

# Human Rights Watch

## Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

<https://www.hrw.org/news/2008/08/06/ending-lapse-lawlessness>

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What must the next United States president do to reclaim Washington's standing to promote human rights around the globe? Many aspects of President George Bush's administration's human rights policy have caused American moral authority to plummet, including its penchant for cosying-up to favoured dictators, equating democracy promotion with regime change, and undermining international standards such as the new treaty banning cluster munitions. But probably nothing has done more to tarnish Washington's reputation in this area than the administration's decision to combat terrorism without regard to US obligations under international human rights law.

What concretely will it take for Senators John McCain or Barack Obama to end this ugly state of affairs? Stopping coercive interrogation - the use of torture and other inhumane treatment to squeeze information from suspects - is probably the most important place to begin. Much has already been accomplished in this regard, but crucial steps remain.

For example, President George Bush has always routinely denied that the US government used torture, but initially his Justice Department legal advisors effectively denied torture out of existence. According to their twisted reading, abuse is not torture unless the pain is equivalent to death, or the loss of a major bodily organ - a denition which, for example, would excuse the mere ripping off of ngernails. That denition has now been abandoned, but it is not clear what Washington's new denition is, and whether it accords with the internationally mandated prohibition of the intentional iniction of severe pain or suffering, whether physical or mental.

For several years, the administration also contended that the parallel prohibition of cruel, inhuman or degrading treatment' applied only to US citizens, or to foreigners in the US, but not to non-Americans held overseas. That fabricated loophole was part of the rationale behind Guantanamo Bay and the CIA's secret detention facilities. Legislation today makes clear that the prohibition applies to all people, wherever they are held.

In response, the US military adopted new interrogation rules which effectively reject the use of coercive interrogation - a major step forward. However, when Congress voted to apply the same rules to the CIA, Bush vetoed the bill, and Congress lacked the votes to override the veto.

Sadly, McCain, the lead sponsor of the rst legislation, sided with Bush on the CIA bill. His election-season justification - that the CIA is a more professional body than the military and thus does not need the same detailed restrictions - is an invitation to abuse. The new president should solicit and sign new legislation bringing the CIA under the same strict rules as the military.

Even without that legislation, one might take comfort in the baseline prohibition of cruel, inhuman or degrading treatment, which applies to all interrogators. But the Bush administration has eviscerated this standard by interpreting it under a subjective shock the conscience' test in which the method of coercion is weighed against its purpose. If coercion is used for the important goal of ghting terrorism, then under the administration's apparent interpretation, few interrogation techniques shock the conscience.

That, in part, is why the administration refuses to forbid even mock execution by drowning, euphemistically known as water-boarding, an obvious form of torture, let alone cruel, inhuman or degrading treatment. The new president should abandon this unseemly balancing test and afirm full compliance with the Convention Against Torture.

### DETENTION BAN

Many of the people subjected to interrogation by the CIA have been held in secret detention facilities where the US government refused to acknowledge their detention, and their only contact was with their jailors and interrogators. Under any government, people who have effectively disappeared' in this way are extraordinarily vulnerable to mistreatment.

Bush has moved a number of those detainees to acknowledged detention in Guantanamo, but he refuses to close the secret CIA detention facilities permanently. The new president should shut all such detention centres denitively, promise that any detained terrorism suspect will be immediately acknowledged, allowed access to the courts and granted visits by the International Committee of the Red Cross, and ratify the Convention against Enforced Disappearances to prohibit such abusive detention in future.

When the Bush administration was not mistreating suspects itself, it often used extraordinary rendition' to send them for interrogation by allies such as Egypt or Jordan that are notorious for their own use of torture. To circumvent the international prohibition on sending anyone to a country where there is a serious risk of torture, the administration would ask the recipient government to provide diplomatic assurances' of proper treatment. But those representations are worthless when coming from governments that routinely violate even their legally binding international obligations not to torture. The new president should vow that no suspect will be sent to a country that regularly tortures, regardless of any assurances.

## CLOSING GUANTNAMO

Perhaps the greatest symbol of Washington's abuse of human rights has been Guantanamo, where hundreds of people have been detained without charge or trial, often for many years. The new president must obviously shut Guantanamo, as both Senators Obama and McCain agree, but the big question is how. While the Bush administration has slowly repatriated many of the inmates, it insists that some one-hundred-and-fifty have committed serious crimes or are too dangerous to be released. What should be done with them?

One proposal is simply to move Guantanamo on-shore - to ask Congress for authority to detain suspects preventively, without criminal charge or trial. That would be a gross deviation from US due process traditions which the new president must reject. Instead, any Guantanamo detainee who is to remain in custody should be prosecuted - not before the Bush administration's substandard military commissions, which are designed to facilitate the use of coerced testimony as evidence - but in the regular court system.

Those who argue that retrospective prosecution is inappropriate in light of the need to prevent terrorist acts, fail to understand the modest evidentiary requirements of a prosecution for the crimes of conspiracy or providing material support for terrorism. As the federal courts have demonstrated, these laws can be used against participants in a terrorist plot long before it comes to fruition.

Because no proper judge would admit coerced testimony or evidentiary leads from it, some detainees may not be prosecutable, but even that would not justify preventive detention. It would still be preferable to release some suspects rather than to continue to detain them without trial. Whatever risk is involved in a handful going free, is likely to be far smaller than the risk that the ongoing use of detention without trial will spur the recruitment of new terrorist operatives.

At a more conceptual level, the new president must abandon the war metaphor for the fight against terrorism. Obviously real wars exist in Iraq and Afghanistan, where the laws of armed conflict apply. But the administration has sought to justify detention without trial on the basis of a global war against terrorism', even when suspects are picked up far from any traditional battlefield.

Leaving aside the difficulty of being at war with a tactic, and assuming that the war' against terrorism is directed foremost against Al Qaeda, the concept of applying war rules on a global basis is still too dangerous to our human rights. It would allow the US government, simply on its own say-so, to detain anyone anywhere in the world, declare him or her an enemy combatant', with detention continuing until the elusive end of the war against terrorism. The new president should close that enormous loophole in due process rights and insist that any suspect detained outside a traditional battle zone will be prosecuted through the criminal justice system.

## TRUTH COMMISSION

While ensuring there is no future repeat of the administration's abusive counterterrorism practices, the new president should not simply sweep the past under the rug. Ideally working with Congress, he should push for the establishment of a high-level, bipartisan, professionally staffed independent commission, modelled after the September 11 Commission, to detail what US practices violated international human rights law, who authorised them, why they were allowed, and what steps should be taken to ensure that they are never permitted again. This truth commission would begin the process of exposure and acknowledgment that is a key element of accountability. Where appropriate, it should also recommend reparations and prosecution.

To signal dramatically the government's renewed commitment to international human rights standards, the new president should also endorse ratification of the International Criminal Court treaty. One lesson of the past seven years has been that, given White House control of the Justice Department, the threat of prosecution is so slight that senior executive officials are not deterred from authorising the use of unlawful tools such as torture.

There would be no stronger statement of the government's commitment to the rule of law under global standards than to permit US officials to be subject to the jurisdiction of the International Criminal Court should a future administration again lapse into such lawlessness.

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