



# Department of Homeland Security Office of Inspector General

## DHS Detainee Removals and Reliance on Assurances





# Homeland Security

November 29, 2011

## Preface

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, efficiency, and effectiveness within the Department.

This report describes the Department of Homeland Security's role in obtaining, validating, and monitoring the diplomatic assurances of humane treatment of persons transferred to another country. It is based on interviews with employees and officials of relevant agencies and institutions and a review of applicable documents.

We trust this report will result in more effective, efficient, and economical operations. We express our appreciation to all who contributed to the preparation of this report.

A handwritten signature in blue ink that reads "Charles K. Edwards".

Charles K. Edwards  
Acting Inspector General

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## Abbreviations

CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBP	U.S. Customs and Border Protection
C.F.R.	Code of Federal Regulations
CRCL	Office for Civil Rights and Civil Liberties
DHS	Department of Homeland Security
EOIR	Executive Office for Immigration Review
FARRA	<i>Foreign Affairs Reform and Restructuring Act of 1998</i>
ICE	U.S. Immigration and Customs Enforcement
ICRC	International Committee of the Red Cross
IIRIRA	<i>Illegal Immigration Reform and Immigrant Responsibility Act of 1996</i>
INA	<i>Immigration and Nationality Act</i>
INS	Immigration and Naturalization Service
NGO	nongovernmental organization
PATRIOT Act	<i>Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001</i>
USCIS	U.S. Citizenship and Immigration Services

# OIG

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*Department of Homeland Security  
Office of Inspector General*

## **Executive Summary**

The Special Interagency Task Force on Interrogation and Transfer Policies, created by Executive Order 13491, requested that the Inspectors General from the Departments of Homeland Security, State, and Defense report on the transfers conducted by each agency in reliance on diplomatic assurances of humane treatment of persons transferred to another country. Diplomatic assurances are written documents or communications from a foreign country designed to reduce the risk that an individual removed to that country will face torture.

Specifically, the Task Force requested that the Inspectors General for the three Departments report on the process for obtaining assurances, their content and implementation, and the treatment of persons transferred between August 24, 2009 and August 25, 2010, when transfers involved obtaining assurances.

Although the Department of Homeland Security did not seek or obtain assurances during the reporting period, we sought to understand its role in obtaining and validating assurances and monitoring post-removal treatment, in compliance with Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as implemented in U.S. law. This report is the result of our review.

Although we do not make any recommendations, aspects of the assurances process warranted examination. For example, the regulations are silent as to potential candidates for assurances, factors countries may consider when contemplating a candidate, and the content of assurances. Furthermore, though the Convention and the legislation implementing U.S. treaty obligations under the Convention do not define reliability regarding assurances (as the Convention makes no reference to assurances), Department officials, a Department of State official, and NGO representatives discussed with us factors to consider when assessing reliability. There appears to be a consensus within DHS that assurances need to be fact-specific, and that someone with protection expertise should be involved in determining reliability factors consistent with those recommended by the Task

Force. We reviewed these and other aspects of assurances, such as the process through which aliens may seek and receive protection against torture. To that end, we explored internal guidance and controls that protect aliens who express fear at any stage in the immigration process.

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## Background

On January 22, 2009, President Obama issued Executive Order 13491, *Ensuring Lawful Interrogations*, which established a Special Interagency Task Force on Interrogation and Transfer Policies. The Task Force established an Interrogation Working Group and a Transfer Working Group. The objective of the Interrogation Working Group was to 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. The objective of the Transfer Working Group was to examine the practices of transferring individuals to other nations. The goal was 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, and to ensure the humane treatment of individuals in its custody or control. The Task Force met with U.S. government agencies, foreign officials, and nongovernmental organizations (NGOs). Those meetings resulted in several recommendations relating to interrogation and transfer policy.

Among the recommendations, the Task Force noted the need for the United States to clarify and strengthen its procedures for obtaining assurances, improve its capabilities for evaluating assurances, and increase the use of monitoring procedures to implement assurances. The Task Force recommended that the Inspectors General from the Departments of Homeland Security (DHS), State, and Defense to report on the transfers they conducted in reliance on assurances of humane treatment of persons transferred to another country. Specifically, the Task Force requested that we report on the process for obtaining the assurances, the content of the assurances, the implementation and monitoring of the assurances, and the post-transfer treatment of the person transferred. Our review focuses on transfers pursuant to assurances in the immigration context between August 24, 2009, and August 25, 2010.

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## Results of Review

### Obtaining Assurances

In the immigration context, diplomatic assurances are rare and extraordinary political documents designed to reduce the risk of torture to an alien removed to his or her home country or a third country. A foreign government may provide these documents promising that an individual will not be tortured and that the government will abide by its international law obligations, specifically the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In the U.S. immigration context, assurances are factored into the analysis of whether an alien is at substantial risk of torture. Reliable assurances might enable a state to return an individual—who otherwise has been determined to face a substantial risk of torture in a certain country—to the country providing the assurances. A transfer pursuant to unreliable assurances would violate the CAT if the individual would more likely than not be tortured in the receiving country. But reliable assurances, which lessen the likelihood of torture, might make it possible to return an alien in compliance with the CAT.

In the United States, assurances may arise in the immigration context when U.S. Immigration and Customs Enforcement (ICE) seeks to remove an alien who has received CAT torture protection. U.S. law allows the Secretary of State to seek, and high-level DHS officials to credit, assurances that the alien will not be tortured. DHS may credit the assurances if they tip the balance of factors such that it is no longer “more likely than not” that the alien will be tortured upon return. If the assurances are sufficiently reliable to permit removal consistent with Article 3 of the CAT, and any applicable deferral or withholding of removal is terminated, the alien may be returned. Once deferral or withholding of removal is terminated on the basis of assurances, the matter will not be considered further in the Immigration Courts or before the Board of Immigration Appeals.<sup>1</sup>

Under no circumstances should a removal proceed in violation of the United States’ non-refoulement obligations, pursuant to Article 3 of the CAT and the 1967 U.N. Protocol relating to the Status of Refugees (“1967 Refugee Protocol”). Non-refoulement is an international principle prohibiting the transfer of an individual from one country to another if he or she would face a violation of certain human rights. With some variations as to the persons it protects and the risks from which it protects, this principle is found in the context of refugees, extradition, human rights,

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<sup>1</sup> The availability and extent of judicial review are unsettled areas of the law.

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and humanitarian law. Under the 1967 Refugee Protocol, which incorporates the non-refoulement obligation in Article 33 of the 1951 Refugee Convention, a signatory such as the United States generally may not return an individual to a territory where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion. Of relevance to the diplomatic assurances context, Article 3 of the CAT contains an explicit, absolute non-refoulement provision that is not based on these protected grounds, but instead prohibits return to a country where there are substantial grounds to believe that an individual would be in danger of being subjected to torture.

Although assurances are permissible under U.S. law, regulations guiding their use are largely silent on agency requirements. By their nature, assurances are fact-dependent and ad hoc. Consequently, DHS approaches them on an ad hoc basis. Furthermore, assurances are so rare and difficult to obtain that aliens granted CAT protection are nearly always either released in the United States or returned to a country where they are not “more likely than not” to be tortured.

### **Convention Against Torture**

The Convention Against Torture is an international human rights treaty. CAT Article 3 prohibits a State Party from sending an alien to a country “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The United States signed CAT on April 18, 1988, and ratified it on October 21, 1994, subject to certain declarations, reservations, and understandings, including a declaration that Articles 1 through 16 are not self-executing and therefore require domestic implementing legislation. The United States declared that it understands the phrase, “where there are substantial grounds for believing that he would be in danger of being subjected to torture” to mean “if it is more likely than not that he would be tortured.” In 1998, Congress implemented the CAT treaty obligations by enacting the *Foreign Affairs Reform and Restructuring Act of 1998* (FARRA).<sup>2</sup> The FARRA expressed U.S. policy not to “expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.” The FARRA also directed relevant agencies to promulgate regulations implementing U.S. obligations under Article 3.

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<sup>2</sup> P.L. 105-277, div. G, tit. XXII (FARRA), § 2242.



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CAT-implementing regulations, required by the FARRA and codified in sections 208.16-208.18 and 1208.16-1208.18 of Title 8 of the Code of Federal Regulations (C.F.R.), prohibit the removal of an alien to any country where the alien would “more likely than not” be subjected to torture. An alien seeking protection under the CAT in the United States has the burden of meeting this “more likely than not” standard.

The CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Consistent with U.S. ratification history, DHS and Department of Justice regulations implementing Article 3 in the removal context define torture as “an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.” The regulations specify that torture under the CAT means that (1) the treatment must be an extreme form of cruel, inhuman, or degrading treatment entailing severe mental or physical pain or suffering; (2) the perpetrator must have had specific intent to inflict severe pain or suffering; (3) a public official or person acting in an official capacity inflicted or instigated the treatment or consented to or acquiesced in it; and (4) the act must be directed against a person in the offender’s custody or physical control. Such treatment does not include pain or suffering arising solely from, inherent in, or incidental to lawful sanctions.

Implementing regulations describe the types of evidence that must be considered when an individual seeks protection under the CAT. In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including the following:

- Evidence of past torture inflicted upon the applicant;
- Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
- Evidence of gross, flagrant, or mass violations of human rights within the country of removal, where applicable; and
- Other relevant information regarding conditions in the country of removal.

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DHS officials said that the “more likely than not” standard to receive CAT protection, reflected in one of the “understandings” in the U.S. ratification instrument, is difficult to meet. Such a standard ensures that only aliens truly at risk of torture, as defined in U.S. law, will receive CAT protection. There are no bars to CAT protection, since there is an absolute prohibition on torture. Even terrorists and human rights violators must be protected from torture.

DHS officials said that aliens can express fear leading to a CAT claim at any point in the immigration process, even after the issuance of a final order of removal if a motion to reopen is filed with the Immigration Court or the Board of Immigration Appeals. One effective measure that DHS employs to implement its obligations under Article 3 of the CAT is investigating a removable alien’s expression of fear of return to the country of removal. DHS is obligated to investigate each such claim of fear, even if the alien is determined inadmissible, has been convicted of an aggravated felony, or is present illegally. In most cases, an immigration judge will adjudicate CAT claims.

DHS internal policies provide aliens with substantial due process rights, including the right to be interviewed about fears of returning to a specific country and the right to contest both an asylum officer’s credible fear or reasonable fear determination and an immigration judge’s determination of eligibility for withholding or deferral of removal. DHS procedures ensure that no alien who expresses fear of torture is removed to a country without his or her claim being reviewed. In some cases, an alien may have had a CAT claim reviewed and denied years before his or her actual removal. In such instances, where personal circumstances or country conditions have changed, the CAT analysis may be rendered “stale” but will not be reevaluated unless the alien has filed a motion to reopen with the Immigration Court or the Board of Immigration Appeals.

### **U.S. CAT Protection Under Article 3 – “Withholding of Removal” (under CAT) and “Deferral of Removal”**

“Withholding of removal” and “deferral of removal” describe two forms of CAT Article 3 protection under U.S. law that prevent an alien from being removed to a country where he or she is “more likely than not” to experience torture.<sup>3</sup> With the enactment of the

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<sup>3</sup> Another type of withholding of removal is contained in *Immigration and Nationality Act* (INA) §241(b)(3). It is based on an alien’s fear of persecution and is not a form of CAT protection.

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*Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)*, some immigration terminology changed. Aliens ineligible to lawfully enter the United States became “inadmissible,” “removable,” or “removed,” whereas they previously were held “excludable” and ordered “deported.” Thus, post-IIRIRA, an alien granted withholding or deferral of removal has his or her “final order of removal” (or deportation order) either “withheld” or “deferred.”

Withholding of removal (under the CAT) generally prevents an alien’s removal to a particular country indefinitely unless the case is reopened and DHS establishes that the alien is not more likely than not to be tortured in that country. The motion to reopen will not be granted unless it is supported by material evidence that was unavailable and could not have been presented at the earlier hearing. Withholding is granted to aliens meeting the “more likely than not” standard who are not subject to “mandatory denial” of withholding on national security, criminal, or related grounds. An alien granted withholding of removal may be removed to another country where he or she is not “more likely than not” to experience torture.

Deferral of removal is granted to those eligible for CAT protection who are barred from receiving withholding of removal on national security, criminal, or related grounds. Deferral of removal is a more temporary protection. It may be terminated at any time the alien is no longer “more likely than not” to face torture. Like withholding, an alien granted deferral of removal may be removed to another country where he or she is not “more likely than not” to experience torture.

Deferral of removal, like withholding of removal, must be terminated before removal may proceed. The key difference with deferral is that if DHS moves for a termination hearing, the immigration judge must hold a hearing if the DHS motion is supported by any evidence relevant to the probability of torture that was not previously considered, regardless of whether the evidence was previously available. It is not necessary to meet the standards for reopening a case in order for a termination hearing to be held, and at such a hearing it is the alien’s burden of proof to establish that he or she continues to face a likelihood of torture in the country in question. Even when assurances are obtained and credited, the Secretary of Homeland Security must terminate deferral before removal can proceed.

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**Assurances in the DHS Context: Administrative Removal, Reinstatement of Removal, and Expedited Removal**

DHS is involved in several categories of removal proceedings that could involve diplomatic assurances.

In “traditional” removal proceedings under INA § 240, where DHS officials said that most CAT claims arise, only the immigration judge has authority to issue a removal order. ICE attorneys litigate § 240 removal cases on behalf of DHS before Immigration Courts falling under the jurisdiction of the Department of Justice’s Executive Office for Immigration Review (EOIR), which administers the nation’s immigration court system. DHS would generally pursue diplomatic assurances only after an immigration judge grants the alien CAT protection.<sup>4</sup>

DHS also may be involved in assurances when the Department of Justice seeks assurances as part of a plea agreement or, as either an observer or participant in interagency discussions, in the Guantanamo Bay context.

Additionally, DHS is involved in three types of streamlined or “expedited” removal proceedings that do not require hearings before an immigration judge: (1) administrative removal, (2) reinstatement of removal, and (3) expedited removal. In these proceedings, DHS has the authority to enter a removal order and screens cases for potential torture concerns. If torture concerns are present, the claim for CAT protection from removal is referred to an immigration judge.

Administrative removal applies to aliens convicted of an aggravated felony.<sup>5</sup> Reinstatement of removal applies to aliens who have reentered the United States illegally after having departed from the United States under an order of removal.<sup>6</sup> Such aliens have no right to a hearing on their removability before an immigration judge, but they are eligible to apply for withholding or deferral of removal under the CAT regulations in specialized proceedings before an immigration judge.

Expedited removal proceedings apply to aliens who are inadmissible because of fraud, misrepresentation, or insufficient documentation, and allow DHS to issue and execute an expedited

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<sup>4</sup> See INA § 240.

<sup>5</sup> See INA § 238(b).

<sup>6</sup> See INA § 241(a)(5).

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removal order without further review by an immigration judge, unless the alien expresses a credible fear of persecution or torture or the intention to apply for asylum. A separate form of expedited removal applies to aliens subject to certain security-related grounds of inadmissibility.<sup>7</sup> IIRIRA amended the Immigration and Nationality Act (INA) to provide for expedited removal without a hearing or right of appeal for certain arriving aliens. At the Secretary's discretion, expedited approval may be applied to aliens apprehended in the United States who have not been admitted or paroled<sup>8</sup> into the United States and who cannot prove that they have been physically present in the United States continuously for 2 years.<sup>9</sup> As of August 11, 2004, DHS applies expedited removal to aliens apprehended within 100 miles of a U.S. border who have not been admitted or paroled into the United States and who cannot prove that they have been physically present in the United States for 14 days or more.<sup>10</sup>

One DHS official said that the only time DHS makes CAT determinations (in contrast to instances when DHS makes threshold screening determinations) is in certain instances when an arriving alien is determined to be inadmissible on national security-related grounds. However, DHS may decide to terminate CAT protection on the basis of assurances consistent with Article 3.<sup>11</sup>

### **Expedited Removal and the Credible Fear Interview**

U.S. Customs and Border Protection (CBP) officers and agents and ICE officers are required to refer certain aliens in expedited removal who claim asylum or express fear of persecution or torture to an asylum officer for a "credible fear" interview.<sup>12</sup> In a credible fear interview, an asylum officer will determine whether there is a

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<sup>7</sup> See INA § 235(c).

<sup>8</sup> "Parole" means that the alien has been granted temporary permission to enter or be present in the United States but is not admitted. Unless granted another lawful status, the alien will be required to leave when the parole expires or is terminated.

<sup>9</sup> See INA § 235(b).

<sup>10</sup> Designating Aliens for Expedited Removal, 69 *Federal Register* 48877-48880 (Aug. 11, 2004).

<sup>11</sup> See 8 C.F.R. §§ 208.17(f), 208.18(c), 1208.17(f), 1208.18(c).

<sup>12</sup> The regulations are unclear, however, on when DHS must refer aliens inadmissible on national security-related grounds and subject to expedited removal to INA § 235(c) proceedings, as opposed to traditional INA § 240 proceedings. Furthermore, when DHS decides to refer an alien to 235(c) proceedings, regulations are unclear as to how CAT claims are to be handled. See 8 C.F.R. § 235.8(b)(4) (stating that DHS "shall not execute a removal order under this section under circumstances that violate section 241(b)(3) of the Act or Article 3 of the Convention Against Torture").

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significant possibility that the alien can establish eligibility for asylum, withholding of removal under INA § 241(b)(3), or withholding or deferral of removal under Article 3 of the CAT, in a full hearing before an immigration judge. When a CBP officer or agent or an ICE officer refers such an alien to an asylum officer, the agent must provide the alien Form M-444. Form M-444 describes the alien's rights to consult with others and to request a review by an immigration judge of the asylum officer's credible fear determination, as well as a description of the interview. According to CBP officials, this might be the last time CBP has contact with that alien. If the claim does not meet the credible fear standard, United States Citizenship and Immigration Services (USCIS) might refer the case back to CBP for processing. But if an asylum officer determines that there is credible fear, CBP no longer plays a role. The process for determining CAT protection in expedited removal, except for aliens who are inadmissible on national security grounds, is depicted graphically in appendix D.

An asylum officer will use the "credible fear" standard as stated in the INA and implementing regulations. The INA states that "the term credible fear of persecution means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." After interviewing the alien, an asylum officer will first determine whether the alien has a credible fear of persecution.

If an alien does not establish a credible fear of persecution, the asylum officer will determine whether the alien has a credible fear of torture. Regulations provide that the alien will be determined to have a credible fear of torture if he or she establishes that there is a "significant possibility" that he or she is eligible for withholding or deferral of removal under the CAT. According to the *Asylum Officer Basic Training Course Manual*, this means that there is a "substantial and realistic possibility" that the alien will be found credible, and therefore succeed on the merits, in a full hearing. DHS officials explained that the credible fear screening offers a lower threshold than granting asylum, withholding of removal, or deferral of removal; the intent is to provide an expeditious screening to ensure that no alien is removed from the United States under circumstances that would violate U.S. non-refoulement obligations under the 1967 Refugee Protocol or Article 3 of the CAT.

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An asylum officer will refer an alien believed to have credible fear to EOIR for removal proceedings. After DHS charges an alien with violating immigration law, EOIR primarily decides whether the alien should be ordered removed from the United States or should be granted relief or protection from removal. The alien may apply before EOIR for asylum, withholding of removal under INA § 241(b)(3), or CAT protection.

If the asylum officer determines that the alien does not have a credible fear of persecution or torture, the alien will be ordered removed. The alien may ask an immigration judge to review the asylum officer's decision, but if the judge agrees with the asylum officer, the alien will not be able to appeal further. If the immigration judge overturns the asylum officer, the alien will be referred for a full § 240 removal hearing, at which time the alien may apply for CAT protection or other forms of relief or protection from removal.

### **Administrative Removal and Reinstatement of Removal, and the Reasonable Fear Interview**

If an alien in the administrative removal or reinstatement of removal context expresses fear of return, an ICE officer or CBP officer or agent will refer the alien to an asylum officer for a “reasonable fear” interview. Similar to a credible fear interview, a reasonable fear interview serves as a low-threshold screening mechanism to ensure that no alien is removed from the United States under circumstances that would violate its non-refoulement obligations. The *Asylum Officer Basic Training Course Manual* states, “In contrast to the credible fear determination, where the asylum officer determines only whether there is a significant possibility the applicant may establish a credible claim, the asylum officer must make a finding as to whether the claim is or is not credible.” Regulations state that a reasonable fear of torture exists when an alien establishes a “reasonable possibility” that he or she will be tortured in the country of removal. The standard of proof to establish “reasonable fear of persecution or torture” is the “reasonable possibility” standard. This is the same standard required to establish a “well-founded fear” of persecution in the asylum context, and is lower

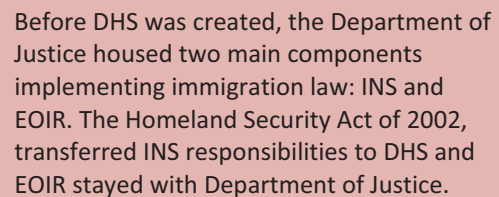
To clarify, the *Homeland Security Act of 2002*, as amended, transferred many of the immigration authorities exercised by the Attorney General and the Immigration and Naturalization Service (INS) to the Secretary of DHS and DHS components.

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than the “more likely than not” standard. It is higher, however, than the standard of proof required to establish a “credible fear” of persecution. The process for determining CAT protection for aliens subject to administrative removal or reinstatement of removal is depicted graphically in appendix E.

If an asylum officer determines that the alien who is subject to an administrative or reinstated removal order has a reasonable fear of persecution or torture, meaning that there is a reasonable possibility of success on the merits, the officer will refer the alien to EOIR for “withholding only” proceedings before an immigration judge. If an asylum officer determines that the alien does not have a reasonable fear, the alien will be removed pursuant to the administrative removal order or reinstatement of removal order. The alien may ask an immigration judge to review the asylum officer’s decision, but if the judge agrees with the asylum officer, the alien will not be able to appeal further. If the immigration judge overturns the asylum officer, then the alien will be placed in “withholding only” proceedings.

During “withholding only” proceedings, an alien may apply only for withholding of removal under INA § 241(b)(3) or CAT protection. The alien may not apply for asylum. The immigration judge will not grant these forms of protection, including under the CAT, if he or she finds that the alien is ineligible. Both DHS and the alien have the right to appeal the immigration judge’s decision to EOIR’s Board of Immigration Appeals.



Before DHS was created, the Department of Justice housed two main components implementing immigration law: INS and EOIR. The Homeland Security Act of 2002, transferred INS responsibilities to DHS and EOIR stayed with Department of Justice.

### **Initial DHS Involvement in Obtaining Assurances**

Both Department of State and DHS officials stressed that assurances cases have been so rare that there is no “standard practice.” Furthermore, immigration regulations are largely silent as to agency requirements regarding assurances. That said, officials agreed that, as a first step, ICE would approach the Department of State to discuss assurances. According to a Department of State official, DHS might want the Department of State to inform DHS’ legal strategy in removal proceedings as DHS considers whether to stipulate to CAT deferral. At this point,



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however, the Department of State would not take an official position as to whether the alien would meet the “more likely than not” standard. The Department of State would not approach a country about assurances until the alien has been granted CAT protection, including in cases in which DHS stipulated to eligibility for deferral or withholding of removal. But the Department of State might discuss informally with DHS, before CAT protection has been granted, whether assurances may be an effective factor reducing the risk of torture and influencing whether an alien may be removed without violating Article 3 of the CAT. According to an ICE official, if the Department of State agrees to seek the assurances, DHS might receive them in approximately 6 months.

A Department of State official explained that after the Department of State receives DHS’ request, officials would cable the appropriate U.S. embassy to specify the terms that it would want the assurances to contain. The Department of State would hope that the providing government authority complies with its suggested language.

The regulations are silent as to who may be considered for assurances and what factors the Department of State may consider. ICE officials said that DHS is engaged in interagency discussions to determine whether assurances are suitable and feasible, but DHS officials did not share what factors are considered.

A USCIS official said that although assurances may be sought at any point in the process, they are intended as a last resort. DHS will very rarely even consider a candidate for assurances. Not only are assurances controversial, but the time and effort to obtain reliable assurances are prohibitive. A Department of State official advised, however, that if DHS intends to consider them, the Department of State would like to participate as early as possible in the process.

### **DHS Components’ Involvement**

ICE is the DHS component that currently handles assurances cases. Although USCIS asylum officers play a role in CAT protection in that they conduct credible fear and reasonable fear interviews, USCIS is not currently involved in deliberations or decisions on assurances.

According to ICE officials, the only DHS assurances cases have involved three Rwandan nationals and an Egyptian national.

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Although assurances have been obtained and credited for the Rwandan nationals, the Rwandans are still in custody, pending a determination by the Deputy Secretary of Homeland Security whether to terminate deferral of removal. Following litigation in the federal courts, DHS is no longer pursuing the removal of the Egyptian national.

### **Detention of Aliens Seeking CAT Protection**

Aliens subject to expedited removal generally must be detained until they are removed and may only be released because of a medical emergency or for law enforcement purposes. If the alien expresses a fear of persecution or the intent to apply for asylum, DHS places the alien in detention until a “credible fear” determination can be made. If the asylum officer determines that the alien has credible fear, the alien may be paroled into the United States. If the asylum officer does not find that the alien has a credible fear, the alien is detained until removal.

Under immigration law, DHS generally is required to detain the following individuals:

- Criminal aliens (including those who are inadmissible on criminal grounds and who have committed specified criminal offenses while in the United States);
- Aliens presenting national security risks;
- Arriving aliens subject to expedited removal, including aliens who are awaiting a credible fear determination or who were determined not to have a credible fear;
- Those with final orders of removal who have committed aggravated felonies, or have been determined to be inadmissible under INA § 212(a)(3)(B) or removable under INA § 237(a)(4)(B) for terrorism grounds; and
- Certified terrorist suspects.

DHS may detain aliens not subject to mandatory detention, including the following:

- Inadmissible, noncriminal arriving aliens not in expedited removal;
- Aliens post-removal order, after 6 months when removal is reasonably foreseeable or under certain “special circumstances;” and
- Any other alien who is in removal proceedings.

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Aliens not subject to mandatory detention can be paroled, released on bond, or kept in continued detention under special circumstances.

### **U.S. CAT Obligations: Law Enforcement and Continued Detention**

U.S. immigration regulations provide three procedures to ensure compliance with U.S. treaty obligations under the CAT: streamlined termination procedures under 8 C.F.R. §§ 208.17(d) and 1208.17(d) for those granted deferral of removal; diplomatic assurances; and continued detention under 8 C.F.R. §§ 208.17(c) and 1208.17(c). DHS officials explained that continued detention—meaning detention after an alien has received a final order of removal, or “post-removal order detention”—has been used to keep criminals off the street. Although Article 3 as interpreted in U.S. law strictly prohibits returning an individual to a country where it is “more likely than not” that he or she would risk being tortured, DHS officials explained that it does not require the United States to allow criminals and other dangerous individuals free rein in its territory.

NGOs expressed concern that aliens seeking CAT protection may be subject to prolonged detention. Two recent Supreme Court decisions, *Zadvydas v. Davis* and *Clark v. Martinez*, however, restrict post-removal detention of aliens to a presumptively reasonable period of 6 months. Based on these decisions, DHS officials said that, in all but exceptional cases and unless DHS can send the alien to a third country, DHS will be required to release such an alien in the United States. Some DHS officials claimed that hundreds of aliens granted deferral of removal each year are released. They said that all aliens granted deferral of removal under the CAT are not the type of people DHS would want to release to the public. Aliens granted deferral of removal under the CAT are ineligible for withholding of removal based on national security, criminal, or related grounds. Releasing such people, DHS officials said, could compromise national security and public safety.

In *Zadvydas v. Davis*, the Supreme Court construed INA § 241(a)(6) to authorize the detention of legally admitted aliens later ordered removed only for a period reasonably necessary to secure the removal. Presumptively after 6 months, the alien is eligible for conditional release if there is not a significant likelihood of removal in the reasonably foreseeable future. The Court said that a statute permitting indefinite detention of an alien

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“would raise a serious constitutional problem” under the due process clause of the Fifth Amendment.

In *Clark v. Martinez*, the Supreme Court extended the *Zadvydas* construction of INA § 241(a)(6) to inadmissible aliens. Responding to the government’s arguments that the security of the Nation’s borders would be compromised by the release of inadmissible aliens who could not be removed, the Court said that Congress “can attend to it.” The Court noted that less than 4 months after the *Zadvydas* decision, Congress enacted a statute that authorized continued detention 6 months beyond the removal period and enabled this period of time to be renewed indefinitely. Under the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA PATRIOT Act), as amended, the Secretary of Homeland Security may keep an alien in continued detention although his or her removal is not reasonably foreseeable, if the Secretary has reasonable grounds to believe that the alien represents a security threat or has been involved in terrorist activities.

Post-*Zadvydas* regulations allow an alien subject to a final order of removal to request release from detention after 6 months based on the alien’s belief that there is not a significant likelihood of removal in the reasonably foreseeable future. ICE must provide the alien, with a copy to counsel of record, a written decision on whether there is such likelihood. Even if there is no significant likelihood of removal within the reasonably foreseeable future, however, DHS regulations permit the continued detention of certain classes of removable aliens on account of special circumstances. Special circumstances can justify detaining an alien with a highly contagious disease who is a threat to public safety; an alien whose release poses serious adverse foreign policy consequences or security or terrorism concerns; and an alien considered “specially dangerous” because he or she has committed one or more crimes of violence and has a mental condition or personality disorder, and behavior associated with either, that makes it likely that he or she will engage in violence in the future, and whose release will jeopardize public safety.<sup>13</sup>

If ICE determines that there are special circumstances justifying an “specially dangerous” alien’s continued detention, ICE must follow certain procedures.<sup>14</sup> It must provide a written statement explaining the basis of its determination and describing the

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<sup>13</sup> See 8 C.F.R. § 241.14(f).

<sup>14</sup> Such procedures do not apply in the national security or foreign policy context.

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evidence considered, and a notice to the alien of a “reasonable cause hearing” before an immigration judge to consider the matter. Such notice must describe the alien’s rights during a reasonable cause hearing and a merits hearing before the Immigration Court.

Despite the prohibitions on continued detention that *Zadvydas* and *Clark* affected, NGOs claimed that individuals still may be detained a long time while assurances are sought, and then removals can occur quickly, leaving no time for the detained individual or the attorney to protest or respond. Alternatively, although the assurances are obtained, the individuals might still remain in detention for an unspecified time. The NGOs mentioned the three Rwandans who were granted protection under the CAT but have been in detention since 2007. These are the only immigration cases that we know of in which aliens have been in continued detention for longer than 6 months while assurances are being considered.

### **Determining the Reliability of Assurances**

CAT-implementing regulations state that when the Secretary of State forwards assurances to the Attorney General, the Attorney General shall, in consultation with the Secretary of State, determine whether they are sufficiently reliable. The regulations state that the Attorney General’s authority may be delegated solely to the Deputy Attorney General or the Commissioner, INS.

The *Homeland Security Act of 2002*, as amended, created DHS and transferred immigration functions from the Commissioner of the former INS to the newly created USCIS, ICE, and CBP.

#### **Balancing Enforcement and Protection: A Strong Internal Process With Minimal Conflicts of Interest Is Needed**

If the DHS Secretary determines that assurances are sufficiently reliable to allow the alien’s removal to a country consistent with Article 3, the Secretary has the authority to credit the assurances or to delegate that authority. In delegating that authority, care must be taken to ensure clarity of roles and responsibilities and that the delegation is consistent with applicable legal requirements. The Third Circuit in *Khouzam v. Attorney General*, for example, held that the government terminated Khouzam’s deferral of removal “without constitutionally sufficient process” because it did not give him notice, a full and fair hearing, and an opportunity to make arguments on his own behalf, and denied his right to an

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individualized determination. Noting Khouzam's argument that the termination decision was tainted by the DHS' bias because DHS had been trying to remove him, the Third Circuit court indicated that the risk of unfairness was high. In follow-up comments to this report, the Office for Civil Rights and Civil Liberties (CRCL) generally concurred that it is important to avoid the appearance of a conflict of interest.

A number of DHS officials agreed that the stronger the internal administrative process, the less need there will be for judicial review and the more likely assurances will continue to be used as intended: as one piece of the risk factor analysis, at high levels insulated from review, and only in rare and important cases.

In an informal follow-up conversation, DHS officials clarified the current process concerning assurances. They explained that as the Director of ICE weighs the credibility of assurances, he or she may reach out to the Secretary of State, who at that point would have already indicated that the assurances can be credited. ICE reviews the record in its entirety. While ICE considers whether to credit the assurances, the alien will have the opportunity to respond. If the Director of ICE decides to credit the assurances and determines that the assurances are sufficiently reliable to allow for removal consistent with Article 3 of the CAT, the alien will receive a copy of the decision and the record. The alien then will be afforded a reasonable time to respond in a written submission to the Deputy Secretary of Homeland Security.

The Deputy Secretary of Homeland Security will consider the Director of ICE's decision and independently determine whether the assurances are sufficiently reliable to allow for removal consistent with Article 3 of the CAT and, if so, whether to terminate the deferral order. The alien will be allowed a reasonable opportunity to make written submissions before the Deputy Secretary makes a decision and, if the Deputy Secretary terminates the deferral order, the alien will be afforded a reasonable opportunity to seek judicial review (including a stay of removal) before the removal proceeds. That process is being followed in the Rwandan cases noted above.

### **Reliability and the Risk Analysis**

The CAT-implementing regulations and the FARRA do not define reliability with respect to diplomatic assurances. There appears to be a consensus within DHS that assurances need to be fact-

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specific, and that someone with protection expertise should be involved in determining reliability factors consistent with those recommended by the Task Force. NGOs said that assurances are just one factor in the risk analysis that may help reduce the likelihood of torture. NGOs and others met the assurances provision with great suspicion during the CAT regulation drafting stage. Nevertheless, the assurances provision was included because the agency understood that a situation calling for assurances would likely arise and that reliable assurances could reduce the likelihood that the alien in question would be tortured in a particular country. According to the regulation's supplementary information, "The nature and reliability of such assurances, and any arrangements through which such assurances might be verified, would require careful evaluation before any decision could be reached about whether such assurances would allow an alien's removal to that country consistent with Article 3."<sup>15</sup>

According to DHS and other sources, the risk analysis as to likelihood of torture in light of assurances depends on various factors: the specific government authority(ies) providing the assurances; the stability of that government; the reasons the particular alien would be at risk of torture; the relationship between the providing and detaining authorities; the ability to conduct effective post-removal monitoring; and the providing country's interest in warm relations with the United States. One NGO representative said that the extent to which the U.S. government believes the providing country's government will remain in power is the extent to which assurances will reduce risk.

The consensus was that assurances need to be and are case specific, not country specific. Each individual case is different, depending on the alien and the circumstances.

To increase reliability, one NGO said that assurances need to be coordinated with country experts at the Department of State. Those involved need to know specific country conditions, such as whether a certain arm of a government commits human rights abuses and which monitoring authority is most independent.

One NGO representative suggested that the verification process should consider the alien's specific beliefs as to who would torture him or her. This representative also suggested that DHS consult with the alien and his or her attorney.

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<sup>15</sup> Regulations Concerning the Convention Against Torture, 64 FR 8478, 8484 (1999).

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## **Contents and Specific Guarantees**

Immigration regulations are silent as to the contents of assurances. DHS officials said that the Department of State considers, at a minimum, diplomatic relations, power structures, past experiences, and country conditions on the ground when evaluating assurances.

One ICE official said that the Department of State probably seeks particular guarantees in assurances, but because of the often confidential nature of diplomatic communications, the content of these guarantees may not be made public. Another ICE official does not believe that Department of State seeks the same particular contents for all assurances, unless officials considered the reliability factors discussed in *Khouzam v. Attorney General*. These factors include whether the terms of the assurances would satisfy the FARRA, whether the assurances were given in good faith, and whether there will be a means to verify compliance with the assurances. Other reliability factors consider the identity and position of the official relaying the assurances; and the country's incentives and capacity to comply with the assurances, including its record of torture and of complying with previous assurances.

One NGO representative said that the assurances should be very specific, include the standard of interrogation (such as any time limitations and number of interrogators present), and include monitoring by well-trained U.S. Embassy staff.

One DHS official said that DHS does not seek a specific commitment for assurances because their use is so infrequent that DHS handles each assurance case by case. Furthermore, DHS is revising the process for assurances and is very selective in the cases it considers for assurances. A Department of State official said that, at a minimum, the guarantees should—

- Be in writing,
- Be explicit as to protection against torture,
- Originate at the cabinet level or above,
- Be provided by the ministry that will keep the alien in custody, and
- Include some kind of monitoring.

In follow-up comments to this report, DHS officials said that they are committed to providing the assurances to the alien applicants in an unclassified format whenever possible.



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## Implementing and Monitoring

DHS officials and others said that sparing use of assurances combined with monitoring might reduce the risk of torture. Therefore, although immigration regulations do not mention monitoring, DHS and Department of State officials said that the Department of State normally would seek monitoring as part of assurances. A Department of State official said that the bare monitoring minimum it would seek would be access at any time without notice.

According to one NGO representative, monitoring must be implemented within the first 10 days after return, when torture is most likely to occur. Monitoring should be prompt, regular, spontaneous, and in private with the detained individual. Monitors should have access to prison staff and the whole complex, since torture might occur away from the main confinement area.

That said, NGO representatives who were interviewed acknowledged that such a mechanism could not guarantee that a returnee would not be tortured. NGOs that were interviewed generally believed that monitoring was completely ineffective. First, they said, torture is difficult to detect, even with monitoring. People who visit detainees undergoing torture are unlikely to see or hear signs because torture occurs in private. Second, despite assurances, a state might not have control over its security forces and might not be able to prevent torture. Finally, when torture is discovered, the United States cannot do much to help that particular individual. Assurances are not legally binding; they are political documents with no enforcement mechanism under U.S. law, and the United States cannot violate another state's sovereignty to retrieve a returned alien found to be tortured.

NGO representatives and DHS officials agreed that country conditions would dictate the monitoring authority. The monitoring authority may be an NGO, although to be effective it would have to be independent of the government and immune from government influence and pressure. A certain NGO might be the ideal monitor in some countries but not in others. One NGO representative said that it would be better to have U.S. Embassy staff act as the monitoring authority because of the embassy's independence. NGOs also cautioned that the United States needs to be careful who monitors because it cannot abdicate its international obligations.

One NGO mentioned that there are many bodies capable of monitoring, such as the United Nations bodies and the domestic bodies required under

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the Optional Protocol to the CAT. Under the Optional Protocol to the CAT, each signatory must have a “national preventive mechanism” with the power to examine the treatment of detainees, make recommendations to relevant authorities, and submit proposals and observations concerning legislation.<sup>16</sup> States Parties “undertake to publish” the preventive mechanisms’ reports, which can publicize torture when discovered. In this way, states can “shame countries into compliance,” as one NGO representative phrased it. DHS officials and NGO representatives suggested that monitoring authorities must receive training, but one person mentioned that experience might be more effective than training.

A CRCL official discussed factors generally considered to improve the effectiveness of monitoring. For example, someone trained to recognize signs of torture should make routine, spontaneous visits. The visits should be in private with the individual, and the monitor should bring his or her own interpreter. Even if the International Committee of the Red Cross (ICRC) has access to an individual, ICRC delegates report treatment to the detaining authorities, not to the U.S. government.

One NGO representative said that there should be “intrusive monitoring with a country that is not that unstable,” particularly if that person has been tortured in that state before.

### **NGO Views on Assurances**

Partly because monitoring cannot prevent torture, some of the NGOs we interviewed argued that assurances are inherently flawed. In addition to the problems with monitoring, NGO representatives said that the “more likely than not” standard presents such a high bar that an alien who meets it should never be returned, with or without assurances. They also said that assurances should never be used because they are not mentioned in the CAT and can be given verbally. They cited issues with due process, credibility, and individual fear factors. Finally, they said that there is no accountability, and those who torture know how to do so without leaving obvious marks.

Other NGO representatives, however, explained that when assurances are used, then the human rights movement will try to empower their proper use and strengthen the process to diminish torture. But they explained that the human rights movement concerns itself with improving conditions overall and may not be able to account for the treatment of a particular individual.

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<sup>16</sup> The United States is not a signatory to the Optional Protocol to the CAT, and the country to which the individual is removed also might not be a party.

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USCIS officials who were interviewed acknowledged that assurances cannot guarantee that torture will not occur. In follow-up comments, USCIS officials clarified that the standard for determining whether a return is consistent with Article 3 obligations is not whether assurances can perfectly guarantee that torture will not occur, but rather whether torture is more likely than not to occur in light of the assurances and all other relevant considerations. A Department of State official said that because assurances are assessed in advance, the Department of State knows who within the providing authority is credible and has capacity. Again, the risk analysis depends on how the providing authority relates to its government and that government's relationship with the United States.

## **Management Comments and OIG Analysis**

Our report did not contain recommendations. Therefore, the Department did not have to describe any corrective actions. However, in addition to technical comments, which we evaluated and used to make changes to the report where we deemed appropriate, the Department provided a written response consisting of general comments regarding its assurances process. A summary of the Department's general comments and our analysis is included below. A copy of the Department's entire response is included as appendix B.

**Management Comments:** The Department has an assurances process that is transparent and provides safeguards for aliens for whom diplomatic assurances have been obtained. During the reporting period, in collaboration with the Department of State, the Department focused on improving its procedures for seeking and using assurances when it is ordered that an alien's removal to a particular country must be withheld or deferred because the alien would more likely than not be tortured if removed to that country. The Department will consider the use of assurances only in extraordinary cases. If ICE's Director, who fills the role of the former INS Commissioner for the purposes of assurances regulations, determines, in consultation with the Department of State, that the assurances are reliable, the matter will be referred to the Deputy Secretary of DHS for a decision whether to uphold the reliability determination. If the Deputy Secretary decides to terminate the withholding or deferral of removal order, that decision will be held in abeyance for a reasonable period to allow the alien an opportunity to pursue judicial review consistent with

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the implementing legislation. The Department considers reliability factors generally accepted by the U.S. Government such as: 1) the terms of the assurances and whether the assurances were provided in good faith; 2) the identity, position, and scope of the authority of the official providing the assurances; 3) whether there is objective basis for believing that the assurances will be fulfilled; and 4) the extent to which compliance with the assurances is verifiable. In assessing compliance with assurances, the Department examines whether an effective post-removal monitoring procedure exists. DHS and Department of State officials use their respective foreign policy, diplomacy, protection law, and country conditions expertise to decide whether to seek and credit assurances. The Department did not agree with all views in our report, but expressed its appreciation for our efforts in describing the procedures for CAT claims in immigration cases and the steps that it has taken to improve its assurances process. The Department also expressed its interest in continuing to cooperate with us and other stakeholders to ensure continued compliance in removal cases with obligations and regulations that implement the CAT.

**OIG Analysis:** In its comments, the Department states that it established an assurances process that provides for transparency and procedural safeguards for aliens for whom diplomatic assurances have been obtained. However, during our review, Department officials explained that the Department’s approach to assurances is ad hoc because, by their nature, assurances are fact-dependent and infrequent. We were provided no written departmental procedure or process guiding the Department’s use of assurances. Even the description of the process in the Department’s comments contains caveats by stating that aliens “generally” are provided an opportunity to review and present evidence on the sufficiency of assurances, and by identifying the reliability factors on which the Department “generally” relies. In the absence of a definitive description of the Department’s process, either as it existed previously or in its current form, we were unable to assess the steps that the Department has taken to improve its assurances process or any collaboration it has undertaken with the Department of State.

The Department also states that the decision to terminate deferral or withholding of removal will be stayed for a reasonable period to allow an alien to pursue any judicial review that may be available. First, we are unaware of any time frames within the Department for it to determine whether to terminate deferral or withholding of removal of an alien for whom it has sought assurances. Second,

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we are not aware of any available right to judicial review. In fact, the legislation implementing the CAT—the FARRA—states that “nothing should be construed as providing any court jurisdiction to consider or review claims raised under [CAT]” except as part of the review of a final order of removal. Similarly, CAT-implementing regulations state that “there shall be no judicial appeal or review or any action, decision, or claim raised under the [CAT] . . . except as part of the review of a final order of removal pursuant to section 242 of the [INA].” Based on the plain language of CAT-implementing legislation and regulations, it is our view that an alien has the right to challenge termination of deferral or withholding of removal to the extent that it is a final order of removal. The Department argued in *Khouzam*, however, that the court did not have jurisdiction to consider termination of deferral of removal because the termination decision was not a final order of removal, but rather was a cause or claim under the CAT that was precluded from judicial review.

## Appendix A

### Purpose, Scope, and Methodology

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We conducted this review of removals pursuant to immigration law in response to a request from the Special Interagency Task Force on Interrogation and Transfer Policies. The Task Force asked that we report on the removals conducted by DHS that rely on assurances of humane treatment of persons removed to another country.

Specifically, the Task Force directed that we report on the process for obtaining assurances, the content of assurances, the implementation and monitoring of assurances, and post-removal treatment of the person removed. We were required to report the number of instances between August 24, 2009, and August 25, 2010, when removals involved obtaining assurances.

Within DHS, we interviewed staff from the Office of the General Counsel, ICE, CBP, CRCL, and USCIS. In addition, we interviewed staff from the Department of State; a consortium of NGOs; representatives from the Columbia School of Law because of their work on a major project involving alien detention; and attorneys from the law firm Crowell and Moring, which is representing one of the three Rwandan nationals.

We collected and reviewed documents and records relevant to DHS' assurances process.

We performed fieldwork from September to November 2010. Our review was conducted under the authority of the *Inspector General Act of 1978*, as amended, and according to the *Quality Standards for Inspections* issued by the President's Council on Integrity and Efficiency.

## **Appendix B**

### **Management Comments to the Draft Report**

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#### **DHS Response to OIG Report on Assurances**

President Obama has repeatedly underscored the Administration's commitment to upholding the United States' obligations under the U.N. Convention Against Torture (CAT) and reaffirming the Convention's underlying principles. In Executive Order No. 13491 (Jan. 22, 2009), the President established the Special Interagency Task Force on Interrogations and Transfer Policies, a primary mission of which was "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."

In its August 24, 2009 report, the Task Force made important recommendations to the Executive Branch concerning implementation by the United States of its obligations under Article 3 of the CAT, which prohibits the transfer or removal of an individual from the United States to a country in which the individual would more likely than not be subjected to torture. One recommendation was that the Inspectors General of the Departments of State, Defense and Homeland Security prepare annually a coordinated report on transfers or removals conducted by each of their agencies in reliance on treatment assurances from foreign governments.

The Department of Homeland Security (DHS) is pleased to receive this initial annual report from the DHS Office of Inspector General (OIG), which covers DHS removals of individuals during the period from August 24, 2009 to August 25, 2010. As the report indicates, DHS did not seek or obtain assurances or remove any alien based on assurances during the reporting period.

During this period, however, in collaboration with the Department of State, the Department has focused on improving its procedures for seeking and using assurances when an immigration judge or the Board of Immigration Appeals (which fall under the jurisdiction of the Department of Justice (DOJ)) orders that an alien's removal to a particular country must be withheld or deferred because the alien would more likely than not be tortured and therefore cannot be removed to that country consistent with the legislation and regulations implementing U.S. obligations under Article 3 of the CAT. The Department will consider the use of assurances only in extraordinary cases, such as those in which the alien is a serious criminal or presents a security threat.

The Department has established an assurances process that provides for appropriate transparency and substantial procedural safeguards for aliens regarding whom treatment assurances have been obtained. For instance, aliens generally are provided an opportunity to review the assurances and are allowed to present evidence on the sufficiency of the assurances. If the Director of U.S. Immigration and Customs Enforcement (who legally stands in the shoes of the former INS Commissioner for

## **Appendix B**

### **Management Comments to the Draft Report**

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purposes of the DHS and DOJ assurances regulations) determines, in consultation with the Department of State, that the assurances are reliable, the matter will be referred to the Deputy Secretary of Homeland Security for a decision whether to sustain the reliability determination and whether to terminate the withholding or deferral of removal order based on the assurances. Once again, the alien is afforded an opportunity to make a written submission. If the Deputy Secretary decides to terminate the withholding or deferral of removal order, the decision will be stayed for a reasonable period to allow the alien an opportunity to pursue any judicial review that may be available.

In making these determinations, the Department takes into account assurances reliability factors generally accepted by the U.S. Government. These reliability factors generally are: (1) the terms of the assurances and whether the assurances were provided in good faith; (2) the identity, position, and scope of authority of the official providing the assurances; (3) whether there is a sound, objective basis for believing that the assurances will be fulfilled; and (4) the extent to which compliance with the assurances is capable of being verified. In assessing compliance with the assurances, the Department examines whether a robust post-removal monitoring mechanism would be in place that would allow for consistent, private access to the individual with minimal advance notice to the detaining government. Responsible DHS and Department of State officials bring to bear their respective foreign policy, diplomacy, protection law, and country conditions expertise throughout the process of deciding whether to seek assurances from a particular foreign government, how to negotiate the terms of such assurances, and whether to credit the reliability of assurances that are obtained.

Although the Department does not agree with all of the views recounted in the OIG's report, we appreciate the OIG's efforts in describing the procedures for consideration of CAT claims in immigration cases and the steps that DHS has taken to improve its assurances process. We look forward to continued cooperation with OIG and other stakeholders as we work to ensure continued compliance in removal cases with U.S. obligations imposed by the legislation and regulations implementing the Convention consistent with the President's policies and the Task Force's recommendations.



**Appendix C**  
**Tasking Document**

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Office of the General Counsel  
U.S. Department of Homeland Security  
Washington, DC 20528



**Homeland  
Security**

December 22, 2009

Richard L. Skinner  
Inspector General  
U.S. Department of Homeland Security  
Washington, DC 20528

Dear Mr. Skinner:

Pursuant to Executive Order 13491 (January 22, 2009), the President established a Special Interagency Task Force on Interrogation and Transfer Policies (Special Task Force). The Special Task Force, which includes the Department of Homeland Security, was tasked with providing recommendations on the subjects within its terms of reference.

Please be advised that one of the Special Task Force's recommendations relates directly to the Office of the Inspector General:

The Inspectors General of the Department of State, the Department of Defense, and the Department of Homeland Security should prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances [of humane treatment of persons transferred by the United States to another country]. The report should, with due regard for confidentiality and classification of information, address the process for obtaining the assurances, the content of the assurances, the implementation and monitoring of the assurances, and the post-transfer treatment of the person transferred.

Please coordinate with the Inspectors General of the Departments of State and Defense to prepare the recommended annual report. We would appreciate your keeping this office informed of progress in implementing this request.

If you have any questions, please contact [REDACTED] from my office.

Very truly yours,

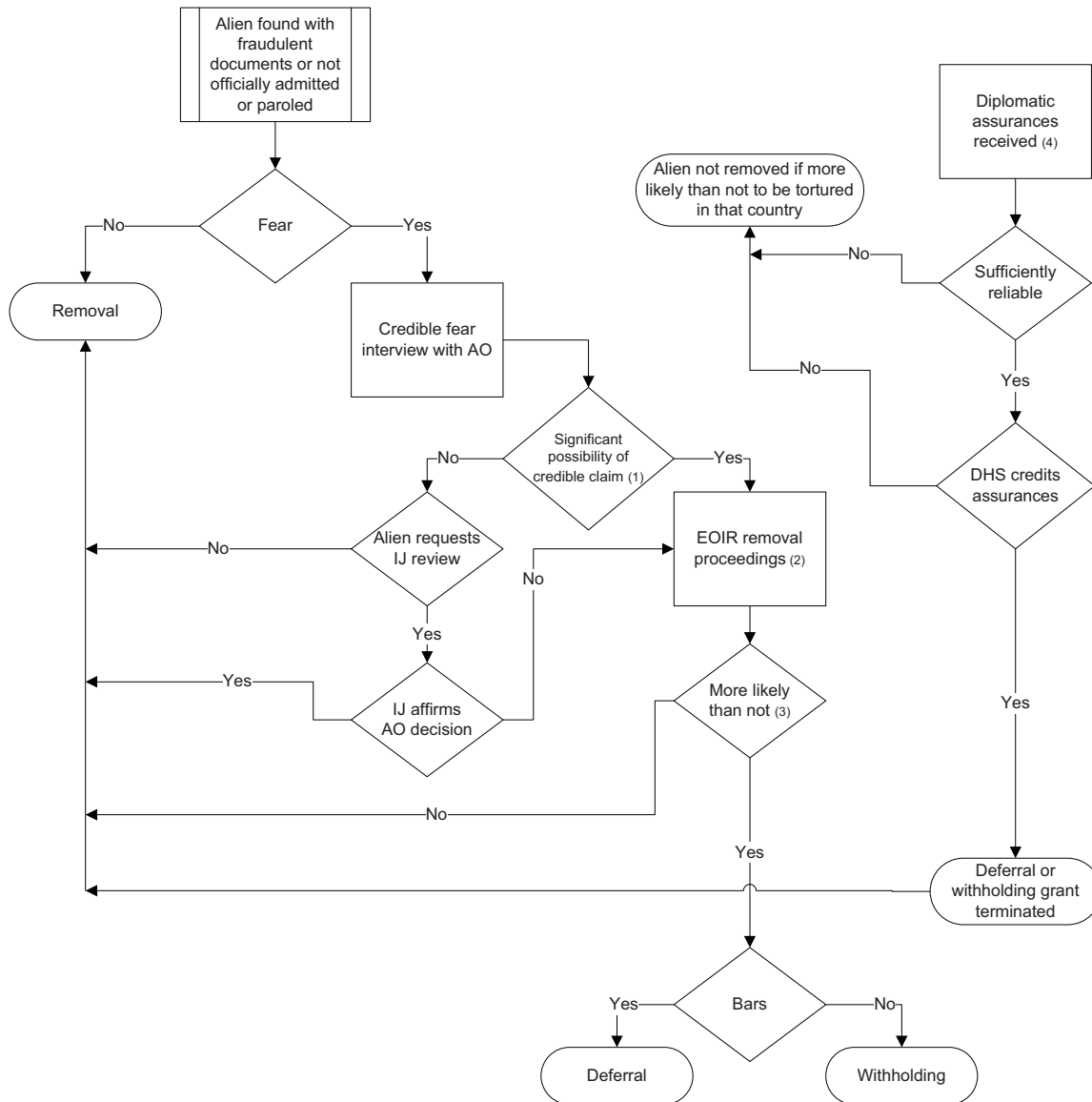
A handwritten signature in cursive script that reads "David A. Martin".

David A. Martin  
Principal Deputy General Counsel

<sup>16</sup> DHS requested that this personally identifiable information not be disclosed.

**Appendix D**  
**CAT Protection Process for Expedited Removals Per INA § 235(b)(1)**

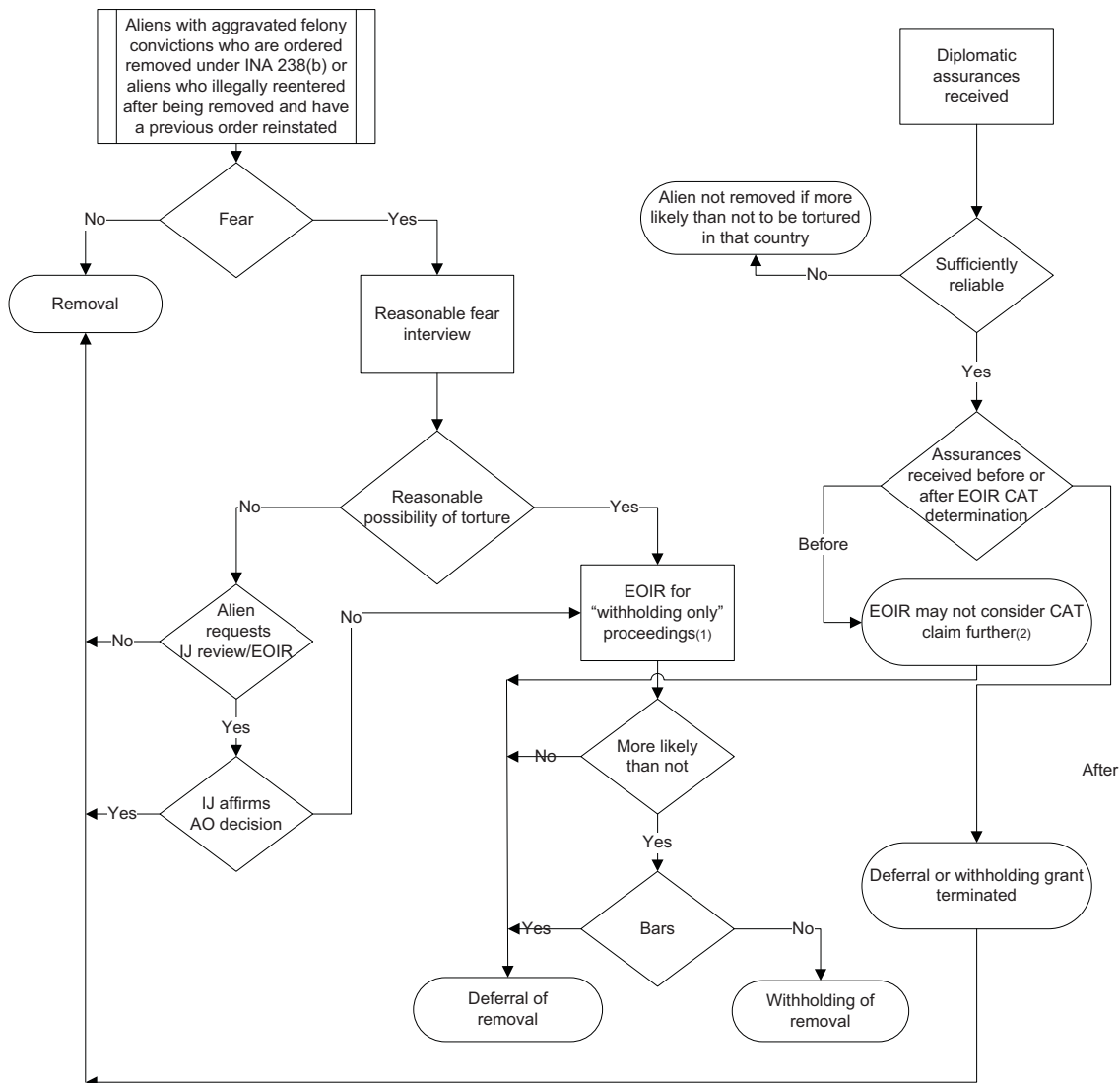
**CAT Protection Process for Expedited Removals Per INA § 235(b)(1)**



(1) The "significant possibility of credible claim" standard is less stringent than the "reasonable possibility" standard for other administrative removals.  
 (2) Alien may apply for asylum and/or CAT protection. Credible fear is not limited to withholding only proceedings. See INA § 240.  
 (3) Alien has the right to appeal to the Board of Immigration Appeals.  
 (4) Once assurances are provided, an immigration judge, the Board of Immigration Appeals, or an asylum office shall not further consider CAT protection. See 8 C.F.R. §§ 208.18(c)(3), 1208.18(c)(3); but see *Khouzam v. Attorney General*, 549 F.3d 235 (3d Cir. 2008) (finding a due process right, before CAT protection is terminated, to some degree of impartial review of the reliability of diplomatic assurances).

**Appendix E**  
**CAT Protection Process for Removals Per INA §§ 238(b) and 241(a)(5)**

**CAT Protection Process for Administrative  
Removals Per INA § 238(b) and Reinstatement  
of Removal Per INA § 241(a)(5)**



(1) Alien has the right to appeal to the Board of Immigration Appeals

(2) See 8 C.F.R. §1208.17(c)(3); but see *Khouzam v. Att'y Gen. of the U.S.*, 549 F.3d 235 (3d Cir. 2008) (finding a due process right to some degree of impartial review of the reliability of diplomatic assurances before CAT protection is terminated).

**Appendix F**  
**Major Contributors to this Report**

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Carlton I. Mann, Assistant Inspector General, Inspections  
Richard Reback, Counsel to the Inspector General  
Nancy Eyl, Assistant Counsel to the Inspector General

**Appendix G**  
**Report Distribution**

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