Scholars' Statement of Principles for a New President on U.S. Detention Policy: An Agenda for Change

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"Restoring the Rule of Law" Hearing

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Introduction

When terrorists attacked the United States on September 11, 2001, they killed thousands of innocent civilians and targeted symbols of our economic and military power. However, we must not let those attacks challenge the values this nation was founded on, which we hold dear. The next President (and next Congress) will have an opportunity to restore the United States' commitment to these values – fairness, liberty, the idea of basic inalienable rights, and the rule of law – in the national security arena. Among other areas of national security policy, a new President will need to undertake serious repair work to U.S. detention policy. Such repair work is ultimately necessary not only as a matter of principle but also to strengthen our security. This Statement of Principles represents a consensus among its signatories regarding the most effective way to reform the current broken system of detention.

Across the political spectrum, there is a growing consensus that the existing system of detention of terrorism suspects without trial through the network of facilities in Guantanamo, Bagram, and beyond is an unsustainable liability for the United States that must be changed. The current policies undermine the rule of law and our national security. The last seven years have seen a steady erosion of the rule of law in the United States through an overly expansive and disingenuous reading of the laws of war, the denial of ordinary legal process, the violation of the most basic rights, and reliance on unreliable evidence (including secret and coerced evidence). The current detention policies also point to the inherent fallibility of "preventive" determinations that are based on assessment of future dangerousness (as opposed to past criminal conduct).[1] Indeed, while the administration once claimed the Guantanamo detainees were "the worst of the worst," it subsequently cleared the way for release of more than 400 of them, indicating that a large number of the detainees were not so dangerous after all.

Because it is viewed as unprincipled, unreliable, and illegitimate, the existing detention system threatens our national security.[2] It creates resentment and potential grounds for

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[1] Empirical studies demonstrate that "preventive" detention determinations that rely on assessment of future dangerousness generate unacceptably high levels of false positives (i.e., detention of innocent people). *See, e.g.*, Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 385-386 (1990) ("The high level of false positives demonstrates that the ability to predict future crimes - and especially violent crimes - is so poor that such predictions will be wrong in the vast majority of cases. Therefore, judges should not use them as an independent justification for major deprivations of liberty such as detention").

[2] Because the current system threatens our national security, we strongly oppose any effort to extend the status quo by establishing (1) a comprehensive system of long-term "preventive"

recruitment of future terrorists, undermines our relationships with foreign allies, and emboldens terrorists as "combatants" in a "war on terror" (rather than delegitimizing them as criminals in the ordinary criminal justice system).[3] Moreover, the current system of long term (and, essentially, indefinite) detention diverts resources and attention away from other, more effective means of combating terrorism. Reflecting what has now become a broad consensus around the need to use the full range of instruments of state power to combat terrorism, the bi-partisan 9/11 Commission pointed out that "long-term success [in efforts to pursue al Qaeda] demands the use of all elements of national power: diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense."[4] Thus, in addition to revamping the existing detention program to bring it within the rule of law, the next President should utilize this broad array of tools to subdue terrorism.

In this Statement, we propose a set of principles that should guide any new detention policy. We then provide concrete policy recommendations for the next administration.

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detention without trial for suspected terrorists, and (2) a specialized national security court to make "preventive" detention determinations and ultimately to try terrorism suspects. Despite dressed up procedures, these proposals would make some of the most notorious aspects of the current failed system permanent. Perhaps most fundamental is the fact that the supporters of these proposals typically fail to make clear who can be detained, much less how such individuals, once designated, can prove they are no longer a threat. Without a reasonably precise definition, not only is arbitrary and indefinite detention possible, it is nearly inevitable. Moreover, many of the proponents of a renewed preventive detention regime explicitly underscore the primacy of interrogation with respect to detainees' otherwise-recognized rights. A detention system that permits ongoing interrogation inevitably treats individuals as means to an end, regardless of the danger they individually pose, thereby creating perverse incentives to prolonged, incommunicado, arbitrary (and indefinite) detention, minimized procedural protections, and coercive interrogation.

[3] In this regard, consider the widely-acknowledged shortcomings of the British experience with the IRA. *See, e.g.*, MICHAEL FREEMAN, FREEDOM OR SECURITY: THE CONSEQUENCES FOR DEMOCRACIES USING EMERGENCY POWERS TO FIGHT TERROR 69 (2003) ("The physical brutality of the army and the police in conducting searches and raids as well as the alleged inhumane treatment of prisoners greatly increased support of the IRA in Catholic communities").

[4] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 363-64 (2004), http://www.9-11commission.gov/report/911Report.pdf.

Statement of Principles: Credible Justice and National Security

The hard lessons of the last seven years teach that the next administration must adopt a true blueprint of reform. Our national security turns in large part on the promulgation of *credible justice*. Any new detention policy must thus operate according to four basic principles:

(a) Any new policy must observe the rule of law,[5] including constitutional and statutory bounds, human rights, and international humanitarian law. End-runs around the Constitution and basic rights for the sake of expediency or fear are ultimately counterproductive.

(b) Detention without trial is an extraordinary measure in our society in which "liberty is the norm."[6] The very notion of "preventive detention" runs fundamentally counter to our most cherished traditions of American justice by imprisoning people for what they *might* do in the future, not for acts they have actually committed.

(c) Every person—including those suspected of terrorism—deserves individualized process that provides a meaningful opportunity to confront the charges against him or her. No person should be treated as a means to an end, and interrogation alone should never suffice to justify detention.

(d) Credibility turns on transparency. Secrecy not only provides a breeding ground for abuses, but it also erodes public trust in government policies in the U.S. and abroad.

A Blueprint for Change: Key Policy Fixes

A program of credible justice leads to the following concrete policy recommendations for a new President:

1. Close Guantanamo: Upon taking office, a new President should immediately announce a firm timetable for closure of the detention center at Guantanamo. The process of closing Guantanamo should include a policy of reviewing each detainee case to categorize and pursue the following:[7]

[5] Conceptually, the term "rule of law" refers to more than just a list of rules of law to be followed. It refers to the idea that law "must be fixed and publicly known in advance of application, so that those applying the law, as much as those to whom it is applied, can be bound by it." Richard Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 3 (1997). According to this idea, law applies equally in all cases and binds both private parties and government agents. No one is above the law.

[6] United States v. Salerno, 481 U.S. 739, 755 (1987) (Rehnquist, C.J., with White, Blackmun, Powell, O'Connor, and Scalia, JJ.).

[7] These recommendations draw on three excellent reports: KEN GUDE, HOW TO CLOSE GUANTÁNAMO, CENTER FOR AMERICAN PROGRESS (June 2008),

a. a **first group** of detainees who are presumed to have committed crimes against the U.S. and should be **brought to U.S. soil for prosecution** in regular federal courts or in military courts (via courts martial proceeding) for crimes committed;

b. a **second group** of detainees who should be **transferred for prosecution in their home country or a third country**, in accordance with any applicable extradition principles, if they cannot be properly tried for crimes against the U.S.;

c. a **third group** of detainees who have not committed crimes against the U.S. and should be **repatriated to their home country for release**, in accordance with U.S. obligations under international human rights and humanitarian law;

d. a **fourth group** of detainees who have not committed crimes against the U.S., but must be **resettled in third countries**, rather than returned to their home country, where they face a risk of torture or other forms of persecution.

2. Scrap the Existing Military Commissions and Reject Specialized Terror Courts: The next President should dismantle the flawed Military Commissions and reject any effort to establish similarly flawed, specialized national security (or terror) courts. Using established U.S. courts to try terrorists will get trials moving more swiftly and would be an important step in restoring confidence in the American system of justice.

3. Look Beyond Guantanamo: Beyond Guantanamo, there are an estimated 25,000 "post 9/11 detainees" being held by the United States or on behalf of the United States worldwide.[8] Given its *sui generis* status, Guantanamo should not be the baseline or model upon which our broader detention program is built.[9] "We must not let the hard case of Guantanamo make bad law for all future counterterrorism detention operations."[10]

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http://www.americanprogress.org/issues/2008/06/pdf/guantanamo.pdf; HUMAN RIGHTS FIRST, HOW TO CLOSE GUANTANAMO: BLUEPRINT FOR THE NEXT ADMINISTRATION, http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf (August 2008); and SARAH E. MENDELSON, CLOSING GUANTÁNAMO: FROM BUMPER STICKER TO BLUEPRINT, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, http://www.csis.org/media/csis/pubs/080715_draft_csis_wg_gtmo.pdf (July 13, 2008).

[8] Amos N. Guiora and Daniel C. Barr, *Where Should the U.S. Try Terrorism Cases? U.S. Should Establish Domestic Terror Courts to Try Cases*, SALT LAKE TRIB. (June 20, 2008).

[9] Deborah N. Pearlstein, *Avoiding an International Law Fix for Terrorist Detention*, at 116 (forthcoming Creighton Law Review) (draft on file with the authors) (July 13, 2008) ("The Guantanamo dilemma … is the result of a series of now years-old, but unprecedented decisions by the United States to deny the [basic rights of the] Guantanamo detainees ").

[10] *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 110th Cong. (Sept. 16, 2008) (statement of Deborah N. Pearlstein).

4. Apply a Zero Tolerance Rule Regarding Torture and Cruelty: Both as a matter of principle and national security, a new President must adhere to treaties that the U.S. negotiated and ratified prohibiting torture and cruel treatment under any circumstances.[11] Since the September 11th terror attacks, the U.S. has gone from a policy of zero tolerance to a policy of zero accountability on torture,[12] which has led to widespread international condemnation. Thus, in parts of the world, photos of abuse from Abu Ghraib rival the Statue of Liberty as emblems of our great country and provide potential fodder for terrorist recruits. Yet, "[o]ur country was founded by people who sought refuge from severe governmental repression and persecution and who, as a consequence, insisted that a prohibition against the use of cruel or unusual punishment be placed into the Bill of Rights."[13] The next President must reassert that all acts of torture are criminal offenses[14] and that no official of the government – whether federal, state or local, civilian, military, or CIA – is authorized to commit or to instruct anyone else to commit torture.[15] Nor may

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[11] See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2), Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027, as modified by 24 I.L.M. 535 (1985) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture") [hereinafter Convention Against Torture], and Common Article 3, common to all four Geneva Conventions. In addition to being wrong as a matter of principle and creating resentment, torture can produce unreliable information. See John McCain, Torture's Terrible Toll, Newsweek, Nov. 21, 2005, at 34, available at http://www.newsweek.com/id/51200 (describing his own experience of giving false information under torture); Lt. Gen. Jeff Kimmons, Army Deputy Chief of Staff for Intelligence, Def. Dep't News Briefing on Detainee Policy (Sept. 6, 2006), available at http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090601442.html ("No good intelligence is going to come from abusive practices.").

[12] Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 IND. L.J 1145, 1147-48 (2006).

[13] *Id.* at 1148 (quoting Statement of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, On-the-Record Briefing on the Initial Report of the United States of America to the UN Committee Against Torture, Washington, D.C. (Oct. 15, 1999), http://www.state.gov/www/policy_ remarks/1999/991015_koh_rpt_torture.html).

[14] Convention Against Torture art. 4 ("Each State Party shall ensure that all acts of torture are offences under its criminal law").

[15] *Id.* art. 1, 2(3).

any official tolerate, condone, acquiesce or consent to torture or cruel treatment in any form.[16]

5. Close Secret Prisons Once and For All: When President Bush announced he was transferring over a dozen detainees from secret prisons run by the CIA overseas to Guantanamo, he failed to end the program of incommunicado CIA detention entirely. Despite U.S. criticism of disappearances by other governments, the Bush Administration's practice of disappearing individuals violates the most basic legal norms in the treatment of prisoners. A new President must end the practice of holding ghost detainees and should allow a neutral body, such as the International Committee of the Red Cross, access to all detainees.

6. Apply the Rule of Law: Bringing the U.S. detention program firmly within the rule of law would better serve the nation's interests going forward, because it would produce more accurate outcomes (regarding who should be detained) and restore our international credibility. Just as an extensive range of tools – diplomatic, military, economic, and otherwise – exists to combat terrorism, so too a broad array of possible legal regimes exists for detention of terrorists and terrorist suspects. These legal regimes exist both within international law (i.e., international criminal law, humanitarian law, and human rights law) and domestic law (i.e., domestic criminal law, immigration law, and related government powers). Rather than view detainees as falling in a legal black hole – within the gaps between and among these legal regimes – as the current administration has done, a new President should regard these multiple potentially relevant bodies of law as providing a useful spectrum "of different policy options in responding to different degrees [and types] of terrorist threat."[17] In particular, the next administration should restore rule of law in the following three areas:

    a. United States Constitution: A new administration should heed the constitutional principles that generally limit the deprivation of liberty as punishment for a crime, as opposed to as punishment purely for perceived dangerousness.[18] Preventive confinement has historically been limited to six categories: mental health (civil commitment);[19] public health (quarantine);[20] juvenile jurisdiction;[21]

[16] *Id*. art. 1 (prohibiting torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"); Convention Against Torture art. 16; Common Article 3, Geneva Conventions.

[17] Pearlstein, *Avoiding an International Law Fix for Terrorist Detention*, at 103.

[18] Foucha v. Louisiana, 504 U.S. 71, 72 (1992). Moreover, although not memorialized in the Bill of Rights, the Supreme Court recognizes that "the presumption of innocence is 'constitutionally rooted,' that it is 'axiomatic and elementary, and that its enforcement lies at the foundation of the administration of our criminal law.'" Miller & Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. at 414-15.

[19] *See* Addington v. Texas, 441 U.S. 418 (1979).

pre-trial confinement in criminal proceedings;[22] immigration;[23] and wartime detention consistent with the traditional laws of armed conflict.

b. U.S. Criminal Justice System: The criminal justice system has demonstrated that it has the capacity to detain terrorism suspects pending trial on charges pursuant to a variety of both terrorism-related statutes and more general statutes.[24] Moreover, the Classified Information Protection Act (CIPA), 18 USC app 3 §§1 et seq. and the Foreign Intelligence Surveillance Act (FISA), 50 USC §§ 1801 et seq. have been used effectively to protect the government's interest in avoiding the disclosure of national security information.[25]

c. International Legal Regimes: A new administration should apply an internationally accepted and accurate understanding of international law, rather than the inaccurate, minority view of international law advanced by the Bush administration's Office of Legal Counsel, particularly with regard to detention policy, torture, and rendition. As with U.S. domestic law, obeying the rule of international law (which the U.S. has been a leader in establishing and developing) is critical as a matter of principle, our national interest (for example, in fair treatment of captured U.S. soldiers), and international stability. The two primary international law regimes that regulate detention policy are international humanitarian law (IHL) and international human rights law. IHL recognizes the possibility of detention under particular circumstances during armed conflict until the end of hostilities to prevent individuals from rejoining the battle on behalf of the enemy.[26] It also requires, at a minimum, humane treatment and

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[20] *See* O'Connor v. Donaldson, 422 U.S. 563 (1975) (Burger, J., concurring).

[21] *See* Schall v. Martin, 467 U.S. 253 (1984).

[22] *See* United States v. Salerno, 481 U.S. 739 (1987); Bell v. Wolfish, 441 U.S. 520 (1979).

[23] *See* Zadvydas v. Davis, 533 U.S. 678 (2001).

[24] Through an analysis of 120 international terrorism cases pursued in federal courts over the last fifteen years, a study conducted by two former prosecutors, Richard Zabel and James Benjamin, demonstrates that our civilian criminal justice system has the capacity and flexibility to detain and punish terrorists without resorting to a system of detention without trial (beyond the regular pre-trial detention that is circumscribed by criminal law). Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (May 2008), http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf (compiled on behalf of Human Rights First).

[25] *See id.* at 77-90.

[26] Under the Third Geneva Convention, "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." Geneva Convention (III) Relative to the

other baseline protections.[27] However, the current administration's attempt to either assume IHL does not apply or, alternatively, stretch IHL to justify indefinite detention for interrogation of acts of terrorism that long have been considered a matter of domestic criminal jurisdiction is inconsistent with longstanding U.S. respect for the letter and spirit of IHL, is illegitimate in the eyes of the international community, and vastly increases the likelihood that individuals will be improperly detained.[28] International human rights law also regulates detention, as it applies in times of war[29] (as well as times of peace) and can only be derogated from under narrow circumstances.[30] Moreover, U.S. treaty

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Treatment of Prisoners of War, Art. 118, Aug. 12, 1949, (1955) 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364. *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 520 ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities").

[27] While the current administration spent most of the past seven years denying IHL protection, the Supreme Court has ruled that the baseline protections of Common Article 3 applied to the conflict between the U.S. and al Qaeda. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[28] Importantly, the Hamdi Court noted, "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized." *Hamdi*, 542 U.S. at 521.

[29] *See* Kadic v. Karadzic, 70 F.3d 232, 242-45 (2d Cir. 1995) (applying both IHL and international human rights law in resolving plaintiffs' claims); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9) ("the protection offered by human rights conventions does not cease in case of armed conflict"); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) ("[T]he protection of the [ICCPR] does not cease in times of war"); and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, O.A.S. OEA/Ser.L/V/II.116, doc. 5 rev. ¶ 42, 1 corr. (Oct. 22, 2002) ("[T]he international human rights commitments of states apply at all times, whether in situations of peace or situations of war"). *See also* MICHAEL BOTHE, KARL JOSEPH PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICT: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 619 (1982) ("[I]t cannot be denied that the general rules contained in international instruments relating to human rights apply to non-international conflicts"); and Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 266 (2000) (noting that international human rights law applies to fill the void where the specialized law of war is silent).

[30] *See* International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The U.S. has not officially derogated from any rights since the September 11 attacks. Article 4 only permits derogation from particular rights, *id.* art. 4(2), and only in times of public emergency "which threaten[] the life of the nation and the existence of which is officially proclaimed." *Id.* art. 4(1). Further derogations must be "strictly required by the exigencies of the situation" and may not involve discrimination "solely on the grounds of race, color, sex, language, religion or sound origin." *Id.* Finally, "derogations cannot be open-ended, but must be limited in scope and duration." Alfred

obligations regulate U.S. operations even when conducted outside the United States.[31] In addition to guaranteeing the basic rights associated with fair trials,[32] these obligations prohibit arbitrary arrest and detention[33] as well as torture and cruel, inhuman or degrading treatment or punishment.[34]

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de Zayas, *Human Rights and Indefinite Detention*, 87 INT'L REV. OF THE RED CROSS 15, 16 (2005).

[31] *See, e.g.*, Conclusions and Recommendations of the Committee Against Torture, United States of America, ¶ 15, U.N. Doc. CAT/C/USA/C/2 (May 19, 2006). Referring to the U.S. position that its international obligations do not apply on Guantanamo, for example, the Committee notes that:

> [A] number of the Convention's provisions are expressed as applying to "territory under [the State party's] jurisdiction" (articles 2, 5, 13, 16). The Committee reiterates its previously expressed view that this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised. The Committee considers that the State party's view that those provisions are geographically limited to its own de jure territory to be regrettable.
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> *The State party should recognize and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.*

Id. (emphasis in original).

[32] *See* ICCPR art. 14 (outlining rights to an independent tribunal, counsel, opportunity to confront witnesses, and the presumption of innocence until proven guilty).

[33] ICCPR art. 9. Arbitrary detention also violates international law if it is prolonged and practiced as state policy. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, comment h (1987) (quoting Statement of U.S. Delegation, 13 GAOR, U.N.Doc. A/C.3/SR.863 at 137 (1958)).

[34] ICCPR art. 7. *See also* Convention Against Torture. Note that the prohibitions on torture and cruel, inhuman or degrading treatment or punishment are nonderogable. ICCPR art. 4(2). Generally, human rights law has been incorporated into Security Council resolutions authorizing U.S. detentions in Iraq and Afghanistan and should be incorporated in bilateral agreements between the U.S. and other countries that authorize U.S. detentions with the consent of other countries (such as with the proposed Strategic Framework Agreement between the U.S. and Iraq).

Conclusion

A new President and Congress will have the opportunity to restore the rule of law to U.S. detention policy and to undo the damage wrought over the last seven years to our reputation and national security. The principles and policy reforms proposed here will be an important part of that process. In the meantime, the President and Congress should refrain from interfering with the ongoing habeas proceedings in federal courts pursuant to *Boumediene v. Bush*.[35] Then, a new administration can take stock of the guidance provided by the courts in undertaking reforms.

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[35] Boumediene v. Bush, 128 S. Ct. 2229 (2008).

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