

President Trump's Draft Executive Order on Detention and Interrogation

On January 25, 2017 *The Washington Post* publishing a draft executive order (EO) entitled “Detention and Interrogation of Enemy Combatants.”¹ This draft order appears to be an attempt to pave the way to reopen CIA “black sites” and reauthorize so-called “enhanced interrogation techniques”² which are illegal under both domestic and international law.³

Among other matters, the draft EO would reinstate Executive Order 13440 from 2007,⁴ which was criticized by the military⁵ as well as by President Reagan appointees General P.X. Kelley and Robert F. Turner, for giving “the CIA carte blanche to engage in ‘willful and outrageous acts of personal abuse’”⁶.

Secretary of Defense General James Mattis has cited rapport-based interrogation techniques as more effective than torture at gaining actionable intelligence.⁷ Professional interrogators agree with General Mattis that torture is ineffective,⁸ as do 176 retired generals and admirals who wrote to President Trump in January 2017, stating that

torture “undermines our national security.”⁹ This group of high ranking retired military leaders affirm that torture “increases the risks to our troops, hinders cooperation with allies, [and] alienates populations whose support the United States needs in the struggle against terrorism.”¹⁰

This document summarizes the provisions in the draft EO.

- Section 1:** Revokes President Obama’s Executive Orders 13491 on humane treatment of detainees and 13492 on closure of the Guantanamo Bay detention facility. Reinstates President George W. Bush’s Executive Order 13440 “to the extent permitted by law.” Defines torture and cruel, inhuman, and degrading treatment in a manner that could pave the way for their use while feigning compliance with domestic and international legal obligations.
- Section 2:** Touts the detention facilities at Guantanamo Bay as legal, safe, and effective;

¹ https://www.washingtonpost.com/world/national-security/white-house-draft-order-calls-for-review-on-use-of-cia-black-sites-overseas/2017/01/25/e4318970-e310-11e6-a547-5fb9411d332c_story.html?utm_term=.53068b17aec9.

² <http://www.humanrightsfirst.org/sites/default/files/Enhanced-Interrogation-Fact-Sheet.pdf>;
<http://www.humanrightsfirst.org/senate-report-cia-torture>.

³ <http://www.humanrightsfirst.org/sites/default/files/Issue-Brief-Laws-Against-Torture.pdf>.

⁴ <https://www.gpo.gov/fdsys/pkg/FR-2007-07-24/pdf/07-3656.pdf>;

⁵ <http://www.humanrightsfirst.org/sites/default/files/Military-cites-risk-of-abuse-by-CIA.pdf>.

⁶ <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/25/AR2007072501881.html>.

⁷ <http://www.humanrightsfirst.org/sites/default/files/interrogator-letter-candidates.pdf>.

⁸ https://www.theguardian.com/us-news/2017/jan/25/trump-executive-order-torture-black-sites-guantanamo-bay?CMP=share_btn_tw. See also <http://www.humanrightsfirst.org/sites/default/files/interrogator-letter-candidates.pdf>.

⁹ <http://www.humanrightsfirst.org/sites/default/files/torture-generals-admirals-letter-to-trump.pdf>.

¹⁰ *Id.*

recites misleading statistics on rates of released detainees engaging in future terrorist acts;¹¹ and finds that it is in U.S. interests to continue detention operations at the base.

- ☑ **Section 3:** Finds that the United States remains engaged in broadly defined “global armed conflict” with not only members al Qaeda, the Taliban, and associated forces—including members of the Islamic State in Iraq and Syria—but also those accused of fighting on behalf of these groups or providing “substantial support” to them in furtherance of hostilities against the United States or its partners.
- ☑ **Section 4:** Subject to “further direction from the President,” orders the secretary of defense to continue detention operations and military commission trials of alien enemy combatants captured in the global conflict as that conflict is defined in Section 3, including newly captured individuals “as appropriate.” Orders such operations to be consistent with the law. Suspends any detainee transfer efforts that are underway pending further review. Reserves the authority to hold detainees in “other facilities available to the United States[.]”
- ☑ **Section 5:** Orders the secretary of defense to review the interrogation policies in the Army Field Manual and make changes and additions, which must be consistent with the law, to ensure “the safe, lawful, and effective interrogation of enemy combatants” captured in what it calls the “fight against radical Islamism.”¹²
- ☑ **Section 6:** Orders the attorney general to review Presidential Policy Directive 14 (PPD 14),¹³ which governs whether newly captured individuals will be held in law enforcement or military custody. Asks the attorney general to

recommend any changes to PPD 14 that are “necessary, lawful, and appropriate” within 120 days of the date the EO goes into effect.

- ☑ **Section 7:** Orders the director of national intelligence to review current intelligence needs of the United States “in the fight against radical Islamism” and to recommend: a) whether to reinstate CIA-run detention facilities outside of the United States; b) whether to modify EO 13440 that was reinstated in Section 1; and c) whether any legislative changes are necessary to “permit the resumption of an effective and lawful interrogation program.” Notably, the explanatory statement of the EO says that Congress has enacted restrictions that provide “a significant statutory barrier” to the resumption of the CIA interrogation program. It also laments the statutory requirement that any changes to the list of approved interrogation techniques must be made public, a requirement that was designed to prevent future administrations from secretly authorizing techniques that constitute torture or other cruel treatment.
- ☑ **Section 8:** Orders the secretary of defense to review the military commission system in use at Guantanamo Bay and recommend how to employ the system going forward to prosecute and punish “unlawful enemy combatants detained in the armed conflict with violent Islamic extremists.”¹⁴
- ☑ **Section 9:** Orders that no person in the custody of the United States may be subjected to torture or cruel, inhuman, or degrading treatment or punishment but only “as proscribed by U.S. law.” Further orders that the detention, treatment, interrogation, and transfer of enemy combatants comply with “all the laws of the United States.”

¹¹ <http://www.humanrightsfirst.org/sites/default/files/Guantanamo-Detainee-Transfers-Fact-Sheet.pdf>.

¹² As in other sections, the phrase “global war on terrorism” is shown as crossed out and replaced with this term.

¹³ <https://obamawhitehouse.archives.gov/the-press-office/2012/02/28/presidential-policy-directive-requirements-national-defense-authorizatio>.

¹⁴ This is the lone use of the term “Islamic extremists” in the entire EO.

This section purports to require compliance with the law, including the prohibition on torture. However, other provisions in the EO and its accompanying explanatory statement suggest the new administration may attempt to interpret or revise existing law to justify a return to unlawful and abusive practices. Such “loophole lawyering” was used during the George W. Bush Administration to secretly permit unlawful treatment of detainees while publicly claiming that it was not engaged in torture.

- Section 10:** Contains generic legal disclaimers, including, notably, that the order must be implemented consistent with applicable law and subject to available appropriations.