

# Center for National Security Studies

*Protecting civil liberties and human rights*

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## **Memorandum to Transition Team**

**From: Center for National Security Studies, Kate Martin, and Aziz Huq, Associate Professor of Law (designate, March 2009), University of Chicago School of Law and Director, Liberty and Security Project, Brennan Center for Justice.**

**Re: Recommendations for a new detention policy and for closing the prison at Guantánamo.**

We have prepared a set of recommendations for a new detention policy to replace this administration's "war on terror" framework. We urge application of existing criminal law authorities and the traditional law of war and rejection of the Bush administration's unfounded and incorrect interpretation of the law and Executive authority. Application of existing authorities will advance national security interests and restore the rule of law. No new statutory authorities are necessary.

(These recommendations address only detention and trial, how to assure humane treatment of all detainees is addressed elsewhere.)

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

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

A new detention policy based on these principles would result in a stronger and more effective counterterrorism effort. It would ensure the detention and trial of fighters and terrorists in accordance with recognized bodies of law and fundamental notions of fairness and justice. It would ensure cooperation by key allies in Europe and elsewhere who have insisted that military detention be limited. It would begin to restore the reputation of the U.S. military, damaged by the international condemnation of the abuses of this administration. And it would deprive al Qaeda of the propaganda and recruiting opportunities created by current policies.

The Supreme Court has reaffirmed that under the law of war, when the U.S. military is engaged in active combat, it has the authority to seize fighters on the battlefield and detain them as combatants under the law of war.<sup>1</sup> The traditional law of war, including the Geneva

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<sup>1</sup> See *Hamdi v. Rumsfeld*, 542 U. S. 507 (2004).

Conventions and Army Regulation 190-8,<sup>2</sup> should be followed when capturing and detaining individuals seized on a battlefield/in a theater of armed conflict/during active hostilities, such as Afghanistan or Iraq. Of course, following the traditional rules for detaining battlefield captives would in no way require “Miranda” warnings or other “Crime Scene Investigation” techniques. Nevertheless, the Bush administration deliberately ignored these military rules – including the requirement for a hearing under Article 5 of the Geneva Conventions -- when it seized individuals in Afghanistan who are now held at Guantánamo.<sup>3</sup>

(While some have claimed that the “battlefield” in the “war against terror” is the entire world, that claim is inconsistent with traditional understandings in the law. For example, one characteristic of a battlefield is the existence of Rules of Engagement, which permit the military to use force offensively against an enemy.<sup>4</sup> Military Rules of Engagement for the armed forces stationed in Germany or the United States for example, are quite different from those applicable to troops in Afghanistan or Iraq. Troops in the United States or Germany are not entitled to use deadly force offensively.)

Outside these battlefields, in countries where there is a functioning domestic judiciary and criminal justice system, criminal laws should be used to arrest, detain and try individuals accused of plotting with al Qaeda or associated terrorist organizations. Outside the war theater, criminal law has proved to be successful at preventing and punishing would-be terrorists, protecting national security interests, and ensuring due process.<sup>5</sup>

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

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

- The first category includes fighters in Afghanistan or Iraq (or other countries where U.S. military forces are engaged in active hostilities in the future); the second category is Osama bin Laden and the other self-proclaimed planners and organizers of the 9/11 attacks. Pursuant to the congressional authorization, individuals in the first or second categories may be targeted, captured and tried under the law of war.
- The third category includes suspected al Qaeda terrorists seized in the United States or elsewhere, other than Afghanistan or Iraq, who must be treated as suspects under criminal law.

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<sup>2</sup> Enemy Prisoners of War, Retained Persons, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997).

<sup>3</sup> Article 5 requires that captives be given a hearing to determine whether they are prisoners of war.

<sup>4</sup> See Geoffrey S. Corn & Eric Talbot Jensen, “Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror,” (January 14, 2008).

<sup>5</sup> See Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice*, Human Rights First, May 2008, available at: <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

- The last category is current detainees at Guantánamo, which includes individuals alleged to fall within all three categories listed above. The detainees in Guantánamo are *sui generis* for a number of reasons, including that their treatment has violated military law and traditions and that it has become an international symbol of injustice.

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

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

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

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

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

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

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

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

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

Such individuals may also be tried in the federal district courts on criminal charges. The best course from the standpoint of discrediting and opposing al Qaeda is to conduct a fair public trial of these individuals, rather than detain them without trial.

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

Individuals found in the United States or in other countries with a functioning judicial system (other than Afghanistan and Iraq) who are suspected of terrorist plans or activities, must

be detained and charged pursuant to the criminal justice system and/or deported in accordance with due process.

Any such individuals may only be transferred to other countries in accordance with due process and to stand trial on criminal charges. They must be protected against torture and abuse.

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

*Individuals currently held at Guantánamo:*

The United States should begin a process to close the Guantánamo detention facility. There are many difficult questions about how to accomplish this arising in part from the administration's failure to follow the law in detaining and seizing these individuals. The Center for American Progress has recently issued a report detailing an approach in line with these recommendations.<sup>6</sup>

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

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

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

Those Guantánamo detainees who are alleged to have been captured in Afghanistan or Iraq and been part of al Qaeda or Taliban forces may be detained until the end of hostilities in those countries if the habeas court finds that they are such.<sup>7</sup> Such detentions without charge for the duration of hostilities were approved by the Supreme Court under *Hamdi* as having been authorized by the AUMF. At the same time, there are likely to be counterterrorism benefits to choosing to bring charges against such individuals and providing them with a fair trial.

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

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<sup>6</sup> See Ken Gude, *How to Close Guantánamo*, Center for American Progress, June 2008, available at: <http://www.americanprogress.org/issues/2008/06/pdf/Guantánamo.pdf>.

<sup>7</sup> Whether al Qaeda fighters may be detained beyond the end of hostilities in Afghanistan will not arise until there is peace in Afghanistan.

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

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

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

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

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