Testimony of the
Center for National Security Studies by
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United States Senate

Restoring the Rule of Law

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We appreciate the opportunity to participate in such a critically important effort by Senator Feingold and this Committee.

The Center is the only non-profit organization whose core mission is to prevent claims of national security from being used to erode civil liberties, human rights, or constitutional procedures. The Center works to preserve basic due process rights, protect the right of political dissent, prevent illegal government surveillance, strengthen the public's right of access to government information, combat excessive government secrecy, and assure effective oversight of intelligence agencies. It works to develop a consensus on policies that fulfill national security responsibilities in ways that do not interfere with civil liberties and constitutional government.

Introduction. The story of this administration's disrespect for the rule of law and separation of powers, as well as the abuses visited on individuals, is well-known and well told by others who have submitted statements to this Committee. We will outline some recommendations for actions the next administration must take to remedy these problems. While these recommendations are focused on actions by the Executive Branch, some solutions will require joint congressional and executive action, including legislation.

The Center for National Security Studies has challenged unconstitutional government surveillance for the past thirty years. Since September 11th, we have worked on many surveillance and detention issues and, in particular, their effect on minority and immigrant communities. The following recommendations are based on the principles and experience of the past few decades. We have developed them after close consultation with Suzanne Spaulding (who has separately submitted testimony) and many civil liberties and civil rights groups engaged on these issues. Ultimately, however, the views and conclusions laid out in this testimony are those of the Center for National Security Studies.

Recommendations concerning Domestic Surveillance, *i.e.*, government collection of information on Americans for counter-terrorism and other national security purposes:

Since immediately following the terrible attacks of 9/11, there has been an expansion of secret government surveillance powers through secret presidential

directives, changes in laws and regulations and investment in new technologies with much greater capabilities to acquire, store and analyze information on Americans. There has also been a large-scale reshuffling of domestic intelligence responsibilities, including the establishment of the Office of the Director of National Intelligence and the Department of Homeland Security, which has resulted in many more agencies and government officials having access to sensitive information about individuals.

Much of the debate about these powers has focused on whether they were a violation of the law, as in the case of NSA warrantless spying, or whether there were sufficient safeguards in place to prevent violations of the law, as with the discussions concerning internal FBI oversight. There has been considerably less attention focused on what should be the standards and criteria that must be met according to law before the government can collect information on Americans–usually in secret and to be kept virtually indefinitely–which will be available for any "authorized" use by numerous government agencies.

At the same time, the standards for such collection, retention and use have been substantially weakened. In general, the new framework adopted by this administration has authorized surveillance so long as the government's "purpose" is to collect information on Americans for a legitimate reason, e.g., to gather foreign intelligence or address national security threats and its techniques comply with the administration's crabbed interpretation of the Fourth Amendment's protections. But substituting this requirement of a legitimate purpose for a framework that required factual predication before conducting surveillance allows virtually unfettered collection of information about Americans. The only remaining prohibition is that the government may not gather information for an illegitimate purpose, which of course no government agency would ever own up to in any event.

There is no doubt that such an approach poses grave risks to privacy and civil liberties, and it is not clear that adequate safeguards can ever be devised for such broad powers. At the same time, there is virtually no evidence that such an approach is, in fact, effective counterterrorism, much less the only or most effective means of preventing terrorism.

The next administration needs to ensure that the government's domestic surveillance and intelligence activities target terrorists, not minorities or political dissenters.

To assist with this effort, we are attaching a Statement of Principles for Constitutional Law Enforcement the Center helped develop and that was signed in 2002 by more than 70 public interest organizations. This statement expresses deep concerns about domestic law enforcement and intelligence activities, and enumerates important principles of non-discrimination, due process and respect for privacy required by the Constitution of the government in its dealings with Americans.

Goals for restoring the rule of law to domestic surveillance. The next administration needs to:

- Restore the trust of the American people that their government abides by the rule of law and is not engaged in illegal spying on them;
- Provide accountability for illegal surveillance in the past eight years; and
- Adopt domestic surveillance policies that are effective in identifying, locating and prosecuting those who are planning terrorist attacks and are also consistent with constitutional protections for individual privacy and liberty and the law.

In her testimony, Ms. Spaulding has spelled out the essential connections between effective counter-terrorism and respect for individual rights and the rule of law, which we will not repeat here. (Domestic surveillance, of course, is undertaken for a variety of "foreign intelligence" purposes, not just counter-terrorism, but these comments will focus on counter-terrorism as illustrative of the broader range of surveillance activities.)

Presidential announcement or directive. The next President needs to set a new framework by making a public commitment that his administration will comply with the following principles when collecting information on Americans and conducting domestic surveillance activities. The government will:

- Abide by the law;
- Operate with the greatest degree of transparency consistent with the necessities of legitimate surveillance activities;
- Respect the constitutional roles of Congress and the judiciary, recognizing that all branches have responsibilities to conduct oversight of government surveillance of Americans, and specifically pledging to cooperate with the other two branches by providing the information needed for them to carry out their legislative, oversight and judicial roles; and
- Respect the Fourth amendment and privacy rights of Americans and carry out necessary surveillance activities in the most focused and effective way possible.

In particular, domestic surveillance and intelligence activities should to the greatest extent possible collect and retain information on individuals only when there is some degree of predication, *i.e.*, some reason to believe that the individual is involved in some way with criminal activities, including plotting terrorist attacks.

Accountability for the current administration's domestic spying. Providing accountability for what has happened to date is not only essential for determining how to frame the most effective policies moving forward, but also essential for preserving constitutional government and the rule of law. Given the existing roadblocks to judicial review of past programs, *e.g.*, the recent congressional amnesty for the companies involved in the warrantless NSA spying, the next administration has a critical responsibility to ensure accountability. To do so, it should:

- Immediately provide to Congress the information requested concerning domestic surveillance and intelligence activities in the U.S. without attempting to impose restrictions regarding access by Members of Congress;
- Immediately review whether the administration's responsibility to keep the Congress "fully and currently informed" of all intelligence activities, including any illegal intelligence activity, through disclosures to the congressional

intelligence committees has been fulfilled with regard to domestic intelligence activities (*see, e.g.*, 50 U.S.C. 413(a)(1), 413(b));

- Direct all agencies to provide full and prompt cooperation with Inspector General inquiries concerning domestic surveillance activities, including the congressionally mandated inquiry in the Foreign Intelligence Surveillance Amendments Act; and
- Conduct a declassification review of those documents that the American people have a right and a need to see, starting with the Justice Department legal opinions and other directives and policies concerning domestic intelligence activities as well as the legal opinions of the FISA court that were cited by this administration in seeking changes to FISA, but withheld from the public and much of Congress. Such materials can be reviewed in order to redact any sensitive and secret intelligence information, whose disclosure would cause more harm than good. [1]

Executive Branch Review. As detailed in Ms. Spaulding's testimony, the administration should also initiate a comprehensive review of domestic intelligence policies and activities to determine their effectiveness and their consistency with constitutional principles. Such review should be led by the next Attorney General with full cooperation from all other agencies. We refer you to Ms. Spaulding's testimony for an explication of the need for such a review and how it should proceed.

Cooperation with congressional inquiry. We also believe that Congress needs to undertake a bicameral inquiry concerning domestic surveillance and other domestic intelligence activities to determine what legislative changes are needed. The next administration should pledge to cooperate with such an inquiry by providing needed information in a timely manner.

Policy Changes. It is rare that a new administration undertakes the construction of an entirely new legal and policy architecture instead of making incremental changes where needed. Yet that is precisely what the current administration did regarding the rules and policies governing domestic surveillance of Americans. In response to the 9/11 attacks and long held ideological views—and enabled by an explosion in technological surveillance capabilities and the failure of congressional oversight encouraged by political fear-mongering—the Bush administration fundamentally changed the principles and practices limiting government information collection and surveillance of Americans.

They did so without any acknowledgment of the enormity of the changes. As Ms. Spaulding points out, the legal framework for surveillance is now a "Rube Goldberg"-like structure, and this patchwork of laws makes it difficult to understand the full impact of the changes. Moreover, the issues that have been the focus of public debate have been largely technical and frequently subjected to less scrutiny than they deserved because of

[1] The Center has long urged that the standard for declassification should be whether the public interest in knowing the information outweighs the national security harm anticipated from disclosure; see Professor Stone's testimony and cf. E.O. 13292, sec. 3.1 (b), "in some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified."

the political pressures surrounding the debate. (For example, while there have been many abstruse and technical debates around such issues as the pre-9/11 "wall" between law enforcement and intelligence, that shorthand was used to obscure rather than illuminate the pre-9/11 failures and how the administration's proposals would address those failures. The shorthand has also stunted consideration of the adverse consequences of these proposals.)

There is no doubt that the government made many mistakes before 9/11, that globalization has changed the vulnerabilities of the United States, that technology has outpaced the law in some areas, and that changes were needed to ensure the most effective possible counterterrorism effort consistent with our Constitution. However, a comprehensive review is needed as to whether the changes made in the past eight years are in fact necessary and effective or whether other approaches would be more effective and less threatening to the balance of power between the government and the people. As Senator Sam Ervin explained in 1974:

> [D]espite our reverence for the constitutional principles of limited Government and freedom of the individual, Government is in danger of tilting the scales against those concepts by means of its information gathering tactics and its technical capacity to store and distribute information. When this quite natural tendency of Government to acquire and keep and share information about citizens is enhanced by computer technology and when it is subjected to the unrestrained motives of countless political administrators, the resulting threat to individual privacy makes it necessary for Congress to reaffirm the principle of limited, responsive Government on behalf of freedom.
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> Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom: the more the Government or any institution knows about us, the more power it has over us. When the Government knows all of our secrets, we stand naked before official power. Stripped of our privacy, we lose our rights and privileges. The Bill of Rights then becomes just so many words.[2]

Renunciation of the unsupportable and extreme views by this administration concerning constitutional requirements, statutory interpretations, and policy needs. This administration justified these unprecedented and extraordinary changes in government power in part by adopting extreme views of executive power and constitutional protections. The next administration should renounce those views. In particular, it should renounce:

> The claim that the President has Article II powers to conduct secret domestic surveillance of Americans for national security purposes, including in cases where such action has not been specifically prohibited by congressional enactment;
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> The claim that the government's authority to conduct searches and seizures is limited by only the most narrow interpretations of Fourth Amendment

[2] Senator Ervin, June 11, 1974, *reprinted in* COMMITTEE ON GOVERNMENT OPERATIONS, UNITED STATES SENATE AND THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974 S.3418, at 157 (Public Law 93-579)(Sept. 1976)

requirements—even when such interpretations are in dispute; and, most specifically,

> The claim that the government has authority to search or wiretap an American without obtaining a court order pursuant to statutory authority should be renounced.

The next administration should also recognize that compliance with the current administration's interpretations of existing privacy statutes, including the Privacy Act and the Electronic Communications Protection Act, is not adequate to ensure that Americans' privacy is being respected. It should commit to cooperate with Congress to enact statutory protections for seizures of information held by third parties about individuals, affording Fourth Amendment protections to sensitive personal information.

New legal and policy framework for surveillance policies. The next administration should adopt a framework that considers the broader question of how the legitimate needs of the government to collect information and conduct surveillance can be best reconciled with the equally important mandate to respect individual rights. The framework should explicitly require that surveillance policies operate in the least intrusive manner possible consistent with legitimate law enforcement and national security needs.

Specifically, the administration should insist that policies comply with the following principles: the government should collect no more information on Americans than is necessary; it should use the least intrusive means to do so; it must have explicit protections against racial or religious profiling and protections for First-Amendment protected activities; and it should operate with the greatest possible degree of transparency. *Compare* E.O. 12333 sec. 2.4 (requiring the use of "least intrusive collection techniques feasible").

While the results of the comprehensive reviews by the Attorney General and the Congress will be needed in order to determine how best to resolve many of the details of many existing authorities and practices, the necessity for some reforms is already clear.

Electronic surveillance and physical searches under FISA.

The administration should direct that electronic surveillance and physical searches of Americans' homes and offices be conducted in accordance with these principles of least intrusive means and greatest transparency consistent with national security and law enforcement requirements.

Surveillance under FISA is less transparent than surveillance conducted under the criminal rules in several key respects: the target of the surveillance is never notified of the wiretapping or search unless he or she is indicted; an innocent target of such surveillance can never learn what is included in government files on himself or herself as a result of the surveillance; even if notified of the surveillance because indicted, there is never any opportunity for meaningful judicial review of the government's warrant application because the application is always withheld from the target. There is no

necessity for such automatic complete secrecy in every case. The Attorney General should direct that:

where feasible electronic surveillance and physical searches should be conducted under the criminal authorities rather than FISA authorities;

where surveillance is conducted under the FISA authorities, as much information as possible should be disclosed to the target when the surveillance/investigation is closed or charges are brought; and

amendments to FISA to provide for greater transparency and accountability should be considered.

Surveillance authorized under FISA including electronic surveillance under this summer's amendments and pen register/trap and trace surveillance is also much broader with less oversight than that conducted under law enforcement authorities. The Attorney General should direct a review of the constitutional objections made to the breadth of these authorities and in the meantime direct that these authorities be used only when absolutely necessary.

Collection of sensitive personal information held by third parties, such as financial records and call records.

Current legal authorities have allowed the secret collection of literally hundreds of millions of records on Americans who have never been and will never be charged with any wrongdoing. The Attorney General should undertake to revise and re-focus such collection authorities and limit their use. This could be done by modifying Patriot Act provisions permitting the clandestine collection of private personal information about people who are not suspected of terrorist acts or plots; including reforming the National Security Letter (NSL) powers that permit the FBI to obtain sensitive personal information.

Limit the creation of massive data-bases and data-mining on Americans.

The administration should work with Congress to impose meaningful restrictions and oversight on the collection and data-mining of personal information about individuals in the U.S. throughout intelligence agencies.

The Attorney General should also undertake to review the existence of masses of personal data already accumulated in the FBI's Investigative Data Warehouse with an eye toward ensuring that such databases are properly focused.

FBI investigations of Americans suspected of no wrong-doing.

The Attorney General should strengthen the Guidelines for FBI investigations to restore the protections that have been eliminated or weakened in the past several years.

Use of undercover informants in places of worship or other First Amendment-protected gatherings.

The Attorney General should require that the Department of Justice make a determination of probable cause before the FBI uses a confidential informant to infiltrate mosques or other houses of worship or places where people are exercising First

Amendment rights. The Attorney General should also work with Congress to provide for judicial warrants in such cases.

Protection against religious and racial profiling in surveillance and against political spying.

The Attorney General should convene a task force to make recommendations to ensure the elimination of religious and racial profiling in domestic surveillance and intelligence activities by all agencies of the government and to ensure that First Amendment-protected activities do not trigger surveillance by the government.

Impose limits on domestic intelligence activities by the Defense Department.

The new administration should review and limit domestic intelligence activities by the Defense Department, *e.g.*:

ensure that new Defense Counterintelligence and Human Intelligence Center that has replaced the Counterintelligence Field Activity (CIFA) office does not restart domestic surveillance of Americans who disagree with U.S. policies; and

Impose meaningful checks on Defense Department collection and data-mining of private information on individuals in the U.S.

Protect against the unfair use of information to penalize individuals. The administration should work with Congress to end unwarranted watch lists, to ensure that individuals are not unfairly denied security clearances or employment or otherwise penalized.

Border searches: The administration should end the policy of seizing the laptops and private information of Americans returning to the United States without probable cause and without a warrant, and work with Congress to pass legislation protecting the rights of American travelers.

Department of Homeland Security. The administration should require the Department of Homeland Security to respect civil liberties and human rights in its surveillance and intelligence activities.

Military satellites should not be used to conduct domestic spying on people in the U.S.

The role of the Department of Homeland Security in collecting information on individuals other than in furtherance of its law enforcement duties should be revisited.

In all events, the protections and limits outlined above regarding domestic surveillance and intelligence activities should explicitly apply to DHS collection of personal information.

The Department of Homeland Security should eliminate discriminatory profiling and refocus its immigration and law enforcement efforts on those who pose a genuine threat of terrorist acts;

Remedies for unlawful surveillance.

The administration should work with Congress to ensure that individuals have a meaningful opportunity to obtain judicial redress for violations of their First and Fourth Amendment rights as well as violations of statutory protections.

Recommendations concerning Detention Policies.

As this Committee is also well aware, this administration has also adopted detention policies, which violate basic principles of due process and have served only to make the United States less, not more powerful in the world. These policies should also be changed.

Detention of non-citizens in the United States.

The next administration should restore due process protections for non-citizens facing detention or deportation.

Secret arrests:

The next administration should renounce the claim of authority to detain individuals in secret and should work with the Congress to outlaw such practices.

Abuse of material witness authority.

The next administration should renounce the claim of authority to imprison individuals using the material witness authority, when the government's interest is not in securing trial testimony from such individuals, but in investigating them.

Detention and trial of alleged "Enemy Combatants" in the United States and elsewhere. The Center with the assistance of the Brennan Center for Justice has also prepared a set of recommendations for a new Detention Policy to replace this administration's "war on terror" framework. We have previously presented these to this Committee in our July 16, 2008 testimony but repeat them below for ease of reference.

A. Application of the Law of War or Criminal Law:

- When military force is used consistent with constitutional authorization and international obligations the United States should follow the traditional understanding of the law of war, including the Geneva Conventions. Individuals seized in a theater of active hostilities are subject to military detention and trial pursuant to the law of war.
- When suspected terrorists are apprehended and seized outside a theater of active hostilities, the criminal law should be used for detention and trial.

A new detention policy based on these principles would result in a stronger and more effective counterterrorism effort. It would ensure the detention and trial of fighters and terrorists in accordance with recognized bodies of law and fundamental notions of fairness and justice. It would ensure cooperation by key allies in Europe and elsewhere

who have insisted that military detention be limited. It would begin to restore the reputation of the U.S. military, damaged by the international condemnation of the abuses of this administration. And it would deprive al Qaeda of the propaganda and recruiting opportunities created by current policies.

The Supreme Court has reaffirmed that under the law of war, when the U.S. military is engaged in active combat, it has the authority to seize fighters on the battlefield and detain them as combatants under the law of war.[3] The traditional law of war, including the Geneva Conventions and Army Regulation 190-8,[4] should be followed when capturing and detaining individuals seized on a battlefield/in a theater of armed conflict/during active hostilities, such as Afghanistan or Iraq. Of course, following the traditional rules for detaining battlefield captives would in no way require "Miranda" warnings or other "Crime Scene Investigation" techniques. Nevertheless, the Bush administration deliberately ignored these military rules – including the requirement for a hearing under Article 5 of the Geneva Conventions -- when it seized individuals in Afghanistan who are now held at Guantanamo.[5]

(While some have claimed that the "battlefield" in the "war against terror" is the entire world, that claim is inconsistent with traditional understandings in the law. For example, one characteristic of a battlefield is the existence of Rules of Engagement, which permit the military to use force offensively against an enemy.[6] Military Rules of Engagement for the armed forces stationed in Germany or the United States for example, are quite different from those applicable to troops in Afghanistan or Iraq. Troops in the United States or Germany are not entitled to use deadly force offensively.)

Outside these battlefields, in countries where there is a functioning domestic judiciary and criminal justice system, criminal laws should be used to arrest, detain and try individuals accused of plotting with al Qaeda or associated terrorist organizations. Outside the war theater, criminal law has proved to be successful at preventing and punishing would-be terrorists, protecting national security interests and ensuring due process.[7]

B. The government must distinguish between the different categories of detainees, who are subject to different rules.

One of the key sources of confusion in the debates to date about detention policy has been to speak about "terrorism detainees" in general as if they are all subject to the same legal regime. Recognizing that the law of war must be followed when seizing individuals on the battlefield and that criminal law must be followed when arresting suspects in Chicago or Italy, makes it clear that there are different categories of detainees.

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[3] *See Hamdi v. Rumsfeld*, 542 U. S. 507 (2004).
[4] Enemy Prisoners of War, Retained Persons, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997).
[5] Article 5 requires that captives be given a hearing to determine whether they are prisoners of war.
[6] Corn and Jensen, *supra* note 1.
[7] *See* Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice*, Human Rights First, May 2008, available at: http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

- The first category includes fighters in Afghanistan or Iraq (or other countries where U.S. military forces are engaged in active hostilities in the future); the second category is Osama bin Laden and the other self-proclaimed planners and organizers of the 9/11 attacks. Pursuant to the congressional authorization, individuals in the first or second categories may be targeted, captured and tried under the law of war.
- The third category includes suspected al Qaeda terrorists seized in the United States or elsewhere, other than Afghanistan or Iraq, who must be treated as suspects under criminal law.
- The last category is current detainees at Guantanamo, which includes individuals alleged to fall within all three categories listed above. The detainees in Guantanamo are *sui generis* for a number of reasons, including that their treatment has violated military law and traditions and that it has become an international symbol of injustice.

Fighters captured in Afghanistan or Iraq (or other countries where U.S. military forces are engaged in active hostilities in the future) subject to military detention and/or trial:

Pursuant to the Supreme Court's ruling in *Hamdi*, individuals fighting in the Afghanistan or Iraq hostilities may be captured and detained pursuant to the law of war and may be held until the end of hostilities in the country in which they were captured.

All such individuals, immediately upon capture, should be provided a hearing pursuant to Article 5 of the Geneva Conventions and military regulations to determine whether they are entitled to be treated as prisoners of war, should be released as innocent civilians, or may be held as combatants pursuant to the Supreme Court's decision in *Hamdi*.

Any such individuals who are accused of violations of the law of war are subject to trial by a regularly constituted military tribunal following the rules of the Uniform Code of Military Justice as outlined below.

Osama bin Laden and the other planners and organizers of the 9/11 attacks:

In the September 2001 Authorization for the Use of Military Force, Congress specifically authorized the use of military force as "necessary and appropriate" against those individuals who "planned, authorized, committed or aided" the 9/11 attacks. The administration has identified approximately six individuals detained at Guantanamo as planners of the attacks and a limited number of others, including bin Laden, remain at large.

If such individuals are captured rather than killed, they should be treated humanely and protected from torture and cruel, inhumane or degrading treatment.

They may be held by the military until they are tried by a military tribunal or the end of the conflict with al Qaeda.

They may be tried by a regularly constituted military tribunal as outlined below.

Such individuals may also be tried in the federal district courts on criminal charges.

The best course from the standpoint of discrediting and opposing al Qaeda may be to conduct a fair public trial of these individuals, rather than detain them without trial.

Suspected al Qaeda terrorists seized in the United States or elsewhere other than Afghanistan or Iraq:

Individuals found in the United States or in other countries with a functioning judicial system (other than Afghanistan and Iraq) who are suspected of terrorist plans or activities, must be detained and charged pursuant to the criminal justice system and/or deported in accordance with due process.

Any such individuals may be transferred to other countries only in accordance with the rules outlined below. They must be protected against the danger of torture and may only be transferred in accordance with due process and to stand trial on criminal charges.

Individuals suspected of terrorist plotting may be subject to surveillance in accordance with domestic laws.

Individuals currently held at Guantanamo:

The United States should begin a process to close the Guantanamo detention facility. There are many difficult questions about how to accomplish this arising in part from the administration's failure to follow the law in detaining and seizing these individuals. The Center for American Progress has recently issued a report detailing an approach in line with these recommendations.[8]

The government should expeditiously transfer all those detainees it has determined are eligible for release to their home country or to some other country where they will not be subjected to abuse or torture.

Those individuals in Guantanamo who are not alleged to have been captured on the battlefields of Afghanistan or Iraq or fleeing therefrom may not be held by the military as combatants, but must be either charged with a crime, transferred to another country for prosecution on criminal charges, or released.

As recognized in *Boumediene*, all detainees at Guantanamo are also entitled to habeas corpus.

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[8] *See* Ken Gude, *How to Close Guantanamo*, Center for American Progress, June 2008, available at: http://www.americanprogress.org/issues/2008/06/pdf/guantanamo.pdf.

Those Guantanamo detainees who are alleged to have been captured in Afghanistan or Iraq and been part of al Qaeda or Taliban forces may be detained until the end of hostilities in those countries if the habeas court finds that they are such.[9] Such detentions without charge for the duration of hostilities were approved by the Supreme Court under *Hamdi* as having been authorized by the AUMF. At the same time, there are likely to be counterterrorism benefits to choosing to bring charges against such individuals and providing them with a fair trial.

Those detainees who are alleged to be planners or organizers of the 9/11 attacks may be detained until the end of the conflict with al Qaeda if the habeas court finds that they personally participated in the planning of the attacks.

Those detainees who are subject to military detention as described above and who are also charged with violations of the law of war may be tried by a regularly constituted military tribunal as outlined below.

C. Military tribunals for individuals who are properly held as combatants, either having been captured on the battlefield or having planned or organized the 9/11 attacks:

As recognized by the Supreme Court in *Hamdan*, combatants may be tried by military tribunals for offenses properly triable by such tribunals. Such tribunals must accord due process and be "regularly constituted courts." In addition, such tribunals must be seen by the world as fair and be consistent with the proud history of U.S. military justice in the past 50 years. The military commission system created for Guantanamo will never be seen as legitimate and thus should no longer be used to try detainees.

If military trials are sought for combatant detainees at Guantanamo, they should be conducted pursuant to the United States Uniform Code of Military Justice courts martial rules to the greatest extent possible.

D. End torture and cruel, inhumane and degrading treatment.

As the Supreme Court has made clear, all of these detainees are protected by Common Article 3 of the Geneva Convention and must be treated humanely. In particular:

All detainees should be treated humanely and be protected from torture and cruel, inhumane or degrading treatment. [10]

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[9] Whether al Qaeda fighters may be detained beyond the end of hostilities in Afghanistan need not be addressed, because peace in Afghanistan does not appear likely in the near future.

[10] For more specific recommendations about insuring humane treatment and ending torture, *see*, e.g., *Declaration of Principles for a Presidential Executive Order On Prisoner Treatment, Torture and Cruelty, National Religious Campaign Against Torture, Evangelicals for Human Rights, and the Center for Victims of Torture*, released June 25,

No individual may be detained in secret.

The government must institute new mechanisms to ensure that no person is transferred to a country where it is reasonably likely that he would be in danger of torture.

Individuals may only be seized and transferred to other countries in order to stand trial on criminal charges in accordance with due process and the domestic laws of the country they are transferred to.

The CIA program of secret detention and interrogation of suspected terrorists should be ended.

The administration should consider whether any overriding national security reason exists for CIA involvement in terrorism detentions and interrogations, which outweighs the demonstrated harm these activities have caused to the national security. Before determining that the CIA should again participate in any detention or interrogation activity, the administration should report to the Congress concerning the national security interests at stake and specifically outline how, if such participation is authorized, it would be conducted with adequate checks to ensure that its operation conforms to law and is fully consistent with the United States' commitment to human rights.

Conclusion

Disrespect for the law has harmed, not enhanced, our national security. The next administration has a crucially important opportunity to restore U.S. standing in the world and respect for individual rights and constitutional separation of powers at home. We appreciate this opportunity to outline our recommendations for doing so.
Thank you.

September, 2008

2008, available at: http://www.evangelicalsforhumanrights.org/storage/mhead/documents/declaration_of_principles_final.pdf, among others.