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

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Introduction

When al Qaeda terrorists attacked the United States on September 11, 2001, they killed thousands of innocent people and targeted symbols of our economic and military power. We must not let those attacks undermine the values upon which this nation was founded. The incoming President (and Congress) will have an opportunity to restore the United States' commitment to these values – fairness, liberty, 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 renovation of 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 ways to reform the current broken system of detention.

Across the political spectrum, there is a growing consensus that the existing system of long term detention of terrorism suspects without trial through the network of facilities in Guantanamo and elsewhere 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 dangerous erosion of the rule of law in the United States through a disingenuous interpretation of the laws of war, the denial of ordinary legal process, the violation of the most basic rights, and the use of 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). 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).[1] Indeed, while the Bush Administration once claimed the

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* Reporter: Catherine Powell, Associate Professor of Law, Fordham Law School; Senior Fellow, Center for American Progress. This Statement has been adapted from *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 110th Cong. (Sept. 16, 2008) (*Scholars' Statement of Principles for a New President on U.S. Detention Policy: An Agenda for Change*).

[1] *See*, *e.g.*, Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 385-86 (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."); Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. Crim. L. & Criminology 415, 438 (1996).

Guantanamo detainees were "the worst of the worst," following minimal judicial intervention, it subsequently released more than 300 of them, as of the end of 2006.[2]

Because it is viewed as unprincipled, unreliable, and illegitimate, the existing detention system undermines our national security. Because the current system threatens our national security, we strongly oppose any effort to extend the status quo by establishing either (1) a comprehensive system of long-term "preventive" detention without trial for suspected terrorists, or (2) a specialized national security court to make "preventive" detention determinations and ultimately to try terrorism suspects.[3] Despite dressed up procedures, these proposals would make some of the most notorious aspects of the current failed system permanent. To the extent such systems were established within the territorial United States as opposed to on Guantanamo or elsewhere, they would essentially bring the failed Guantanamo system home. Perhaps most fundamental is the fact that the supporters of these proposals typically fail to make clear who should 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.

Such arrangements instill resentment and provide propaganda for recruitment of future terrorists, undermine our relationships with our allies, and embolden terrorists as "combatants" in a "war on terror" (rather than delegitimizing them as criminals in the ordinary criminal justice system).[4] 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

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[2] *See* Mark Denbeaux and Joshua Denbeaux, *Profile of Released Guantanamo Detainees: The Government's Story Then and Now* (2008). For a detailed demographic profile and analysis of those detained at the U.S. naval base in Guantanamo Bay Cuba, see Mark Denbeaux and Joshua Denbeaux, *Report on Guantanamo Detainees* (2006). Both reports are available at http://law.shu.edu/center_policyresearch/Guantanamo_Reports.htm.

[3] *See* THE CONSTITUTION PROJECT, A CRITIQUE OF "NATIONAL SECURITY COURTS": A REPORT BY THE CONSTITUTION PROJECT'S LIBERTY AND SECURITY COMM. & COALITION TO DEFEND CHECKS AND BALANCES (June 23, 2008) (rejecting national security courts) (compiled by Stephen L. Vladeck).

[4] 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.").

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."[5] Thus, in addition to revamping the existing detention program to bring it within the rule of law, the incoming President should work with Congress to utilize this broad array of tools to vigorously prosecute 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.

[5] 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 restoration of and stringent devotion to *justice*. Any new detention policy must thus operate according to four basic principles:

(a) Observe the rule of law,[6] including constitutional and statutory bounds, human rights, and international humanitarian law (addressed in further detail in policy recommendation 8, below). End-runs around the Constitution and basic rights for the sake of expediency or fear are wrong and ultimately counterproductive.

(b) Liberty is the norm:[7] Detention without trial is an extraordinary measure. Moreover, the very notion of "preventive detention" runs fundamentally counter to our most cherished traditions of justice by incarcerating people for what they *might* do in the future, not for acts they have actually committed.

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

(d) Transparency: Credibility and legitimacy turn on transparency. Secrecy not only provides a breeding ground for abuses, but it also erodes public trust in government policies, both in the United States and abroad.

A Blueprint for Change: Key Policy Fixes

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

[6] 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.

[7] This phrase appears in U.S. v. Salerno, 481 U.S. 739, 755 (1987) (Rehnquist, C.J., with White, Blackmun, Powell, O'Connor, and Scalia, JJ.).

1. Close Guantanamo:[8] To make a clean break with the unsuccessful policies of the past, upon taking office, the new President should immediately announce a firm timetable for closure of the detention center at Guantanamo.[9] The process of closing Guantanamo should include a process by which the new Administration promptly undertakes its own, independent review of these cases, and publicly releases its conclusions in as much detail as possible without releasing appropriately classified information. Those who can be criminally charged and tried should be prosecuted, and those who should be released must be released, in accordance with the following classification and process:

    a. the **first group** of detainees whom the United States chooses to prosecute, should be transferred to U.S. detention facilities pending trial for alleged crimes; and

    b. the **second group** of detainees, whom the United States chooses not to prosecute, should be repatriated to their home countries in accordance with all applicable laws (and those who cannot be charged or repatriated because of fear of torture must be resettled either in a third country or in the United States).[10]

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[8] The discussion here draws on *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 110th Cong., at 9-10 (Sept. 16, 2008) (statement of Deborah N. Pearlstein). *See also* KEN GUDE, HOW TO CLOSE GUANTÁNAMO, CENTER FOR AMERICAN PROGRESS (June 2008), 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 (Aug. 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).

[9] As President-elect Barack Obama has noted, the struggle against terrorism is a "global battle of ideas." BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 308 (Three Rivers Press, 2006). To promote the United States' commitment to constructive humanitarian ends, the new President should consider converting the naval base at Guantanamo into a public health research center or other institution for promotion of humanitarian activities. *See* Nicholas D. Kristof, Op-Ed., *Rejoin the World*, N.Y. TIMES, Nov. 2, 2008, *available at* http://www.nytimes.com/2008/11/02/opinion/02kristof.html (proposing that the United States "should not only close the Guantanamo prison but also turn it into such as an international center for research on tropical diseases that afflict poor countries. It could thus become an example of multilateral humanitarianism.").

[10] A process of reviewing individual cases is already underway through habeas proceedings in federal courts pursuant to *Boumediene*. Some of the undersigned note that the new Administration, in its own review, may identify exceptional cases in which a detainee has not demonstrably committed a crime (for example, because there is a lack of admissible evidence to try the detainee for a crime), but the government has evidence to support its conclusion that the detainee has engaged in belligerent acts or has directly participated in hostilities against the United States. Continued detention of such detainees must be in accordance with the principles and policy recommendations outlined in this Statement (especially policy recommendation 8,

2. Welcome Judicial Oversight: As *Boumediene v. Bush* makes clear, all Guantanamo detainees have a constitutional right to petition U.S. courts for a writ of habeas corpus to review, at a minimum, their status classification and/or continued detention.[11] Habeas actions by detainees must proceed swiftly, and the new President should facilitate that process.

3. Scrap the Existing Military Commissions and Reject Specialized Terror Courts: The next President should immediately suspend all military commission proceedings and then expeditiously 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.

   This Statement expresses a strong preference for the use of federal courts, wherever feasible, over courts-martial for those Guantanamo detainees who are prosecuted. The use of courts-martial against current detainees – who contest their status as combatants – would merely prolong jurisdictional disputes and therefore would not achieve the swift dispensation of credible justice. By contrast, the federal courts have handled many terrorism cases, successfully and credibly.[12] Indeed, because the rules of evidence in courts-martial are a virtual carbon copy of those in district court, there is no evidentiary benefit to the government in employing courts-martial when district courts could try the case. Moreover, international human rights law strongly disfavors the use of military courts to try civilians. Finally, the prominent role played by civilian Department of Justice prosecutors and a civilian convening authority in the military commissions suggests that there is nothing inherently military about these cases. While courts-martial may be a lawful option in some cases, trial by courts-martial does not generally serve the government's interest, the interests of detainees, or our national security.

4. 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

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below), and in full compliance with applicable U.S. constitutional law, international human rights law, international humanitarian law, and the standards articulated in Parhat v. Gates, 532 F. 3d 834 (June 20, 2008), *available at* http://pacer.cadc.uscourts.gov/common/opinions/200806/06-1397-1124487.pdf.

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

[12] *See* 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).

worldwide, primarily in Iraq and Afghanistan.[13] Given its *sui generis* status, Guantanamo should not be the baseline or model upon which our broader detention program is built. The Guantanamo predicament is the result of a sequence of unprecedented decisions by the Bush Administration to deny the basic rights of those detained there since 2001.[14] "We must not let the hard case of Guantanamo make bad law for all future counterterrorism detention operations."[15] The new Administration must review the status of all U.S.-held detainees and comply with international human rights and humanitarian law principles, as set forth below in policy recommendation 8.

5. Apply a Zero Tolerance Rule Regarding Torture and Other Illegal Abusive Treatment: Both as a matter of law and national security, the new President must adhere to treaties that the United States negotiated and ratified prohibiting torture as well as cruel, inhuman, or degrading (CID) treatment or punishment under any circumstances.[16] Since the September 11th terror attacks, the United States has gone from a policy of zero tolerance to a policy of minimal accountability on torture, which has led to widespread condemnation.[17] Sadly, in parts of the world, photographs of abuse from Abu Ghraib

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

[14] *See* Deborah N. Pearlstein, *Avoiding an International Law Fix for Terrorist Detention*, 114 CREIGHTON L. REV. 663, 677 (2008).

[15] *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).

[16] *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]; Convention Against Torture art. 16 (prohibiting cruel, inhuman, or degrading (CID) treatment or punishment). See also Common Article 3, common to all four Geneva Conventions (prohibiting torture, cruel treatment, as well as "outrages upon personal dignity, in particular humiliating and degrading treatment"). 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, WASH. POST, 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.").

[17] *See* Conclusions and Recommendations for the U.S. by the Comm. Against Torture, U.N. Doc. CAT/C/USA/C/2 (May 19, 2006) (expressing concern regarding issues such as allegations of

rival the Statue of Liberty as an emblem of our great country. Those photographs, moreover, 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."[18] To signal a new page in our county's behavior, the next President must reassert the principle that *all* acts of torture and cruel or inhuman treatment are criminal offenses[19] and that *no* official acting as an agent of the government (whether federal, state or local, civilian, military, or CIA) –including private contractors or foreign partners – is authorized to commit or to instruct anyone else to commit torture.[20] No official may tolerate, condone, acquiesce or consent to torture or CID treatment in any form.[21] Nor may evidence extracted through such means be the basis for the imposition of criminal punishment or detention. For a ban on torture and CID treatment to be credible, there must be structures in place to define the prohibition clearly and enforce the prohibition. In addition to undertaking monitoring and compliance, such structures should include: training initiatives in human rights and

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torture in secret detention facilities, secrecy surrounding diplomatic assurances that an individual will not be tortured if sent to another country, and the use of harmful and humiliating interrogation techniques); Philip Heymann, Response to Reviewers, 29 CARDOZO L. REV. 91 (2007); Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 IND. L.J 1145, 1147-48 (2006); John McCain, *Torture's Terrible Toll*, NEWSWEEK, Nov. 21, 2005, at 34, *available at* http://www.newsweek.com/id/51200 ("We should not torture or treat inhumanely terrorists we have captured. The abuse of prisoners harms, not helps, our war effort."); and Brief for Concerned Retired Military Officers and Military Law and History Scholars as Amici Curiae Supporting Plaintiffs, In re Iraq and Afghanistan Detainees Litigation, No. 06-145 (D.D.C. 2006).

[18] Koh, *Can the President be Torturer in Chief?*, 81 IND. L.J 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 U.S. to the U.N. Comm. Against Torture (Oct. 15, 1999), http://www.state.gov/www/policy_ remarks/1999/991015_koh_rpt_torture.html).

[19] Convention Against Torture art. 4 ("Each State Party shall ensure that all acts of torture are offences under its criminal law"); Third Geneva Convention, arts. 129-30 (requiring states parties to criminalize grave breaches, including torture, inhuman treatment, or willfully causing great suffering or serious injury to body or health).

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

[21] *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") and art. 3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture"); Convention Against Torture art. 16 (prohibiting CID treatment or punishment). See also Common Article 3, Geneva Conventions (prohibiting torture and cruelty treatment).

lawful interrogation techniques; Congressional oversight; and enforcement up the chain of command.[22]

6. Close Secret Prisons Once and For All: When President George W. Bush announced that 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 hypocritical practice of disappearing individuals violates the most basic legal norms in the treatment of prisoners. The new President must end the practice of holding ghost detainees and should afford a neutral body, such as the International Committee of the Red Cross, access to all detainees.

7. Shut Down the "Extraordinary Rendition" Program: The United States has directly or indirectly abducted terrorism suspects from around the globe for the purpose of interrogation. These so-called "extraordinary renditions" have created a spider's web of secret interrogation facilities throughout the world. In addition to running its own secret detention facilities, the United States has cooperated with some of the world's worst human rights offenders – Syria, Egypt, Morocco – resulting in the torture and arbitrary detention of an unknown number of terrorism suspects. This practice must stop immediately, and all international apprehensions and transfers must occur within the bounds of domestic and international law, as a tool to bring individuals into the justice system.

8. 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 determinations (regarding who should be detained) and restore our international credibility. Discrete regimes exist for detention of terrorists and terrorist suspects. These legal regimes exist both within international law and domestic law. Rather than view detainees as falling in a legal black hole – within the gaps between and among legal regimes – as the Bush Administration has done, the 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."[23] Moreover, essential markers of judicial systems that enforce the rule of law are

[22] For a concrete proposal as to how the new Administration can establish such structures, see, for example, CATHERINE POWELL, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, HUMAN RIGHTS AT HOME: A DOMESTIC POLICY BLUEPRINT FOR THE NEW ADMINISTRATION (2008) (prepared in consultation with a bi-partisan advisory group) (proposing that the new Administration re-establish the Inter-Agency Working Group for Human Rights, created pursuant to Executive Order 13107, and transform and strengthen the U.S. Commission on Civil Rights into a U.S. Commission on Civil and Human Rights).

[23] Pearlstein, *Avoiding an International Law Fix for Terrorist Detention*, *supra* note 14, at 665. At the same time, application of any legal regime should be subject to an appropriately narrow definition of "terrorism" that does not include supporting purely lawful activities.

judges who are independent and required to provide hearings open to the public.[24] In particular, the new Administration should restore the rule of law in the following three areas:

a. U.S. Constitution:[25] The new Administration should heed the constitutional principles that generally limit the deprivation of liberty to punishment for a crime, as opposed to as detention purely for perceived dangerousness.[26] Historically, the government has exercised the power to physically confine persons in only six discrete, carefully cabined areas that are (or claim to be) outside of the criminal punishment system: mental health (civil commitment);[27] public health (quarantine);[28] juvenile jurisdiction;[29] pre-trial confinement in criminal proceedings;[30] pre-hearing confinement in immigration proceedings;[31]

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[24] Judith Resnik, *Interdependent Judiciaries: Puzzling about Why and How to Value the Independence of Which Judges*, 137Daedelus 28 (Fall, 2008). As discussed below, U.S. federal courts have successfully used tools to protect sensitive sources and methods. *See infra* notes 41-44 and accompanying text. Comparative experience suggests analogous ways of protecting sensitive information. *See, e.g.*, Thomas Henquet, *Accountability for Arrests: The Relationship between the ICTY and NATO's NAC and SFOR, in* INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY (Gideon Boas & William A. Schabas eds., 2003) (summarizing strategies which the Appeals Chamber has used to protect sensitive information, such as *in camera* and *ex parte* proceedings, where the disclosure of certain materials raises national security concerns).

[25] This discussion draws on Eric S. Janus, *Constitutional Constraints on Preventive Detention* (Aug. 2008) (unpublished manuscript, on file with the reporter for this Statement).

[26] 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*, *supra* note 1, at 414-15.

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

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

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

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

[31] Detention based on dangerousness in the immigration context is permitted only during the pendency of immigration proceedings, not as a stand-alone authority for immigrants who are not in proceedings. *See* Carlson v. Landon, 342 U.S. 524 (1952). *See also* I.N.A. 236A, 8 U.S.C. § 1226A, which was added by the Patriot Act and permits detention based on certification by the

and detention during armed conflict, consistent with U.S. obligations under the international laws of armed conflict.[32] These alternative forms of confinement are sometimes called "preventive confinement" (in contrast to punitive confinement), because they typically claim justification on the grounds of seeking to prevent some form of future harm.[33] Each of these forms of confinement share particular safeguards: (1) perceived dangerousness alone is not sufficient to justify confinement;[34] (2) the duration of confinement must be reasonably related to its purpose, and the state may not confine a person indefinitely as it seeks a clearly unattainable purpose;[35] and (3) confinement may not be punitive[36] (for example, with regard to the purpose,[37] physical conditions,[38] and duration (if unreasonable)[39] of the confinement). "Thus, the Supreme Court has insisted repeatedly that the 'charge and conviction' system is the 'norm,' and that incursions must be the 'narrow,' 'carefully limited' or 'sharply focused' exceptions … thereby requiring the state to 'explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction . . . .'"[40]

Attorney General, but expressly requires that immigration or criminal charges be filed within seven days, and that habeas is available to challenge the certification.

[32] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[33] Janus, *Constitutional Constraints on Preventive Detention* at 2.

[34] The Supreme Court has insisted on a dangerousness-plus rubric, in which a plus-factor (i.e., mental disorder) clearly invokes one of the historic categories of preventive confinement to justly such detention. *Id.* at 4 (citing 504 U.S. 71; 521 U.S. 346 (1997); 534 U.S. 407 (2002)).

[35] Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed. *See* Zadvydas v. Davis, 533 U.S. 678 (2001); Jackson v. Indiana, 406 U.S. 715, 738.

[36] "As he was not convicted, he may not be punished." Foucha, 504 U.S. at 76 (quoting Jones v. United States, 463 U.S. 354, 369 (1983)).

[37] *See* Kansas v. Hendricks, 521 U.S. 346 (1997).

[38] *See* Turay v. Seling, 108 F. Supp. 2d 1148 (W.D. Wash. 2000); Bell v. Wolfish, 441 U.S. 520 (1979).

[39] *See* Bell, 441 U.S. 520.

[40] Janus, *Constitutional Constraints on Preventive Detention* at 5 (quoting Foucha, 504 U.S. at 72 (discussing United States v. Salerno 481 U.S. 739, 755 (1987)) and 82).

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.[41] Moreover, the Classified Information Procedures Act[42] and the Foreign Intelligence Surveillance Act (FISA)[43] have been consistently used effectively to protect the government's interest in avoiding the disclosure of sensitive sources and methods.[44] Furthermore, the criminal justice system does not necessarily require waiting to allow dangerous terrorists to commit their crimes before detaining them. Suspected terrorists may be detained for attempting to commit crimes, or conspiring to commit crimes in the future. But where conspiracy law does allow incarceration for conspiracy to commit future crimes, it provides safeguards by, for example, requiring an overt act in furtherance of the conspiracy, to be established beyond a reasonable doubt.

c. International Legal Regimes: The new Administration should apply an internationally accepted and accurate understanding of international law, rather than the idiosyncratic and often inaccurate 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 United States 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.[45] It also requires, at

[41] 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). *See* ZABEL AND BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, *supra* note 12.

[42] Classified Info. Procedures Act, 18 U.S.C. App. III § 1-16 (1984).

[43] Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801-1871 (1978).

[44] *See* ZABEL AND BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, *supra* note 12, at 77-90.

[45] 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 Treatment of Prisoners of War, Art. 118, Aug. 12, 1949, (1955) 6 U.S.T. 3316, 3406, T.I.A.S.

a minimum, humane treatment and other baseline protections.[46] However, the Bush Administration claimed that IHL either did not apply or, alternatively, stretched IHL to justify indefinite detention for interrogation of acts of terrorism that long have been considered a matter of domestic criminal jurisdiction.[47] This approach is inconsistent with longstanding U.S. respect for the letter and spirit of IHL, is illegitimate in the eyes of the international community, vastly increases the likelihood that individuals will be improperly detained, and, because it creates resentment, undermines our national security. International human rights law also regulates detention. It applies in times of war[48] (as well as times of peace) and only particular rights can be derogated, and only under narrow circumstances.[49] Moreover, U.S. treaty obligations regulate U.S. operations even

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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").

[46] While the Bush 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 United States and al Qaeda. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[47] 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.

[48] *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, I.C.J. 136, ¶ 106 (July 9, 2004) ("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, I.C.J. 226, ¶ 25 (July 8, 1996) ("[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).

[49] *See* Int'l 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 United States has not officially derogated from any rights since the September 11th 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 social origin." *Id.*

when conducted outside the territory of the United States.[50] In addition to guaranteeing the basic rights associated with fair trials,[51] these obligations prohibit arbitrary arrest and detention[52] as well as torture and cruel, inhuman or degrading treatment or punishment.[53]

Finally, "derogations cannot be open-ended, but must be limited in scope and duration." Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT'L REV. OF THE RED CROSS 15, 16 (2005).

[50] *See, e.g.*, Conclusions and Recommendations of the Comm. Against Torture for the U.S., ¶ 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 to 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.
>
> *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).

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

[52] ICCPR art. 9. While the U.S. government has at times argued that treaties do not apply extraterritorially – a claim that is hotly contested – it has not made the same case vis a vis customary international law. Arbitrary detention also violates customary international law if it is prolonged and practiced as state policy. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE U.S. § 702, comment h (1987) (quoting Statement of U.S. Delegation, 13 G.A.O.R., U.N. Doc. A/C.3/SR.863 at 137 (1958)).

[53] ICCPR art. 7. *See also* Convention Against Torture, *supra* note 16. 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 United States and other countries that authorize U.S. detentions with the consent of other countries (such as with the proposed Strategic Framework Agreement between the United States and Iraq).

Conclusion

The new President and Congress will have a tremendous opportunity to restore the rule of law to U.S. detention policy and to undo some of the damage wrought over the last seven years to our reputation and national security. The principles and policy reforms proposed here should be an important part of that process.

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