



**RECOMMENDATIONS RESPECTFULLY SUBMITTED TO  
THE TRUMP ADMINISTRATION REGARDING  
NATIONAL SECURITY POLICIES**

The New York City Bar Association (the “City Bar”), writes to express our deepest concerns about reports of policies that your Administration is considering with regard to the national security policies of the United States, in particular as they relate to the detention and interrogation of individuals thought to be involved in Islamist terrorism. Since its establishment in 1870, the City Bar has worked to advance and defend the rule of law. Over the past fifteen years in particular, the City Bar has issued thoroughly researched and thoughtfully reasoned reports and letters to promote America’s long-term security in part through respect for lawful and humane policies.

The principal lesson we have derived from our work is that full and faithful respect for the rule of law strengthens our country. Our system of justice – based on time-tested constitutional and international norms – is a source of strength, not vulnerability. Since 9/11, certain U.S. policies for the detention, treatment, and trial of persons suspected of membership in, or support of, al Qaeda, the Taliban or associated groups have violated our traditions of fair process and respect for human dignity and the rule of law. Many of those practices were subsequently abandoned by the Bush Administration and all of them were explicitly rejected by your predecessor. According to widely publicized reports, suggestions have been made within your Administration that you employ and even expand some or all of these practices, although we understand that Secretary of Defense Mattis and CIA Director Pompeo have expressed opposition to that course of action. We were encouraged to hear you state that you will defer to Messrs. Mattis and Pompeo and, for the reasons discussed below, we urge that you continue to reject opposite suggestions as not only contrary to the rule of law and our nation’s most cherished values but to our national security interests. In that spirit, we offer these concrete suggestions for ensuring the rule of law and bolstering our national security. These proposals have been developed by the City Bar’s Task Force on National Security and the Rule of Law, which oversees and coordinates the City Bar’s work on issues pertaining to civil liberties and national security.

**DETENTION**

We urge you to close the detention facility at Guantanamo Bay, not to increase its population. Since 9/11, certain U.S. detention policies have disregarded the norms and values enshrined in our Constitution and have drawn wide public opprobrium upon our nation, ultimately undermining our nation’s security. The operation at Guantanamo Bay has earned condemnation from our allies and continues to serve as a recruiting tool for forces hostile to the

United States even as it remains an increasingly expensive drain on the public fisc in a time of austerity and budget discipline. Grim experience tells us that this facility weakens the United States. Its costs – in terms of money, reputation and motivating enemies of the United States – far outweigh any benefits derived from isolating a few men thought to wish us harm and who could be incapacitated in the United States consistent with our security interests.

For those detainees who have engaged in criminal conduct, we urge your Administration to move forward with prosecutions where in the professional judgment of Department of Justice prosecutors, the admissible evidence would support a prosecution. We urge your administration to continue to observe the strong presumption in favor of civilian-court prosecutions, and we believe the NDAA prohibition on transfer to the U.S. for prosecutions in U.S. courts is profoundly misguided.<sup>1</sup> The one Guantanamo detainee who to date has been transferred to New York for prosecution, Ahmed Ghailani, was convicted in 2010 for his role in the 1998 East Africa embassy bombings, and is now serving a sentence of life without possibility of parole at the “Supermax” prison in Florence, Colorado.<sup>2</sup> The legitimacy of Ghailani’s conviction and sentence are unquestioned. Despite fears raised at the time, there were no disruptions or problems at the courthouse in lower Manhattan during his trial. Contrast this record with that of the Military Commissions, which have for years been bogged down in pre-trial hearings due to their irregular nature and other flaws.

We urge you in the strongest possible terms to reject any proposal to reopen the so-called “CIA Black Sites” or otherwise hide detainees as contemplated in your draft Executive Order.<sup>3</sup> Moreover, it is essential that Guantanamo detainees continue to have reasonable access to counsel and to the federal courts to test the legality and circumstances of their detention. Such access is mandated by the Supreme Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which affirmed the constitutional rights of Guantanamo detainees to petition Article III courts for a writ of habeas corpus. We urge your administration to continue compliance with the law governing access to counsel and the courts. Our criminal justice system is a source of tremendous strength for the United States. Secret and other irregular systems undermine these key institutions and ultimately national security as well.

## **TREATMENT OF DETAINEES**

We urge you to ensure that the United States treats all detainees humanely and in accordance with obligations we have voluntarily and sensibly assumed under domestic and international law. During the course of your campaign and more recently, you suggested that you

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<sup>1</sup> Public Law 114-92, National Defense Authorization Act for Fiscal Year 2016, Section 1031 (“Prohibition on use of funds for transfer or release of individuals detained at United States Naval Station, Guantanamo Bay, Cuba, to the United States.”)

<sup>2</sup> See U.S. Att’y’s Office for the S. Dist. of N.Y., Ahmed Khalfan Ghailani Found Guilty in Manhattan Fed. Court of Conspiring in the 1998 Destruction of United States Embassies in E. Africa Resulting in Death (Nov. 17, 2010), available at <http://www.fbi.gov/newyork/press-releases/2010/nyfo111710a.htm>; Transcript of Sentencing at 71, United States v. Ghailani, S10 98 Cr. 1023 (LAK) (No. 1098).

<sup>3</sup> Draft Executive Order: Detention and Interrogation of Enemy Combatants, available at <http://apps.washingtonpost.com/g/documents/national/read-the-draft-of-the-executive-order-on-cia-black-sites/2288/>.

would consider supporting, as effective tools, the use of interrogation techniques such as waterboarding, and worse. We emphatically warn against the use of such practices on the grounds that they are unethical, immoral, and above all unlawful. These practices amount to torture and cruel, inhuman and degrading (CID) treatment and are prohibited by both domestic and international law. The Detainee Treatment Act of 2005 bans torture and CID and mandates DOD interrogation in accordance with Army Field Manual. The Supreme Court has also consistently held that punishments involving the use of torture are unconstitutional as a violation of the Fifth and Eighth Amendments. The use of torture and CID treatment is proscribed without exception<sup>4</sup> by the U.N. Convention against Torture (UNCAT), to which the United States is a party. The provisions of UNCAT are executed and incorporated into U.S. law by 18 U.S.C. § 2340, criminalizing the use of torture and CID treatment. Heads of state who authorize and engage in the use of torture during an armed conflict may also be prosecuted as war criminals under the federal War Crimes Act and 1949 Geneva Conventions.

We had been relieved to hear CIA Director Mike Pompeo clearly renounce waterboarding as torture and absolutely rejecting the idea that he might bring back forms of “enhanced interrogation” not listed in the Army Field Manual during his January 12, 2017 confirmation hearing before the Senate Select Committee on Intelligence.<sup>5</sup> As you know, he said that he could not imagine your asking him to do so. We hope and trust his faith is borne out by experience. Likewise Senator Jeff Sessions clearly stated that waterboarding is torture and therefore illegal at his own confirmation hearing before the Judiciary Committee. Again, we agree and stress the importance of respecting this position, and support your recent statement that you would do so. To revoke Executive Order 13941 would send an unambiguous signal to the world that we intend to violate domestic and international law obligations in our interrogations.

There is a strong, bipartisan consensus that “enhanced interrogation” techniques are unlawful and immoral.<sup>6</sup> It is critical that the United States observes clear, bright lines against torture. The international community looks to the United States for leadership, and the failure to uphold our domestic and international obligations to prohibit and prevent torture only serves to

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<sup>4</sup> UNCAT art. 2(2): “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

<sup>5</sup> See <https://www.c-span.org/video/?c4645261/rep-pompeo-will-torture>.

<sup>6</sup> See Detainee Treatment Act of 2005 (cosponsored by many Republicans and passed in the Senate by a 90-9 vote); Marc Santora, *McCain’s Stance on Torture Becomes Riveting Issue in Campaign*, N.Y. Times, Nov. 16, 2007, available at <http://www.nytimes.com/2007/11/16/us/politics/16mccain.html?pagewanted=all>; *McCain says torture did not lead to bin Laden*, NBC News, May 12, 2011, available at [http://www.msnbc.msn.com/id/43007276/ns/politicsmore\\_politics/t/mccain-says-torture-did-not-lead-bin-laden](http://www.msnbc.msn.com/id/43007276/ns/politicsmore_politics/t/mccain-says-torture-did-not-lead-bin-laden); *Q&A: Lindsey Graham on Torture*, Newsweek, Sept. 17, 2006, available at <http://www.newsweek.com/qa-lindsey-graham-torture-109769>.

See McCain-Feinstein Amendment to the 2016 National Defense Authorization Act, available at <https://www.congress.gov/congressional-record/2015/06/09/senate-section/article/S3905-2> (requiring International Committee of the Red Cross access to detainees in US custody/control in armed conflict and limiting the techniques that can be used against any detainee in US custody or effective control to those set forth in *Army Field Manual* 2-22.3). And see Senate Select Committee on Intelligence, *Committee’s Study of the Central Intelligence Agency’s Detention and Interrogation Program, Executive Summary* (declassification revisions Dec. 3, 2014), available at [http://www.feinstein.senate.gov/public/\\_cache/files/7/c/7c85429a-ec38-4bb5-968f-289799bf6d0e/D87288C34A6D9FF736F9459ABCF83210.sscistudy1.pdf](http://www.feinstein.senate.gov/public/_cache/files/7/c/7c85429a-ec38-4bb5-968f-289799bf6d0e/D87288C34A6D9FF736F9459ABCF83210.sscistudy1.pdf).

erode the same international legal norms that apply to foreign nations. This in turn emboldens our enemies to violate these laws themselves, putting our own service members at increased risk and undermining our counterterrorism efforts. Use of these techniques also would jeopardize our ability to work with intelligence agencies of other nations that will not cooperate with nature that engage in torture and CID. We urge you to reject any moves to restoring use of these harsh measures and to reinforce the message that the United States strictly adheres to interrogation techniques that are lawful, humane, and effective.

## **CONCLUSIONS**

Your decisions over the following months will have profound and long-term effects on U.S. national security and on our liberties at home. Moreover, our service members in the field rely for their safety on the restraints on interrogation and detention imposed by this rule of law system; unwinding it would put them at grave risk. A strong rule of law system has always played an essential role as bulwark against threats foreign and domestic. When we strengthen it and adhere to its principles, we prosper as a people.

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January 2017