



## **Counterterrorism and Human Rights: A Report Card on President Obama's First Year**

Within days of taking office in January 2009, President Barack Obama issued executive orders that repudiated key elements of the Bush administration's abusive approach to fighting terrorism. By changing course in such a swift and high-profile way, President Obama appeared to signal a new and reformed counterterrorism policy, one consistent with basic US values and with international law. But in the months that followed this promising start, the administration chose to retain a number of the previous administration's most problematic policies, albeit in modified form.

Past abuses at Abu Ghraib, Guantanamo, and elsewhere had greatly damaged the United States' moral standing and served as a rallying cry for terrorists around the world. Rather than protecting national security, these crimes hindered international cooperation in combating terrorism, helped terrorist recruitment, and undermined the goal of reducing anti-American militancy. One of the difficult challenges facing the new administration when it took office was how to deal with the legacy of these abuses, including, specifically, the question of what to do about the approximately 240 prisoners in military custody at Guantanamo Bay.

Human Rights Watch issued a [comprehensive set of recommendations](#) to President Obama in November 2008 that laid out the steps we thought his administration should take to combat terrorism and respect human rights. Now, one year into the president's tenure, Human Rights Watch reviews his administration's advances, analyzes its missteps, and urges more meaningful and extensive reforms.

One key recommendation is for the Obama administration to reconsider its decision to detain some terrorism suspects indefinitely without charge. A traditional tool of repressive governments, the practice of long-term administrative detention bypasses basic due process rights found in criminal proceedings, and is inconsistent with US legal traditions and constitutional values.

## **Leading Accomplishments**

### ***Ending Secret Prisons***

On January 22, 2009, his second full day in office, President Obama issued an executive order on interrogation policy that ended the Central Intelligence Agency's secret detention program. The CIA's prisons, which are thought to have held some 100 detainees since 2002, were the site of some of the Bush administration's most egregious human rights violations, including waterboarding and other forms of torture.

CIA Director Leon Panetta announced that the president's order had been implemented in an April 9, 2009 memorandum to CIA staff that stated: "The CIA no longer operates detention facilities or black sites and has proposed a plan to decommission the remaining sites."

In August, in another move to end the use of secret detention, the Department of Defense implemented a new policy requiring US military forces to notify the International Committee of the Red Cross (ICRC) of the identity of all detainees within two weeks of their capture. Under the previous rules, a detainee's identity could be withheld until he was transferred to a long-term military detention facility.

### ***Implementing the Ban on Torture and Cruel, Inhuman or Degrading Treatment***

Another provision in the January 2009 executive order on interrogation policy prohibited the CIA from using the coercive interrogation techniques authorized by the Bush administration and required it to abide by the same interrogation standards as the US military. The order also set up an interagency task force to assess whether the interrogation practices authorized by the Army Field Manual (FM 2-22.3 on Human Intelligence Collector Operations) are adequate to acquire needed intelligence and to advise whether the CIA should be provided additional guidance. In August 2009, the task force concluded that the practices employed by the military were sufficient.

In his April 9 memo to CIA staff, CIA Director Panetta reported that the agency was in compliance with the president's order, explaining that "the CIA does not employ any of the enhanced interrogation techniques that were authorized by the Department of Justice from 2002 to 2009." The memo also stated that CIA officers "will continue to conduct debriefings

using a dialogue style of questioning that is fully consistent with the interrogation approaches authorized and listed in the Army Field Manual.”

### ***Repudiating Past Authorizations for Torture***

The January 22 executive order on interrogation also revoked past presidential directives and other orders and regulations that authorized the abusive treatment of detainees, and repudiated all Justice Department memos relating to interrogation that were issued between September 11, 2001, and January 20, 2009.

### ***Pledging to Move the 9/11 Trial to Federal Court***

In November 2009, Attorney General Eric Holder announced that five defendants accused of planning the September 11 attacks would be transferred to the Southern District of New York for trial in federal court. The five men—who were initially held in CIA custody and who have been held since 2006 in military detention at Guantanamo—were facing pending charges before a military commission.

Holder’s announcement underscores the importance of the 9/11 trial to America’s reputation in the fight against terrorism. By moving this historic trial to federal court—and out of the ad hoc, chaotic, and discredited military commissions—the administration has taken a crucial step toward ensuring that the trial’s results will be recognized as legitimate both domestically and internationally. Human Rights Watch is disappointed, however, with Holder’s commitment to seeking the death penalty against the five defendants in the case.

## **Missteps, Missed Opportunities, and Incomplete Reforms**

### ***Maintaining the War Paradigm as a Justification for Holding Suspected Terrorists Indefinitely without Charge***

One of the most potentially far-reaching Obama administration positions was first revealed in a brief that the Justice Department filed in the Guantanamo litigation in March 2009. In response to a federal court order seeking a definition of the term “enemy combatant,” the Justice Department claimed the authority to pick people up anywhere in the world on the grounds of support for or association with al Qaeda or the Taliban, and to hold them indefinitely without charge in military detention.

While formally discarding the phrase “enemy combatant,” the Justice Department adopted the previous administration’s position that the United States was at war with al Qaeda and the Taliban, effectively seeking to justify the detention of persons linked to those groups until the war is over. The only substantive difference from the Bush administration’s prior litigating position was that if the person’s connection to al Qaeda or the Taliban was limited to support, that support had to be “substantial.” In subsequent court filings and other communications, the administration has reiterated these views.

Human Rights Watch strongly urges the administration to reject the paradigm of an ill-defined and open-ended war as a justification for holding people indefinitely without charge.

### ***Closing Guantanamo by Establishing a System of Indefinite Detention in the United States***

On January 22, 2009, President Obama announced plans to close the Guantanamo Bay detention facility by January 2010. He also established a task force to review the status of the roughly 240 men then held at Guantanamo to determine if they should be transferred, released, prosecuted, or handled in some other way.

In a speech at the US National Archives in May 2009, President Obama specifically indicated that his administration might continue to hold some number of detainees indefinitely without charge. In describing the population held at Guantanamo, he outlined five categories of detainees, including a set of persons “who cannot be prosecuted yet who pose a clear danger to the American people.” He said his administration would work with Congress to develop a legal framework setting out the rules and procedures for the “prolonged” detention of such persons.

While Obama did not state categorically that there were detainees who fit into this fifth category, his administration has since made clear that when Guantanamo closes it will transfer some number of prisoners to the United States for continued, indefinite detention. The administration did pull back from the idea of proposing legislation to govern such detentions, though it may yet issue an executive order that outlines evidentiary rules and standards, review procedures, and other relevant issues.

It has been clear for several months that the administration will not meet its one-year deadline for closing Guantanamo. But much worse than the delay in closing the facility is the manner in which the facility seems likely to close. Effectively bringing Guantanamo to the

United States—or, specifically, to the correctional facility in Thomson, Illinois, which the administration has announced plans to purchase—will do little to address the violations of fundamental rights of the men held there.

Human Rights Watch urges the Obama administration to prosecute the remaining detainees at Guantanamo or appropriately repatriate or resettle them elsewhere. To simply move detainees to US soil while continuing to hold them indefinitely without charge would eviscerate the meaning of closing Guantanamo.

### ***Reviving the Unfair Military Commissions***

On the day he took office, President Obama directed military prosecutors to seek a 120-day suspension of military commission proceedings, the deeply flawed prosecutions that have taken place at Guantanamo over the past several years. The president's subsequent executive order on Guantanamo stopped military commission proceedings during the pendency of the detainees' status review process.

In May, however, President Obama announced plans to resurrect the military commissions system, while asserting that detainees would be tried in federal courts wherever feasible. The administration subsequently worked with Congress to draft legislation amending the commissions' rules, known as the Military Commissions Act of 2009 (MCA). The new law made a number of improvements to the Bush-era military commissions system, creating, among other changes, important restrictions on the use of hearsay and coerced evidence.

Yet military commissions remain vastly inferior to the federal courts as a forum for trying terrorism cases. Notably, military commission judges lack the independence necessary to protect their rulings from the taint of executive pressure. The commissions' convening authority, a political appointee, wields enormous power to bring charges or drop them, approve plea bargains, and reduce or waive sentences. And despite the new changes, the MCA provides defendants with substandard procedural protections, and continues to authorize charges that have not previously been considered war crimes, raising ex post facto concerns.

As a tool for fighting terrorism, the military commissions are especially flawed. A military institution, they encourage terrorism suspects to glorify themselves as warriors engaged in a legitimate fight. Civilian prosecutions, by contrast, treat terrorism suspects as criminals, denying them the propaganda value of combatant status.

Compared to its predecessor, the Obama administration has made progress in reasserting the primacy of the federal civilian courts for the prosecution of terrorism suspects. Soon after taking office, the administration returned [Ali Saleh Kahlah al-Marri](#) to the custody of federal criminal justice authorities, charging him with conspiracy and material support of terrorism. A Qatari citizen and US resident who had been held in military custody as an “enemy combatant” since 2003, al-Marri pled guilty to conspiracy to provide material support to al Qaeda and was sentenced to more than eight years in prison. In May 2009, the Obama administration also transferred [Ahmed Ghailani](#), a Tanzanian who was held for several years in secret CIA detention, from Guantanamo to federal criminal proceedings in the Southern District of New York. And the planned transfer of the 9/11 case, discussed above, should take place in early 2010.

Yet other cases have remained in military commissions. In November 2009, Attorney General Holder announced that five detainees previously charged in commissions would be charged again under the revised rules. Among the defendants was [Omar Khadr](#), a former child soldier who was 15 years old at the time of his alleged crime.

Human Rights Watch urges the Obama administration to discontinue its reliance on the military commission system and prosecute all detainees implicated in crimes in federal civilian court.

### ***Returning and Resettling Detainees Held at Guantanamo***

The administration has faced serious obstacles to reducing the prisoner population at Guantanamo. A full year into President Obama’s tenure, 198 detainees remain in custody there, down from 242 when he took office. The pace of transfers out of Guantanamo has been no faster under Obama than it was during the last years of President Bush.

The Guantanamo Detainee Review Task Force, mandated to examine each detainee’s case, has yet to complete its review. In December, Secretary of Defense Robert Gates announced that the task force’s preliminary assessment concluded that 116 detainees were eligible for release, but thus far, only 43 men have actually left the detention facility. (An additional prisoner has died.)

Among the most daunting obstacles to shrinking the prisoner population has been Congress’s refusal to allow detainees to be resettled in the United States. When President

Obama took office, an estimated 50 to 60 of the remaining detainees at Guantanamo could not be returned to their home countries because of the risk of torture or abuse. Included in this group were 17 Uighurs from China who had long been cleared for release but who no third country would take. The administration had hoped to resettle some of the Uighurs in Virginia, where a vibrant local Uighur community was willing to provide housing, language training, and other assistance. However, the administration failed to secure congressional support for the plan, and Congress subsequently passed legislation blocking the transfer of any detainee from Guantanamo to the United States for purposes other than prosecution.

The administration's inability to resettle detainees in the United States has hindered its efforts to convince other countries to do so. To date, eight countries have accepted 19 non-citizen detainees for resettlement, far fewer than the number for whom resettlement is needed.

Another important stumbling block to closing Guantanamo has been the number of detainees from Yemen. When Obama took office, about 100 Yemeni detainees remained at Guantanamo, the largest national group by far. The US has been reluctant to send detainees back to Yemen because of al Qaeda's robust presence in the country. With the alleged Yemen connection to the Christmas day bombing plot, plans to carry out returns from Guantanamo to Yemen became politically untenable. In early January, the Obama administration announced that detainees would no longer be sent home to Yemen, including the approximately 40 Yemenis who had been cleared for return last year in a painstaking review process. In effect, Yemenis at Guantanamo are being punished because of a plot carried out without their participation or knowledge.

Human Rights Watch urges the Obama administration to charge the Yemenis it has credible evidence against and work with Yemen on a plan for safely returning or resettling the rest. The Obama administration should also intensify negotiations with other countries to resettle the remaining Uighurs and other detainees who cannot return to their home countries.

### ***Denying Basic Rights to Prisoners at Bagram***

The Obama administration has been slow to acknowledge the rights of the approximately 700 prisoners held in military custody at Bagram Air Base in Afghanistan.

In July, the Defense Department announced new status review procedures for detainees held at Bagram, procedures that are modeled on the Combatant Status Review Tribunals (CSRTs)

previously used at Guantanamo. The new procedures, which provide greater procedural rights than the previous system in use at Bagram, still suffer from the flaws of the CSRTs. Notably, the “personal representative” assigned to the detainee is not a lawyer and does not have a confidential attorney-client relationship with the detainee; the fact-finder lacks independence; the detainee has no ability to see the classified information used against him, and there is little possibility for the detainee to call witnesses on his behalf. Yet detainees in Afghanistan, regardless of whether they are under the physical control of the Afghan or US government, are entitled to both international human rights and Afghan domestic legal protections, which include the right to counsel and the right to challenge the legal and factual basis for the detention before an independent and impartial fact-finder.

In habeas litigation currently in the US Court of Appeals for the DC Circuit, the Justice Department has reasserted the Bush administration position that prisoners held at Bagram—even those arrested in other countries and brought to Afghanistan—have no right to challenge their detention in US court. Rejecting a district court ruling in April that found that detainees brought to Bagram from outside of Afghanistan have the same right to court review as detainees at Guantanamo, the Justice Department argues that because Bagram, unlike Guantanamo, is located in a traditional theatre of war, the courts should have no jurisdiction over detainees held there. Human Rights Watch recognizes that Afghanistan is war zone, but believes that petitioners in the Bagram litigation—who are terrorism suspects flown to Afghanistan from non-war zones such as Thailand and Dubai—cannot simply be detained without charge and without access to any court.

Human Rights Watch urges the Obama administration to reconsider its position in the Bagram litigation, and to stop indefinitely detaining terrorism suspects without charge. We also urge the administration to grant basic due process rights—such as the right to be informed of the specific reasons for arrest, to have access to a lawyer, and to challenge the detention before an Afghan court—to other detainees held by the US at Bagram, including persons apprehended in Afghanistan.

### ***Accounting for Past Abuses***

The American people deserve a full and public accounting of the scale of post-9/11 abuses, why and how they occurred, and who was responsible for authorizing and facilitating them. In order to deter serious human rights violations such as torture and enforced disappearance from occurring again, officials implicated in these crimes should be investigated and prosecuted. Both a commission of inquiry and criminal prosecutions are



needed to repudiate these serious abuses, restore US moral authority, and satisfy the demands of justice.

The Obama administration has shown little enthusiasm for either of these steps. President Obama has repeatedly expressed a reluctance to “look backwards” at the crimes of the previous administration. He has specifically ruled out prosecuting CIA agents who committed abuses that the Justice Department advised were lawful, even though torture is a serious crime under both US and international law.

In August, Attorney General Holder announced that he was appointing a special prosecutor to carry out a preliminary review of alleged CIA abuses. The review is focusing on so-called “unauthorized” interrogation techniques: practices that went beyond what was allowed under legal advice provided by the Justice Department at the time. It seems unlikely to look up the chain of command to the senior-level officials who planned, ordered, and condoned abuses.

Human Rights Watch urges President Obama to work with Congress to set up a commission of inquiry to investigate, document, and publicly report on post-9/11 counterterrorism-related abuses. We also believe that the Department of Justice should initiate a full-scale criminal investigation into senior-level responsibility for the abusive interrogation practices by the US government since the attacks of September 11, 2001.

### ***Ensuring that Prisoners Are Not Rendered to Torture***

The January 22 [executive order on interrogations](#) established a special task force mandated, among other things, to review prisoner transfer policies to ensure that suspects are not rendered (transferred) to countries where they face a serious risk of torture. In August 2009, the task force issued its policy recommendations relating to transfers. It counseled US authorities to continue carrying out detainee transfers based on “diplomatic assurances,” non-binding promises from the receiving country that detainees will be treated humanely. The task force advised that the State Department should be involved in evaluating assurances, and that some type of monitoring mechanism to ensure private access to transferred persons should be used.

Human Rights Watch has found diplomatic assurances against torture and other ill-treatment to be unreliable. We urge the administration to reconsider its position and to mandate that detainees not be transferred based on diplomatic assurances to countries

where they face a real risk of torture or other serious abuse. In every instance, including transfers from Guantanamo, detainees facing transfer should be granted access to a fair review mechanism in which to raise potential concerns about abuse.

### ***Asserting an Overbroad Understanding of the State Secrets Privilege***

The Obama administration has taken an indefensible position on the “state secrets” privilege. In a series of court cases, the Obama administration has invoked an overly broad understanding of the scope of the privilege, claiming that even meritorious litigation should be summarily dismissed if it might lead to the revelation of classified information. The administration has also failed to support pending reform legislation, known as the State Secrets Protection Act, which would provide clear and sensible procedures for courts to prevent government misuse of the privilege.

The first indication of the Obama administration's views came in February 2009 in the case of *Mohamed v. Jeppesen Dataplan, Inc.* In urging a federal appeals court to uphold the dismissal of a lawsuit involving CIA flights that brought suspects to be tortured, a Justice Department lawyer acknowledged that the administration was taking “exactly” the same position as the Bush administration. In subsequent cases, despite issuing new guidelines in September that purported to limit the use of the privilege, the Justice Department has continued to assert an overly broad position. It called for full court review of an appellate panel’s ruling in the plaintiffs’ favor in the *Jeppesen* case, and, at oral argument before the full appellate court in December, it pressed the court to dismiss the case.

Human Rights Watch urges the Obama administration to opt for a narrower approach to the state secrets privilege: to invoke it only to protect national security—not to prevent the release of information that the government might find embarrassing—and only when genuinely necessary.

### ***Ensuring Transparency and Abolishing Unreasonable Barriers to Declassification***

Despite a few missteps, the Obama administration has made important progress in ensuring transparency through the release of official documents and other government materials.

In April, the Justice Department declassified four Bush-era memos on so-called enhanced interrogation techniques. The memos provided the legal framework for the CIA's use of waterboarding and other abusive interrogation techniques that violate domestic and

international law. They demonstrate the falsity of the Bush administration's repeated protestations that the United States did not engage in torture. In August, similarly, the Justice Department released a 2004 report from the CIA inspector general's office that details a range of CIA abuses that constitute torture under US and international law. It describes how CIA operatives subjected prisoners held in secret detention to mock executions, brandished a gun and an electric drill before one detainee, and threatened to kill another prisoner's children.

In December, President Obama issued an executive order on classifying and declassifying national security information, which, for the first time, establishes that no records may remain classified indefinitely. Significantly, the order eliminates the veto authority that the Bush administration granted intelligence agencies regarding declassification, and establishes a streamlined process for declassification through a National Declassification Center. While its actual impact remains to be seen, the order is clearly a positive step toward improving public access to matters of societal concern and ensuring that government agencies do not have unfettered power to restrict the disclosure of embarrassing information.

Yet the Obama administration's record on transparency is not unblemished. In May, the administration blocked the court-ordered release of photographs of detainee abuse that occurred from 2001 to 2005, claiming that the photos' publication would endanger US troops. At the administration's request, Congress later rewrote the Freedom of Information Act to grant the Defense Department the authority to withhold specific photographs from release.

In addition, the Justice Department has yet to release a report from its Office of Professional Responsibility (OPR) that examines possible ethics violations by the attorneys who drafted the Bush-era "torture memos." The release of the report, a draft of which was originally completed in December 2008, has been repeatedly delayed, despite the attorney general's assurances to Congress that it would be made available by the end of November 2009.

Human Rights Watch urges the Obama administration to continue to release previously suppressed or classified documents detailing abuses against persons in US custody, or setting out the decision-making process behind such abuses.