Statement of Harold Hongju Koh

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Before the Senate Judiciary Committee, Subcommittee on The Constitution on Restoring the Rule of Law

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Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify today on how the next President and Congress may best act to restore the rule of law, especially in the national security arena. I am the Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law at Yale Law School, where I have taught since 1985 in the areas of international law, human rights, and the law of U.S. foreign relations.[1] I have twice served in the United States government: as an Attorney-Adviser at the Office of Legal Counsel of the U.S. Department of Justice from 1983-85, and as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001. On several prior occasions, I have addressed various aspects of this subject before Congress when testifying before this and other committees.[2]

Seven years ago, our country was properly viewed with universal sympathy as the victim of a brutal attack. Tragically, the current Administration chose to respond with an series of unnecessary, self-inflicted wounds, which have gravely diminished our global standing and damaged our reputation for respecting the rule of law. The infamous list includes: Abu Ghraib; Guantanamo; torture and cruel treatment of detainees; indefinite detention of "enemy combatants;" military commissions; warrantless government wiretapping and datamining; evasion of the Geneva Conventions and international human rights treaties; excessive government secrecy and assertions of executive privilege; attacks on the United Nations and its human rights bodies, including the International Criminal Court; misleading of Congress; and the denial of habeas corpus (recently

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[1] A brief curriculum vitae is attached as an appendix to this testimony. Although I sit on a law school faculty as well as on the boards of directors of a number of organizations, the views expressed here are mine alone, not those of my colleagues or of any of the institutions with which I am affiliated.

[2] See Statement of Harold Hongju Koh Before the House Committee on Foreign Affairs regarding The 2006 Country Reports on Human Rights Practices and the Promotion of Human Rights in U.S. Foreign Policy, March 29, 2007, available at http://www.internationalrelations.house.gov/110/koh032907.pdf ; Statement of Harold Hongju Koh before the Senate Committee on the Judiciary Regarding *Hamdan v. Rumsfeld*: Establishing a Constitutional Process, July 11, 2006, available at http://www.law.yale.edu/documents/pdf/Deans_Office/KOH__Hamdan_TESTIMONY.pdf ; Statement of Harold Hongju Koh before the Senate Committee on the Judiciary Regarding Wartime Executive Power and the National Security Agency's Surveillance Authority February 28, 2006, available at http://www.law.yale.edu/documents/pdf/HHKNSAtestfinal.pdf ; Statement of Harold Hongju Koh before the Senate Judiciary Committee Regarding The Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States, January 7, 2005, available at http://www.law.yale.edu/documents/pdf/KohTestimony.pdf .

rejected by the U.S. Supreme Court) for suspected terrorist detainees on Guantanamo.[3] I know that other witnesses--including law professors, historians, and advocates -- have submitted written testimony for the record of this hearing, documenting many of the legal violations that have occurred during recent years, a sorry historical record that has also been documented by numerous book-length accounts.[4]

Given this extensive record, let me focus my testimony on two issues: first, the distorted constitutional vision, based on claims of unfettered executive power, that this Administration has invoked to justify many of its policies; and second, specific steps -- combining executive orders, proposed legislation, agency reorganization, and foreign policy action-- that the next President and Congress should take to reverse the damage and restore the Framers' vision of checks and balances in national security affairs.

I. *A Distorted Constitutional Vision*

Before September 11, as a matter of constitutional law, U.S. national security policy was generally conducted within four widely accepted premises.[5] First, under our Constitution, executive power operates within a constitutional framework of checks and balances, resting on the vision of shared institutional powers set forth in Justice Robert Jackson's famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[6] That vision of shared powers rests on the simple notion that constitutional checks and balances do not stop at the water's edge. In a global world, we need an energetic executive, but checked by an energetic Congress and overseen by a vigilant judicial branch.

Second, there are no law-free zones, practices, courts, or persons. Third, we accept no infringement on our civil liberties without a clear statement by our elected representatives.[7] Fourth and finally, with the exception of a few political rights, such as

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[3] See *Boumediene v. Bush*, 553 U.S. -- (2008); 128 S.Ct. 2229 (2008).

[4] See, e.g., Frederick A.O. Schwarz, Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (2007); Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (2007); Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (2007); Barton Gellman, *Angler: The Cheney Vice Presidency* (2008); Eric Lichtblau, *Bush's Law: The Remaking of American Justice* (2008); Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (2008); James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (2006).

[5] See generally Harold Hongju Koh, Setting the World Right, 115 *Yale L.J.* 2350 (2006), from which this Part derives. For a historical review of the evolution of the Constitution's allocation of powers regarding national security matters, see generally Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (1990).

[6] 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). In *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981), a majority of the Court adopted Justice Jackson's tripartite framework.

[7] Under the "clear statement" doctrine of *Kent v. Dulles*, 357 U.S. 116 (1958), courts must carefully scrutinize statutes cited by the executive for signs not only that Congress has consented to the President's actions, but also to determine whether the President and Congress acting together have made a clear determination to infringe on individual rights. When individual rights are at stake, courts should "construe narrowly all delegated powers that curtail or dilute them." *Id.* at 129; *accord Greene v. McElroy*, 360 U.S. 474, 507-08 (1959).

the right to vote or serve on a jury, noncitizens are not systematically disadvantaged vis-à-vis citizens, especially with respect to economic, social, and cultural rights.[8]

Today, only seven years later, each part of this constitutional vision has been stood on its head. First, in defense of the various policies described above, the Bush Administration has consistently asserted a constitutional theory of unfettered executive power, based on extraordinarily broad interpretations of Article II's "Commander-in-Chief" Clause and the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*, which called the President the "sole organ of the federal government in the field of international relations."[9] Under this vision, the President's Article II powers are paramount, Congress exercises minimal oversight over executive activity, government secrecy prevails, and the Solicitor General regularly urges the courts to give extreme deference to the President, citing the judiciary's "passive virtues." Second, the Bush Administration has consistently rejected the universalism of human rights in favor of executive efforts to create law-free zones, such as Guantánamo; executive courts, such as military commissions; extralegal persons, who are labeled enemy combatants; and law-free practices, such as extraordinary rendition, all of which it claims are exempt from judicial review. The Administration has regularly opposed judicial efforts to incorporate international and foreign law into domestic legal review so as to insulate the U.S. government from charges that it is violating universal human rights norms. Third, we have increasingly heard claims that the executive can infringe upon our civil liberties without clear legislative statements, relying on such broadly worded laws as the Authorization for Use of Military Force Resolution (AUMF) of September 2001 to justify secret National Security Agency surveillance, indefinite detentions, and torture of foreign detainees.[10] Fourth, the conduct of the war on terror has deeply exacerbated distinctions between citizens and aliens within American society with respect to political, civil, social, and economic rights, and contributed to pronounced scapegoating of Muslim, Middle Eastern, and South Asian aliens.

The last straw has been the startling argument that executive action should be treated as a kind of law unto itself. Remarkably, the President's lawyers have recently argued, the policy rationale for executive action has somehow *created* the legal justification for executive unilateralism. Take, for example, the surprising revelation that the President had ordered the National Security Agency (NSA) to engage in nearly four

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[8] Indeed, in *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971), the Supreme Court went so far as to say that its decisions had "established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate.") (internal citations omitted).

[9] 299 U.S. 304, 320 (1936). When I served as a Justice Department attorney in the early 1980's, Justice Sutherland's description of the president's powers was jokingly called the "*Curtiss-Wright*, so I'm right cite"—a statement of deference to the president so sweeping as to be worthy of frequent citation in any U. S. government national security brief. But see Koh, *National Security Constitution*, *supra note* 5, at 93-96, explaining why the *Curtiss-Wright* decision and vision are deeply flawed.

[10] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).

years of secret, warrantless domestic surveillance of uncounted American citizens and residents, notwithstanding the statutory directive that domestic intelligence wiretapping be conducted exclusively within the terms of the 1978 Foreign Intelligence Surveillance Act (FISA).[11] The Bush Administration first claimed the necessity of wiretapping telephone calls involving al Qaeda, but ended up asserting that a presidential determination that the executive action was necessary not only overrode the FISA but also rendered application of that statute unconstitutional.[12] In January 2005, before the NSA program came to light, when Alberto Gonzales was being confirmed as Attorney General, the Chair of this subcommittee, Senator Feingold, asked Mr. Gonzales whether he believed the President could violate existing criminal laws and spy on U.S. citizens without a warrant. Mr. Gonzales dismissed the question as a "hypothetical situation," but answered that it was "not the policy or the agenda of this president to authorize actions that would be in contravention of our criminal statutes."[13] But when later questioned about this during hearings on NSA surveillance, he answered that he had not misled Congress because once the President had authorized an action, in effect, it had *become* legal under the President's constitutional powers and thus could not contravene any criminal statutes.[14]

Similarly, in its infamous, now-overruled August 2002 "Torture Opinion," the Justice Department's Office of Legal Counsel opined that: (1) even criminal prohibitions against torture do "not apply to the President's detention and interrogation of enemy combatants pursuant to [the President's] Commander-in-Chief authority," (2) "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President;" and (3) that executive officials can escape prosecution for torture on the ground that "they were carrying out the President's Commander-in-Chief powers," reasoning that such orders would preclude the application of a valid federal criminal statute "to punish officials for aiding the President in exercising his exclusive constitutional authorities."[15]

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[11] 18 U.S.C. § 2511(2)(f) (2000). See generally Koh, February 28, 2006 testimony, *supra* note 2 (criticizing the legal authority for this practice)

[12] "The President has determined that the speed and agility required to carry out the NSA activities successfully could not have been achieved under FISA. Because the President also has determined that the NSA activities are necessary . . . FISA would impermissibly interfere with the President's most solemn constitutional obligation" to defend the country and therefore would be "unconstitutional as applied." U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 34-35 (Jan. 19, 2006) [hereinafter DOJ White Paper], *available at* http://www.fas.org/irp/nsa/doj011906.pdf.

[13] Confirmation Hearing on the Nomination of Alberto Gonzales To Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 116-17 (2005).

[14] Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Alberto Gonzales, Att'y Gen. of the United States).

[15] Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto Gonzales, Counsel to the President, 35, 39 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf; *see also id.* at 39 ("Congress can no more interfere with the President's conduct of interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."). For a critical analysis of this opinion, see Harold Hongju Koh, *A World Without*

To students of constitutional history, this line of argument evoked eerie memories of Richard Nixon's comment: "[W]hen the president does it, that means that it is not illegal."[16] If this is true, then the President's word alone is law, and the carefully prescribed system of checks and balances prescribed in the Constitution no longer exist.

II. *Recommendations for the Next Administration and Congress*[17]

The Bush Administration's "War on Terror" has done serious and extensive damage to civil liberties and the rule of law in the name of national security. The Administration's obsession with defining our human rights policy through the "war on terror" has clouded our human rights reputation, given cover to abuses committed by our allies in that "war," blunted our ability to criticize and deter gross violators elsewhere in the world, and made us less safe and less free. Thankfully, some of these policies have been rebuffed by the current Supreme Court, even though seven members of that court were appointed by the President's own party.[18] Moreover, they have yielded strikingly few convictions or proven security benefits, while costing tens of millions to maintain Guantanamo as an offshore prison camp and devastating America's global reputation for commitment to the rule of law.[19]

Even before his inauguration, the next President should unambiguously signal his intention to reverse this trend.[20] Upon taking office, the new Administration should move decisively to restore respect for the rule of law in national security policy with a package of executive orders, proposed legislation, agency shakeups, and concrete foreign policy actions.

Torture, 43 Colum. J. Transnat'l L. 641 (2005), based on testimony at http://www.law.yale.edu/documents/pdf/KohTestimony.pdf .

[16] *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16.

[17] This Part derives from a forthcoming chapter in *Change for America: A Progressive Blueprint for the 44th President* (Basic Books 2009) (Mark Green & Michele Jolin, eds.).

[18] See *Boumediene v. Bush*, 553 U.S. -- (2008); 128 S.Ct. 2229 (2008); *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004).

[19] See David Bowker & David Kaye, *Guantanamo by the Numbers*, New York Times, Nov. 10, 2007 (enumerating financial costs of Guantanamo).

[20] At this writing, both presidential candidates have expressed willingness to change direction on some of these issues. *Compare* Senator John McCain, Op-ed, *Financial Times*, March 18, 2008, available at http://www.cfr.org/publication/15755/mccains_oped_on_the_us_and_europe.html?breadcrumb=%2Fcampaign2008%2Fspeeches%3Fpage%3D3 ("We Americans recall the words of our founders in the declaration of independence, that we must pay "decent respect to the opinions of mankind". … We all have to live up to our own high standards of morality and international responsibility. We cannot torture or treat inhumanely the suspected terrorists that we have captured. We will fight the terrorists and at the same time defend the rights that are the foundations of our society.") *with* Speech by Senator Barack Obama, Ohio State University, February 27, 2008, available at http://irregulartimes.com/index.php/archives/2008/02/27/recording-of-barack-obama-speech-in-columbus-february-27-2008/ ("We are going to lead by example, by maintaining the highest standards of civil liberties and human rights, which is why I will close Guantanamo and restore habeas corpus and say no to torture. … Because if you are ready for change, then you can elect a president who has taught the Constitution, and believes in the Constitution, and will obey the Constitution of the USA.")

In undoing the damage of the last seven years, the new Administration faces three major challenges. First, the scale of government national security activity has been so extensive and extreme that it will be difficult to undo over time, and even more difficult to undo quickly. Even a recognized policy fiasco such as Guantanamo –which President Bush, his Secretaries of State and Defense, and his Attorney General now all concede should be closed--has lingered, in part because of the complex interagency and diplomatic negotiations needed to avoid sending detainees who never should have been brought to Guantanamo from now being dispersed to locations where they could be subject to even crueler treatment.

Second, in public discourse, a nonevent -- the absence of a major terrorist attack on U.S. soil since September 11-- has been repeatedly offered as proof that the Bush Administration's infringements of law and civil liberties were somehow necessary. Those who have criticized the Government's extreme practices have been branded as unpatriotic, naïve, or soft on national security.

Third, all three branches of government participated in the warping of sound constitutional process. Journalistic accounts confirm that a dysfunctional process arose within the executive branch, which excluded all but the most extreme voices. This "groupthink" drowned out moderate government voices and a cloak of secrecy kept extreme policies from being reviewed effectively by good lawyers.[21] Rather than being part of the solution, the two other branches of government were too often been part of the problem. A compliant Congress repeatedly blessed unsound executive policies by enacting nominal, loophole-ridden "bans" on torture and cruel treatment and rubberstamping, without serious hearings, presidentially introduced legislation ranging from the Patriot Act, to the Military Commissions Act, to the most recent amendment of the Foreign Intelligence Surveillance Act (FISA). The lower courts in which 9/11 litigation has been concentrated have accepted many of the government's most extreme claims regarding state secrets and immunity. Even when the Supreme Court has set welcome limits on executive overreaching, it has acted late and through sharply divided decisions.

Significantly, civil society—not government--has led the resistance to the Administration's extreme tactics on each of these issues.[22] The new Administration should reassure civil society that it genuinely respects the rights of the people. The new President should promise that in the future, national security policies will not be set by closed, secret "war councils," but rather, through transparent processes designed to bring diverse experiences and viewpoints before key policymakers. Upon election, the new

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[21] See sources cited in note 4, *supra*.

[22] The media uncovered Abu Ghraib. The organized bar offered representation to detainees and challenged policies in court. Career Justice Department officials resisted the government wiretapping program. Career military officers spoke out against torture and for the Geneva Conventions. Librarians across America protested the extension of the Patriot Act to library records.

Administration should immediately signal its new direction by taking four steps.

A. Closing Guantanamo. First, as soon as the transition teams are appointed, the Justice, State, Defense, Intelligence and White House teams should work closely with their Bush Administration counterparts to identify steps needed to close the Guantanamo prison camp as soon as possible.[23] To fully close Guantanamo, each detainee's case should be individually reviewed to determine: (1) which detainees have committed crimes against the U.S. and thus should be brought to U.S. soil (presumably to supermax prisons) for prosecution in regular federal or military courts; (2) if they cannot be properly tried for crimes against the U.S., which detainees should be transferred for prosecution in their home country or a third country, in accordance with applicable extradition principles; (3) which detainees have committed no crimes against the U.S. and thus should be repatriated to their home country for release, consistent with U.S. obligations under international human rights and humanitarian law; and (4) which detainees have committed no crimes against the U.S., but must be resettled in third countries (or granted asylum), rather than returned home, where they face substantial risk of torture or other forms of persecution.[24]

With respect to the last three groups, immediately after the 2008 election, the incoming State Department transition team should ask the outgoing administration to appoint a high-level confidant of the President-elect as a special envoy. That special envoy should be dispatched abroad to advise nations whose citizens comprise significant parts of the Guantanamo population that the strength of their diplomatic relations with the new Administration will depend vitally upon their willingness, where possible, to repatriate their citizens *before* the inauguration with meaningful and enforceable diplomatic assurances -- in writing, and monitored by visitations by U.S. diplomats, the International Committee of the Red Cross, and human rights nongovernmental organizations-- that repatriated detainees will not be subjected to torture or cruel treatment.

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[23] In a parallel case, the Carter Administration and the Reagan transition team worked closely together in 1980 to secure the release of the Iranian Hostages on inauguration day, allowing the new administration to take office free of this albatross. When President Clinton was elected in 1992, by contrast, his transition team did not persuade the first Bush Administration to clear Guantanamo of Haitian refugees or to terminate Bush's policy of directly returning refugees to Haiti, saddling the new administration with the standing policy, which then was not reversed until nearly two years later.

[24] Any ongoing military commissions cases should be terminated, and the suspects recategorized into one of these four categories. These categories derive from detailed recommendations set forth in the Joint Scholars' Statement of Principles for a New President on U.S. Detention Policy: An Agenda for Change, of which I am a co-signatory (and which has been submitted as prepared testimony into the record of this hearing and is available at www.yale.edu). That Statement draws in turn upon detailed reports by 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 (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).

At the same time, the Defense Department should begin shutting down facilities on Guantanamo to demonstrate that the United States will no longer inappropriately use the naval base as an offshore prison camp. The DOD's Office of Detainee Affairs should be brought under the supervision of a senior legal counsel position on human rights and humanitarian law created within the Defense Department's General Counsel's Office. A similar legal counsel position should also be created within the General Counsel's Office at the Department of Homeland Security.

The Justice Department should appoint a point person to deal collectively with Guantanamo habeas counsel, and to file judicial statements of interest seeking delay of pending habeas petitions in cases where there is a high likelihood of imminent diplomatic release. Incoming attorneys to the White House Counsel's office, the Defense Department's General Counsel's office and the Justice Department's Office of Legal Counsel should also be given access to all classified legal opinions issued by those offices to determine which opinions should be withdrawn as based on inappropriate legal theories.

B. Executive Orders. Second, as soon as the new President takes office, he should issue executive orders: (1) ordering the relevant agencies to begin formally closing the prison camp at Guantanamo by a date certain; (2) directing compliance by all U.S. officials with the Geneva Conventions and the Convention Against Torture, which are ratified treaties that are part of U.S. law; (3) unequivocally banning the use of torture and cruel, inhuman or degrading treatment (including waterboarding) by any person employed by or under contract to the United States government anywhere in the world; and (4) clarifying that the new Administration will not construe the vaguely worded Authorization for the Use of Military Force (AUMF) Resolution to override existing legislation or to infringe upon or modify pre-existing legal rights.[25]

As part of that package of executive orders, the President should further immediately: (5) establish as part of the National Security Council structure, a National Security Law Committee (NSLC).[26] This new entity would serve as the decisionmaking body for national-security related legal issues, such as surveillance policy, detention and interrogation practices, rules of engagement and others. The NSLC would be chaired by the Attorney General and report directly to the President through the Attorney General, and would include the Secretaries of State, Defense, the National Intelligence Advisor, and the Director of Homeland Security; and (6) create an independent commission, modeled perhaps on the 9/11 commission, to investigate -- and if appropriate, to recommend accountability measures to address -- torture, human rights abuses, and other legal violations that may have been committed or authorized by U.S. government officials during the past seven years.

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[25]Authorization for Use of Military Force Resolution, September 18, 2001, Pub. Law No. 107-40, S. J. RES. 23, 107th CONG., 115 Stat. 224 (2001).

[26] For elaboration, see the forthcoming chapter by Samuel Berger and Thomas Donilon in *Change for America: A Progressive Blueprint for the 44th President* (Basic Books 2009) (Mark Green & Michele Jolin, eds.), to which I owe this suggestion.

(7) Finally, the new President should publicly forswear future executive or legislative efforts to avoid habeas corpus by moving detainees to offshore locations, through extraordinary rendition to "black sites." The Supreme Court recently made clear that "the political branches [do not] have the power to switch the Constitution on or off at will" by moving detainees around to various "law-free zones."[27]

Taken together, these executive orders should send the unequivocal message that the United States does not accept double standards in human rights. Like much of international law, the Geneva and Torture Conventions are not about our adversaries and who they are; rather, they are about us and who we are and how we are obliged to treat all detainees, however they may behave: with basic humane treatment, as a matter of universal principle. If we truly believe that human rights are universal, we are obliged to respect them, even for suspected terrorists.

C. National Security Legislation. The new President should also ask Congress to create a bipartisan, bicameral standing committee on liberty and security legislation. At the earliest opportunity, the new President should work with these congressional leaders to introduce "national security charter" legislation to support a continuing fight against terrorists, while at the same time defending the basic rights that form the foundation of our society.[28] This legislation should be considered in thoughtful hearings (similar to those conducted in first adopting the Foreign Intelligence Surveillance Act in the late 1970s) aimed at dismantling bad policies adopted since September 11, without adopting the new bad policies that some are offering to replace them. Such legislation should: (1) repeal the Military Commissions Act, or at a minimum, revise it drastically to repair the inadequacies in that law's procedures identified by the Supreme Court in its 2006 decision in *Hamdan v. Rumsfeld*;[29] and (2) revise classified information procedures to enable more effective terrorism prosecutions in standing civilian courts.

Any new national security legislation should resist authorizing a new system of preventive detention or creating a special "terror court" of the kind being urged by some commentators.[30] A recent empirical report by former prosecutors (released by Human

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[27] *Boumediene v. Bush*, 553 U.S. --, -- (2008); 128 S.Ct. 2229 (2008) (slip op. at 36) (ruling that the Guantánamo detainees have a constitutional right to habeas corpus). On the same day, the Court ruled that the writ of habeas corpus runs to all U.S. citizens being held anywhere under American command and control. As the concurring opinion in that case noted, nothing in the Court's opinion "should be read as foreclosing [judicial] relief for a citizen of the United States who resists transfer ... from the American military [or presumably civilian intelligence] ...to a foreign country for prosecution in a case in which the possibility of torture is well documented, even if the Executive fails to acknowledge it." *Munaf v. Geren,* 553 U.S. – (2008) (Souter, J., joined by Breyer, and Ginsburg, JJ., concurring) at 2.

[28] I have previously described what such national security legislation could look like in Harold Hongju Koh, *The National Security Constitution, supra* note 5.

[29] *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006).

[30] See, e.g., Benjamin Wittes & Mark Gitenstein, *A Legal Framework for Detaining Terrorists: Enact a Law to End the Clash over Rights*, The Brookings Institute: Opportunity '08, at 12 (Nov. 15, 2007), *available at*: http://www.brookings.edu/papers/2007/~/media/Files/Projects/Opportunity08/PB_Terrorism_Wittes.pdf; Andrew McCarthy & Alykhan Velshi, *We Need a National Security Court*, *in* Outsourcing American Law 43 (forthcoming), *available at* http://www.defenddemocracy.org/usr_doc/NationalSecurityCourt.doc. Jack

Rights First) extensively reviews more than more than 120 international terrorism cases pursued in the federal courts over the past fifteen years and concludes that the existing federal civilian courts can be adapted to the task of trying terrorist suspects.[31] The Supreme Court has now twice indicated that rulings of regularly constituted courts are more likely than those of *ad hoc* courts to survive judicial scrutiny.[32]

These sources suggest that our standard for American justice should be the due process of law required by the Constitution and international law, not “at least it’s better than Guantanamo.” The goal of the next Adminstration and Congress should be to end debacles like Guantánamo, not to set its worst features in concrete. Any tailor-made “terror court” would plainly fail the most relevant test of "credible justice"-- justice that potential allies in the Mideast might find convincing. Few abroad will likely respect the judgments of an extraordinary court designed to convene in secret to punish a particular class of suspect-- particularly those of the Muslim faith-- for crimes that could not be prosecuted in a standing, open, regularly constituted court. Nor should we promote a system of preventive detention that is likely to become a breeding ground for terrorists, as occurred in the British prisons for the Northern Irish, particularly if those courts will never win credibility abroad and may eventually be found unconstitutional in any event. As a nation, we should not accept that indefinite detention without trial, abusive interrogation, and other unacceptable practices have somehow become necessary features of a post-9/11 world. We should appoint good judges and give our standing civilian and military courts their proper role in the system of separation of powers, not further damage our reputation abroad by trying to appoint antiterror judges or creating tribunals that will be widely perceived as rubber stamps for executive action.[33]

The arrival of a new Congress along with the new President in 2009 should also create an occasion for revisiting the foreign intelligence surveillance amendments of 2008.[34] Unlike the controversial legislation enacted hastily in 2008, the previous version of FISA resulted from extensive hearings and bipartisan legislative process following the resignation of President Nixon during Watergate. Similar legislative hearings should be held early in the next Congress, with greater emphasis on examining the impact of widespread datamining and government surveillance on privacy protections and less emphasis on narrow demands for immunity by telephone and internet service providers. Such hearings should also evaluate, on a thirty-year record, the proven strengths and

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Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. Times, July 11, 2007 (urging that detention determinations be made by life-tenured Article III judges, selected by the Chief Justice of the U.S. Supreme Court, similar to the selection of judges who serve on the Foreign Intelligence Surveillance Court).

[31] See Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (MAY 2008) (available at http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf) [hereinafter *In Pursuit of Justice*] (including quantitative analysis and based upon interviews with judges, prosecutors and defense lawyers with firsthand experiences in terrorism cases).

[32] *Hamdan* v. *Rumsfeld*, *supra* note 29 (underscoring value of proceeding in regularly constituted courts); *Boumediene v. Bush, supra* note 27.

[33] Other specific policy suggestions for detention policy are elaborated in the Joint Scholars’ Statement of Principles for a New President on U.S. Detention Policy: An Agenda for Change, *supra* note 24.

[34] If there were political will to do the job seriously, careful legislative hearings could also reexamine the impact of the Patriot Act on civil liberties before it becomes a permanent part of our legal landscape.

weaknesses of the Foreign Intelligence Surveillance Court as a specialized judicial institution designed to protect both privacy and national security concerns.

D. Supporting International Law and Institutions: Finally, respect for the rule of law should not be limited to domestic constitutional law. The next President should recall the words of our founders in the Declaration of Independence to pay "decent respect to the opinions of mankind" by supporting, not attacking, the institutions and treaties of international human rights law.[35] Despite the Bush Administration's vocal opposition to the International Criminal Court (ICC), for most of its second term, the Administration has pursued a policy of *de facto* acceptance of the Court's existence, passively supporting the prosecutions of high-level leaders in Sudan and war criminals in Uganda and the Congo. To make this policy official, at the earliest opportunity, the new Secretary of State should withdraw the Bush Administration's May 2002 letter to the United Nations "unsigning" the U.S. signature to the Rome Treaty creating the ICC, restoring the *status quo ante* that existed at the end of the Clinton Administration.[36]

The new Administration should publicly support the efforts of the ICC Prosecutor to convict those most responsible for the genocide in Darfur and provide prosecutorial and intelligence resources to the Prosecutor's staff, much as the U.S. government provided for the prosecutorial staff at the International Criminal Tribunals for Yugoslavia and Rwanda.[37] The new Administration should also declare its commitment to preventing future genocides and mass atrocities by adopting the recommendations of the Genocide Prevention Task Force of the Holocaust Museum, co-chaired by former Secretaries of State and Defense Madeleine Albright and William Cohen.[38] In addition, the Administration should reengage diplomatically with the Contracting Parties to the ICC to seek resolution of outstanding U.S. concerns and pave the way for eventual U.S. ratification of the Rome Treaty.

To further signal its support for accountability for human right violations, the new Administration should move the State Department's Ambassador-at-Large for War Crimes into a standing bureau, the Bureau of Democracy, Human Rights and Labor, and clarify that the Ambassor-at-Large's mandate includes both genocide monitoring and prevention coordination. At the same time, the Administration should broaden the

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[35] *See, e.g.,* the comments of Senator McCain, *supra* note 20.

[36] *See* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm. Although the United States did not initially accede to the Rome Statute of the International Criminal Court, President Clinton ultimately signed the treaty on December 31, 2000, just before leaving office. *See Clinton's Words: "The Right Action,"* N.Y. TIMES, Jan. 1, 2001, at A6.

[37] For example, the United States could provide evidence or experienced prosecutors to support ICC prosecutions —as was done when the United States made classified evidence available to the International Criminal Tribunal for the former Yugoslavia (ICTY) to support the indictment of Slobodan Milosevic—as well as cooperate in the extradition to the ICC of suspects located on U.S. territory. Such cooperation would help shift the United States toward a more pragmatic long-term policy of cooperating with the ICC. See generally Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 Stanford L. Rev. 1479, 1509 (2004).

[38] See http://www.ushmm.org/conscience/taskforce/

mandates of the anti-trafficking and war crimes units of the Justice Department's Criminal Division. In addition, the Attorney General should appoint a point person in the Justice Department's Civil Rights Division to play the role played by that division during the Carter and Clinton Administrations of monitoring (and where appropriate, supporting) accountability efforts of human rights victims in Alien Tort Claims Act and Torture Victim Protection Act cases. The transition team for the Civil Division of the Justice Department should also survey pending human rights cases against former U.S. government officials to ensure that overly expansive claims of state secrets or immunity have not been asserted.

Finally, at the earliest opportunity, the new Administration should signal its willingness to endorse universal standards by re-engaging in the Kyoto Protocol process and moving the long-overdue ratifications of a number of key treaties.[39] The new Administration should also signal its readiness to resume a leading role on human rights issues by promoting and ratifying the new U.N. Conventions on Disability Rights and Against Forced Disappearances, seeking a seat on the new United Nations Human Rights Council, and engaging with the UN Secretary-General and High Commissioner for Human Rights to develop and promote a common human rights agenda for the next decade.

In short, the new Administration should clearly announce that it will not allow its policy toward international law and human rights to be subsumed entirely by the War on Terror. As recent months have shown, there are simply too many other global issues--ranging from the global economy, to energy policy, to climate change, to public health--that demand America's urgent attention. The new President should clearly announce his intent to engage those issues in a way that lives up to America's historically high standards of international responsibility and respect for the rule of international law.

III. *Conclusion*

Since all of us have been alive, the United States has been recognized as the world's human rights leader. From World War II until September 11, ours was universally regarded as a nation that valued human rights and the rule of law, that spoke out against injustice and dictatorship in other countries, and that tried to practice what we preached. Of course, we were never perfect, but we were usually thought to be sincere. Other countries would listen to what Americans had to say because we were powerful, but they thought us powerful in part because they thought us principled.

Ours is a country built on human rights. Quite simply, our commitment to human rights and the rule of law define who we are, as a nation and a people. If this country no longer stands for these principles, we really don't know who we are anymore.

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[39] The most obvious candidates are the U.N. Convention on the Law of the Sea, the American Convention on Human Rights, the UN Convention for the Elimination of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child (which remarkably, only one other nation in the world has not yet ratified).

As difficult as the last seven years have been, they loom far less important in the grand scheme of things than the next eight, which will determine whether the pendulum of U.S. policy swings back from the extreme place to which it has been pushed, or stays stuck in a "new normal" position under which our policies toward national security, law and human rights remain wholly subsumed by the "War on Terror." To regain our global standing, the next President and Congress must unambiguously reassert our historic commitments to human rights and the rule of law as a major source of our moral authority.

Thank you. I look forward to answering any questions you may have.

Appendix

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