

## **President Obama's first six months**

As a candidate, President Obama pledged meaningful and overdue change in America's responses to terrorism. He vowed to ban torture, to shutter secret prisons and empty Guantánamo, and to lift the "war on terror" cloak of secrecy, where national security was invoked to cover national embarrassment.

Six months into his presidency, however, these promises remain largely unfulfilled. This document outlines Obama's commitments, achievements, and shortcomings in four critical areas: transparency and accountability; access to and judicial oversight of other extralegal prisons, notably Bagram; release of Guantánamo prisoners; and practices of torture and rendition.

### **1) Transparency and accountability for past abuses**

#### ***What is at stake?***

- Despite a large body of evidence that torture and rendition of prisoners was not the mistake of a "few bad apples" but government policy, the only individuals to face official censure for US torture are the footsoldiers, not the planners. Virtually no policymaker has been required to testify under oath before any Court, committee or other governmental body. Ex-officials remain unapologetic for their decisions to permit torture, and continue to claim, on the basis of secret evidence, that US torture policy saved lives.
- Revealing the past is the first step towards coming to terms with it. But the extent and nature of prisoner abuses in Guantánamo, CIA blacksites, and other military detention centers such as Bagram and Kandahar has never fully come to light, largely because of improper overclassification of documents showing abuse.
- Prisoners released from Guantánamo continue to be tarred, at times by US officials, of ties with terrorism, even though they have been cleared by the US government. Where the US government has discredited its prior allegations, it should own up to it—both for the historical record, and so the wrongly accused can clear their names.

- Former Guantánamo prisoners are unable to seek redress from private companies that helped to carry out their abuse because the government is concealing important evidence of those companies' complicity. The US government needs to allow former victims of abuse to rebuild their lives by sharing information that explains the circumstances of their abuse.

### ***What has Obama pledged?***

- “Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use.” Barack Obama, January 21, 2009.<sup>1</sup>
- “A democratic government accountable to the people must be as transparent as possible and must not withhold information for self-serving reasons or simply to avoid embarrassment.” Barack Obama, May 27, 2009.<sup>2</sup>
- “When it comes to what’s wrong with this country, the American people are not the problem. The American people are the answer. The American people want to trust in our government again – we just need a government that will trust in us. And making government accountable to the people isn’t just a cause of this campaign – it’s been a cause of my life for two decades.” Barack Obama, September 4, 2007.<sup>3</sup>
- “The Bush administration has ignored public disclosure rules and has invoked a legal tool known as the "state secrets" privilege more than any other previous administration to get cases thrown out of civil court.” Barack Obama campaign website, 2008.<sup>4</sup>
- “In our system of checks and balances, someone must always watch over the watchers.” Barack Obama, May 21, 2009.<sup>5</sup>

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### **What has Obama accomplished?**

- *Mandated a review of classification procedures to make declassification swifter and more meaningful.* “Within 90 days of the date of this memorandum, and after consulting with the relevant executive departments and agencies (agencies), the Assistant to the President for National Security Affairs shall review Executive Order 12958, as amended (Classified National Security Information), and submit to me recommendations and proposed revisions to the order. The recommendations and proposed revisions shall address: Establishment of a National Declassification Center... Effective measures to address the problem of over classification, including the possible restoration of the presumption against classification, which would preclude classification of information where there is significant doubt about the need for such classification, and the implementation of increased accountability for classification decisions... Appropriate prohibition of reclassification of material that has been declassified and released to the public under proper authority...” Barack Obama, 27 May 2009.<sup>6</sup>
- *Ordered a review of the use of the state secrets privilege.* “The Attorney General has directed that senior Justice Department officials review all assertions of the State Secrets privilege to ensure that the privilege is being invoked only in legally appropriate situations.” DOJ spokesman Matt Miller, February 9, 2009.<sup>7</sup>
- *Improved the legal standard for granting FOIA requests.* “The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. An agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption. The Department of Justice will defend a denial of a FOIA request only if the agency reasonably foresees that disclosure would harm the interest protected by one of the statutory exemptions [replacing the “sound legal basis” test that had been used since October 12, 2001].” Eric Holder, March 19, 2009.<sup>8</sup>
- *Released several OLC memoranda relating to torture practices.*

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- *Mandated the creation of an “Open Government Directive”.* “I direct the Chief Technology Officer, in coordination with the Director of the Office of Management and Budget (OMB) and the Administrator of General Services, to coordinate the development by appropriate executive departments and agencies, within 120 days, of recommendations for an Open Government Directive, to be issued by the Director of OMB, that instructs executive departments and agencies to take specific actions implementing the principles set forth in this memorandum. The independent agencies should comply with the Open Government Directive.” Barack Obama, January 21, 2009.<sup>9</sup>
- *Left the Attorney General discretion to investigate violations of law by senior Bush Administration officials.*

### **What has Obama left undone?**

- The US government has refused to disclose information relating to the rendition of Binyam Mohamed in ongoing civil litigation in *Mohamed v. Jeppesen Dataplan*. The US government has also threatened the British government with diplomatic retaliation if the British government complies with an order of the Law Lords to disclose information related to Mr. Mohamed’s rendition in *Binyam Mohamed v Secretary of State for Foreign & Commonwealth Affairs*.
- The government continued to use the state secrets doctrine to prevent disclosure of information relating to the known rendition of released Guantánamo prisoners in *Mohamed v Jeppesen Dataplan*. Legislation to regulate use of the state secrets doctrine has been stalled in committees in the House and the Senate since February.<sup>10</sup>
- The government refuses to disclose which Guantánamo prisoners have been cleared for release, or where it intends to send them.
- The government insists that the number and names of prisoners being held under long-term imprisonment at Bagram Theater Internment Facility in Afghanistan is classified, barring their disclosure to families, the Afghan government, and representatives of the people being held.<sup>11</sup>
- The US government has refused to declassify the CIA Inspector General’s Special Review Report on “enhanced interrogation techniques” as required by federal courts in *ACLU, et al., v. Department of Defense, et al.* and *ACLU, et al., v. Department of Justice*. An almost fully redacted version of the report was released in May 2008. The government then agreed to reconsider its classification with the purpose of declassifying more of the report. As of July 15, the government continues to delay release of the report.<sup>12</sup>

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- The Open Government Directive mandated for completion by 21 May 2009 has not been completed.
- The review of classification policy is not complete (it is scheduled for completion by August 27).
- On May 13, the government reversed its prior agreement to comply with court orders to release numerous photographs of abuses of prisoners at Abu Ghraib prison in Iraq.<sup>13</sup>

***What does Reprieve have to say to the Obama Administration?***

- “The US government is whisking people from around the world to its prison network in Afghanistan, without telling the public who they are, how many of them there are, or where they came from. The prison network in Afghanistan is a black hole: it remains a secret to the American people, to the government of Afghanistan, and to the families of those who are imprisoned. The US government under Barack Obama risks getting into a business of ‘disappearances’ unlike anything we have seen since Latin America of the 1970s. This must be stopped, and disclosure of information is the first and best measure to make it stop.” – Clive Stafford Smith OBE, Director of Reprieve.
- “Former prisoners have already had years of their lives taken away from them. Now the Obama administration threatens to deprive them of their future by refusing to clear their name and by denying them the remedy of civil trials against companies that participated in their abuse. The least that can be done at this point it to let them know why and how they lost so much of their lives, to give them the information they need to seek remedies for their harm.” – Clive Stafford Smith OBE, Director of Reprieve.
- So many Reprieve clients have stories that still cry out for redress: from Mohammed el Gharani, shipped to Gitmo aged fourteen and found innocent in court, to Binyam Mohamed, who never received any apology for his horrific ordeal. But US policy has been and remains not to admit the worst of what these men went through, and not to pay a cent towards helping them cobble their lives together. Surely “transparency” means telling the whole truth about our past wrongs; surely “reconciliation” means making amends for them. – Cori Crider, Staff Attorney, Reprieve

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## 2) Access to and judicial oversight of Bagram prison

### ***What is at stake?***

- People from around the world are being disappeared to the US prison network in Afghanistan, without any public knowledge of who they are, how many people are there, or why they are being held. Stories of abuse at the prison have continued to seep out. The US government must allow their family members, their governments, and the public to know what has happened to them.
- Bagram has become the same legal black hole that Guantánamo was, with the same policies, the same lack of external oversight, and indeed many of the same prisoners. It needs the benefit of the same legal accountability that ended the abuses at Guantánamo.
- We know that many people have been wrongfully detained at US prisons in Bagram, and that some of those have been tortured to death; we don't know, however, how many of the current prisoners are also being held without justification. The administrative proceedings at Bagram need to be strengthened and opened to outside counsel in order to ensure that detentions are fair and lawful.

### ***What has Obama pledged?***

- "I have faith in America's courts. I have faith in our JAGs. As president, I'll close Guantánamo, reject the Military Commissions Act, adhere to the Geneva Conventions. Our Constitution and our Uniform Code of Military Justice provide a framework for dealing with the terrorists." Barack Obama, August 7, 2008.<sup>14</sup>
- "From Europe to the Pacific, we've been the nation that has shut down torture chambers and replaced tyranny with the rule of law. That is who we are. And where terrorists offer only the injustice of disorder and destruction, America must demonstrate that our values and our institutions are more resilient than a hateful ideology. We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability." Barack Obama, May 21, 2009.<sup>15</sup>

### ***What has Obama accomplished?***

- *Closed CIA-operated black sites.* "The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future." Barack Obama, executive order of 21 January 2009.<sup>16</sup>

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- *Complied with Geneva Conventions requirements that the ICRC be informed of all detentions.* “All departments and agencies of the Federal Government shall provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States Government, consistent with Department of Defense regulations and policies.” Barack Obama, executive order of 23 January 2009.<sup>17</sup>
- *Federal courts upheld habeas corpus rights of non-Afghans rendered to Bagram.* The district Judge in *Al Maqaleh, et al., v. Gates* held that the Constitution provides habeas corpus rights to non-Afghans held in Bagram for the same reasons that they are due to prisoners held in Guantánamo.<sup>18</sup>

### **What has Obama left undone?**

- The government insists that the number and names of prisoners being held under long-term imprisonment at Bagram Theater Internment Facility in Afghanistan is a secret, barring their disclosure to the families, government, and representatives of the people being held.<sup>19</sup>
- People held at the prison have no access to lawyers, Afghan government officials, or consular officials from their home countries.
- The government is appealing against the *Al Maqaleh, et al., v. Gates* court order that non-Afghan prisoners in Bagram be afforded *habeas corpus* hearings as done at Guantánamo.<sup>20</sup>
- The US military mechanism for determining whether a prisoner is held lawfully does not meet basic standards, according to the International Committee of the Red Cross.<sup>21</sup> In particular, prisoners are not able to speak on their behalf, do not have any counsel to speak for them, and are not able to call on witnesses or exculpatory evidence.
- US military Special Operations Command continues to operate secret detention facilities in Afghanistan, even after the January 23 executive order.

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### **What does Reprieve have to say to the Obama Administration?**

- “The entire Bagram prison, holding some 600 people, is itself a black site. The government refuses to tell family members, lawyers, and even the Afghan government who is being held there, for how long, or for what reasons. This site needs to be brought into the open or it needs to be closed. If the government is confident of its legal values, and confident of the decisions that its officers are making about who is being detained, then it has no reason to fear opening the prison to scrutiny.” – Clive Stafford Smith OBE, founder of Reprieve.
- “What was true of Guantánamo is true of Bagram: our legal system, including our military justice system and the international laws of war, can handle this situation. Doing so will help identify people who are wrongfully detained, will ensure that conditions are humane for those who must be held, and will provide family members and the prisoners themselves the basic dignity of knowing that they have not been forgotten. Failure to do so will result in continued abuses, continued unlawful detentions, and a further erosion of American legal and moral authority.” – Clive Stafford Smith OBE, founder of Reprieve.
- “Closing the original Guantánamo means next to nothing if the US maintains copycat prisons and proxy detention sites around the world. Bagram and its kind fuel widespread belief that since 9/11, the US has built a separate extralegal prison system for Muslims. If we continue to see more US-run ‘Guantánamos’, those perceptions of hypocrisy will plague Obama’s foreign policy plans in the Muslim world.” –Cori Crider, Staff Attorney, Reprieve.

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### 3) Release of prisoners from Guantánamo

#### ***What is at stake?***

- Hundreds of lives are being disrupted by illegal detentions that have continued for years. Prisoners who have been recognized as posing no threat to the US or who have no legal basis for detention must be released now.
- The clearance process for the remaining prisoners remains shadowed in secrecy, as do decisions about where to send prisoners who fear returning to their citizenship countries, such as Algeria, Libya, or Tunisia.

#### ***What has Obama pledged?***

- “The legal framework behind Guantánamo has failed completely, resulting in only one conviction. As president, Barack Obama will close the detention facility at Guantánamo. He will reject the Military Commissions Act, which allowed the U.S. to circumvent Geneva Conventions in the handling of detainees. He will develop a fair and thorough process based on the Uniform Code of Military Justice to distinguish between those prisoners who should be prosecuted for their crimes, those who can’t be prosecuted but who can be held in a manner consistent with the laws of war, and those who should be released or transferred to their home countries.” Barack Obama campaign publication, undated 2008.<sup>22</sup>
- “Whenever feasible, we will try those who have violated American criminal laws in federal courts -- courts provided for by the United States Constitution. Some have derided our federal courts as incapable of handling the trials of terrorists. They are wrong.” Barack Obama, May 21, 2009.<sup>23</sup>
- “The courts have spoken. I cannot ignore these rulings because as President, I too am bound by the law. The United States is a nation of laws and so we must abide by these rulings.” Barack Obama, May 21, 2009.<sup>24</sup>
- “The idea that we cannot find a place to securely house 250-plus detainees within the United States is not rational.” Barack Obama, quoting Sen. Lindsey Graham, May 21, 2009.<sup>25</sup>

#### ***What has Obama accomplished?***

- *Guantánamo prisoners released.* Eleven Guantánamo prisoners have left since January 2009. Five of these individuals were resettled in third countries other than their country of citizenship due to risk of persecution in their countries of citizenship.

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- *Guantánamo prisoners charged in civilian justice system.* One Guantánamo prisoner, Ahmed Ghailani, was transferred to US federal courts in June 2009.

### **What has Obama left undone?**

- From January 20 to July 15, only eleven people were released from Guantánamo. As of January 20, courts had determined that nineteen people were being unlawfully held at Guantánamo Bay, and the Bush administration had determined that nearly sixty people were “cleared for release.” Yet as of July 15, only eleven people had been released. This represents less than 20% of the people that the government knows to be unlawfully and unnecessarily detained. At this rate, Guantánamo will not be closed for over ten years.
- Despite offers from Portugal, Spain, Ireland and others to accept prisoners who are citizens of countries to which they cannot return, only one prisoner has been resettled to Europe since January 2009. Other governments that have a history of accepting asylum-seekers, including Norway, have expressed frustration at not receiving any request from the US government for assistance with resettling Guantánamo detainees.
- In cases where courts have ordered the release of prisoners, the US government has been inconsistent in how quickly it responds to the orders. While three of the prevailing petitioners in the landmark *Boumediene* case went to Bosnia relatively swiftly (in the Bush administration), Lakhdar Boumediene, an Algerian, was resettled in France months after he won his habeas case. Mohammed el Gharani, likewise, was only released to his home country of Chad after six months of sluggish negotiations. Finally, there are thirteen Uighurs from China who remain detained in Guantánamo despite the fact that the US government has known of their innocence for the past six years and despite court orders mandating their release.
- Rather than expedite the release of people already found to be “cleared for release”, the Obama administration has conducted a new review of all prisoners, the results of which is has not disclosed. The US Government refuses to allow the cleared prisoners’ lawyers to assist in finding suitable countries for resettlement.
- The government has also insisted that much of its evidence in court proceedings is classified, slowing down the trials of prisoners who are not yet cleared for release.
- The US government has brought only one prisoner into the federal justice system since January.

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- The government as resurrected the Military Commission system for administering a diluted standard of justice despite widespread recognition that the Commissions are legally flawed.
- None of the prisoners, including those who are known to be unlawfully held and are known to pose no threat to the US, has been offered the option of relocating to the US. The failure of the US to accept wrongfully-detained prisoners, such as the Uighurs who remain detained in Guantánamo, has discouraged the goodwill of other states to help accept resettled prisoners.

### ***What does Reprieve have to say to the Obama Administration?***

- “The nation and the world realized long ago what had to be done about Guantánamo: it must be closed; those wrongfully held must be freed; those who have committed crimes must be brought to justice. This has been said by courts, by the President, and by the public. It is unconscionable that over 200 people remain imprisoned there, including dozens of people that are known to pose no threat to the United States and over a dozen people who have been ordered released by courts. There is no longer any excuse for continuing to hold those who should be free.” – Clive Stafford Smith OBE, Director of Reprieve.
- “The Obama administration has expressed the intention of releasing its innocent prisoners, but it is interfering with our efforts to put these words to action. Government lawyers obstruct court proceedings with unnecessary delays and classification requests. The government refuses to allow prisoners’ lawyers to help identify countries who might accept them from Guantánamo. This makes no sense. The depth of the injustice we have seen there – innocent people held for six or seven years – demands urgent action, and no good faith effort to remedy this problem should be impeded.” – Clive Stafford Smith OBE, Director of Reprieve.
- The eyes of the world are on the US, and the clock is ticking on its promise to close Guantánamo. The main question is: will it use its last six months wisely, or will it continue to dither and in a last-ditch effort to solve the problem, send men to places they cannot safely go? –Cori Crider, Staff Attorney, Reprieve.

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## 4) Rendition and torture

### ***What is at stake?***

- US policy on the treatment of prisoners continues to permit forms of psychological torture designed to make prisoners lose their minds. This is neither humane nor an effective form of legitimate intelligence collection and it must be stopped.
- The US continues to disappear people from countries across the globe to its prison network in Afghanistan. This practice of rendition must be stopped by bringing the arrest, transfer, and imprisonment of people within US control into conformity with the rule of law.

### ***What has Obama pledged?***

- “I say without exception or equivocation that we do not torture, and that we will vigorously protect our people while forging a strong and durable framework that allows us to fight terrorism while abiding by the rule of law.” Barack Obama, May 21, 2009.<sup>26</sup>
- “As president, Obama will end the use of torture and extreme rendition. From both a moral standpoint and a practical standpoint, torture is wrong. Barack Obama will end the use torture without exception. He also will eliminate the practice of extreme rendition, where we outsource our torture to other countries.” Barack Obama campaign publication, undated.<sup>27</sup>

### ***What has Obama accomplished?***

- *Affirmed international law relating to humane treatment of prisoners.* “Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340 2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture, Common Article 3 [of the Geneva Conventions], and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.” Barack Obama, executive order of January 22, 2009.<sup>28</sup>

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- *Ended some torture practices.* “Executive Order 13440 of July 20, 2007, is revoked. All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order... Officers, employees, and other agents of the United States Government may, in conducting interrogations, act in reliance upon Army Field Manual 2-22.3, but may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation -- including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2 22.3, and its predecessor document, Army Field Manual 34-52 issued by the Department of Justice between September 11, 2001, and January 20, 2009.” Barack Obama, executive order of January 22, 2009.<sup>29</sup>
- *Closed CIA-operated black sites.* “The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.” Barack Obama, executive order of January 22, 2009.<sup>30</sup>
- *Ordered a review of existing interrogation and rendition practices.* “There shall be established a Special Task Force on Interrogation and Transfer Policies (Special Task Force) to review interrogation and transfer policies... The mission of the Special Task Force shall be: (i) to study and evaluate whether the interrogation practices and techniques in Army Field Manual 2 22.3, when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation...; and (ii) to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.” Barack Obama, executive order of January 22, 2009.<sup>31</sup>

### **What has Obama left undone?**

- The review of interrogation practices mandated by the January 22 executive order has not been completed.

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- The current interrogation policies described in Army Field Manual 2-22.3 continue to permit forms of psychological torture designed to destroy a person's sense of identity and their basic cognitive functioning, such a music torture.
- The review of rendition practices mandated by the January 22 executive order has not been completed.
- The review of rendition practices described in the January 22 executive order refers only to transfers of individuals from US custody to the custody of other countries. The US government is also conducting renditions where people are moved from a form of US control that is subject to external oversight to a form of US control that is not subject to external oversight, for example by transferring prisoners from US prisons in Iraq to secret prisons in Afghanistan. This practice must be banned in the rendition policy review.
- The government continues to use the state secrets doctrine to prevent disclosure of information relating to the known rendition of innocent and now-released Guantánamo prisoners in *Mohamed v Jeppesen Dataplan*.

#### **What does Reprieve have to say to the Obama Administration?**

- “The US government has left the door open for forms of psychological torture that destroy a prisoner's sense of identity and their basic cognitive functioning, including music torture. These practices are inhumane, are inconsistent with the values endorsed by the President, and serve no legitimate intelligence-gathering function. It is both absurd and barbaric to suggest that the US government has any interest in destroying the minds of people in its custody.” – Clive Stafford Smith OBE, founder of Reprieve.
- “The review of torture and rendition policies should not take six months to complete. Basic principles can be enforced now: no person should be disappeared; no person should be tortured, physically or psychologically; no person should be taken beyond the reach of the law.” – Clive Stafford Smith OBE, Director of Reprieve.
- “As long as we have a government that is able to take people beyond the reach of the law, then we have a government that is itself beyond the reach of the law. If you have a system where people are abducted, disappeared into secret prisons and kept beyond the scrutiny of the courts, then abuses and unlawful detentions are guaranteed. The best way, the only way, to keep the government's prisons within the rule of law is to bring its prisoners within the rule of law.” – Clive Stafford Smith OBE, Director of Reprieve.

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