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Holding Terrorists Accountable: A Lawful Detainment Framework for the Long War

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During the recent presidential campaign, then-Senator Barack Obama promised to close the Guantanamo Bay detention center and stated that some Guantanamo detainees should be prosecuted or transferred to other countries and that others should be detained "in a manner consistent with the laws of war."[1] President Obama already, on his second full day in office, has taken the first steps in that direction by issuing an executive order calling for the closure of Guantanamo "as soon as practicable" and the prosecution, release, transfer, or continued detention of all detainees housed there following review of their statuses.[2]

This action is bold, comprehensive, yet cautious. In some respects, it represents a continuation, and at most an acceleration, of many of the policies of the Bush Administration. Prior to January 20, some detainees were being prosecuted,[3] and others were transferred to other countries: In fact, that latter group comprises nearly two-thirds of all those who have been held at Guantanamo.[4]

More important is what has not yet been addressed. While the Obama executive orders allude to continued detention of some Guantanamo detainees, they address only the current detainees at Guantanamo. President Obama's bigger decision—one where he is more likely to modify previous practice—concerns *future* detainees, not the fate of those already captured and held at Guantanamo Bay.

The Obama Administration will not be ending the practice of military detention. Military detention[5]

Talking Points

- Military detention is a necessary and lawful tool with a long history of use. Closing the detention facility at Guantanamo does not answer the question of what to do with future captures. Whatever President Obama does, he is extremely unlikely to end detention altogether.
- But Obama does have the opportunity, and the obligation, to put U.S. detention policy on a firmer footing by crafting a durable legal framework for detention that meets our security needs as well as our values.
- This framework ought to follow the contours of Article 5 of the Geneva Conventions and include ample and periodic review, with counsel, of each detainee's status.
- Further, detention should be reserved only for those who cannot be safely prosecuted—a group that will always exist.

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of some detainees is appropriate, consistent with long historical practice, and a necessary and lawful tool in the current conflict.[6] True, as General David Petraeus and Secretary of Defense Robert Gates have essentially said, we cannot kill or capture our way to victory in this conflict.[7] Yet military detention, properly calibrated and designed to complement our broader national security and counterterrorism policy, is necessary, not only for some detainees currently detained at Guantanamo but also for future captures of high-value detainees.

Indeed, candidate Obama also pledged to continue to build U.S. capacity and international partnerships to track down, capture, or kill terrorists around the world, and this presumably entails holding additional detainees.[8] That promise should assure the American people that President Obama intends to protect us from those terrorists who seek to kill us. But it also begs several key questions:

- When the U.S. captures a high-value terrorist and, for whatever reason, cannot prosecute him, where will he be detained?
- Under what legal framework will he be detained?
- How will all this work given the shifting legal landscape since 9/11?

Answering those questions and crafting an acceptable legal framework that ensures the continued safety of the American people is the difficult but necessary work ahead, and it is the substance of what the Obama Administration will have to confront as it forges a new durable policy and legal framework on detainees in the war on terrorism.

Defining the Issue

Winding down the detention operation at Guantanamo Bay in a responsible manner will be difficult, will take more than just a couple of months, and requires making difficult decisions and tradeoffs.[9] Indeed, President-elect Obama acknowl-

1. Obama '08, "Barack Obama: The War We Need to Win," at *http://www.barackobama.com/pdf/CounterterrorismFactSheet.pdf*.
2. See, "Executive Order — Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities," January 22, 2009, at *http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities*.
3. The Bush Administration decided early on to prosecute some Guantanamo detainees in military commissions. To date, there have been only a handful of commissions. The topic of which type of entity—military commissions, federal district court, traditional courts-martial, or a new national security court—should be used is beyond the scope of this paper.
4. To date, the United States has transferred or released over 500 detainees from Guantanamo Bay. At its peak, the detention facility had approximately 780 detainees. As of January 2009, there are approximately 248 detainees, of which approximately 55 have been approved for transfer.
5. The term "military detention" refers generally to the incapacitation of privileged belligerents (typically "prisoners of war"); unprivileged belligerents; or others caught during armed conflict. The term is sometimes used interchangeably with "preventative detention" or "administrative detention." However, the latter two terms can and do occur outside of armed conflict, such at the involuntary detention of the criminally insane, criminal suspects held pending trial, sexually violent predators confined indefinitely after serving their criminal jail terms, persons subject to immigration holds, or the like.
6. The issue of what procedural protections Guantanamo detainees should have, or should have had when captured, is a separate and distinct matter and not the subject of this paper.
7. General Petraeus said, in an interview in the January 2008 issue of *Foreign Policy*, "You can't kill or capture everybody in an insurgency." In a speech at the National Defense University on September 29, 2008, Secretary Robert Gates said that "we cannot kill or capture our way to victory."
8. Obama '08, "Barack Obama: The War We Need to Win."
9. The author was Deputy Assistant Secretary of Defense for Detainee Affairs in 2006–2007. As such, he was the primary policy adviser to the Secretary of Defense on all matters related to Department of Defense detainees, including those in Guantanamo, Iraq, and Afghanistan. He also conducted the first classified Department of Defense review of how it might be possible to close Guantanamo's military detention center in 2006. Nothing in this paper relies on or reveals any classified or other sensitive information contained within the review.

edged that ending the detention mission at Guantanamo Bay will be difficult and, more significantly, that he would consider it a failure if he did not close Guantanamo by the end of his first term.[10] It is a challenge because the process actually has less to do with Guantanamo Bay detainees than with the question of how we wage war in the modern era against non-state actors who are actively waging war against us.

Guantanamo Bay is just a place—a place that admittedly has harmed our country's reputation and whose benefits arguably have come to be outweighed by its costs. To be sure, the United States has gained valuable intelligence from some detainees at Guantanamo over the years and has kept those very same detainees from killing or injuring our soldiers or allies in our ongoing conflict. That intelligence has helped us to understand and fight this enemy more effectively, but its value has diminished over time. More important, that intelligence and security has strained diplomatic relations, undermined the moral authority of the United States in the eyes of some, and raised distracting domestic legal obstacles.

Simply ending the detention operations at Guantanamo addresses only one visible aspect of a broader post-9/11 detention legal framework for the incapacitation and lawful interrogation of terrorists. Closing Guantanamo or merely moving the detainees to the United States without addressing the serious underlying challenges and questions regarding detention policy in this ongoing conflict is essentially changing the ZIP code without confronting the broader challenges.

The new Administration has the opportunity, and an obligation, to build on the strategic rationale, legal and policy underpinnings, and entire framework regarding how to hold accountable and incapacitate terrorists.[11]

It is important to recall that a key recommendation from the 9/11 Commission Report was for the United States to engage our allies and develop a common approach to the detention and humane treatment of captured terrorists, drawing from Common Article 3 of the Geneva Conventions.[12] Much work has been done with respect to this key recommendation;[13] some remains.

Military detention of the enemy during armed conflict is authorized and legal. According to a legal adviser for the International Committee of the Red Cross (ICRC), such detention is an "exceptional measure of control that may be ordered for security reasons in armed conflict or for the purpose of protecting State security or public order in non-conflict situations, provided the requisite criteria have been met."[14] According to the author, "the exceptional nature of internment lies in the fact that it allows the detaining authority to deprive liberty of persons who are not subject to criminal processes but nevertheless represent a real threat to security in the present or in the future."[15]

It is also just common sense. When our military enters armed conflict, however that is defined, it

10. See "Obama Pledges Entitlement Reform: President-Elect Says He'll Reshape Social Security, Medicare Programs," *The Washington Post*, January 16, 2009. The front-page article, based on a wide-ranging 70-minute interview with *Washington Post* reporters and editors, says that the President "will consider it a failure if he has not closed the U.S. military prison at Guantanamo Bay, Cuba, by the end of his first term in office."
11. See Matthew C. Waxman, "Administrative Detention: The Integration of Strategy and Legal Process," July 24, 2008, pp. 4–5. Mr. Waxman was the first Deputy Assistant Secretary of Defense for Detainee Affairs from 2004–2005.
12. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, p. 380.
13. See, for example, Department of Defense Directive 2310.01E, September 2006, which incorporated verbatim the text of Common Article 3 of the Geneva Conventions and established a baseline standard of care and treatment for all Department of Defense detainees regardless of their legal status. See also *FM 2-22.3, Human Intelligence Collector Operations* manual, the so-called Army Field Manual on interrogations, also published in September 2006.
14. See Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence," *International Review of the Red Cross*, Vol. 87, No. 858 (June 2005), p. 376.
15. *Ibid.*, p. 380.

has the legal authority to use lethal force when necessary. It stands to reason that the military must also be able to detain the enemy in a lawful manner, all the while upholding the rule of law, protecting human rights, and adhering to applicable provisions of the Geneva Conventions.[16]

Military detention is not a right-wing proposition; it is a time-honored, legal, proper national security tool during armed conflict. That fact is recognized across the political spectrum. On January 6, 2009, Senator Dianne Feinstein (D–CA), along with Senators John D. Rockefeller IV (D–WV), Ron Wyden (D–OR), and Sheldon Whitehouse (D–RI), introduced Senate Bill 147, the Lawful Interrogation and Detention Act. The act, directed specifically at the detainees currently at Guantanamo Bay, Cuba, specifically authorizes military detention for some detainees who cannot be prosecuted or transferred.[17]

Thus, despite what some have argued over the years, the United States is not required, by its international obligations or otherwise, to "try them or set them free." This false choice is dangerous, and it comes with real consequences. It is widely known that some detainees released from detention in Iraq, Afghanistan, and Guantanamo have taken up arms against Americans and our allies and no doubt have committed further combatant activity.[18] This risk of further combatant activity will always exist, and it is particularly acute in the current conflict.

Reducing that risk through lawful detainment is not always a controversial proposition. For years, the United States has captured, detained, and lawfully interrogated thousands of combatants within the political boundaries of Iraq and Afghanistan, and it will continue to do so for some time in Afghanistan.[19] Most detainees are detained to prevent further combatant activity against the U.S. or our forces—not tried in a criminal trial.

Beyond Guantanamo

With respect to terrorists captured in the future outside of Afghanistan, including by our allies or in a future conflict or other crisis, the detainment situation is more complicated. Neither the criminal law nor the law of armed conflict provides comprehensive and complete policy prescriptions in terms of how best to keep these combatants off of the battlefield and lawfully interrogate them while upholding the rule of law, protecting human rights, and safeguarding our country.

Prior to September 11, 2001, terrorism was treated as a matter of criminal law. The limits of and flaws in that approach have been detailed in numerous articles.[20] It is true that our anti-terrorism statutes have improved over the years and that our track record of trying terrorism in the courts is impres-

16. Under the Geneva Conventions, prisoners of war (POWs) may not be interrogated by their captors. Rather, POWs may only be asked their name, rank, and other identifying information. See Geneva Convention Relative to the Treatment of Prisoners of War (GC III), Article 17. Unprivileged belligerents (those who do not qualify as POWs) may be interrogated, if they agree to speak to their captors, beyond the restrictions of GC3, Article 17.

17. See S. 147, Sec.3 (5), which states, "The individual shall be held in accordance with the law of armed conflict."

18. On January 13, 2009, the Pentagon announced that 61 former detainees from Guantanamo Bay, Cuba, were confirmed to be or suspected of returning to the fight. The Pentagon's revised number—up from 37—represents 11 percent of all terrorists released from Guantanamo Bay since 2002. See U.S. Department of Defense, "DoD News Briefing with Geoff Morrell from the Pentagon," January 13, 2009, at *http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4340*.

19. The United Nations Security Council resolution on Iraq that authorizes U.S. forces to detain insurgents for imperative reasons of security expired at the end of 2008. Starting January 1, 2009, pursuant to the recently signed Status of Forces Agreement between the United States of America and the Republic of Iraq, insurgents captured on January 1, 2009, going forward must be charged with a crime or set free under Iraqi law. It remains to be seen how many months (or longer) defendants will remain in custody prior to arraignment and trial.

20. See, for example, Robert M. Chesney and Jack L. Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models," *Stanford Law Review*, Vol. 60 (2008), pp. 18–21 (discussion of difficulties with terrorism trials in federal district court such as extradition, hearsay, Fifth and Sixth Amendment issues, and classified information). See also Andrew McCarthy, *Willful Blindness: A Memoir of the Jihad* (New York: Encounter Books, 2008), pp. 310–314.

sive, but despite the system's strength and flexibility, these improvements will carry us only so far.[21]

A recent report by Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, details over 100 terrorism cases successfully prosecuted in federal court since 9/11. The report covers many, but not all, of the important laws and legal and policy considerations regarding trying terrorism cases in federal district court. Yet it does not mention one case of a terrorist captured overseas on the battlefield after 9/11 and tried in the U.S. courts, nor does it seriously address the issue of the use of hearsay in federal trials for battlefield captures.

Most important, the Human Rights First report downplays the risks associated with the inadvertent disclosure of classified evidence, including valuable (and expensive) sources and methods of intelligence gathering. In every case involving such evidence—and this would include some cases involving terrorists captured overseas—there must be a careful, sophisticated cost-benefit analysis conducted by the highest officials in the government before deciding to disclose certain evidence in courtroom proceedings. Trying some terrorists in federal court should be an option, and it is an option the Bush Administration should have used more often;[22] but it should not be the exclusive weapon in our arsenal for combating al-Qaeda and other unprivileged belligerents.

To its credit, the Human Rights First report does acknowledge that some detainees may properly be held under "the law of war for the duration of active hostilities to prevent them from returning to the field of battle, and without any effort by the government to file charges or impose punishment."[23] In other words, military detention has a place in this conflict.[24]

For the most part, the Bush Administration and Congress, in its Authorization for the Use of Military Force, recognized the terrorist attacks of 9/11 as an act of war, and the law of armed conflict was the foundation for the legal framework surrounding detention. With respect to Guantanamo, the law-of-armed-conflict paradigm was challenged within weeks of detainees arriving in January 2002, and its limitations have become clearer during this long conflict.

Certainly, the law of armed conflict should and will provide the underpinnings for the detention framework in Afghanistan in the years to come, but it does not provide adequate answers to or procedural protections for detainees captured outside of Afghanistan and all of the issues that arise in a conflict of this nature.[25]

A legal regime can only set the boundaries of permissible policy; it is not a substitute for policy decisions to resolve lingering questions. In the future, when we capture a high-value al-Qaeda operative somewhere outside of Afghanistan who plots acts of terrorism or trains fellow terrorists but has not committed a domestic crime that can be prosecuted in federal district court, a court-martial, or even a new national security court, do we release him? If not, should we detain him, and under what legal framework? Where will he be detained? It is

21. See, for example, 18 U.S.C. 2339A and 2339B. See also *9/11 Commission Report*.

22. Terrorists who committed crimes against U.S. interests prior to 9/11 and then were captured after 9/11 might have been excellent candidates for prosecution in federal district court. Some were actually under indictment (some sealed) prior to 9/11. For example, Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri was captured in 2002. According to his military commission's charge sheet, he was responsible for attempting to blow up the USS *The Sullivans* in 2000 and for the successful bombing of the USS *Cole* in September 2000. There are many other examples.

23. Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, May 2008, p. 5.

24. Even the liberal Center for American Progress has acknowledged the need for a narrow category of military detention for some Guantanamo Bay detainees. See Diane Rehm interview with Ken Gude, Associate Director, International Rights and Responsibility Program, on National Public Radio, November 26, 2008. Guests included the author, Ken Gude from the Center for American Progress, and Vincent Warren from the Center for Constitutional Rights.

25. See, generally, Benjamin Wittes, *Law and the Long War* (Penguin Press, 2008), chapters 1 and 6.

highly unlikely that the government of Afghanistan (or any other country) will allow him to be detained inside their country. Should we bring him to the United States? If so, what is his legal status, and what framework is he held under?

Further, in many of these cases, we will want to lawfully interrogate a captured operative to gain tactical or strategic intelligence. How do those lawful interrogations for intelligence reasons affect the potential for criminal prosecution? We may not be able to prosecute some of these individuals, and it may not be in our best interest as a country to try them because to do so might unreasonably risk exposing critical national security secrets.

A Future Framework

The answer, far beyond closing Guantanamo, is to solve the broader challenge of holding accountable and incapacitating terrorists in a detention framework that is lawful, durable, and internationally acceptable. As we capture future high-value terrorists outside of Afghanistan and conclude that some may not be prosecuted in our domestic courts, we will need a sustainable legal framework to detain them.[26]

Creating the right framework will be challenging, but it is necessary. As a former Administration official in charge of detainee matters observed, detention carries risks to both liberty and security.[27] Much thought needs to be given to the characteristics of persons subject to detention.[28] Conceptual criteria such as (among others) dangerousness, active or direct participation, membership in or support for an organization such as al-Qaeda, past acts, and future intentions must all be considered and weighed before drafting an appropriate definition of who may be detained.[29] However, we must remain ever mindful that our service members are facing the enemy on numerous battlefields every day: These questions are not, and should not be treated as, merely academic.

As for procedural protections for future captures, under the law of armed conflict, if there is a question as to a detainee's legal status (e.g., a prisoner of war, a civilian, or some other class), the detaining authority must hold a hearing, similar to an Article 5 hearing provided to prisoners of war under the Geneva Conventions, at or near the time of capture. If the "Article 5" hearing officer finds the terrorist detainable, then he may be detained. Alternatively, the hearing officer could make a finding that the captured person does not meet the proper criteria and order him released after the hearing.

If the person is deemed detainable by the hearing officer, after a defined period of lawful interrogation, the detainee should be given an Article 5–style "competent tribunal" hearing before a military judge where he should have assistance of military counsel.[30] If the military judge, after a full and fair hearing, decides that the detainee qualifies for further military detention, the detainee is thereafter detained pending periodic review.

There should be robust judicial appellate review, and the detainee should be afforded qualified free appellate counsel. The basis for his detention should be reviewed periodically.

26. The proposal in this section, and the procedural protections suggested, would not necessarily suffice for those detainees currently at Guantanamo Bay, Cuba.
27. See Waxman, "Administrative Detention: The Integration of Strategy and Legal Process," p. 19.
28. To some, any captured member of al-Qaeda may be lawfully detained until the end of the conflict, however long that may be. Nowhere in the Geneva Conventions is there a requirement that a particular detainee represent an imminent threat to anyone; it is required only that the detainee was a member of the opposing armed force captured during the course of military operations. Some experts fear the degradation of the fundamental ability to detain all members of the opposing force until the end of hostilities. Of course, that begs the question in this conflict: How do you know who is a member of al-Qaeda, since many al-Qaeda members are not willing to disclose their association with the terrorist organization?
29. See Waxman, "Administrative Detention: The Integration of Strategy and Legal Process," pp. 14–24. See also Chesney and Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models," pp. 45–49.
30. For an excellent example of how to conduct a "competent tribunal," one need not look any further than the one conducted by Judge Keith Allred in the *United States v. Salim Hamdan* case in the summer of 2008.

Furthermore, military detention should be used only for those detainees who cannot be safely prosecuted.[31] This means, at the front end of the detention matrix, that there must be a robust system in place to determine which cases are prosecutable and which ones are not.

As a legal matter, there is support for the argument that the current Authorization for Use of Military Force (AUMF) authorizes the President to detain militarily a person captured in the United States.[32] However, as a policy matter, the proposed military detention framework should not apply to anyone captured in the United States, at least under current circumstances.[33]

Not even the Geneva Conventions or the principles underlying them answer every question. Once you give future captures an "Article 5" hearing and a "competent tribunal" determines that the detainee may be detained, then what? Does the case get transferred automatically to a federal district court judge for "independent review," perhaps under a newly created national security court? And how long do you detain the individual? How often do you review the basis of his detention? According to the Geneva Conventions, a person subject to detention must have the basis for his detention reviewed periodically, but is that an appropriate standard in this case? I believe it is warranted.

Would this system even be workable if, for example, the United States captured hundreds of detainees at a time? And what impact will these robust new rules and procedures have in the next war against a state actor who will receive fewer safeguards or rights as a prisoner of war?

All of this must be done as transparently as possible.

Finally, the United States must continue to allow the International Committee of the Red Cross[34] to perform its valuable function vis-à-vis detainees, and we must continue to work with and engage the ICRC in a substantive, confidential diplomatic dialogue.

Conclusion

Shuttering detention operations at Guantanamo Bay will be only a symbolic gesture—or perhaps not even that—if the Obama Administration does not also address the broader challenge of lawfully incapacitating terrorists who are intent on waging war against us. The incoming Administration has the duty to think through the strategic rationale of military detention in the broader context of its counterterrorism policies.

Some detainees may be appropriate candidates for criminal prosecution in federal district court, in terrorists' court-martials, or even in a newly created

31. These proposed procedural protections are greater than those a POW would receive under the Third Geneva Convention. However, due to the unique nature of this conflict and the difficulties involved in detaining combatants who fail to follow the law of war, these additional safeguards may be necessary to ensure that we have not mistakenly detained an innocent civilian. No set of procedural safeguards is error-free. However, the proposed procedural safeguards are an acknowledgment of a prudential trade-off: The concept of ensuring that we are not arbitrarily detaining the wrong person is more important than the idea of providing greater safeguards to those that fail to follow the law of war. A corollary question must be asked: What incentives, perverse or otherwise, does this new system create for a state or non-state actor engaged in combat to follow the laws of war? Like all policy proposals put into action, there will be a host of consequences, intended and unintended, that flow from such a change.
32. See the case of Ali Saleh Kahlah al-Marri, who is currently housed at the Navy Consolidated brig in South Carolina. In July 2008, the United States Court of Appeals for the Fourth Circuit upheld the government's right to hold al-Marri as an enemy combatant, despite the fact that he was arrested and detained in the United States in December 2001. Al-Marri appealed the Fourth Circuit's opinion, and on December 5, 2008, the United States Supreme Court agreed to hear the case.
33. Since 9/11, only a small number of suspected terrorists have been captured within the United States. Most committed domestic criminal violations and were subsequently prosecuted in federal court. Those prosecutions, with notable exceptions, proved successful. If the number increased dramatically, the Administration would be wise to revisit that policy choice. The recently signed executive orders give the President that flexibility.
34. The ICRC is mentioned specifically, by name, in the Geneva Conventions as an approved humanitarian organization. See GC III, Article 2, 9 and 10.

national security court—as long as there is not an unreasonable risk of exposure of critical national security information. Other detainees at Guantanamo Bay and those captured in the future will be appropriate candidates for military detention.

Achieving this new policy will take time. It will require the new Administration to use this "strategic pause" in military commissions, *habeas corpus* cases, and other ongoing matters to take stock of the best way forward.

We will see how Barack Obama responds to calls from some of his supporters to "try them or set them free." Will he make the case for a thoughtful military detainment policy, or will he give in to their dangerous demand? If Obama acknowledges that al-Qaeda members and others similarly situated are not common criminals and that military detention is a lawful and necessary tool in this ongoing conflict, we will know that our new President is serious about the threats aligned against us.

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