Summary of Recommendations

Chapter One: Coercive Interrogations

TREATY AND STATUTORY COMMITMENTS

- **Without exception, the United States shall abide by its statutory and treaty obligations that prohibit torture.**
- **Consistent with the provisions under "Emergency Exception," the United States shall abide by its statutory and treaty obligations that prohibit cruel, inhuman, or degrading treatment.** Lawfulness under the U.S. reservation to Article 16 of the Convention Against Torture ("cruel, inhuman, or degrading treatment") requires at least compliance with the due process prohibition against actions that U.S. courts find "shock the conscience." Nothing in the following effort to define compliance with these obligations is intended to supplant our additional obligations when particular circumstances make applicable the Third and Fourth Geneva Conventions.

TRANSFER OF INDIVIDUALS

- **The United States shall abide by its treaty obligations not to transfer an individual to a country if it has probable cause to believe that the individual will be tortured there.** If past conduct suggests that a country has engaged in torture of suspects, the United States shall not transfer a person to that country unless (1) the secretary of state has received assurances from that country that he or she determines to be trustworthy that the individual will not be tortured and has forwarded such assurances and determination to the attorney general; and (2) the attorney general determines that such assurances are "sufficiently reliable" to allow deportation or other forms of rendition.

- **The United States shall not direct or request information from an interrogation or provide assistance to foreign governments in obtaining such information if it has substantial grounds for believing that torture will be utilized to obtain the information.**
- **The United States shall not encourage another nation to make transfers in violation of the prohibitions of the Convention Against Torture.**

OVERSIGHT OF THE USE OF ANY HIGHLY COERCIVE INTERROGATION (HCI) TECHNIQUES

- **The attorney general shall recommend and the president shall promulgate and provide to the Senate and House Intelligence, Judiciary, and Armed Services Committees, guidelines stating which specific HCI techniques are authorized.**[1] To be authorized, a technique must be consistent with U.S. law and U.S. obligations under international treaties including Article 16 of the Convention against Torture, which under "Treaty and Statutory Commitments" above, prohibits actions that the courts find "shock the conscience." These guidelines shall address the duration and repetition of use of a particular technique and the effect of combining several different techniques together. The attorney general shall brief appropriate committees of both houses of Congress upon request, and no less frequently than every six months, as to which HCIs are presently being utilized by federal officials or those acting on their behalf.
- **No person shall be subject even to authorized HCI techniques** unless (1) authorized interrogators have probable cause to believe that he is in possession of significant information, and there is no reasonable alternative to obtain that information, about either a specific plan that threatens U.S. lives or a group or organization making such plans whose capacity could be significantly reduced by exploiting the information; (2) the determination of whether probable cause is met has been made by senior government officials in writing and on the basis of sworn affidavits; or (3) the determination and its factual basis will be made available to congressional intelligence committees, the attorney general and the inspectors general of the pertinent departments (i.e., Department of Justice, Department of Defense, etc.).

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1. Highly coercive interrogation methods are all those techniques that fall in the category between those forbidden as torture by treaty or statute and those traditionally allowed in seeking a voluntary confession under the due process clauses of the U.S. Constitution.

EMERGENCY EXCEPTION

- **No U.S. official or employee, and no other individual acting on behalf of the United States, may use an interrogation technique not specifically authorized in this way** except with the express written approval of the president on the basis of a finding of an urgent and extraordinary need. The finding, which must be submitted within a reasonable period to appropriate committees from both houses of Congress, must state the reason to believe that the information sought to be obtained concerns a specific plan that threatens U.S. lives, the information is in possession of the individual to be interrogated, and there are no other reasonable alternatives to save the lives in question. No presidential approval may authorize any form of interrogation that would be prohibited by the Fifth, Eighth, or Fourteenth Amendments of the U.S. Constitution if applied to a U.S. citizen in similar circumstances within the United States.
- **The president shall publicly report the number of uses of his special necessity power biannually to Congress.**

INDIVIDUAL REMEDIES AND APPLICABILITY

- **An individual subjected to HCI in circumstances where the conditions prescribed above have not been met shall be entitled to damages in a civil action against the United States.**
- **No information obtained by highly coercive interrogation techniques may be used at a U.S. trial, including military trials, against the individual detained.**

Chapter Two: Indefinite Detention

PERSONS SEIZED WITHIN THE UNITED STATES AND THE SEIZURE OF U.S. PERSONS ANYWHERE IN THE WORLD EXCEPT IN A ZONE OF ACTIVE COMBAT

- **Any U.S. person and any person within the United States who is seized or arrested outside a zone of active combat shall be detained only on criminal charges.** If the present array of statutes is considered inadequate, additional criminal laws should be passed, including, for example, incorporation in Title 18 of the U.S. Code (18 U.S.C.) of the principles of command responsibility in cases where the conduct for which the individual is to be tried constitutes a grave breach of the provisions of the Geneva Conventions of 1949. No such person shall be detained without probable cause to believe that he has committed or is planning to commit an act previously criminalized by statutes. Such persons captured by personnel of military or intelligence agencies must be transferred without delay to the custody of civilian authorities.

- **Any such person seized with probable cause that he is planning, assisting or executing an act of terrorism can and should be charged with conspiring to violate one of the many U.S. statutes criminalizing acts of terrorism.**

- **A judicial officer shall order the pre-trial detention (under 18 U.S.C. § 3142(e)) of the individual arrested upon a showing that there is reason to suspect that the individual arrested** (1) has committed a terrorist act; or (2) is planning or supporting a planned terrorist act; and (3) cannot be prevented from assisting in that effort by any other reasonable means.

- **The detainee shall be allowed access to an attorney of his choice.** If the government intends to rely on classified information at any stage of the detention proceedings, it will make every effort to provide security clearance as quickly as possible to that attorney and will make available, in the meantime, a list of cleared defense attorneys. If the detainee cannot be represented by a cleared defense attorney of his choice at a critical stage of detention proceedings, the court shall promptly appoint a "special advocate" who is cleared to see all evidence and whose role is to argue the case against detention. This special advocate shall not thereby form an attorney-client relationship with the detainee.

- **The judicial officer may deny the detainee, but not his cleared attorney or "special advocate," access to parts of the detention hear-**

ing if, on the basis of a governmental petition, the officer concludes this step is necessary to protect national security secrets.

•**On showing to a court that, despite the Classified Information Procedures Act, an immediate trial would be impossible without significant loss of national security secrets, and evidence that cannot be revealed in public demonstrates that release of the detainee would significantly endanger the lives of others, a federal judge may delay the trial date for a period of ninety days and renew the delay for a period of up to two years while the government pursues evidence that can be used at a public trial without compromising national security.** During this period, the government must seek orders extending pre-trial detention for every ninety-day period. The first such order must be issued within ninety days of initial detention. Each order shall be subject to prompt appeal whether or not it is considered a final judgment.

•**A person so detained who is not thereafter brought to trial shall be entitled to fair compensation from the United States for the period of detention.** Whenever the executive detains a non-U.S. person who is in violation of his immigration status or his permission to enter the United States, he shall not be detained for a period longer than that required for his deportation unless pursuant to the procedures of this Section. No person shall be detained as a material witness, rather than under the provisions of this Act, unless a federal judge specifically determines that the risk of non-appearance, the importance of the witness to the proceeding, and the importance of the proceeding justify that detention as a matter of law.

NON-U.S. PERSONS SEIZED OUTSIDE THE UNITED STATES AND NOT IN A ZONE OF ACTIVE COMBAT

•**A non-U.S. person cannot be seized by a U.S. intelligence or military agency acting within any state in which the U.S. secretary of state has certified that the state is willing and able (practically and legally) to assist the United States in all legal ways to prevent attacks on U.S. territory, persons or property, unless such seizure is with the permission or concurrence of appropriate authorities of that state.** If the secretary of state has not so certified or if the individual is delivered to U.S. officials by officials of the place where he is found, he may be detained.

•**No individual will be seized abroad outside a zone of active combat by U.S. forces, civilian personnel, or others acting on behalf of the United States unless a senior legal officer of the agency respon-**

sible for the seizure has made a written and documented finding that there is probable cause that the individual is planning a terrorist attack against the United States.

- **A competent military or specialized civilian tribunal defined by statute shall substitute for a federal court abroad, and may perform the functions otherwise assigned in the previous section of our recommendations on indefinite detention to a federal judge or magistrate and under the same restrictions and conditions, determine whether detention by an intelligence or military agency or other U.S. authorities is legal and appropriate.** A decision to detain and each renewal and denial of personal legal assistance shall be subject to judicial review. The above procedures, relating to ex parte hearings and the designation of a "special advocate" if a personal attorney is not available or not permitted access to classified information, shall apply during this judicial review. In any case to be tried within the United States (as described in chapter 3) the period of pre-trial detention prior to transfer to the United States for trial shall not exceed thirty days.

- **Access of the detainee to an attorney of his choice may be delayed up to seven days by order of the judicial officer on a showing that the individual arrested has information which may prevent an imminent terrorist attack and that any interrogation will be conducted in a way consistent with the U.S. Constitution and U.S. statutory and treaty obligations.** No statement obtained by custodial interrogation in the absence of a lawyer representing the detainee or any evidence derived from any such statement will be admissible at any criminal prosecution of the detainee.

- **The federal district court in the geographic jurisdiction to which the person seized and detained is first transferred shall have jurisdiction to try the charges.** Our preceding provisions for persons seized within the United States and for U.S. persons seized abroad apply to the trial.

PERSONS SEIZED WITHIN A ZONE OF ACTIVE COMBAT

- **A "designated zone of active combat" is territory declared by the president, either publicly or in a classified presidential determination made available to the appropriate oversight committees of Congress, as constituting a theater of military operations** (1) in connection with a declared war or other armed conflict between the United States and a foreign state, organization, or defined class of

individuals; or (2) the territory occupied and administered, consistent with the Geneva Conventions, by the U.S. military following such a conflict; or (3) within the territory of a state that the United States has been asked to assist in connection with the suppression of an armed insurrection or other uprising within that state.

• **The rules set forth in the first two sections do not apply to the detention of persons captured during hostilities in a designated zone of active combat.** Whatever rights and liabilities now exist for such persons are not affected in any way by those sections.

• **The U.S. Constitution, the decisions interpreting it, the Third and Fourth Geneva Conventions (to the extent applicable) and relevant Department of Defense directives consistent with these sources and any other U.S. treaty obligations shall be fully honored.**

• **At a minimum, the following protections shall be available:**

1. An individual captured in a zone of active combat is entitled to an initial determination, after a hearing before a competent tribunal to be held as soon as practicable under the circumstances, of whether he was engaged in or actively supporting those engaged in hostilities against the United States and whether he is entitled to prisoner of war (POW) or other protected status under the Geneva Conventions of 1949.

2. During the continuation of hostilities but outside the zone of active combat designated by the president, the detainee shall be accorded a periodic review to determine whether his continued detention is warranted because he continues his support for the hostile force to which he belonged.

• **Detainees held in a facility under U.S. control and outside a zone of active combat shall** (1) be accorded the right to challenge their detention through habeas corpus in U.S. federal court, under 28 U.S.C. §2241; and (2) be accorded such fundamental due process rights under the Fifth Amendment as the federal courts determine are appropriate in light of the factors set forth in *Mathews v. Eldridge*: the private interest of the person asserting the lack of due process; the risk of erroneous deprivation of that interest through the use of existing procedures and the probable value of additional or substitute procedural safeguards; and the competing national security interests of the government.

• **After the president or Congress has determined that the hostilities in connection with which he was detained have terminated, the detainee shall without undue delay be released and repatriated to**

his country of citizenship or prosecuted for violations of the laws of war or other applicable penal provisions before a federal court or other appropriate tribunal.

DETENTION ON THE BASIS OF A JUDICIAL WARRANT

- **Notwithstanding any other provisions in this section, the Foreign Intelligence Surveillance Court may issue and renew a warrant for thirty days of detention for an individual who is not a U.S. person, whether seized inside or outside the territory of the United States. A warrant shall be issued only in the following circumstances:**

  1. The attorney general must personally approve the application.

  2. The application must satisfy the court, on the basis of affidavits or sworn testimony, that the individual to be detained either (1) must be prevented by detention from assisting in an imminent terrorist attack, or possesses information critical to the safety of U.S. persons or citizens of other democratic nations from imminent terrorist attack and will be subjected to lawful interrogations for a period authorized by the court; or (2) is a high-level leader in the planning or financing of an extended plan of terrorist attacks and either will be subjected to lawful interrogations for a period authorized by the court or is not yet known by his associates to have been captured, creating important possibilities of tactical surprise for a limited period.

- **The application for the warrant and its justification must be made available promptly, under conditions of assured secrecy, to the appropriate committees of Congress.** The number of such warrants and renewals of warrants issued each year shall be made public annually. The warrant issued by the Foreign Intelligence Surveillance Court shall specify (1) the location, duration, and conditions of detention authorized by the warrant; and (2) any necessary conditions of judicial monitoring of interrogations for legality under U.S. law and treaties.

Chapter Three: Military Commissions

ADDITIONS TO THE CLASSIFIED INFORMATION PROCEDURES ACT (CIPA)

- **The U.S. Congress should consider the need for adding to the terms of the Classified Information Procedures Act. The U.S. Congress should include such provisions as are thought necessary to permit the trial of terrorists and others for violations of federal terrorist statutes or the rules of war.** As in the case of CIPA, there must be adequate guarantees that any modifications of familiar court or court-martial procedures do not significantly undermine the fairness of a trial. Subject to that constraint, any modifications adopted should protect national security secrets from revelation either to the defendant or to a wider public during a trial. If the constraint of fair trial cannot be met and if any trial would disclose critical national security secrets, only temporary detention can be used, not as a punishment but as a form of needed, but temporary, incapacitation.

JURISDICTION OVER VIOLATIONS OF THE LAWS OF WAR

- **Any case of military trial for violation of the laws of war of a person seized as a combatant within a zone of active combat will be tried before a court-martial under the jurisdiction granted by 10 U.S.C. § 818.**
- **Persons seized within a zone of active combat will be tried only by such court-martial,** whether the individual is deemed a lawful combatant, and therefore entitled to the protections of the Geneva Conventions, or an unlawful combatant.
- **Except for U.S. military personnel, all prosecutions for violations of the laws of war committed by U.S. persons captured outside a zone of active combat or of individuals found within the United States shall be carried out in a federal district court.**
- **If seized outside a zone of active combat and outside the United States, a non-U.S. person detained for violating the laws of war is subject to court-martial only if the attorney general certifies to the appropriate military authorities that** (1) there cannot be a fair and secure civilian trial before a U.S. district court; and (2) either there is no reliable prospect of a fair and vigorous trial before a court of the state where the criminal acts of planning a terrorist attack on the United States took place, or any such trial in a foreign court would require the revelation of national security secrets that would otherwise be protected by a U.S. district court.

Chapter Four: Targeted Killing

TARGETED KILLING IN A DESIGNATED ZONE OF ACTIVE COMBAT

• **The following rules do not apply to targeting those engaged in active hostilities in a zone of active combat.** A "designated zone of active combat" is territory designated by the president, either publicly or in a classified presidential determination made available to the appropriate oversight committees of the Congress, as constituting a theater of military operations (1) in connection with a declared war or other armed conflict between the United States and a foreign state, organization, or defined class of individuals; (2) in the territory occupied and administered, consistent with the Geneva Conventions, by the U.S. military following such a conflict; or (3) within the territory of a state that the United States has been asked to assist in connection with the suppression of an armed insurrection or other uprising within that state.

TARGETED KILLING OUTSIDE A DESIGNATED ZONE OF ACTIVE COMBAT

• **In all situations and locations outside designated zones of active combat, any targeted killing must be pursuant to procedures outlined in legislation detailing the conditions for such an action.**

STANDARDS FOR THE USE OF TARGETED KILLING

• **Any such authorization of targeting a particular individual outside a zone of active combat must be justified as necessary to prevent, or in defense against, a reasonably imminent threat to the life of one or more persons.** To be "necessary" there must be no reasonable alternative such as arrest or capture followed by detention. To be "reasonably imminent" there must be a real risk that any delay in the hope of developing an alternative would result in a significantly increased risk of the lethal attack. Retribution for past events, as opposed to prevention of future attacks, cannot justify a targeted killing.

• **Under familiar rules applicable to military action under the laws of war, the action taken must be proportionate to the objective to be obtained, and the selection of the time, place, and means employed must avoid to the extent reasonably possible harm to innocent persons.**

- **Even when these conditions are met, there shall be no targeted killing of: a U.S. person; any person found in the United States; or an individual found in any foreign state that has previously agreed to, and displayed a willingness to try, extradite, or otherwise incapacitate those reasonably suspected of planning terrorist attacks on U.S. citizens and facilities.**

- **Any decision to target an identified individual for killing must be approved by the president of the United States in a finding, provided to appropriate committees of the Congress, and setting forth** (1) the evidence on which the necessary conclusion of imminent danger has been made; (2) the alternatives considered and the basis for rejecting them; and (3) the reasons for concluding that the previous conditions have been met.

- **The president shall promulgate detailed procedures for making these findings reliably and for maintaining a permanent record, available to appropriate committees of Congress, of any such decision.**

- **The rules described in the previous section shall be made public.** Particular findings in any individual case and the fact that such targeting was approved by the president need not be made public, but must be provided to appropriate committees of the Congress.

Chapter Five: Communications of U.S. Persons or Others within the United States Intercepted During the Targeting of Foreign Persons Abroad

ACQUIRING CONTENTS OF FOREIGN COMMUNICATIONS

- **Targeting the content of communications of persons within the United States or of U.S. persons abroad should be governed by the following rules:**

  1. No U.S. agency may target for interception the content of any domestic communications of a person known to be within the United States or of any international communications of a U.S. person within the United States without satisfying the legal requirements of Title III (regarding electronic surveillance for criminal purposes) or FISA (regarding electronic surveillance for foreign intelligence purposes).

  2. To target for interception the content of communications of a U.S. person located outside the United States, the attorney general must find probable cause to believe that the communications may reveal evidence of a crime, or that the U.S. person is an agent of a foreign power and the purpose of the collection is to acquire foreign intelligence or information about the person's involvement in espionage, international terrorism, or foreign-directed covert operations against the United States.

  3. There shall be a presumption that a pattern of repeated acquisition of communications to or from a U.S. person is the result of activity targeted on that person, and thus requires compliance with the above rules respectively.

- **Targeting the content of communications of non-U.S. persons abroad shall be governed by the following rules:**

  1. The content of communications of non-U.S. persons located outside the United States ("foreign communications") may be the target of interception so long as the purpose is to gather foreign intelligence or evidence of a violation of U.S. law. This rule applies whether or not another party to the targeted communication is known to be a U.S. person; whether or not the content of the communication is expected to involve the activities of a U.S. person; and wherever the interception is accomplished, as long as the person whose communications are sought is outside the United States.

2. When the communications targeted for interception are of a person mistakenly—but reasonably—believed to be neither a U.S. person nor in the United States, the communications have not been targeted as the communications of a U.S. person or of anyone within the United States.

3. Communications to or from a U.S. person intercepted unexpectedly during a content-based collection reasonably directed at communications of non-U.S. persons outside the United States for intelligence purposes are not deemed targeted on U.S. persons or territory.

THE CONSEQUENCES OF UNINTENTIONAL ACQUISITION

- **The retention, dissemination, and use of the content of communications of U.S. persons or of communications of persons in the United States which have been unintentionally acquired while targeting non-U.S. persons abroad shall be governed by rules determined by regulations of the attorney general.** These regulations shall, as closely as possible, duplicate the provisions for information obtained under the Foreign Intelligence Surveillance Act under 50 U.S.C. 1801(e) and (h) and 50 U.S.C. 1804(a)(5). The basis for concluding that information identifying a U.S. person is necessary to the conduct of foreign affairs or the national defense as well as to understand its content or importance must be set forth in writing along with the names of those to whom that information will be furnished. The record of this request will be maintained by the agency furnishing the information and will be available to the intelligence committees of Congress.

ACQUIRING INFORMATION OTHER THAN THE CONTENTS OF FOREIGN COMMUNICATIONS

- **Neither a U.S. person abroad nor anyone within the United States is constitutionally entitled to a finding of some factual basis for suspicion of terrorist activity or of being an agent of a foreign power before the government reviews to whom an electronic communication was sent or when and how it was sent.**

- **An agency responsible for gathering foreign intelligence may gather such information (other than the content of the communication) by targeting the messages of U.S. persons or individuals within the United States only if it is acting as an agent of, and under the control of, the attorney general, and it is subject to all the departmental regulations of the attorney general.**

Chapter Six: Information Collection

GENERAL DATA-MINING PROCEDURES

- **A federal district court or a specialized court, such as the Foreign Intelligence Surveillance Act (FISA) court, should be authorized by Congress to issue a warrant making available to the federal government access to extensive systems of commercial and other third-party records when there is clear and convincing evidence that** (1) the systems of records to which the government is given access will, when combined, be no broader than necessary to permit a determination of whether there is a high risk of terrorist activity; (2) anonymization techniques will initially prevent the identification of any individuals with any particular record unless and until the court authorizes the release to the government of the individual's identity, as discussed in the section below; (3) the systems of records and any copies of them will not be retained by the federal government but will remain at all times under the control of their owners; (4) systems will be in place that guarantee an adequate audit trail of who has had access to what information and for how long; and (5) the access will not be unduly disruptive of the activities of the custodian of the records.
- **The court shall authorize the federal government to demand or obtain the identities of individuals whose activities are revealed by analysis of commercial or other private systems of records** if the government establishes to the court's satisfaction that a pattern of activities revealed by the systems of records has a significant probability of being a part of a plan for terrorism; and the individuals whose identities are to be revealed are so related to the pattern of activity as to have a significant probability of being engaged in terrorism.
- **Once an individual has been identified in this or in any other legal way, based on reasonable factual inferences that the individual is likely to be planning terrorism or is part of an organization or group planning terrorism, the federal government shall have access to commercial records and to records of other third parties relevant to determining the identity of his or her associates and discovering other activities in connection with this plan.**

ACCESS TO INDIVIDUALIZED DATA

- **Records of activity of identified individuals should not be subject to compelled government access for prevention of terrorist activities**

unless they are sought pursuant to the investigation of an individual or organization already reasonably suspected of terrorism.

REQUIRED SECRECY CONCERNING DELIVERY OF RECORDS

- **The court ordering the revelation of records may forbid the nongovernmental custodian of documents to reveal that the government has demanded them,** but only upon a showing of cause and for a limited, renewable period.
- **Any requirement that a nonjudicial demand, such as a National Security Letter, be kept secret shall be valid for only sixty days** but can be renewed by a court on a particularized showing of the need for continued secrecy.

Chapter Seven: Identification of Individuals and Collection of Information for Federal Files

PERMISSIBLE DEMANDS FOR BIOMETRIC INFORMATION

- **Biometric or other systems of identification are necessary and appropriate for reliably matching federal "files" of accumulated information on an individual with the current activities of that individual** (1) whenever the federal government, a state or local government, or a private facility can appropriately check all or part of a file maintained by the federal government before deciding whether to give an individual access to a sensitive resource or target of a terrorist attack; (2) in order to keep a reliable federal record of requests for access to sensitive resources and targets, whether such a record is developed by obtaining information from another organization or governmental unit or by electronically or otherwise recording requests for access to federal facilities; and (3) whenever an individual is either visiting or returning to the United States.

IMPERMISSIBLE DEMANDS FOR BIOMETRIC INFORMATION

- **Biometric or other systems of identification are neither necessary nor appropriate for matching federal "files" of accumulated information on an individual with the current activities of that individual during random requests for identification when an individual is neither seeking access to sensitive resources or targets nor seeking to enter the country.** In these circumstances (where demanding identification is not appropriate), no federal records of individual activity should be created or maintained.

Chapter Eight: Surveillance of Religious and Political Meetings

MONITORING RELIGIOUS AND POLITICAL ORGANIZATIONS

- **An investigation of a religious or political organization pursuant to the rules regarding domestic intelligence investigations may be authorized where there is a reasonable and articulable basis for suspecting that a group, or leaders of a group, are** (1) planning terrorist activity; (2) recruiting participation in an organization involved in such activity; (3) actively advocating political violence; or (4) actively advocating hatred against another group.
- **The authorization shall be governed by the following conditions:**

  1. The request for authorization shall be made, in writing, to be approved by a senior official at FBI Headquarters.
  2. It shall last for only sixty days, renewable upon written evidence that the information acquired during the authorization continues to satisfy the conditions in the above section.
  3. The number of such authorizations shall be furnished publicly to the members of the House and Senate Judiciary committees.

RECORDS OF RELIGIOUS AND POLITICAL GROUP MONITORING

- **In instances where federal agents are permitted to attend religious and political meetings under the above section, the keeping of records is appropriate so long as it is limited to persons engaged in the activities of the above section or who support and encourage these activities.**

Chapter Nine: Distinctions Based on Group Membership

DISTINCTIONS REGARDING U.S. CITIZENS

- **Broad profiles based on national origin of a U.S. citizen, or on the race or religion of any individual, are never permissible.** Affiliation with a religious or political group may be considered if there is reason to suspect that group of either advocating violent or illegal activities (pursuant to our recommendation on "Surveillance of Religious and Political Meetings") or being an agent of a foreign power.
- **Lawful permanent resident aliens should be afforded the protections of U.S. citizens for purposes of this recommendation,** unless they have been in the United States less than the required time (presently five years) for becoming naturalized citizens.
- **Distinctions based on the fact that an individual is not a U.S. citizen, such as in employment at sensitive sites or locations, are legitimate.** It is customary and rational to limit certain privileges to U.S. citizens.

DISTINCTIONS REGARDING GROUPS OF NONCITIZENS WITHIN THE UNITED STATES

- **As a trigger for further review, distinctions among aliens based on their nationalities, such as those from the United Kingdom as compared to those from Iran, are permissible in situations in the United States where there already exists a discretionary level of review before access or entry is permitted,** such as at an airport or a sensitive facility.
- **While enough to trigger more careful review, the fact that someone is a national from a particular country associated with a terrorist threat will generally hold little weight in determining whether that specific individual should be denied access.** Thus, the fact that a high proportion of terrorists come from a particular country may make its citizens subject to additional review, even though only a minuscule portion of that population will generally be a threat.
- **Despite the high risk of error, when the facts of a particular terrorist incident suggest the culpability of a state or its citizens, it is appropriate to give disproportionate attention in the initial stages of investigation to the citizens of that state.**

Chapter Ten: Oversight of Extraordinary Measures

CONGRESSIONAL OVERSIGHT OF NEW COUNTERTERRORISM LAWS AND PRACTICES HAVING SIGNIFICANT EFFECTS ON TRADITIONAL RIGHTS OF INDIVIDUALS

- **As ongoing extraordinary measures are retained by legislation or acquiescence, the congressional leadership should establish a five-year nonpartisan commission to make findings and recommendations regarding the continuing need for these measures for consideration by the Congress and the relevant committees of each House.**

- **With regard to any extraordinary measure for addressing the dangers of terrorism that the Congress determines to have or have had significant effects on the liberties of citizens, the commission should establish a system of continuing review.**

1. The list of extraordinary measures to be reviewed should include measures undertaken by the president with or without congressional authority.

2. The frequency of review should be at least annual.

3. The members of the commission should be subject to security clearance procedures and then provided access to classified information on terms similar to those now applicable to the Intelligence Committees.

4. At an absolute minimum, such assessments should examine the case for and against the efficacy of an extraordinary measure in light of:

   -The use, or lack thereof, of the measure;

   -The likelihood of the assumptions under which the extraordinary measure would be effective;

   -The likelihood of the rival assumptions under which it would fail;

   -The history and experience that may throw light on these relative probabilities;

   -The experience of other democracies in utilizing similar measures; and

   -The adequacy of oversight of these extraordinary measures.

5. The published results of the review should not contain classified information that was made available to the commission acting on

behalf of the relevant congressional committees. While as much detail as possible should be furnished, even a review that merely reaches unclassified conclusions, if carried out by a credible body, would be valuable.

EXECUTIVE OVERSIGHT OF SUBSTANTIVE LEGAL REFORMS

- **Congress shall enact legislation that provides that each inspector general (IG) shall conduct a systemic review of the use made of each of a list of provisions granting extraordinary powers to the IG's agency.** The review shall include their effectiveness and their costs (intangible as well as tangible) to those affected as well as to the agency, on an annual basis, for no less than five years. This list shall include, but not be limited to, any provisions with sunset clauses in past legislation. While present statutory authority would not preclude reviews of the civil liberties impact of an agency's counterterrorism activities by an inspector general, specific statutory authority and responsibility should be explicitly granted to all relevant IGs as it has already been to the inspector general of the Department of Justice. In both the reviews of effectiveness and of the impact on civil liberties, the IG's authority should extend to reviews of private sector and state and local government conduct, when done pursuant to a mandate from or agreement with the Department.

- **Any new legislation granting extraordinary authorities should include requirements that the relevant inspector general conduct annual reviews, in a classified and unclassified form, of the efficacy of any measure.**

- **To provide a coherent review of (1) extraordinary power vested in more than one agency; and (2) the effect of using different extraordinary powers of different agencies for a shared purpose, the Congress should authorize and fund an interagency committee of IGs that would establish criteria** for any investigation that would involve more than one department or agency and create structures to allow joint-OIG reviews and recommendations.