be brought unless and until the claimant has first presented his or her claim to the "appropriate Federal agency" and had it finally denied by the agency. Because the *Rasul* claimants had not exhausted their administrative remedies in this way, Judge Urbina granted the government's motion to dismiss the international law claims on the basis that he did not have jurisdiction to consider them.

Judge Urbina then addressed the claim that their rights under the US Constitution had been violated by their arbitrary detention and ill-treatment in Guantánamo. At that time (2005), the question of what constitutional protections the Guantánamo detainees were entitled to was before the federal courts, with the *Hamdan v. Rumsfeld* ruling, the Military Commissions Act, and the *Boumediene v. Bush* ruling not yet having occurred. Judge Urbina ruled that even if the Supreme Court were to extend constitutional protections to the detainees, the *Rasul* claimants would "still have the burden of proving that these rights were clearly established at the time of the alleged conduct". He found that the four UK nationals had "provided no case law, and the court finds none, supporting a conclusion that military officials would have been aware, in light of the state of the law at the time, that detainees should be afforded the rights they now claim". Because of the "unsettled nature of Guantánamo detainees' constitutional rights in American courts, the [government officials] cannot be said to have been plainly incompetent or to have knowingly violated the law, and therefore are entitled to qualified immunity".

Finally, Judge Urbina called on the parties to file supplemental briefing on the question of whether the detainees' rights under the Religious Freedom Restoration Act (RFRA) had been violated during their detention in Guantánamo, including through the use of forcible shaving, the alleged flushing of the Koran down the toilet, and harassment while practicing their religion. On 8 May 2006 Judge Urbina ruled that such conduct by officials – "blatant and shocking acts" allegedly perpetrated against individual detainees on account of their religion – would fall squarely within the conduct prohibited by the RFRA. He ruled that the RFRA

applied to US government actions at Guantánamo Bay, and the defendants were not entitled to qualified immunity on this claim.[144]

The case was appealed to the US Court of Appeals for the DC Circuit. On 11 January 2008, a three-judge panel of the Court upheld the District Court's rulings on the international law and constitutional claims. On the claim of religious discrimination, the Court of Appeals noted that the RFRA prohibits the government from "substantially burden[ing] a *person's* exercise of religion" (emphasis in original). The Court took the view that because the claimants were foreign nationals who were held outside US sovereign territory at the time of the alleged conduct that led to the RFRA claim, US Supreme Court precedent meant that they did not fall within the definition of "person". Their RFRA claim, it ruled, should therefore be dismissed.

In its January 2008 ruling, the Court of Appeals noted that it had ruled on 20 February 2007 in the *Boumediene v. Bush* case that the Guantánamo detainees lacked constitutional rights because they were foreign nationals captured and held outside the USA, and that the Military Commissions Act had lawfully stripped the courts of jurisdiction to consider habeas corpus petitions from foreign detainees held abroad as "enemy combatants". The Court of Appeals noted that its ruling in the *Boumediene* case was currently pending on appeal before the US Supreme Court, but stated that "we must follow Circuit precedent until and unless it is altered by our own *en banc* [full court] review or by the High [Supreme] Court".

Following the US Supreme Court's *Boumediene* ruling overturning the DC Court of Appeals decision in that case, the *Rasul* petitioners appealed to the Supreme Court to take the case and apply its *Boumediene* ruling to it, or to return the case to the Court of Appeals for reconsideration in the light of *Boumediene*. In an order issued on 15 December 2008, the Supreme Court took this latter route and remanded the *Rasul* case to the Court of Appeals. Six days later, on 22 December 2008, the DC Court of Appeals ordered the parties to "file supplemental briefs addressing the effect, if any, of the holding in *Boumediene v. Bush*, on this court's opinion in *Rasul v. Myers*, in light of Circuit precedent".

At first the Court of Appeals ordered that the parties' briefing to it on the *Rasul* case be completed by 16 January 2009 – four days before the inauguration of President Obama. It subsequently agreed to extensions and briefs from the parties were filed by 23 March 2009. This new schedule meant that the new administration would be responsible for briefing the court on the government's position on the rights of the *Rasul* petitioners to remedy for human rights violations authorized and committed under the previous administration.

On 12 March 2009, the Justice Department filed its brief in the Court of Appeals in the *Rasul* case. It argued that the Court had been right to rule earlier that Guantánamo detainees lack due process rights under the Fifth and Eighth amendments to the US Constitution.[145] The brief asserted that this had been affirmed in the 18 February 2009 ruling by the DC Court of Appeals overturning a District Court order for the immediate release into the USA of 17 Uighur detainees unlawfully held in Guantánamo.[146] It argued that "the controlling precedent of this

[144] *Rasul v. Rumsfeld*, Memoranum opinion denying the defendants' motion to dismiss the Religious Freedom Restoration Act claim. US District Court for DC, 8 May 2006.
[145] The Fifth amendment reads, in part: "No person shall be...compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..." The Eighth amendment prohibits, inter alia, "cruel and unusual punishments".
[146] *Kiyemba v. Obama*, US Court of Appeals for the DC Circuit, 18 February 2009.

Circuit supports reinstatement of this Court's prior judgment of dismissal of [the *Rasul* petitioners'] constitutional claims". It also stated that at the time the four UK nationals were in US custody (2002 to 2004), "it was, at a bare minimum, not clearly established that the Fifth and Eighth Amendments protected aliens detained abroad by the military". The Justice Department asserted that it would be "unfair" to subject government employees to financial damages when the constitutional rights being asserted, "which are still not established today, were not clearly established at the time of the alleged acts in question here".

In its 12 March 2009 brief, the Justice Department effectively sought a blanket ban on lawsuits brought for foreign nationals claiming constitutional violations against US military officials, on the grounds that such lawsuits "for actions taken with respect to aliens detained during wartime would enmesh the courts in military, national security, and foreign affairs matters that are the exclusive province of the political branches". Allowing such lawsuits might lead officials to "make decisions based upon fear of litigation rather than appropriate military policy".

Finally, the Justice Department argued that the earlier decision by the Court of Appeals to dismiss the RFRA claim was unaffected by the *Boumediene* ruling. Even if the RFRA did apply to foreign nationals held at Guantánamo, the brief continued, dismissal of the *Rasul* petitioners' RFRA claim should be dismissed because the government defendants "are entitled to qualified immunity". At the time of the detentions in question, 2002 to 2004, "a reasonable official could have doubted, at a minimum, that RFRA granted rights to suspected enemy combatants captured on foreign soil and held at a military facility abroad during a time of war".[147]

Under Article 2.3 of the ICCPR, any person whose rights under the ICCPR have been violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". Any person claiming a remedy must have this right "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State", and the government must "develop the possibilities of judicial remedy". Moreover, the government must ensure that the competent authorities "enforce such remedies when granted".

International law requires the USA to provide the victims of violations with remedies that are not only theoretically available in law, but are actually accessible and effective in practice.[148] Victims are entitled to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The new administration should amend its arguments in the *Rasul* case to those that are fully consistent with international law, including the international prohibition on torture or other

[147] *Rasul v. Rumsfeld*, Supplemental brief for appellees/cross-appellants, In the US Court of Appeals for the DC Circuit, March 2009.

[148] See UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", Resolution A/RES/60/147 (21 March 2006); Human Rights Committee, General Comment no. 31 (2004), paras. 15 & 16; UNCAT, article 14; Committee against Torture, *Dzemajl v Yugoslavia* (161/2000), 21 Nov. 2002, para. 9.6.

cruel, inhuman or degrading treatment or punishment, and the right to remedy of individuals whose rights under international law have been violated.

State secrets doctrine invoked

In another case before the US Court of Appeals, this time in the Ninth Circuit, the new administration's initial stance is a cause for serious concern. The case is *Mohamed v. Jeppesen Dataplan, Inc.*, and at the centre of it is the question of governmental use of secrecy that blocks judicial scrutiny of human rights violations and facilitates impunity and lack of remedy for them.

Five current detainees or former detainees filed a lawsuit in US District Court in California in 2007 against Jeppesen Dataplan, Inc. (Jeppesen), a US company based in California, for its alleged role in the 'rendition' program operated by the USA, largely under the auspices of the CIA, since 2001. The five plaintiffs seeking damages for the human rights violations they say they were subjected to in this program are:

- Binyam Mohamed, a UK resident who was arrested in 2002 in Karachi, Pakistan, and turned over to US custody. According to the complaint, he was held for four months in incommunicado detention in US custody before being transferred to Morocco where he was held for 18 months in secret detention and subjected to torture or other ill-treatment by Moroccan interrogators. In January 2004, he was flown to secret detention in the so-called "Dark Prison" in Kabul, Afghanistan, before being transferred to Bagram, and thence in September 2004 to Guantánamo. He was released to the UK in February 2009.
- Abou Elkassim Britel, an Italian national who was working in Pakistan. According to the lawsuit, he was arrested in March 2002, spent two months in Pakistani custody before being handed over to the CIA and flown to Morocco, where he was held in secret custody for eight months and subjected to torture. He was released without charge in February 2003, but arrested by Moroccan authorities three months later, tried for terrorist-related activities and sentenced to 15 years in prison, reduced to nine years on appeal.
- Ahmed Agiza is an Egyptian national who was arrested in Sweden in December 2001, handed over to the CIA, and flown to Egypt where he was allegedly subjected to torture. In 2004, he was tried by a military tribunal in Egypt and sentenced to 25 years for membership of a banned organization, reduced to 15 years on appeal.
- Muhammad Faraj Ahmed Bashmilah is a Yemeni national who was arrested in Jordan in 2003, handed over to the CIA and flown to Afghanistan and thence to secret detention at an undisclosed location. He was allegedly subjected to torture or other ill-treatment during 19 months in US custody. He was returned to Yemen in May 2005.
- Bisher al-Rawi is an Iraqi national and a UK permanent resident who was arrested in Gambia in November 2002, handed over to the CIA and flown to Afghanistan, where he was held in the 'Dark Prison' and Bagram before being transferred to Guantánamo. He has alleged that he was subjected to torture or other ill-treatment in US custody. He was released to the UK in March 2007.

The lawsuit alleged that "Jeppesen has provided direct and substantial services to the United States for its 'extraordinary rendition'. In providing its services to the CIA, Jeppesen knew or reasonably should have known that Plaintiffs would be subjected to forced disappearance, detention, and torture in countries where such practices are routine".

The Bush administration moved to intervene in the case, to assert "state secrets privilege" on behalf of itself and Jeppesen, and to have the case dismissed on that basis. Under US constitutional law, the government may assert state secrets privilege when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged". The invocation of the state secrets privilege is a categorical bar to a lawsuit if its very subject matter is a state secret. The Bush administration asserted that the subject matter of this lawsuit was. In support of this assertion, the Director of the CIA filed a declaration with the District Court that proceeding with the case would cause "exponentially grave damage" to national security by revealing CIA methods and sources and "extremely grave damage" to the USA's foreign relations and activities by revealing which governments the CIA had cooperated with.

In February 2008, the District Court ruled in favour of the government. The judge said that a review of the CIA Director's public and classified declaration raised concern that "any further proceedings in this case would elicit facts which might tend to confirm or refute as of yet undisclosed state secrets". He noted that at the core of plaintiff's case against Jeppeson were "allegations" of covert US operations outside the USA against foreign nationals which he said was "clearly a subject matter which is a state secret". He dismissed the case.[149]

The decision was appealed to the US Court of Appeals for the Ninth Circuit, and two and half weeks after the new US administration took office, a hearing was held in the court. Asked by one of the three judges whether the new administration would be adopting a different stance on the case than its predecessor, the Justice Department lawyer replied that it would not. Pressed by another of the judges who asked: "The change in administration has no bearing?", the Justice Department official replied: "No, Your Honour". The matter had been "thoroughly vetted with the appropriate officials within the new administration", he said, and "these are the authorized positions".[150]

Amnesty International urges the new administration not to block accountability. To ensure that the right to remedy and redress is effective as required by international law, any invocation of state secrets privilege that might prevent a victim of torture or other ill-treatment, arbitrary detention, unfair trial, enforced disappearance, or other human rights violations from establishing the violation and obtaining an effective remedy, must be precluded.

8. Conclusion

Last week, I visited Guantánamo Bay and toured the facility. My trip reinforced my belief that while closing the detention center will be no easy task, it is one that must be done. The closure of Guantánamo has come to symbolize – to our citizens and to our global partners –

[149] *Binyam Mohamed et al. v. Jeppesen Dataplan, Inc.*, Order granting the United States' motion to intervene and granting the United States' motion to dismiss with prejudice, In the US District Court for the Northern District of California, San Jose Division, 13 February 2008.

[150] Obama backs off a reversal on secrets. New York Times, 10 February 2009. See also Handling of 'state secrets' at issue. The Washington Post, 25 March 2009.

the depth of our commitment to the rule of law. This is why President Obama and I believe that ultimately, closing Guantánamo will make us safer and stronger.
US Attorney General Eric Holder, March 2009[151]

By presidential order, the detention facility at Guantánamo will close by 22 January 2010. This is to be welcomed. The history of detentions at the US Naval Base in Cuba is one of denial of the human rights and human dignity of those held there. In the absence of independent judicial review, detainees have been subjected to torture and other ill-treatment, arbitrary detention, and other human rights violations. Amnesty International will continue to campaign for the detainee cases to be resolved with all due urgency and in ways that comply with the USA's international obligations. It will also continue to campaign for accountability and for remedy.

It took more than six years for the detainees held at Guantánamo to be recognized by the US Supreme Court as having the right under the US Constitution to challenge the lawfulness of their detention in US court. The Supreme Court's order that the detainees be given "prompt" habeas corpus hearings has not happened, however. This is perhaps not surprising given the Bush administration's tactics that sought to delay and limit the impact of the *Boumediene* ruling that had finally punctured the government's original reason for locating detainees at Guantánamo. To its final days, this was an administration which disregarded its international obligations on the treatment of detainees.

A new administration brings with it the promise of change. There have already been positive moves towards ending and unraveling some of the unlawful detention and interrogation policies adopted by the USA during the Bush administration's term in office. Amidst the positive, however, there is some cause for concern. An apparent lingering attachment to the global war paradigm, and its concomitant rejection of human rights and criminal law, is one. Another is an apparent willingness to delay the judicial review that is already years overdue for the detainees held at Guantánamo. Another is, like its predecessor, to seek to narrow the scope of judicial review to exclude court oversight of detainee treatment. Another is the invocation of "state secrets privilege" by the new administration in the cases of detainees seeking remedy for human rights violations committed against them in US custody.

Amnesty International considers it unacceptable that any Guantánamo detainee continues to be held without criminal charge followed without further undue delay by a fair trial. It therefore continues to call on the administration to immediately release any detainee not charged with a recognizable criminal offence for trial under fair procedures in existing District Courts. The organization has sent the administration more detailed recommendations in this regard.[152]

Amnesty International reiterates that the USA should offer release into the USA to detainees who are not charged, cannot be returned to their country of origin, and for whom there is no immediate, safe, lawful and appropriate third country solution, in order to bring their unlawful detention to an end. Doing so would also serve to show that the USA is prepared to play its

[151] Remarks as prepared for delivery by Attorney General Eric Holder at the Jewish Council for Public Affairs Plenum, Washington, DC, 2 March 2009.
[152] USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en.

part in bringing an end to the Guantánamo detentions "as soon as practicable", as President Obama has ordered. This may well in turn lead to increased willingness by other countries to receive such released detainees.

Amnesty International calls on the new administration to act with all due urgency in responding to the fact that 10 months after the Supreme Court ruled that the Guantánamo detainees were entitled to a "prompt" habeas corpus hearing to challenge the lawfulness of their detention, only a handful have had such a hearing and a decision on the merits of their challenge. Ordinarily in habeas corpus proceedings, government authorities are required to bring an individual physically before the court and show legal grounds for their detention. If the government is unable to do so promptly (i.e. within a matter of days), the individual is entitled to be released. This is the bedrock guarantee against arbitrary detention; if it is not fully respected by the government and courts in a national legal system, the right to liberty is gravely undermined.

In keeping with Amnesty International's position that all Guantánamo detainees be charged or released immediately, the organization also urges the administration to rely only on criminal justice grounds, and not the Authorization for Use of Military Force or other vague purported legal authority, in seeking to justify any continued detention of any of the detainees in habeas corpus proceedings.

Amnesty International will continue to call on the US administration to:

- clarify that it will not interpret the Authorization for Use of Military Force as representing any intent on the part of Congress to authorize violations of international human rights or humanitarian law, or as otherwise providing authority for such violations;

- accept that it is subject to international human rights obligations at all times, in all places and in respect of all persons over which it exercises effective control;

- not oppose on jurisdictional or other procedural grounds "conditions of detention" challenges brought by or on behalf of Guantánamo detainees. The new administration should work with Congress to repeal or substantially amend the Military Commissions Act so that it complies with international law, including by full revocation of Section 7.

- declassify all statements made by detainees alleging or describing treatment that violates international law, including the use of enforced disappearance, secret detention, secret transfers, and torture or other cruel, inhuman or degrading treatment;

- ensure that no information obtained through the use of torture or other cruel, inhuman or degrading treatment, enforced disappearance, or other similar forms of coercion, is used in any proceedings except against those alleged responsible for the unlawful conduct as evidence that the conduct occurred.

- not adopt in domestic litigation positions that are inconsistent with its international obligation, including the international prohibition on torture or other cruel, inhuman or degrading treatment or punishment, and the right to remedy of individuals whose rights under international law have been violated. Any invocation of state secrets privilege that might prevent a victim of torture or other ill-treatment, arbitrary detention, unfair trial, enforced disappearance, or other human rights violations from establishing the violation and obtaining an effective remedy, must be precluded.

Appendix 1
The need for effective judicial review
Case examples

Tortured in secret custody: Abu Zubaydah
Nearly four years on hunger-strike – Ahmed Zuhair
A little knowledge is a dangerous thing – Majid Khan

Tortured in secret custody: Abu Zubaydah

The other day we hauled in a guy named Abu Zubaydah. He's one of the top operatives plotting and planning death and destruction on the United States. He's not plotting and planning anymore. He's where he belongs.
President George W. Bush, 9 April 2002

Abu Zubaydah, arrested in Pakistan in March 2002, has been in US custody for seven years, four and a half of them spent incommunicado in solitary confinement at undisclosed locations before he was transferred to Guantánamo in September 2006.[153] He has never been charged, despite being accused for years by US authorities of involvement in serious crimes. Ten months after the US Supreme Court ruled in *Boumediene v. Bush* that the Guantánamo detainees were entitled to a "prompt" hearing to challenge the lawfulness of their detention, he has still not had such a hearing. Moreover, to date no-one has been brought to justice for crimes under international law that have been committed against him.

Abu Zubaydah was described in the USA's 9/11 Commission Report as an "al Qaeda lieutenant". [154] By the time the report was published in July 2004, he had already been in US custody without charge or trial, or access to the outside world, for more than two years. The report noted that two of its chapters relied "heavily" on information from detainees. It added that "assessing the truth of statements by these witnesses" was "challenging", but did not say that a reason to question the reliability of such statements was because the detainees were held in prolonged incommunicado detention at secret locations and exposed to torture or other cruel, inhuman or degrading treatment authorized at the highest levels of the US government.

Among its sources, the 9/11 Commission Report cites interrogations of Abu Zubaydah conducted in July, August, October and November 2002; May, June and December 2003; and February 2004. What techniques were employed in these and other interrogation sessions remains to be revealed. As outlined further below, a least some of the evidence of his interrogations has since been destroyed by the Central Intelligence Agency (CIA).

In 2008, the US government admitted that it had subjected Abu Zubaydah to "water-boarding", a torture technique that simulates drowning. According to a leaked ICRC report (see further below), Abu Zubaydah told the ICRC in Guantánamo in October 2006 that he was subjected to water-boarding in five interrogation sessions during an approximately one-week period in or around August 2002 at his third place of detention, allegedly in Afghanistan.

> "I was put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds caused severe pain. I vomited. The bed was then again lowered to a horizontal position and the same torture carried out with a black cloth

[153] Abu Zubaydah is also known as Zayn al Abidin Muhammad Husayn.
[154] Final Report of the National Commission on Terrorist Attacks upon the United States, 2004 (9/11 Commission Report), July 2004.

> over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled against the straps, trying to breathe, but it was hopeless. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress."

Both President Barack Obama and Attorney General Eric Holder have recognized, rightly, that water-boarding constitutes torture.[155] They are bound under international law to ensure full investigation and accountability for this crime under international law. As detailed further below, water-boarding is not all Abu Zubaydah and other detainees held in secret CIA custody were subjected to. According to the leaked report of its interviews with Abu Zubaydah and 13 other detainees transferred to Guantánamo in September 2006, the ICRC states:

> "The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture. In addition, many other elements of the ill-treatment, either singly or in combination, constituted cruel, inhuman or degrading treatment."

Abu Zubaydah was arrested in Pakistan on 28 March 2002. A few days later, then US Secretary of Defense Donald Rumsfeld described as "hypothetical" and "not on the radar screen" the notion that the USA would transfer Abu Zubaydah to a location outside of Pakistan, Afghanistan or the USA for interrogation.[156] Abu Zubaydah was, however, taken to a secret CIA facility for interrogation and medical treatment (he had sustained life-threatening gunshot wounds at the time of his arrest). The secret facility is believed to have been in Thailand.[157] He is believed to have then been taken to Afghanistan and thence to various other locations.

A report by the US Justice Department's Office of Inspector General (OIG), published in May 2008, cites an FBI agent's recollection that what the CIA was doing to Abu Zubaydah after it took over his interrogation was "borderline torture", but that he had been told by CIA personnel that the techniques had been approved "at the highest levels". The FBI was informed that the CIA had sought and obtained a legal opinion from the Justice Department's Office of Legal Counsel (OLC) that certain techniques could legally be used. John Ashcroft, who had been US Attorney General at the time, told a congressional committee in July 2008 that after Abu Zubaydah proved "highly resistant to standard interrogation techniques", the administration had "turned to OLC for general guidance as to the standard for interrogation of al Qaeda

[155] At his confirmation hearing in January 2009 in front of the Senate Judiciary Committee, Attorney General-designate Eric Holder said "I agree with you, Mr. Chairman, water boarding is torture." Asked if the US President could authorize torture, he responded "no one is above the law."
[156] Department of Defense news briefing with Secretary Rumsfeld and General Myers, 3 April 2002, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3390.
[157] CIA holds terror suspects in secret prisons, Washington Post, 2 November 2005. Prior to their destruction, videotapes of Zubaydah's interrogation are reported to have been held in a safe at the CIA station in Thailand. US says CIA destroyed 92 tapes of interrogations, New York Times, 2 March 2009.

detainees outside the United States under...the [US] anti-torture statute, and the Convention Against Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment".[158]

The resulting OLC memorandum to the White House, dated 1 August 2002, concluded that "under the current circumstances, necessity or self-defense may justify interrogation methods that might violate [the US statute prohibiting torture by US agents outside the USA]".[159] It also stated that interrogators could cause a great deal of pain before crossing the threshold to torture; that there was a wide array of interrogation techniques that while qualifying as cruel, inhuman or degrading treatment would not rise to the level of torture and thus not qualify for prosecution under this law, and that in any case the US President's authority as Commander-in-Chief could override the prohibition on torture. An 18-page Justice Department memorandum of the same date, 1 August 2002, advised the CIA on the legality of "alternative interrogation methods".[160] This memorandum remained classified at the time of writing, with the new administration considering its release.[161]

The former FBI Director's former Chief of Staff told the OIG review that "in the context of the Zubaydah interrogation", he had attended a meeting at the National Security Council (NSC) at which "CIA techniques were discussed", and at which a lawyer from the OLC had given advice "about the legality of CIA interrogation techniques".[162] In its inquiry into the treatment of detainees in US custody, the US Senate Armed Services Committee pursued this reference to the NSC meeting, and concluded in its summary report issued in December 2008 that:

> "Members of the President's Cabinet and other senior officials attended meetings in the White House where specific interrogation techniques were discussed. Secretary of State Condoleezza Rice, who was then National Security Advisor, said that, 'in the spring of 2002, CIA sought policy approval from the National Security Council (NSC) to begin an interrogation program for high-level al-Qaida terrorists'. Secretary Rice said that she asked Director of Central Intelligence George Tenet to brief NSC Principals on the program and asked the Attorney General John Ashcroft 'personally to review and confirm the legal advice prepared by the Office of Legal Counsel'. She also said that Secretary of Defense Donald Rumsfeld participated in the NSC review of CIA's program".

The Senate Committee further concluded that:

[158] Hearing before the House Judiciary Committee. 17 July 2008

[159] Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A. Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002.

[160] *ACLU et al v. Department of Defense et al.* Sixth Declaration of Marilyn A. Dorn, Information Review Officer, Central Intelligence Agency, US District Court, Southern District of New York, 5 January 2007.

[161] Re: *ACLU v. Department of Defense*, Letter to Judge Alvin K. Hellerstein from Lev Dassin, Acting US Attorney, Southern District of New York, 2 April 2009.

[162] A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Oversight and Review Division, Office of Inspector General, US Department of Justice, May 2008. Secretary of State Rice told the Senate Armed Services Committee that she recalled Deputy Assistant Attorney General John Yoo providing advice at "several of these meetings".

> "Legal opinions issued by the Department of Justice's Office of Legal Counsel (OLC) interpreted legal obligations under US anti-torture laws and determined the legality of CIA interrogation techniques. Those OLC opinions distorted the meaning and intent of anti-torture laws [and] rationalized the abuse of detainees in US custody..."

Shortly after the Senate Armed Services Committee released its conclusions, the then US Vice President, Dick Cheney, said in an interview:

> "After 9/11, we badly needed to acquire good intelligence on the enemy. That's an important part of fighting a war. What we did with respect to al Qaeda high-value detainees, if I can put it in those terms, I think there were a total of about 33 who were subjected to enhanced interrogation; only three of those who were subjected to waterboarding... Was it torture? I don't believe it was torture. We spent a great deal of time and effort getting legal advice... I signed off on it; others did, as well, too. I wasn't the ultimate authority, obviously. As the Vice President, I don't run anything. But I was in the loop. I thought that it was absolutely the right thing to do."[163]

Vice President Cheney subsequently reiterated his involvement in the approval of the use of water-boarding in secret detention. "If necessary", he told CNN on 9 January 2009, "I would certainly recommend it again". Seven years earlier, he had told ABC News that detainees in US custody were "not going to be mistreated. They are going to be treated like the unlawful combatants that they are".[164]

The secrecy surrounding what "standard" or "enhanced" interrogation techniques other than water-boarding have been used in the CIA program was clear in documents released to the American Civil Liberties Union in 2008 under Freedom of Information Act litigation. One of the documents, dated 7 May 2004, is a Special Review by the CIA's Office of Inspector General on the CIA's secret Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003). Most of the report has been redacted from the public record. Of its 109 pages (excluding appendices), 53 have been "denied in full", and another 40 are missing with not even the "denied in full" explanation. In other words, 85 per cent of the report has been hidden from public view. Many of the remaining few pages are almost entirely redacted except for a few words, including references to the use of waterboarding. Page 15, for example, is blacked out except for the title "enhanced interrogation techniques" and the words "the waterboard technique" near the bottom of the page. The report reiterates that Khalid Sheikh Mohammed, Abu Zubaydah and Abd al-Rahim al-Nashiri were subjected to water-boarding, but blacks out any other detail of their treatment, which apparently covers pages of text.[165]

In early September 2006, Abu Zubaydah was transferred from the CIA program to military custody in Guantánamo. He and 13 other detainees transferred with him to the US naval base

[163] Interview with the *Washington Times,* 17 December 2008.

[164] Interview of Vice President Cheney with Diane Sawyer of ABC, 29 November 2001.

[165] The leaked ICRC report referenced below states that Abu Zubaydah, Khaled Sheikh Mohammed and Abd al-Nashiri alleged that they were subjected to water-boarding. Another detainee stated that he was strapped to a tilting bed and cold water poured over his body while being threatened with water-boarding.

in Cuba were granted access to the ICRC.[166] The ICRC's subsequent report remains confidential, but a leaked copy has recently been made public.[167] The report adds detail to what has previously been alleged.[168]

The locations where Abu Zubaydah and the other detainees were held in CIA custody before their transfer to Guantánamo remain classified top secret. The ICRC report states:

> "Throughout their detention, the fourteen were moved from one place to another and were allegedly kept in several different places of detention, probably in several different countries. The number of locations reported by the detainees varied, however ranged from three to ten locations prior to their arrival in Guantánamo in September 2006.
>
> The transfer procedure was fairly standardised in most cases....The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles... Mr Abu Zubaydah alleged that during one transfer operation the blindfold was tied very tightly resulting in wounds to his nose and ears. He does not know how long the transfer took but, prior to the transfer, he reported being told by his detaining authorities that he would be going on a journey that would last twenty-four to thirty hours...
>
> The detainee was not allowed to go to the toilet and if necessary was obliged to urinate or defecate into the diaper... In addition to causing severe physical pain, these transfers to unknown locations and unpredictable conditions of detention and treatment placed mental strain on the fourteen, increasing their sense of disorientation and isolation. The ability of the detaining authority to transfer persons over apparently significant distances to secret locations in foreign countries acutely increased the detainees' feeling of futility and helplessness, making them more vulnerable to the methods of ill-treatment described below...
>
> "[T]he ICRC notes that four detainees believed that they had previously been held at Guantánamo, for periods ranging from one week to one year during 2003/4. They reported recognising this location upon return there in September 2006, as each had been allowed outdoors on a daily basis during their earlier time there. The ICRC has been assured by [the US Department of Defense] that it was given full notification of an access to all persons held in Guantánamo during its regular detention visits. The

[166] Defense Department ordered to take custody of high-value detainees, US Department of Defense new release, 6 September 2006.

[167] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, February 2007, page 7. This leaked report is available at http://www.nybooks.com/icrc-report.pdf. The ICRC has said, generally, that it "deplores the fact that confidential information conveyed to the US authorities has been published by the media on a number of occasions in recent years. The ICRC has never given its consent to the publication of such information." US detention related to the fight against terrorism – the role of the ICRC. ICRC Operational update, March 2009.

[168] See also Mark Danner, US torture: Voices from the black sites. New York Review of Books, Vol. 56, No. 6, 9 April 2009.

ICRC is concerned, if the allegations are confirmed, it had in fact been denied access to there persons during the period in which they were detained there".

The interrogation techniques (except waterboarding) and detention conditions to which the detainees were subjected in CIA custody also remain classified top secret. According to the ICRC report, the detainees reported that the methods used in the CIA program, in addition to water-boarding, included those listed below. The ICRC report emphasizes that "each specific method was in fact applied in combination with other methods, either simultaneously, or in succession. In addition, the situation faced by the detainees was "further exacerbated" by the deprivation of access to the open air, to exercise, and to appropriate hygiene facilities and basic items, as well as restricted access to the Koran. Access to such items, and to the Koran, was allegedly linked to the detainee's perceived compliance and cooperation during the interrogation process.

- *Years of solitary confinement and incommunicado detention*. For the entire time of their detention in CIA custody, the detainees were kept in continuous solitary confinement and incommunicado detention. This period ranged from 16 months to four and a half years (for Abu Zubaydah). Eleven of the 14 were held in the secret program for over three years. According to the report, the detainees "had no knowledge of where they were being held, no contact with persons other than their interrogators or guards. Even their guards were usually masked and, other than the absolute minimum, did not communicate in any way with the detainees". The ICRC concluded that the cases of the 14 constituted enforced disappearance.

- *Prolonged stress standing*. Ten of the 14 detainees said they had been subjected to being held naked with their arms extended and shackled to a bar or hook in the ceiling above their heads. This lasted for periods from two to three days continuously, and for up to two or three months intermittently. While being held in this position some of the detainees were allowed to defecate in a bucket; they were released from the tied position so that they could do so. None was allowed to clean himself afterwards. Four detainees alleged that they had been forced to defecate and urinate over themselves.

- *Beatings by use of a collar*. Six of the 14 detainees alleged that a "thick collar or neck roll" was placed around their necks and with this in place their heads and bodies were forcefully banged against the walls.

- *Beating and kicking*. Nine of the 14 alleged that during the initial period of detention they were daily subjected to slapping and punching to the body and face and, less often, to kicking. The beatings lasted for up to half an hour, and were repeated throughout the day and on subsequent days, over periods lasting from a week to two or three months.

- *Prolonged nudity*. Eleven of the 14 detainees alleged that they were stripped during detention, interrogation and ill-treatment. This enforced nudity last for periods ranging from several weeks continuously to several months intermittently. According to what Abu Zubaydah told the ICRC, a few weeks after his arrest he was taken to Afghanistan

"where he remained naked, during interrogation, for between one and a half to two months. He was then examined by a woman he assumed to be a doctor who allegedly asked him why he was still being kept naked. Clothes were given to him the next day. However, the following day, these clothes were then cut off his body and he was again kept naked. Clothes were subsequently provided or removed according to how cooperative he was perceived by his interrogators".

- *Sleep deprivation and use of loud music*. Eleven of the 14 alleged that they had been subjected to sleep deprivation through days of interrogations, the use of stress positions, cold water, and repetitive loud music or noise. Abu Zubaydah alleged that, while held in Afghanistan, "I was kept sitting on a chair, shackled by hands and feet for two to three weeks. During this time I developed blisters on the underside of my legs due to the constant sitting. I was only allowed to get up from the chair to go to the toilet, which consisted of a bucket". He said that "if I started to fall asleep a guard would come and spray water in my face". He said that the cell was kept very cold by the use of air-conditioning. He also said that "very loud, shouting type" music was played constantly on a 15-minute loop, 24 hours a day, although sometimes it was replaced by a "loud hissing or crackling noise".

- *Exposure to cold temperature/cold water*. Most of the 14 alleged that they had been subjected to cold cells and interrogation rooms, usually at the same time as being kept naked. Seven alleged that they had had cold water poured, thrown or hosed over their bodies. Three of the detainees said that they had had cold water poured over them while they were "lying on a plastic sheet raised at the edges by guards to contain the water around his body creating an immersion bath with just the head exposed". Abu Zubaydah alleged that his cell was excessively cold during the nine months he was held in Afghanistan in 2002/3.

- *Prolonged use of shackles and handcuffs*. Many of the 14 alleged the prolonged use of shackling of hands and/or feet. Khaled Sheikh Mohammed was allegedly kept continuously shackled, even when inside his cell for 19 months. Another detainee alleged that he was kept continuously handcuffed for four and a half months and shackled for seven months while detained in Kabul in 2003/4.

- *Threats*. Nine of the 14 alleged that they had been subjected to threats of torture or other ill-treatment, including threats of water-boarding, electric shocks, infection with HIV, and rape of him or his family, and being brought close to death.

- *Forced shaving*. Two of the 14 alleged that they had been subjected to forced shaving of the head and beard.

- *Deprivation/restriction of food*. Eight of the 14 alleged that they had been deprived or subjected to restricted provision of solid food for up to a month after arrest. Abu Zubaydah alleged that during the first two to three weeks that he was held in Afghanistan, when he was kept constantly sitting on a chair (see above), he was not provided with any solid food.

The ICRC report states that "not all of these methods were used on all detainees, except in one case, namely that of Mr Abu Zubaydah". In addition, a technique that was alleged only by Abu Zubaydah was 'confinement inside boxes'. Here it might be recalled that during a meeting of US military lawyers and others in October 2002 on interrogation techniques, according to the minutes of the meeting, a senior CIA counter-terrorism lawyer had said that "it is very effective to identify phobias and use them" against detainees. Claustrophobia was one of the examples he offered at the meeting.[169] The ICRC report reveals the following allegations made by Abu Zubaydah during the approximately nine months he says he was held in Afghanistan between May 2002 and February 2003:

> "[A]bout two and a half or three months after I arrived in this place, the interrogation began again, but with more intensity than before. Then the real torturing started. Two black wooden boxes were brought into the room outside my cell. One was tall, slightly higher than me and narrow. Measuring perhaps in area 1m x 0.75m and 2m in height [3 by 2½ by 6½ feet]. The other was shorter, perhaps only 1m in height. I was taken out of my cell and one of the interrogators wrapped a towel around my neck, they then used it to swing me around and smash me repeatedly against the hard walls of the room. I was also repeatedly slapped in the face. As I was still shackled, the pushing and pulling around meant that the shackles pulled painfully on my ankles.
>
> I was then put into the tall black box for what I think was about one and a half to two hours. The box was totally black on the inside as well as the outside. It had a bucket inside to use as a toilet and had water to drink provided in a bottle. They put a cloth or cover over the outside of the box to cut out the light and restrict my air supply. It was difficult to breathe. When I was let out of the box I saw that one of the walls of the room had been covered with plywood sheeting. From now on it was against this wall that I was then smashed with the towel around my neck. I think that the plywood was put there to provide some absorption of the impact of my body. The interrogators realized that smashing me against the hard wall would probably quickly result in physical injury.
>
> During these torture sessions many guards were present, plus two interrogators who did the actual beating, still asking questions, while the main interrogator left to return after the beating was over. After the beating I was then placed in the small box. They placed a cloth or cover over the box to cut out all light and restrict my air supply. As it was not high enough even to sit upright, I had to crouch down. It was very difficult because of my wounds. The stress on my legs held in this position meant my wounds both in the leg and stomach became very painful. I think this occurred about 3 months after my last operation. It was always cold in the room, but when the cover was placed over the box it made it hot and sweaty inside. The wound on my leg began to open and started to bleed. I don't know how long I remained in the small box, I think I may have slept or maybe fainted."

[169] Counter Resistance Strategy Meeting, 2 October 2002. Comments attributed to individuals are paraphrased in the minutes of this meeting. Other phobias suggested related to snakes and insects.

Abu Zubaydah alleged that he was then "dragged from the small box, unable to walk properly and put on what looked like a hospital bed, and strapped down very tightly with belts." It was then that he was subjected to water-boarding as described above. After that,

> "I was then placed again in the tall box. While I was inside the box loud music was played again and somebody kept banging repeatedly on the box from the outside. I tried to sit down on the floor, but because of the small space the bucket with urine tipped over and spilt over me. I remained in the box for several hours, maybe overnight. I was then taken out and again a towel was wrapped around my neck and I was smashed into the wall with the plywood covering and repeatedly slapped in the face by the same two interrogators as before.
>
> I was then made to sit on the floor with a black hood over my head until the next session of torture began. The room was always kept very cold.
>
> This went on for approximately one week. During this time the whole procedure was repeated five times. On each occasion, apart from one, I was suffocated [water-boarded] once or twice and was put in the vertical position on the bed in between. On one occasion the suffocation was repeated three times. I vomited each time I was put in the vertical position between the suffocation.
>
> During that week I was not given any solid food. I was only given Ensure [a liquid nutrient] to drink. My head and beard were shaved everyday.
>
> I collapsed and lost consciousness on several occasions. Eventually the torture was stopped by the intervention of the doctor.
>
> I was told during this period that I was one of the first to receive these interrogation techniques, so no rules applied. It felt like they were experimenting and trying out techniques to be used later on other people."

US officials have themselves made statements suggesting that Abu Zubaydah was a guinea pig of sorts. They have pointed to his case as justifying the development of the secret detention program operated by the CIA. It was clear to his interrogators, the Bush administration said, "that Abu Zubaydah possessed a great deal of information about al-Qa'ida; however, he soon stopped all cooperation. Over the ensuing months, the CIA designed a new interrogation program..."[170] Former Attorney General Ashcroft acknowledged to the US House Judiciary Committee in July 2008 that Abu Zubaydah was subjected to aggressive interrogation techniques months before "legal cover" was provided by the Justice Department's OLC in its August 2002 memorandums.

After his transfer to Guantánamo, Abu Zubaydah and the 13 other detainees transferred from CIA custody to the naval base at the same time were still denied access to the courts or legal counsel. A Combatant Status Review Tribunal (CSRT) was held on Abu Zubaydah's case on 27

[170] Summary of the High Value Terrorist Detainee Program. Office of the Director of National Intelligence, undated, available at http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf.

March 2007, with no access provided to media, the public, or any outside body. On 9 August 2007, nearly a year after his transfer to Guantánamo, the Pentagon announced that the CSRT had determined that he met the criteria for designation as an "enemy combatant".[171]
Abu Zubaydah and the other former CIA detainees were held in Camp 7 in Guantánamo.[172] Conditions in Camp 7 are reported to be the most isolating at the detention facility. Detainees there are held in cells that permit no communication with adjacent cells. They are permitted up to four hours a day in an outdoor recreation area, with a "recreation partner" in an adjacent area (the partner is always the same fellow detainee). Detainees have no opportunity for phone calls, their mail takes longer to clear than in other Guantánamo camps, and they have less opportunity for intellectual stimulation. The review of detention conditions ordered by President Obama in his executive order on Guantánamo of 22 January 2009 "vigorously" urged that steps be taken to "increase detainee-to-detainee contact" in Camp 7, including opportunity for group prayer and communal recreation.[173] At the time of writing, Amnesty International did not know what, if any, of the recommendations had been acted upon.

In August 2008, a matter of weeks after the *Boumediene* ruling, Abu Zubaydah's US lawyers filed an emergency motion in District Court. They reported that since being transferred to Guantánamo, Abu Zubaydah had suffered approximately 150 seizures, episodes which he said were brought on by noise and bright lights and caused him excruciating pain.[174] The seizures were frequently followed by vomiting and loss of consciousness, possibly for hours.[175] The emergency motion reported that the medication prescribed by Guantánamo doctors had been ineffective and had deleterious side-effects, including inducing psychosis. The government refused to provide Abu Zubaydah's lawyers with copies of his medical records, or any reports and notes of guards or other staff relating to the seizures, or to allow counsel to interview the doctors who had treated Abu Zubaydah at Guantánamo, or to allow the lawyers to discuss the condition with an independent doctor. The lawyers therefore filed the emergency motion seeking a judicial order on the government to provide such records. In the motion, they argued:

> "A critical issue before the Court is whether [Abu Zubaydah] is an 'enemy combatant', about which the parties are in sharp disagreement. [Abu Zubaydah's] medical condition bears directly on the fair adjudication of this issue, since his seizures not only imperil his immediate health but severely compromise his ability to participate in his case and prepare his defense. By themselves, the seizures reduce his ability to communicate with counsel and recall events. They also affect his capacity to write and speak. But quite apart from these acute affects, repeated seizures over an extended

[171] US Department of Defense news release, 9 August 2007, http://www.defenselink.mil/releases/release.aspx?releaseid=11218.
[172] The ICRC has transmitted a separate confidential report to the Pentagon "regarding the material conditions and treatment of the fourteen since their arrival in Guantánamo". ICRC report on the treatment of fourteen 'high value detainees' in CIA custody. February 2007.
[173] Review of Department compliance with President's executive order on detainee conditions of confinement, February 2009.
[174] By December 2008, the number of seizures during this time had risen to 'approximately 175'.
[175] Abu Zubaydah suffered nearly 40 seizures between his arrival at Guantánamo in September 2006 and his CSRT hearing in March 2007. At the latter hearing, according to the transcript, he had a statement read out for him, which said that "I would have liked to have spoken to you today on my own, but I have been having seizures lately" which "affected my ability to speak and write without difficulty".

> period signal the likelihood of other serious disorders that may have profound cognitive consequences, including organic brain damage. In order to assess whether and to what extent [Abu Zubaydah's] medical condition threatens to undermine his constitutional right to habeas, counsel must examine his records, speak with his physicians, and consult with independent professionals."[176]

The government opposed the motion, arguing that the District Court did not have jurisdiction because the claims were not about Abu Zubaydah's lawfulness of detention but were instead challenges to his conditions of confinement, and therefore excluded from review under Section 7 of the MCA (see Chapter 5 above). The government said that even if there was jurisdiction, the court should decline to "intrude upon, and micro-manage the operations of the Guantánamo Bay detention facility by ordering the production of medical records, guard, staff reports, logs and other notes relating to his episodes of seizure, and by ordering that [Zubaydah's] military treating physicians be interviewed by counsel". It maintained, not only that the medical care for Guantánamo detainees was "excellent" and "comprehensive", but also that "the public has a strong interest in assuring that the military operations at Guantánamo are not interrupted, overly burdened, and second-guessed by the unnecessary demands of individual detainees regarding the particulars of their confinement conditions".[177]

Such arguments, if accepted, would strip the courts of a crucial function and detainees of an essential protection. However, on 22 September 2008, Judge Thomas Hogan agreed that the second paragraph of Section 7 of the MCA "remains valid" and had stripped the District Court of "jurisdiction to hear a detainee's claims that 'relate to any aspect of the detention, transfer, treatment, trial, or conditions of confinement'." He said that while the *Boumediene* ruling gave the detainee "the right to challenge the fact of his confinement, it says nothing of his right to challenge the conditions of his confinement".[178] The emergency motion was therefore denied.

Abu Zubaydah's lawyers sought reconsideration of the denial, including on the basis that the question of his medical health directly implicated his constitutional right to habeas corpus, including by affecting his ability to assist legal counsel in his case. In late September 2008, Abu Zubaydah's US lawyer visited him at Guantánamo and found his client's condition to be a cause for serious concern. Abu Zubaydah explained that about three weeks earlier he had been given an injection of the powerful anti-psychotic drug Haldol. In a memorandum, the lawyer wrote: "He explained that since he received the injection, he had felt completely lost. He has found it difficult to write in his diary, and impossible to write to counsel. He cannot read his books, including the Koran. He cannot pray because he cannot concentrate. Exercise has become nearly impossible. His mind was a muddle. He spoke with difficulty, was unable to focus, and found it harder than usual to recall events... All in all, I felt as though I were talking to an elderly, infirm patient whose mind was beginning to fail him".[179]

The government opposed reconsideration of the denial of judicial review, arguing that under the MCA, the District Court had "no jurisdiction to so entangle itself in this conditions of confinement claim", and military operations should not be second-guessed by the

[176] *Husayn v. Gates*, Emergency motion for immediate disclosure of petitioner's medical records and for related relief, In the US District Court for DC, 19 August 2008. Unclassified version.
[177] *Husayn v. Gates*, Respondents' opposition to petitioners' emergency motion for immediate disclosure of petitioner's medical records and for related relief. In the US District Court for DC, 21 August 2008.
[178] *Husayn v. Gates*, Memorandum opinion, US District Court for DC, 22 September 2008.
[179] Memorandum re: Request for expedited review, 9 October 2008. Unclassified.

"unnecessary demands" of a detainee "regarding the particulars of his medical treatment".[180] On 28 November 2008, however, the District Court ruled that "justice requires reconsidering the September Opinion". Judge Richard Roberts said that

> "if Zubaydah's right to present his [habeas corpus] case with the assistance of counsel is to have any meaning, his counsel must be able to make the very assessments he seeks to make. Requesting copies of Zubaydah's medical records and staff records regarding Zubaydah's seizure-related episodes and being able to secure independent expert assessments of the data in the records is a legitimate and important effort to provide effective representation and present the court with appropriate information affecting the lawfulness of his detention."

This would not amount to an action that would be barred by the MCA, the judge ruled and he granted, in part, the motion. Judge Roberts denied the lawyers their request to meet with Abu Zubaydah's Guantánamo doctors but said they would be allowed to show the records they eventually obtained to an independent doctor.[181] Under international standards, detainees or their lawyers have the right to petition a judicial or other authority for a second medical examination or opinion beyond that provided by the detaining authorities.[182] Access to medical records must be ensured.[183]

So too must access to evidence relevant to a habeas corpus challenge be ensured and to the right to remedy for human rights violations committed against the detainee. However, some such evidence has already been destroyed.[184] In 2005, the CIA destroyed videotapes made in 2002 of interrogations of detainees in secret US custody.[185] The hundreds of hours of videotape are believed to have recorded, among other things, interrogations of Abu Zubaydah. In early March 2009, the Department of Justice revealed that a criminal investigation had found that 92 tapes had been destroyed.[186] Amnesty International considers that the

[180] *Husayn v. Gates*, Respondents' opposition to petitioners' motion for reconsideration of denial of emergency motion for immediate disclosure of petitioner's medical records and for related relief. In the US District Court for DC, 23 October 2008.

[181] *Husayn v. Gates*, Memorandum Opinion and Order, US District Court for DC, 28 November 2008.

[182] Principle 25 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion").

[183] *Ibid.*, Principle 26 ("The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured").

[184] Among documents released by the Senate Armed Services Committee in 2008 are the minutes of a meeting in October 2002 involving US military and other lawyers and personnel. Their discussion included whether "aggressive" interrogation sessions should be videotaped. A representative of the Defense Intelligence Agency suggested that "videotapes are subject to too much scrutiny in court". The chief counsel to the CIA's counter-terrorism centre added that "the videotaping of even totally legal techniques will look ugly". Counter Resistance Strategy Meeting, (comments paraphrased), *op. cit.*

[185] Statement by Director of the CIA, 6 December 2007, https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/taping-of-early-detainee-interrogations.html.

[186] Letter to the Honorable Alvin K. Hellerstein, US District Court, Southern District of New York, Re: *ACLU v Department of Defense*, US Attorney, Southern District of New York, US Department of Justice, 2 March 2009. In another letter to Judge Hellerstein, dated 20 March 2009, the Justice Department

destruction of the tapes may have concealed evidence of government crimes, including torture and enforced disappearance. Concealing evidence of a crime is a criminal offence, and can constitute complicity in the crime itself.

In light of the destruction of the interrogation tapes by the CIA, Abu Zubaydah's US lawyers have sought a court order requiring the US government to preserve all existing documents and information relating to his case and treatment in custody. By early April 2009, the District Court had not yet made a decision, despite having been fully briefed by 5 January 2009.

Meanwhile, questions about the US government's allegations that Abu Zubaydah was a leading member of *al-Qa'ida* are raised not only by its failure to bring him to trial, but also by what his lawyers characterize as the government's "surreptitious but systematic purging of any mention or reference" to Abu Zubaydah from the charge sheets and 'factual returns' of other detainees.[187] In late 2005, for example, four Guantánamo detainees – Binyam Mohamed, Jabran Said al Qahtani, Sufyina Barhoumi and Ghassan al Sharbi – were charged for trial by military commission under the Military Order signed by President Bush in November 2001. Their charge sheets were littered with references to Abu Zubaydah, who had been arrested in late March 2002 in the same house in Faisalabad in Pakistan as Al Qahtani, Barhoumi and al Sharbi (Mohamed was arrested at Karachi airport in April 2002). Charges against the four detainees were dropped after the US Supreme Court ruled the military commission system unconstitutional in June 2006 in *Hamdan v. Rumsfeld*. In May 2008, the four men were re-charged for trial by military commission under the MCA. This time the references to Abu Zubaydah had been removed from the charge sheets.[188]

In April 2002, Secretary Rumsfeld had been asked whether Abu Zubaydah would stand trial. He replied "I would certainly assume so".[189] Seven years later, Abu Zubaydah has not even been charged, and has still not had the lawfulness of his detention reviewed by a court. Those responsible for the crimes committed against him in the secret detention program have not been brought to justice, and his access to remedy appears at best minimal.

revealed that the CIA had about 3000 documents relating to the tapes.

[187] *Husayn v. Gates*, Memorandum in support of motion for preservation order, 16 December 2008. See also, Detainee's harsh treatment foiled no plots, Washington Post, 29 March 2009 ("Abu Zubaida was not even an official member of al-Qaeda, according to a portrait of the man that emerges from court documents and interviews with current and former intelligence, law enforcement and military sources").

[188] Charges under the MCA against the four were dismissed without prejudice in October 2008. The military commissions are currently suspended. Binyam Mohammed has been released in the UK.

[189] Secretary Rumsfeld Live Interview with MSNBC TV, 12 April 2002, Department of Defense transcript, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3400.

Nearly four years on hunger-strike – Ahmed Zuhair

The seventh anniversary of Mr. Zuhair's apprehension into United States custody is upon us. He continues to languish at Guantánamo Bay without charge, trial or due process, and with no definitive judicial determination as to the legality of his detention. The need for the 'prompt habeas corpus hearing' to which he is entitled is especially pressing as he nears the fourth anniversary of his hunger strike protesting his indefinite and arbitrary imprisonment.
US lawyers for Ahmed Zuhair, January 2009[190]

According to his petition for habeas corpus, in late December 2001 Saudi Arabian national Ahmed Zuhair was seized in a market in Lahore, Pakistan, by a dozen men in civilian clothes. He was blindfolded and taken to a house in a residential area of Lahore, where he was allegedly subjected to torture or other ill-treatment, including severe beating and threats. In early January 2002, he was transferred to an underground military facility in Islamabad and held incommunicado there for about 10 weeks, before being handed over to US custody in mid-March 2002 and held in Bagram air base in Afghanistan. In June 2002 he was transferred to detention in Kandahar, where he was held for two weeks. He was allegedly subjected to ill-treatment in US custody in Afghanistan, including forced prolonged kneeling, threats, and stripping during interrogations. He was transported to Guantánamo in mid to late June 2002 where he was held in isolation for the first two weeks and "forced to sleep on a cold steel floor".[191]

On 6 November 2004, the CSRT affirmed his status as an "enemy combatant" in a process in which he had no legal representation and in which he did not participate. The allegations against him in the CSRT included that he was involved in the bombing of the *USS Cole* in Yemen in October 2000 in which 17 US sailors died, and in the murder of William Arnold Jefferson, a US employee of the United Nations, near Tuzla, in Bosnia-Herzegovina in 1995. Ahmed Zuhair has maintained that he was involved in neither. In any event, if the USA has evidence against Zuhair of criminal acts, it should have promptly charged him for trial in an independent and impartial civilian court. In Administrative Review Board proceedings in 2005, 2006 and 2008, the US authorities also added what his lawyers have described as "vague and unsubstantiated allegations" relating to activities in Afghanistan and Kuwait, and "connections" to armed opposition groups in Algeria and Egypt.

In June 2005 Ahmed Zuhair began a hunger strike, and has continued on this protest since then. He is daily force-fed by the Guantánamo authorities. According to his US lawyer in an emergency filing in US District Court, dated 27 November 2008:

> "Over time, this process had been carried out in an increasingly brutal fashion: Mr Zuhair – who does not physically resist force-feeding – is nevertheless painfully strapped into a six-point restraint chair for each of these twice-daily feeding sessions lasting two hours or more. At the beginning of his hunger strike, Mr Zuhair was force-fed in a bed, without restraints. As Mr Zuhair's counsel have previously brought to this Court's attention, prolonged restraint is medically unnecessary, is uncalled for by Mr

[190] *Zuhair v. Bush*, Petitioner's motion for status hearing, US District Court for DC, 23 January 2009.
[191] *Zuhair v. Bush*, Petition for writ of habeas corpus and complaint for declaratory and injunctive relief, US District Court for DC, 12 May 2008.

> Zuhair's conduct, and caused Mr Zuhair severe pain. Wanton use of the restraint chair on all hunger strikers, regardless of their compliant status has needlessly soured relations between Guantánamo personnel and prisoners such as Mr Zuhair, who, by [the government's] own admission, does not resist force-feeding in the course of a hunger strike he undertook as a form of peaceful, passive protest at his unlawful and indefinite imprisonment."

The emergency motion alleged that the Guantánamo authorities had sought to compel Ahmed Zuhair to end his protest both through the use of force and by conditioning adequate medical treatment on his ending his hunger strike. It claimed that medical personnel had been replaced with Initial Reaction Force (IRF) guards to force feed hunger-strikers, and these personnel had conducted the force-feeding in a violent manner. Force feeding by medical personnel was only resumed, according to the petition, when Ahmed Zuhair and other detainees began smearing themselves in their own faeces to deter this treatment.

Ahmed Zuhair began reporting intense stomach pain during force-feeding from June 2008, describing to his lawyer in August 2008 that he suffered pain "like a fire" in his stomach when he received the nutrients. The emergency motion was filed in the District Court after Ahmed Zuhair's lawyer met his client in Guantánamo's Camp Echo on 14 and 15 November 2008. According to the petition, Ahmed Zuhair "was vomiting intermittently throughout the first two hours of counsel's meeting with him and appeared to have lost a great deal of weight", and his chest was now "skeletal" and his "legs looked like bones with skin wrapped tight around them".[192]

The emergency motion sought an order from the court to force the government to "address, diagnose, and treat the cause of Mr Zuhair's chronic vomiting and to address the concomitant side-effects of his chronic malnutrition". The lawyers also asked the court to order the government to feed Ahmed Zuhair with a corn-free solution, to cease the use of the restraint chair for his force-feeding (the use of which Zuhair described to his lawyer in September 2008 as a "saw cutting through his spine"), to release Ahmed Zuhair's medical records, and for him to be given access to an independent medical examination.

The government opposed the motion arguing that the District Court was barred from considering the issue under the second paragraph of Section 7 of the MCA, adding that the Supreme Court had, in *Boumediene*, "expressly noted that it was not deciding whether Guantánamo detainees have a constitutional right to bring non-core habeas claims, such as conditions of confinement claims". It maintained that, in any event, Ahmed Zuhair had been provided "timely, compassionate, quality healthcare", and alleged that his weight loss was due to "intentional vomiting". It made general allegations about assaults by hunger-striking detainees on guards and medical staff in 2005 and 2006 to justify its use of the restraint chair on Ahmed Zuhair, against whom it did not make allegations of having engaged in such misconduct. It argued that for the government to be ordered to stop the use of the restraint chair for his force-feeding "would potentially place his comfort ahead of the maintenance of his health or the safety of the medical staff – hardly justifiable grounds for condition of confinement relief, let alone core habeas".[193]

[192] *Zuhair v. Bush*, November 27, 2008 Declaration of Ramzi Kassem, US District Court for DC.

[193] *Zuhair v. Bush*, Respondents' opposition to petitioner's emergency motion to compel immediate medical relief, In the US District Court for DC, 2 December 2008. See also Amnesty International Urgent

On 22 December 2008, District Court Judge Emmett Sullivan ordered the US authorities to allow a court-appointed independent medical expert to examine Ahmed Zuhair. Judge Sullivan ordered the parties to agree by 24 December 2008 the names of three independent medical experts for him to consider appointing to examine Ahmed Zuhair. He also ordered the government to release Ahmed Zuhair's medical records to his lawyers. Judge Sullivan made the decision on the grounds that the detainee must be medically fit enough to have "meaningful access to counsel", and so that his lawyers "are able to adequately communicate with him" in his habeas corpus challenge.[194]

On 16 January 2009, Judge Sullivan appointed the independent expert suggested by Zuhair's lawyers to conduct a "comprehensive medical and psychiatric evaluation" of Ahmed Zuhair, and ordered that she and an independent interpreter be provided transportation to Guantánamo and access to the detainee, that she be given access to all Zuhair's medical records and records relating to his enteral feeding, and allowed to speak with personnel at Guantánamo regarding Ahmed Zuhair's medical and mental health and the feeding process.

On 12 March 2009, Judge Sullivan ordered the government to tell him by noon on 16 March why Ahmed Zuhair had been moved to Camp 6 at Guantánamo, and what consideration had been given to moving the detainee to Camp 4. At a hearing on 20 February 2009, the independent expert had said that Ahmed Zuhair had told her that he was willing to end his hunger strike if he was moved to Camp 4. On 16 March 2009, the US administration responded that Ahmed Zuhair had been moved to Camp 6 on 17 May 2008 "based upon his violations of rules and procedures". He had then been moved to Camp 1 on 12 November 2008 because Camp 6 was undergoing construction work. During the visit by the independent expert between 19 and 23 January 2009, Ahmed Zuhair had been moved to Camp Echo. On 25 January, he was moved back to Camp 6 because "space had become available again" there. On 9 February, he was moved to hospital. The government said that Ahmed Zuhair's "request for a transfer to Camp 4 should be denied at this time". It added that to transfer him as a precondition for ending his hunger-strike "will undermine security and operations at the detention facility" and would raise "a very real risk that other detainees will begin hunger strikes, refuse to end on-going hunger strikes, or engage in noncompliant behaviour as leverage to barter their camp location or other conditions-of-detention."[195]

The way to end hunger-strikes at Guantánamo is to do what should have been done years ago: charge the detainees or immediately release them.

Action, 23 December 2008, http://www.amnesty.org/en/library/info/AMR51/156/2008/en, and update 20 February 2009, http://www.amnesty.org/en/library/info/AMR51/028/2009/en.

[194] *Zuhair v. Bush*, Order. US District Court for DC, 22 December 2008.

[195] *Zuhair v. Obama*, Respondents' response to the Court's March 12 order regarding Petitioner's camp assignment, In the US District Court for DC, 16 March 2009.

A little knowledge is a dangerous thing – Majid Khan

The Supreme Court held clearly and unambiguously that 'the costs of delay can no longer be borne by those who are held in custody', and 'the detainees in these cases are entitled to a prompt habeas corpus hearing'. The Supreme Court made no exception for detainees like Khan, who were tortured by the CIA in secret detention. To the contrary, if anything, the habeas cases filed by such detainees should be afforded the greatest priority because they have suffered the greatest harm. Yet the government continues its dilatory tactics, attempting to delay as long as possible any meaningful review...
US lawyers for Majid Khan, February 2009[196]

More than six years after he was seized in Pakistan, Majid Khan still has not had his day in court, either in the form of a trial or a habeas corpus proceeding. Subjected to multiple human rights violations in US custody, his right of effective access to remedy is still being denied.

It is said that 'a little knowledge is a dangerous thing'. For Majid Khan, a Pakistan national and legal resident of the USA who was subjected to enforced disappearance by the USA for three and a half years before being transferred to Guantánamo in the first week of September 2006, his knowledge is part of the problem he faces. Unless the government declassifies certain details of the CIA's program of secret detention in which he was held, what he and other detainees like him know about it – or the obstacles they face in challenging government information obtained under its classified methods – will continue to compound the human rights violations to which they have been and continue to be subjected by the USA.

Pakistani security agents seized Majid Khan from his brother's house in Karachi during the night of 5 March 2003. There was no news of his fate or whereabouts until President Bush announced on 6 September 2006 that Khan and 13 others had been transferred from secret CIA custody to Guantánamo. In his speech, the President expressly called Majid Khan "a terrorist", and proceeded to exploit his and the 13 other cases to obtain congressional approval of the Military Commissions Act, legislation incompatible with international law. Majid Khan is now well into his third year in indefinite military detention without charge in Guantánamo.

President Bush stated in his September 2006 address that "these are dangerous men with unparalleled knowledge about terrorist networks and their plans for new attacks. The security of our nation and the lives of our citizens depend on our ability to learn what these terrorists know." He said that "once we've determined that the terrorists held by the CIA have little or no additional intelligence value, many of them have been returned to their home countries for prosecution or detention by their governments." In the case of Khan and the other 13, however, the USA kept custody of them. While the USA had "largely completed our questioning" of these 14, in order to "start the process for bringing them to trial, we must bring them into the open." For Majid Khan, being brought out "into the open" has consisted not of trial, or even charges, but of detention without trial, and virtually no access to the outside world. It seems to be that what was done to the detainee, rather than what he is alleged to have done, is determining his fate. His US lawyers wrote in 2008:

[196] In Re: Guantanamo Bay detainee litigation, *Khan v. Obama*, Motion for reconsideration, In the US District Court for DC, 5 February 2009.

> "In a transparent attempt to avoid criminal indictments of US officials and the national embarrassment that would unquestionably follow from public disclosure of Khan's ordeal, the government has improperly classified every detail of his experience in the CIA Torture Program. The government has essentially sought to maintain complete secrecy concerning Khan by holding him indefinitely in military custody at Guantánamo, and by withholding from public scrutiny any description of his torture or its impact on him and the conduct of his Combatant Status Review Tribunal at Guantánamo. The government has classified Majid Khan almost in his entirety, as if he never existed to the outside world after his abduction except through government descriptions of him as an al Qaeda terrorist – a claim he rejects."[197]

It took the US authorities nearly a year after Khan's transfer to Guantánamo to hold a CSRT and confirm him as an "enemy combatant". He was refused access to a lawyer until another two months after that, in mid-October 2007. This access was granted for the purpose of pursuing the narrow judicial review to which Majid Khan was then entitled under the Detainee Treatment Act, namely to challenge the CSRT's "enemy combatant" finding against him.[198] At the same time as he was receiving his first visit with a lawyer in four and a half years in custody, the government was seeking in the Court of Appeals to have review under the DTA narrowed. When it failed to achieve the degree of narrowness it sought, it litigated to end this review scheme altogether, a goal it achieved in January 2009.[199]

More than a year of litigation in Majid Khan's case under the DTA review scheme in the Court of Appeals came to nothing. In November 2007, his lawyers filed a motion to preserve evidence of his torture. In December 2007, they filed a motion to declare that his treatment in CIA custody had constituted torture. In May 2008, they filed a motion seeking an order that would allow Khan to make public his allegations of torture on the grounds that he had a constitutional right to freedom of speech, and that his statements were not properly classified. When these motions were never ruled upon by the Court of Appeals, Khan's lawyers filed a motion on the motions, seeking a response from the Court. None was forthcoming. Particularly considering the nature of the claims – involving a detainee making allegations of torture and enforced disappearance, crimes under international law – Amnesty International considers it wholly unacceptable to deprive someone of any effective remedy in this fashion.

Majid Khan's lawyers filed declarations in the Court of Appeals describing what he had told them about his three and a half years in secret US custody. Most of what they have filed was redacted (censored) from the public record. The declaration of one of the lawyers states:

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[197] *Khan v. Gates*, Motion to unseal petitioner's torture motions. In the US Court of Appeals for the DC Circuit, 9 May 2008. Unclassified version.

[198] In its *Boumediene* ruling the Supreme Court held that the only law that it was finding unconstitutional was Section 7 of the MCA. The Court said that "both the DTA and the CSRT process remain intact".

[199] The Court of Appeals ruled that the "basic objective of the DTA was not to supplement habeas corpus, but rather to restrict judicial review of the Executive's detention of persons designated enemy combatants". Had the Congress known that its attempts to eliminate habeas corpus jurisdiction of the district courts would be ruled unconstitutional, "it would not have turned around and created an additional and largely duplicative process by which a detainee could challenge his detention in the court of appeals." The Court dismissed the DTA petitions before it. *Bismullah v Gates*. On petition for rehearing. US Court of Appeals for the DC Circuit, 9 January 2009.

> "[D]uring our meetings with Khan we learned that he was subjected to an aggressive CIA detention and interrogation program notable for its elaborate planning and ruthless application of torture... As a direct result of this ordeal, Khan has suffered and continues to suffer severe physical and psychological trauma from which he is unlikely ever to recover fully. Khan's torture was decidedly not a mistake, an isolated occurrence, or even the work of 'rogue' CIA officials or government contractors operating outside their authority or chain of command. To the contrary, as described below, Khan encountered several other prisoners who were similarly abducted, imprisoned and tortured by US personnel at CIA 'black sites' around the world. The collective experiences of these men, who were forcibly disappeared by our government and became 'ghost' prisoners, reveal a sophisticated, refined program of torture operating with impunity outside the boundaries of any domestic or international law".[200]

Almost all of the remaining 40 pages of this declaration detailing Majid's Khan's alleged treatment have been redacted, page after page entirely blacked out. The USA's use of secrecy is by design or effect serving to shut down scrutiny of human rights violations and facilitate impunity and block redress, including for the international crimes of torture and enforced disappearance that have been committed as part of the CIA program.

The recently leaked ICRC report reveals that Majid Khan has alleged that he was subjected to prolonged stress standing, which as detailed in Abu Zubaydah's case above consisted of the detainee having their wrists shackled to a bar or hook in the ceiling above his head. In Majid Khan's case, this was apparently done to him for three days in Afghanistan and seven days in his third, unknown, place of detention. During this period he was allegedly kept naked. He has also alleged that he was denied solid food for seven days in US custody in Afghanistan.[201]

Majid Khan has said: "They had no choice but to make me Top Secret because of what they did to me".[202] In fact, the USA does have a choice, namely whether or not to comply with its legal obligations. It can – and must – choose to end *all* use of secret detention (steps towards which President Obama has already taken). The new administration can and must choose, in the interest of accountability, justice and respect for human rights and the rule of law, to declassify all statements made by the detainees and their lawyers necessary to describe and substantiate their allegations of torture or other prohibited ill-treatment and unlawful conditions in the secret program. It can and must choose to declassify the interrogation methods, the conditions of confinement, and the location of secret detention facilities that have been used in the program.

As the censorship of Majid Khan and the other ex-CIA detainees currently relies upon their physical location on a military base and an official refusal to allow them to come to an ordinary court, a concern is that behind the classification of their statements perhaps rested an assumption on the part of the previous administration that these men would never come to an ordinary court and never be released. For if they were to be released, they would be free to

[200] *Khan v. Gates*. In the US Court of Appeals for the District of Columbia Circuit, Declaration of J. Wells Dixon, 6 December 2007. Unclassified version.
[201] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, February 2007, *op. cit*.
[202] Majid Khan, quoted in *Khan v. Gates*, Motion to unseal petitioner's torture motions, In the US Court of Appeals for the District of Columbia Circuit, 9 May 2008. Unclassified version.

publicize information which the government has maintained would cause grave damage to US national security. In 2008, a Pentagon spokesperson said that "there is still a significant population within Guantánamo who will likely never be released because of the threat they pose to the world".[203] He also said that "there are a certain number of detainees who are – will simply not be able to be tried, in all likelihood, given the security threat they pose".[204] Among those to whom he was likely referring were those who had been held in the CIA program, given how President Bush and other officials branded these detainees in public commentary.

The CIA has maintained that "media speculation", and allegations from detainees other than those "high-value" detainees now held in Guantánamo, about the location of CIA facilities and the interrogation techniques used by the agency, does not alter its position on classification because "in none of those cases", has the US government "acknowledged whether the information in the media is correct or whether such persons were ever held in the CIA detention program".[205] Indeed, the opposite is the case, according to the CIA. By acknowledging that the 16 "high-value" detainees in question had been in the CIA program and that at least some of them had been subjected to "alternative interrogation techniques", the Bush administration argued that the detainees "may have come into possession of the very information about the CIA program that the US Government seeks to protect". Therefore, if the detainees were to be allowed to disclose any such information, the detainees would be able to make "truthful unauthorized disclosures about such activities". This would, it is claimed, allow "terrorists…to improve their counter-resistance training".[206]

Under this reasoning, what separates the 16 "high-value" detainees now in Guantánamo from those who were held in the program and subsequently released from US custody is that the US government has acknowledged that those still held were detained in the program. If they were to be released, therefore, and make allegations about their treatment in secret custody, the US government would be unable to ignore their claims in the way that it has the claims of other detainees who it has refused to acknowledge were ever held in the CIA program. This heightens concern that, without a change in policy in relation to classification, the knowledge that the current detainees may have about the abuses of the CIA program, which they would have obtained only because they were victims of the abuse, makes their release less likely, and their conditions of detention in terms of contact with the outside world more stringent.

The classification of a detainee's allegations of torture as a state secret also implicates his right to freedom of expression. Under Article 19 of the ICCPR, "everyone shall have the right to freedom of expression", which includes the right to impart information "of all kinds, regardless of frontiers, either orally, in writing or in print" and through any media that the individual chooses. There can be certain restrictions placed on this right, but only as "provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order, or of public health or morals". These detainees were not willing recipients of government secrets, nor have they improperly obtained them. If they have knowledge they wish to reveal about abuses they say they have suffered, it is because the government itself forced it upon them in the course of violating their rights. If

[203] Department of Defense news briefing with Geoff Morrell, Pentagon Briefing Room, 5 August 2008.
[204] *Ibid*.
[205] The Hilton Declaration, 28 March 2008, *op. cit*.
[206] *Ibid*.

the allegations of torture or other ill-treatment are true, allowing the government to permanently gag those who say they have been tortured, thereby by purpose or effect depriving them of an effective remedy and preserving the impunity of the perpetrators, would be a flagrant violation of international law.

According to President Bush in his September 2006 address confirming the existence of the secret detention program, "many specifics of this program, including where these detainees have been held and the details of their confinement, cannot be divulged. Doing so would provide our enemies with information they could use to take retribution against our allies and harm our country." Of the interrogation techniques used, the President said: "I cannot describe the specific methods used – I think you understand why – if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country."

Amnesty International considers that the justification to keep the CIA's "enhanced" interrogation methods secret to prevent individuals who might one day be subjected to them from developing resistance strategies is unsustainable. The amount of information already in the public domain about what the CIA has been doing in all likelihood leaves little to be learned for resistance training purposes. What remains to be disclosed is of more relevance to human rights monitors as well as to potential prosecuting authorities: which specific techniques were used against which detainees, when and where, and who applied and approved them. Lawyers for Majid Khan have written: "Nothing could be learned about the CIA's methods from Khan's torture papers that has not already been debated publicly, except that Khan experienced the torture himself".

With the DTA review scheme terminated, Majid Khan's route to judicial remedy is restricted to habeas corpus following *Boumediene*. As noted in Chapter 6, a protective order on procedures for legal counsel was not entered in the ex-CIA detainee cases until 9 January 2009, meaning that no lawyer had had access to their clients for the purpose of challenging the lawfulness of their detention in habeas corpus petitions in District Court, and Majid Khan's habeas case, like the others, had effectively been dormant for six months following the *Boumediene* ruling.[207]

In a brief filed in February 2009, Khan's lawyers protested the continued delays:

> "Delay means more indefinite detention, and that *itself* is the harm that Khan filed a habeas petition in order to remedy more than two years ago... Indeed, the need for a prompt hearing is never greater than where, as here, it is undisputed that the petitioner was forcibly disappeared, secretly imprisoned and tortured by US officials for several years, and the petitioner has been denied *any* judicial review... The law is clear – the government is not entitled to drag out this case for as long as it wishes in order to evade judicial review".[208]

On or around 5 March 2009, Majid Khan began his seventh year in US detention without charge or trial. By early April, no date had been set for the habeas corpus hearing to which the US Supreme Court said he was entitled 10 months earlier.

[207] A habeas corpus petition was filed for Khan on 29 September 2006. The government denied him access to counsel, and the District Court took no action on motions for him to be granted such access.
[208] *Khan v. Obama*. Motion for reconsideration, In the US District Court for DC, 5 February 2009.

Appendix 2: A chronology of the denial and restoration of *habeas corpus*

13 November 2001 – President Bush signs Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism authorizing the Secretary of Defense to hold anyone subject to the Order "at an appropriate location" designated by the Secretary in or outside the USA. The Order stated that those held under the Order "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."

28 December 2001 – US Justice Department memo advises Pentagon that holding foreign detainees in the non-sovereign territory of Guantánamo Bay should prevent *habeas corpus* review by US courts. It warns of "potential legal exposure" if a US court was ever able to exercise *habeas* jurisdiction over the detainees.

10/11 January 2002 – first detainees transferred to Guantánamo. Litigation begins soon after.

31 July 2002 – District Court for District of Columbia (DC) rules in *Rasul v. Bush* that it has no jurisdiction to hear *habeas corpus* appeals from Guantánamo detainees.

11 March 2003 – Court of Appeals for the DC Circuit upholds the District Court *Rasul* ruling.

28 June 2004 – US Supreme Court rules in *Rasul v. Bush* that US courts do have jurisdiction under federal law to consider *habeas corpus* petitions from Guantánamo detainees. *Hamdi v. Rumsfeld* ruling issued on the same day.

7 July 2004 – Combatant Status Review Tribunals (CSRTs) established for Guantánamo detainees.

14 September 2004 – Administrative Review Board established as annual review for Guantánamo detainees.

21 and 31 January 2005 – two District Court judges considering habeas corpus petitions from Guantánamo detainees issue opposing interpretations of the *Rasul* ruling. Cases go to the Court of Appeals for the DC Circuit, but no ruling will emerge for another two years.

30 December 2005 – Detainee Treatment Act (DTA) signed into law, containing *habeas*-stripping provisions in relation to Guantánamo and providing for limited judicial review of CSRT decisions by DC Court of Appeals.

29 June 2006 – US Supreme Court issues *Hamdan v. Rumsfeld* decision. It holds that the DTA did not strip federal courts of jurisdiction over *habeas corpus* petitions pending when the DTA was enacted.

2/3 September 2006 – 14 "high-value" detainees transferred from years of secret CIA custody to Guantánamo; administration exploits their cases to push for legislation favouring its detention policies.

17 October 2006 – Military Commissions Act (MCA) signed into law stripping the US courts of jurisdiction to consider *habeas corpus* petitions from foreign nationals held as "enemy combatants", and limiting judicial review to that enacted under the DTA of 2005.

20 February 2007 – In the case it first heard in 2005, DC Circuit Court rules in *Boumediene v. Bush* that under the MCA, the US courts have no jurisdiction to consider *habeas corpus* petitions from Guantánamo detainees.

12 June 2008 – US Supreme Court rules in *Boumediene v. Bush* that Section 7 of the MCA has unlawfully stripped habeas corpus and that the Guantánamo detainees "are entitled to a prompt habeas corpus hearing". The ruling leaves the DTA and CSRT scheme intact.

8 October 2008 – District Court orders release into USA of 17 Uighurs no longer labeled "enemy combatants" but for whom no third country solution has been found. Administration appeals to Court of Appeals, and release order is overturned on 18 February 2009.

20 November 2008 – First District Court ruling following habeas corpus proceedings on cases contesting "enemy combatant" status. Judge orders release of five of six detainees in the case. The sixth, he says, lawfully detained as an "enemy combatant".

9 January 2009 – US Court of Appeals sides with Bush administration and ends DTA review scheme in *Bismullah v Gates*.

22 January 2009 – President Barack Obama orders closure of Guantánamo by January 2010; orders executive review of detainee cases.

8 April 2009 – Since *Boumediene* ruling, there have been merits rulings on habeas corpus petitions of 12 detainees (excluding Uighurs). Seven ordered released; five detentions upheld. Some 244 detainees still held, including Uighurs and four others ordered released.

Appendix 3: Rulings on habeas corpus petitions, 12 June 2008 – 8 April 2009			
Case	**Date**	**Decision**	**Notes**
Ghaffar v. Bush (Judge Ricardo Urbina)	8 October 2008	17 releases into the USA ordered	Case concerned 17 Uighurs whom the Bush administration no longer considered "enemy combatants", long approved for release, but not to China because of the human rights violations they would face there. Judge's release order overturned by US Court of Appeals in February 2009. Uighurs still held at Guantánamo in early April 2009, when they were reportedly visited by members of the new administration's executive review team.
Boumediene v. Bush (Judge Richard Leon)	20 November 2008	1 detention upheld; 5 detainees ordered released	Six men seized in Bosnia and Herzegovina in January 2002 and transported to Guantánamo. In support of its claim that the six had planned to travel to Afghanistan to fight US forces there, the US government relied "exclusively on the information provided in a classified document from an unnamed source". Judge said this was too "thin a reed" on which to base their detention. Ruled that the sixth man could be held because the government had shown "by a preponderance of the evidence" that he not only planned to travel to Afghanistan but was also a facilitator for others to do so. The evidence for this was classified. Two of the detainees whose release was ordered were still held in Guantánamo in early April 2009.
Sliti v. Bush (Judge Leon)	30 December 2008	1 detention upheld	Tunisian national Hisham Sliti, held in Guantánamo since 2002. The government's evidence against him, according to the judge, consisted of "a combination of certain statements by petitioner Sliti which the Court found credible and certain supporting classified documents that elaborate in greater detail the most likely explanation for, and significance of, petitioner's conduct". Judge concluded that he could make a "reasonable inference" that Sliti went to Afghanistan in 2000 as an *al-Qa'ida* recruit, and upheld his detention as an "enemy combatant".
Al Alwi v. Bush (Judge Leon)	30 December 2008	1 detention upheld	Yemeni national Moath Hamza Ahmed al Alwi, held in Guantánamo since 2002. The government's evidence was a combination of statements made by the detainee and classified documents. Judge ruled that there was no need for there to be any evidence that the detainee had actually used arms against the USA. Al Alwi's "close ties to Taliban and al Qaeda forces during the year preceding the initiation of force by the United States in October 2001, combined with the fact that he remained with his Taliban unit after hostilities were initiated by the United States and its allies, is more than enough to meet the definitional requirement [of 'enemy combatant']."

El Gharani v. Bush (Judge Leon)	14 January 2009	1 release ordered	Mohammed el Gharani, a Chadian national who was reportedly 14 years old when transferred to Guantánamo in 2002. According to the judge, the government's case "consisted principally of the statements made by two other detainees while incarcerated at Guantánamo Bay. Indeed, these statements are either exclusively, or jointly, the *only* evidence offered by the Government to substantiate the majority of their allegations." The government, Judge Leon ruled, provided no information about the detainee that could be relied upon by the court. The government decided not to appeal, but the detainee was still held in Guantánamo in early April 2009.
Al Bihani v. Obama (Judge Leon)	28 January 2009	1 detention upheld	Yemeni national Ghaleb Nassar al Bihani held in Guantánamo since 2002. The government's evidence consisted of statements made by the detainee and classified documents. Judge found that detainee was lawfully held as an "enemy combatant", even if all he did was seven years earlier cook for a Taleban unit with links to *al-Qa'ida*. "Simply stated, faithfully serving in an al Qaeda affiliated fighting unit that is directly supporting the Taliban by helping prepare the meals of its entire fighting force is more than sufficient 'support' to meet this Court's definition. After all, as Napoleon himself was fond of pointing out: 'an army marches on its stomach'."
Basardh v. Bush (Judge Ellen Segal Huvelle)	31 March 2009	1 release ordered	Yemeni national, Yasin Muhammed Basardh, taken to Guantánamo in 2002 after being detained in Pakistan and handed over to US custody. The Judge said that her judgment was based on classified documents.
Hammamy v. Obama (Judge Leon)	2 April 2009	1 detention upheld	Tunisian national, Hedi Hammamy, arrested in April 2002 in Pakistan, handed over to the USA, and transferred to Guantánamo. According to the judge, "the Government's evidence [of 'enemy combatant' status] consists principally of intelligence reports from various government law enforcement and intelligence services" and was therefore classified.