

trial proceeding. In addition, because grand juries have wide latitude as investigative bodies, it is far more difficult for a detained witness to establish that his or her testimony is not “material”—or for a judge to evaluate materiality—at the grand jury stage. The bill also fails to limit or reform the secrecy of many material witness proceedings.<sup>298</sup> At this submission, the bill is pending before the Judiciary Committee of the United States Senate.

## F. Inadequate Review of Interrogation Rules (Article 11)

The Abu Ghraib photographs of torture and abuse became public in April 2004. Secretary of Defense Rumsfeld and other officials in the United States government knew, or had reason to know, about the abuses being reported as early as 2002,<sup>299</sup> and yet they failed to adequately review interrogation techniques that contributed to the abuse or to issue new policy guidelines for soldiers to apply in their handling of detainees in Afghanistan and Iraq. Only in December 2004 did the Department of Justice withdraw the August 2002 memorandum. But the new memorandum fails to define torture and to prohibit cruel, inhuman or degrading treatment or punishment. It also fails to address the August 2002 memorandum’s assertion that the President can authorize torture and that there can be various defenses against criminal liability for torture such as “necessity” and “self-defense.” Instead, the new memorandum simply asserts that to address such concerns is “unnecessary” because of the “President’s unequivocal directive that United States personnel not engage in torture.”<sup>300</sup>

Moreover, the Pentagon Working Group report of April 2003 was not deemed inapplicable to Department of Defense activities until March 2005.<sup>301</sup> In November 2005, the Department of Defense did, however, issue a new policy directive that applies to all intelligence interrogations conducted by DOD military and civilian personnel, contractor employees under the DOD, law enforcement personnel and counterintelligence personnel

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<sup>298</sup> Letter from ACLU to Senator Patrick Leahy, *Re: S. 1739, providing safeguards for material witness detentions* (Oct. 26, 2005), available at <http://www.aclu.org/safefree/detention/21244leg20051026.html>.

<sup>299</sup> See, e.g., Molly Moore, *Villagers Released by American Troops Say They Were Beaten, Kept in “Cage,”* WASH. POST, Feb 11, 2002; Dana Priest and Barton Gellman, *U.S. Decries Abuse But Defends Interrogations*, WASH. POST, Dec. 26, 2002.

<sup>300</sup> Memorandum from Daniel Levin, Acting Deputy Assistant Attorney General, Office of Legal Counsel to James Comey, Deputy Attorney General, *Re. Legal Standards Applicable Under 18 U.S.C. § 2340-2340A*, (Dec. 30, 2004) (hereinafter “December 2004 Memorandum”), available at <http://www.usdoj.gov/olc/dagmemo.pdf>.

<sup>301</sup> Memorandum from William J. Haynes II, General Counsel, Dept. of Justice to the JAG Corps (Mar. 17, 2005). Haynes’s memo states that “in light of the Justice Department’s modification of its earlier legal analysis, the legal portion of the 2003 DoD Working Group Report on Detainee Interrogations does not reflect now-settled executive branch views of the relevant law.” Haynes continued: “I determine that the Report of the Working Group on Detainee Interrogations is to be considered a historical document with no standing in policy, practice, or law to guide any activity of the Department of Defense. This determination should be disseminated throughout the Department of Defense, as appropriate.” *Id.* See also Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at A1.

conducting interrogations for intelligence purposes.<sup>302</sup> The directive is applicable to all who interrogate detainees in DOD custody.

The directive assigns responsibilities for interrogation activities to senior DOD officials; requires interrogation techniques sought by Army field commanders to be reviewed by the Secretary of Defense's office; requires training and certification of all interrogators; and establishes procedures for reporting violations of the policy. The directive specifically prohibits the use of "[m]ilitary working dogs, contracted dogs, or any other dog in use by a government agency . . . as part of an interrogation approach not to harass, intimidate, threaten, or coerce a detainee for interrogation purposes."<sup>303</sup> The directive prohibits "[a]cts of physical or mental torture," but fails to affirmatively prohibit cruel, inhuman or degrading treatment or punishment.

The Detainee Treatment Act enacted by Congress in December 2005 in response to detainee abuse explicitly prohibits cruel, inhuman or degrading treatment or punishment, as prohibited by the Fifth, Eighth, and Fourteenth Amendment, of anyone in U.S. custody and physical control irrespective of geographical location. It limits interrogations to standards codified in the Army Field Manual 34-52, which has been updated and at this writing is not yet released.<sup>304</sup> The army field manual, however, is not applicable to the CIA. The press has reported that an annex to the amended manual will remain secret. The ACLU is concerned that the annex may reintroduce the administration's claim, made in August 2002 and still not repudiated, that the President has "commander-in-chief-authority" to order torture. This concern is supported by the President's signing statement to the Detainee Treatment Act which suggests that the President as commander-in-chief can authorize unlawful acts by government agencies under his control, thereby nullifying the applicability of the law.

## **G. Unlawful Renditions (Articles 1, 3, 16)**

*We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.*

—Unnamed U.S. government official.<sup>305</sup>

The United States openly defends the practice of rendition as a counterterror technique and has used it in ways which violate the prohibitions against refoulement, torture, and cruel, inhuman or degrading treatment.<sup>306</sup> Renditions involve the clandestine abduction and detention, without legal process, of persons suspected of terrorist activities. These

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<sup>302</sup> Dep't of Defense, *DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*, DoD Directive 3115.09, Nov. 3, 2005, available at

[http://www.dtic.mil/whs/directives/corres/pdf/d311509\\_110305/d311509p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/d311509_110305/d311509p.pdf).

<sup>303</sup> *Id.*

<sup>304</sup> Detainee Treatment Act, *supra* note 5, § 1002(a).

<sup>305</sup> Priest and Gellman, *U.S. Decries Abuse But Defends Interrogations*, *supra* note 299.

<sup>306</sup> Press Release, U.S. Dep't of State, Rice Says United States Does Not Torture Terrorists (Dec. 5, 2005), available at <http://usinfo.state.gov/eur/Archive/2005/Dec/05-471726.html> (includes transcript of Sec'y Rice's remarks upon her departure for Europe on Dec. 5, 2005) ("Renditions take terrorists out of action, and save lives . . . . Such renditions are permissible under international law.").