

June 8, 2009

The Honorable Barack H. Obama
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: The Adequacy of Our Existing Laws and Institutions to Deal with the Threat of Terrorism

Dear Mr. President:

We are writing to express our concern with suggestions that have been made for the creation of a new legal regime to deal with terrorist suspects. We understand that your primary responsibility as President is to protect the security of our nation, and that some are advising you that our existing laws are inadequate to deal with the threat we face today from international terrorism and that a new system for detaining suspected terrorists is required to protect the nation's security. We urge you to approach that advice with caution.

We believe that our existing laws are adequate and enable the government to detain those who need to be detained to protect the nation's security. We further believe that departing from existing law and bending our bedrock principles will ultimately make us less safe by undermining our greatest asset in the struggle with international terrorism – our moral authority and international respect as a nation committed to the rule of law.

Executive Summary — Our Existing Legal System Works.

Our country can achieve its legitimate goals through existing laws which authorize the detention of those who should be detained in the fight against international terrorism. Longstanding law-of-war principles authorize the detention for the duration of armed hostilities of those who engage in armed conflict against the United States or its allies. They do not authorize the detention of people for terrorist activities far from the battlefield, which are not acts of war but criminal acts. Our existing federal criminal laws equip us to deal effectively with terrorist threats away from the battlefield. They authorize the prosecution, conviction and incarceration of anyone who intentionally plans, engages in or supports acts of terrorism directed against our country, our citizens or our property, or who assists groups in carrying out those activities.

Together those laws equip us to deal effectively with the threat of terrorism we face today. They enable us to detain anyone who commanded or fought with Taliban troops in battle.

They also enable us to prosecute and incarcerate anyone who received explosives training at al-Qaeda training camps or who swears allegiance and provides assistance to Osama bin Laden or otherwise makes it clear, acting on behalf of a terrorist organization, that he intends to kill Americans and takes any act to carry out that intent. Some modifications to the existing system may be warranted, but no new system is necessary. We urge you to resist calls to depart from a system that has worked effectively and that provides us with international credibility as a nation committed to the rule of law.

We firmly believe it would be a grave mistake to create a new legal regime to permit the detention of persons who could not be detained under existing law. Authorization of “preventive detention” is unnecessary and directly in conflict with the principles this country is founded upon, and would seriously undermine your efforts to restore our reputation in the international community.

Law-of-War Principles Authorize the Detention for the Duration of Armed Hostilities of Those Who Engage in Armed Conflict Against U.S. Troops.

The law does not require everyone detained to be charged criminally. Whenever U.S. troops are engaged in armed conflicts, they must be able to seize and detain those who are fighting against them, whether members of the enemy’s armed forces or civilians who directly participate in the hostilities. As the Supreme Court made clear in the *Hamdi* decision, “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.”¹ No criminal charge is required. Whenever “[a]ctive combat operations” are ongoing, as they are in Afghanistan and Iraq, “[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to . . . [have] engaged in an armed conflict against the United States.”²

There are limits, of course, on the authority to detain under the laws of war. First, the detention is only temporary; it “may not last longer than active hostilities,”³ and individuals may be detained only “for the duration of the particular conflict in which they were captured.”⁴

Second, detention under the laws of war is intended to prevent captured enemy forces from returning to the battlefield; it may not be used as a means for incarcerating people for suspected criminal conduct engaged in far from the battlefield. The laws of war cannot be used to circumvent the criminal justice process.

Terrorists Are Criminals.

Acts of terrorism, such as the killing of innocent civilians and the intentional and wanton destruction of property, are criminal acts. Organizations committed to those activities are

criminal enterprises, and anyone who intentionally assists them in carrying out their purposes is a criminal. The President may certainly employ military personnel outside areas of actual armed conflict abroad to track down and capture persons suspected of planning, engaging or assisting in those criminal terrorist acts. But any suspect apprehended in those operations may be imprisoned only after charge and trial under the criminal laws. The military is no more authorized to incarcerate a terrorist suspect captured in Bosnia or England or Canada until the end of the “war on terror” than it would be to incarcerate a suspected drug dealer captured in Bogota or Mexico until the end of the “war on drugs.” If the suspicions against them are correct, these people are criminals and should be prosecuted as such.

It is also a mistake in our view to treat terrorists as anything but common criminals. Awarding them the status of combatants glorifies them and elevates them to a status they do not deserve. Anyone who intentionally plans, participates in or supports terrorist acts, such as those committed on 9/11, is a criminal and should be brought to justice through the criminal process.⁵

Existing Criminal Laws Authorize the Government to Prosecute and Prevent Terrorist Activities Directed Against the United States or its Citizens.

Those who suggest that the criminal laws are inadequate may not be familiar with the breadth of those laws. Our existing criminal statutes reach the range of people who should be detained. They cover murder, bombing, assault, theft, intentional destruction of government and private property, kidnapping and high-jacking. Congress has also enacted statutes that specifically address terrorist-related activities and authorize the government to thwart those activities in their nascent stages. See, for example:

- 18 U.S.C. § 2384: Conspiring to overthrow, make war or oppose by force the government of the United States.
- 18 U.S.C. § 2339A: Providing “material support or resources” to terrorist organizations for carrying out a number of specified offenses, including murder, kidnapping and the violation of various anti-terrorism statutes.
- 18 U.S.C. § 2339B: Knowingly providing material support for foreign terrorist organizations, but not requiring intent that the support be used in furtherance of terrorist activity.
- 18 U.S.C. § 2339C: Engaging in conduct that “directly or indirectly” provides funds with the knowledge that the funds will be used to carry out terrorist activities.

- 18 U.S.C. § 2339D: Receiving military-type training from an organization that the Secretary of State has designated a foreign terrorist organization.
- 18 U.S.C. § 2332b: Committing acts of terrorism “transcending national boundaries.”

Those engaging in or supporting terrorist acts would also be likely to violate a number of other criminal statutes, for example, money laundering, illegal possession of fire arms or explosives, the making of false statements, and wire, mail and credit-card fraud. In addition, the authority to charge persons not only with the substantive crimes themselves but also with aiding and abetting or conspiring to commit those crimes expands considerably the government’s ability to prosecute and detain dangerous people. There is also a statutory presumption that anyone charged with terrorism-related offenses may be detained before trial. *See*, 18 U.S.C. § 3142.⁶

The Existing Criminal Justice System Works and Has Credibility.

Again, those who suggest that our criminal justice system is inadequate may not be familiar with the record of convictions compiled by the Department of Justice since 9/11. In a report prepared under the prior Administration, the Department concluded that the existing criminal laws provide it with the tools necessary to prosecute terrorist suspects and stop acts of terrorism before they can be carried out.⁷ As it reported, the Department has achieved “impressive success” and has drawn “on the full range of criminal charges available in the federal criminal code” to successfully prosecute suspected terrorists. Its “effective use” of the existing statutes “has allowed [it] to intervene at the early stages of terrorist planning before a terrorist act occurs.”⁸ Between September 2001 and June 2006, it obtained convictions against more than 250 people in U.S. criminal courts for terrorism-related offenses. The convictions covered a range of activities, from completed acts of terrorism to the “early stages of terrorist planning” and enabled it “to disrupt terrorist activity before it occurs.”⁹

Recently, former federal prosecutors from the Southern District of New York also conducted a study that carefully examined nearly 125 federal terrorism prosecutions involving Islamic extremist groups. Based on a detailed review of those cases, they concluded that the existing “criminal justice system serves as an effective means of convicting and incapacitating terrorists.”¹⁰ They found that major terrorism cases did raise complications, but that the criminal justice system, and the federal judges administering it, had proved remarkably capable of adapting to meet those challenges and to do justice in the individual cases.

The former federal prosecutors also examined the possibility that the government would be unable to detain someone who it believed, based on valid intelligence information, was linked

to terrorism. They concluded: “Given the breadth of the federal criminal code, the energy and resourcefulness of law enforcement agents and federal prosecutors, and the fact that terrorists, by definition, are criminals who often violate many laws, we believe that it would be the rare case indeed where the government could not muster sufficient evidence to bring a criminal charge against a person it believes is culpable. And experience bears out this conclusion . . . [T]he overall body of cases strongly suggests that existing tools provide an adequate basis for the lawful detention of suspected terrorists.”¹¹

Thus, our federal criminal justice system has repeatedly demonstrated its ability to successfully prosecute and imprison those who plan, commit, or assist in committing, terrorist acts directed against the United States and its citizens. Although some modifications or additions to existing law may be warranted – and we would support a study to examine that issue – *no new system is necessary*.

There are also clear advantages to using the existing system. First, decisions by our existing civilian courts have credibility, far more than any decisions by military commissions or national security courts or administrative panels ever could. Second, the existing system is in place, with well developed rules and procedures and an experienced judiciary, which has shown flexibility in adapting the system to meet the needs of individual cases. Any new system – even a modified commission system – would require the creation of new procedures and precedents that would inevitably cause delays. Finally, any new system is likely to be challenged in litigation, lengthening the delays. In other words, any new system is likely to be subject to the same sorts of problems and delays that have plagued the military commissions at Guantanamo and prevented them from being an effective tool for prosecuting terrorism suspects during the prior Administration.

In summary, the claims that the criminal justice system is inadequate and must be bypassed are not based on fact. The evidence shows that the system does work. The recent outcome in the *Al Marri* case is the latest confirmation of that. Believing that Mr. Al Marri could neither be interrogated nor prosecuted effectively within the criminal justice system, the prior Administration swept him out of the system and detained him for years in a naval brig as an enemy combatant. This Administration reversed that policy, and brought him back into the system, where he was indicted and recently pled guilty. We agree with the Attorney General that this experience “reflects what we can achieve when we have faith in our criminal justice system and are unwavering in our commitment to the values upon which the nation was founded and the rule of law.”¹²

The Use of Evidence Obtained by Torture.

Some have suggested that the existing criminal justice system cannot be used to convict certain known al-Qaeda criminals who are now in custody because the evidence against them was obtained through torture and therefore may not be used in our federal courts. If that is a problem, however, it exists only for the limited population of existing prisoners. We can avoid that problem in the future by banning the use of torture, a policy already adopted by your Administration. No new system is required to address a problem resulting from past mistakes that have already been corrected.

Moreover, even with respect to the existing detainee population, the government should be very suspicious of the accuracy of accusations against any individual if the only evidence against the person consists of statements extracted by coercion. As the Law Lords, the highest court of final appeal in the United Kingdom, recently emphasized: “the common law has regarded torture and its fruits with abhorrence for over 500 years.”¹³ It has done so not only because torture is technically illegal but also because of the “inherent unreliability” of the evidence it produces and because torture has “degraded all those who lent themselves to the practice.”¹⁴ Our Supreme Court has consistently agreed.¹⁵

The Existing System Protects Classified Information.

Some have also suggested that prosecutions under the existing system would jeopardize our security by requiring the government to disclose classified intelligence information regarding the methods that had been used to obtain information and the sources of the information. These suggestions, however, fail to take into account the detailed rules and procedures that have been adopted and employed by the courts under the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3. That statute is designed to balance the defendant’s right to be informed of the charges with the government’s need to protect classified information from disclosure. CIPA provides a number of procedures for accomplishing those goals, including the use of pseudonyms, paraphrasing, summaries and the like, all employed under the close supervision of the presiding judge. Those procedures have worked. As the Department of Justice concluded in its report: “[CIPA] enable[s] us to appropriately handle this intelligence in criminal cases while protecting both the classified information and defendants’ due process rights.”¹⁶

Similarly, the former federal prosecutors concluded in their study: “We are not aware of a single terrorism case in which CIPA procedures have failed and a serious security breach has occurred.”¹⁷ Patrick Fitzgerald, the prosecutor in the Embassy Bombing case, and now U.S. Attorney for the Northern District of Illinois, reached the same conclusion: “When you see how much classified information was involved in that case, and when you see that there weren’t any leaks, you get pretty darn confident that the federal courts are capable of handling these

prosecutions. I don't think people realize how well our system can work in protecting classified information."¹⁸

Imprisonment Based on Fear of Future Dangerousness Is Contrary to Our Values and Would Undermine Our Credibility in the International Community.

We are concerned that the efforts to detain people who cannot be detained under existing law would establish in this country a system of preventive detention – that is, a system under which people may be detained not for actions taken in the past (fighting against our armed forces or planning or engaging in criminal terrorist acts) but purely on the basis of suspicions about what they might do in the future.

Prolonged or indefinite detention based purely on suspicion has never been consistent with our system of justice. By contrast, it has been a hallmark of non-democratic nations, and it is contrary to our most fundamental values. It is not unusual for Presidents to receive advice to depart from those values to deal with the current threats facing the nation.¹⁹ By and large, our leaders have resisted calls to depart from our system of laws even when confronting the most dire threats. On occasion, however, the United States has departed from those principles and engaged in forced preventive detention.²⁰ Those are not proud moments in our history. With the passage of time and of the fears that impelled them, those actions have become recognized as stains in the history of our country that we have come to regret.²¹

The Eminent Jurists Panel of the International Commission of Jurists recently conducted a study of actions taken by countries around the world to combat terrorism. The Panel found that a number of countries had adopted counter-terrorism laws that “reduced legal safeguards relating to arrest, detention, treatment, and trial in order to provide a supposedly more effective framework to combat terrorism.” The Panel found that such measures “have encouraged prolonged arbitrary and *incommunicado* detention and created an environment prone to abuse.”²²

Significantly, the Panel also found that countries adopting such measures always provided the same rationale for doing so – that the situation they faced was unique, that the threat was entirely new and unprecedented, that existing laws were inadequate (even though existing laws were rarely examined) and that a new system was needed to safeguard the people's security.

The same rationale has consistently been advanced in support of preventive detention and consistently proved mistaken.

Most disturbingly, the Panel reported that it was the “liberal democratic societies – States that previously lauded the importance of the rule of law and human rights protections – that are now at the forefront of undermining those protections.”²³ In drawing this conclusion, the Panel found that these states are damaging more than themselves: “In departing from previously

accepted norms of behavior, such governments also give succour to others that have routinely violated the human rights of their citizens.”²⁴

The signers of this letter do not have access to all the information available to the government and, therefore, do not know whether there are, in fact, known al-Qaeda operatives among the detainees held at Guantanamo whose cases warrant convictions, but whom the government is precluded from successfully prosecuting because of existing evidentiary rules. We believe strongly, however, that it would not be worth risking lasting damage to our system of law and to our international credibility by deviating from our principles to accommodate problems in a few isolated cases.

Whatever steps may be necessary to deal with a few problem cases at Guantanamo cannot justify the creation of a preventive detention regime stretching into the future. The adoption of such a regime by the United States would seriously undermine the credibility and international support we need to effectively fight terrorism, while providing support to our enemies and encouragement to those states that routinely violate human rights. We must always bear in mind that conduct sanctioned by our government establishes a standard for all other nations.

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As the first nation to be deliberately founded on the principles of individual liberty and the rule of law – and as an historic beacon of those values around the world – the United States has a special obligation to adhere to those values. Unlike others, we are a nation bound together not by a common race or creed, but by our commitment to certain fundamental ideals. We believe, as we know you do, that those ideals and, most importantly, our commitment to the rule of law, are our greatest assets in the struggle against international terrorism.

Future generations will look back and judge how we act today – whether our political leaders had the courage to stand by our values or were willing to sacrifice those values in the face of threats from the likes of Osama Bin Laden. As Chief Justice Cranch cautioned more than 200 years ago: “[Our] Constitution was made for times of commotion”; it is in those “dangerous times” that we must “be peculiarly watchful” and vigilant in standing by our principles.²⁵ This same caution was expressed recently by Justice Sandra Day O’Connor: “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”²⁶

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Very truly yours,

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¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

² *Id.* at 521 (internal quotation marks omitted).

³ *Id.* at 520.

⁴ *Id.* at 518.

⁵ As District Judge William Young said in sentencing Richard Reid, the so-called “shoe bomber”:

You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. . . .

[W]ar talk is way out of line in this court. You’re a big fellow. But you’re not that big. You’re no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders. . . . You’re no big deal.

See Reid: ‘I am at war with your country’, CNN.com Law Center, Jan. 31, 2003, <http://www.cnn.com/2003/LAW/01/31/reid.transcript/>.

⁶ For example, in the Embassy bombing cases, defendant El-Hage was detained thirty-three months before his trial. *United States v. Hage*, 213 F.3d 74, 81 (2d Cir. 2000).

⁷ U.S. Department of Justice, Counterterrorism Section, *Counterterrorism White Paper*, 22 June 2006, at 3-4, 10-11, available at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

⁸ *Id.*

⁹ *Id.* at 3, 11.

¹⁰ Richard B. Zabel & James J. Benjamin, Jr., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISTS IN THE FEDERAL COURTS 2 (May 2008), available at: <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

¹¹ Zabel & Benjamin at 8. *See also* U.S. Department of Justice, Counterterrorism Section, *Counterterrorism White Paper* at 10 (describing “the flexibility of the criminal justice system” and “the range of charges available to both prevent and punish terrorist acts”).

¹² John Schwartz, *Path to Justice, but Bumpy for Terrorists*, N.Y. TIMES, May 2, 2009, at A9.

¹³ *A. v. Secretary of State*, [2005] UKHL 71, ¶11, ¶51 (appeal from Eng.).

¹⁴ *Id.*

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- ¹⁵ It has long been recognized in the United States that statements obtained through force and the threat of force are inherently unreliable because of “[t]he tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain.” *Stein v. New York*, 346 U.S. 156, 182 (1953). See *Rochin v. California*, 342 U.S. 165 (1951); *Brown v. Mississippi*, 297 U.S. 278 (1936).
- ¹⁶ U.S. Department of Justice, Counterterrorism Section, *Counterterrorism White Paper* at 4.
- ¹⁷ Zabel & Benjamin at 9.
- ¹⁸ S. Turner & S.J. Schulhofer, *THE SECRECY PROBLEM IN TERRORISM TRIALS* 25 (Brennan Ctr. For Justice 2005) (quoting a November 29, 2004 consultation with Patrick Fitzgerald). Judge Coughenour, who presided over the Millennium Bomber trial in 2001, noted that CIPA “played a prominent role during the trial,” and that “the act’s extensive protections [were] more than adequate.” John C. Coughenour, *The Right Place to Try Terrorism Cases*, WASH. POST, July 27, 2008, at B7.
- ¹⁹ See William H. Rehnquist, *ALL THE LAWS BUT ONE* (Random House, 1998).
- ²⁰ See *Id.*; *Korematsu v. United States*, 323 U.S. 214 (1944).
- ²¹ See Civil Liberties Act of 1988, 50 U.S.C. Appx. § 1989 (which, among other things, was intended to “acknowledge the fundamental injustice of” and “apologize on behalf of the people of the United States for . . . the evacuation, relocation and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II”).
- ²² *Assessing Damage, Urging Action, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, International Commission of Jurists, at 38.
- ²³ *Id.*
- ²⁴ *Id.* at 12.
- ²⁵ *United States v. Bollman*, 24 F. Cas. 1189, 1192-93 (C.C.D.C. 1807) (Cranch, C.J., dissenting).
- ²⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (U.S. 2004) (plurality opinion of O’Connor, J., joined by Rehnquist, C. J., and Kennedy and Breyer, JJ.).