

Charting America's Return to Public International Law Under the Obama Administration

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The administration of George W. Bush left the international credibility of the United States in tatters and seriously undermined any U.S. claim to leadership in human rights and the rule of law. The Obama administration can begin to repair the damage wrought by the Bush administration by establishing a healthy new respect for public international law. Reengaging the international community multilaterally to develop international law further would be widely welcomed after eight years of unilateral and dictatorial engagement.

Why is the deliberate embrace of public international law national security advice essential for the new Administration? Public international law creates a web of pragmatic expectations and reciprocal obligations that provide a stable framework for inter-state relations. Where there is no rule of law, there is likely to be chaos. And where there is chaos, threats can easily escalate from a micro- to a macro-level – as witnessed by the explosion of piracy activity off the Horn of Africa, the rise of al Qaeda in Afghanistan that led to the September 11 attacks on the United States, or the retrenchment of the Taliban in the chaotic tribal areas of western Pakistan.

There are two interrelated purposes for re-engaging international law. First, returning to international law is critical to winning over hearts and minds in the global struggle against terrorism. Second, embracing international law is fundamental if the United States is to recapture its leadership role in human rights and the rule of law. With the election of Barack Obama, the United States now has a unique opportunity to do just that.

The eruptions of spontaneous celebration in the United States and throughout the world following the election of President Obama represent a popular and surprisingly broad-based repudiation of the Bush administration. With this popular support and a Democratic Congress, President Obama is in a strong position to overturn some of President Bush's most alienating unilateral decisions with respect to international law.¹

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1. See, e.g., *One for the History Books; Barack Obama's Election as Our First African American President Touches Off Celebrations Around the World*, WASH. POST, Nov. 6, 2008, at C12; Sarah Baxter, *Welcome Back America*, TIMES ONLINE (London), Nov. 9, 2008, at 1; James Morrison, *Trust Regained*, WASH. TIMES, Nov. 7, 2008, at A14; Juliet Njeri, *Jubilant*

There are both immediate steps and longer-term actions that the Obama administration can take to bring the United States back into line with international law. In the near term, the Administration can push for ratification of the Law of the Sea Convention,² sign the treaty banning landmines,³ and acknowledge our compulsory jurisdiction before the International Court of Justice.⁴ Longer-term actions fall into four areas; each will be discussed fully below:

1. Reengage the United Nations
2. Reaffirm Adherence to the Geneva Conventions
3. Embrace the Kyoto process
4. Engage the International Criminal Court

Mary Ellen O'Connell, professor of law at the University of Notre Dame, recently ruminated on this very question only four days after Barack Obama took the oath as America's 44th president:

Can we expect the United States to return to the more general and robust commitment to international law that our leaders displayed until the 1960s? That, unfortunately, seems unlikely in the next four years. International law has simply been denigrated for too long among America's foreign policy elite. But I may underestimate the President. He may well have the wisdom to understand what so many of his predecessors did. Complying with

at Obama's Kenyan Home, BBC NEWS, Nov. 5, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7710675.stm>; Eric Johnston, *Fukui Town of Obama Erupts in Victory Parties*, JAPAN TIMES ONLINE, Nov. 6, 2008, available at <http://search.japantimes.co.jp/cgi-bin/nn20081106a3.html>. "Supporters welcomed Obama's victory with delirious celebrations on public squares and in living rooms across the United States and abroad. In Washington, hundreds took to the streets near the White House, carrying balloons, banging drums and chanting 'Bush is gone!'" Douglas Birch & Steven R. Hurst, *Obama Makes History with Win over McCain*, TAIWAN NEWS, Nov. 6, 2008, available at http://www.etaiwannews.com/etn/news_content.php?id=781938; Andrew Norfolk, *Kaya Burgess & Simon Bruxelles, He's Black, from a Single Parent, So What Excuse Is There Now?*, TIMES ONLINE (London), Nov. 6, 2008, at 11; *Obama Victory Sparks Celebration, Praise Around Globe*, CBC NEWS (Canada), Nov. 5, 2008, available at <http://www.cbc.ca/world/story/2008/11/05/obama-reaction.html>; Henry Chu, *World Reaction to Obama Victory: Elation*, L.A. TIMES, Nov. 6, 2008, available at <http://www.latimes.com/news/nationworld/world/la-fg-worlddrex6-2008nov06,0,6037603.story>; Kim Se-jeong, *Local Kenyans Cheer Obama's Victory*, KOREA TIMES, Nov. 5, 2008; Sharon Cohen, *Celebration, Tears Greet Obama's Victory Across U.S.*, BALT. SUN, Nov. 5, 2008, available at <http://www.baltimoresun.com/news/nation-world/balreact1105,0,4382896.story>.

2. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

3. U.N. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997 (Ottawa), 2056 U.N.T.S. 211 (entered into force Mar. 1, 1999).

4. Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1031 (entered into force Oct. 24, 1945).

international law is the surest way to realize our most cherished aspirations and to recapture our standing in the world. International law is the best means for promoting peace, prosperity, respect for human rights and protection of the natural environment.⁵

While she ultimately settled on a species of optimism more cautious than hopeful, I am satisfied to lean more toward hopefulness.

I. REENGAGE THE UNITED NATIONS

The collective security apparatus of the United Nations worked as intended in Afghanistan and Iraq. Not everyone was pleased with the outcomes, but the system worked. When the United States was attacked on September 11, the U.N. Charter's Article 51 self-defense provision was activated (together with the North Atlantic Treaty Organization's Article 5 mutual defense provision), and a NATO invasion of Afghanistan was undertaken with the general support of the Security Council in compliance with international law. The invasion of Iraq by U.S.-led forces was another matter entirely. It was undertaken without the support of the Security Council or NATO and was widely regarded as illegal.⁶

Part of what undermines Security Council action, however, is the increasingly indefensible make-up of its veto-wielding permanent membership. The five permanent members, the "P-5" (Russia, China, Britain, France, and the United States), reflect the power structure after 1945 and the end of World War II, rather than today's political realities. Both medium-sized and large states have agitated for years about this shortcoming, along with inequities built into systems of share allocation at the International Monetary Fund and World Bank – which also reflect the 1945 power distribution. The nuclear exclusivity rationale for the P-5 evaporated years ago, along with the economic rationale. Indeed, Japan and Germany, the second and fourth largest economies in the world⁷ (and the largest contributors to the U.N. budget after the United States) are still referred to in the U.N. Charter as "enemy states."⁸

The political reality in the United Nations, a bicameral sort of body, is that *legitimacy* in the General Assembly is derived from representativeness, while *authority* in the Security Council is derived from power. Each lacks

5. Mary Ellen O'Connell, *President Obama: New Hope for International Law?*, JURIST, Jan. 26, 2009, available at <http://jurist.law.pitt.edu/forumy/2009/01/president-obama-new-hope-for.php>.

6. Maggie Farley, *Annan Calls U.S.-Led Invasion of Iraq Illegal*, L.A. TIMES, Sept. 17, 2004, at A7.

7. *China Passes Germany in Economic Rankings*, CNN, Jan. 15, 2009, <http://www.cnn.com/2009/WORLD/asiapcf/01/15/china.economy/>.

8. U.N. Charter arts. 53(1), 77(1), 107.

what the other enjoys. The framers of the Charter cast this dichotomy in stone when they rendered General Assembly resolutions non-binding and Security Council resolutions binding.

There is general international agreement that increasing the Security Council's permanent membership would increase its legitimacy. In addition to obvious candidates for permanent seats, like Germany and Japan, others, such as India, Brazil, South Africa, and Egypt, have valid claims to permanent representation. Expansion was not possible during the Cold War, and the United States was lukewarm to the idea in the 1990s as it dealt with meltdowns in the Balkans and Africa. The Bush administration, of course, had no use whatsoever for the United Nations or other multilateral institutions.⁹

But the ongoing struggle against terrorism and recent financial crises have forced leaders to face reality. Washington has learned that it cannot succeed simply by "going it alone." Informal institutions are already changing. The G-8 is becoming the G-20.¹⁰ Brent Scowcroft sagely noted, "[w]e ought to have institutions that reflect the world we live in."¹¹

To be sure, expansion of the Security Council's permanent membership raises political issues and efficiency challenges that will need to be addressed. Powerful and jealous neighbors such as Pakistan and Mexico fear being left behind while India and Brazil ascend. Veto proliferation is a valid concern. But negotiated fixes for these issues, such as the creation of regionally rotating permanent seats and the development of what I call a

9. Nicholas Burns did, however, acknowledge some support for expansion in 2005, albeit even more tepid than that offered by the Clinton administration:

We . . . have expressed our openness to Security Council expansion, and proposed our own criteria-based approach as a constructive way to measure a country's readiness for a permanent seat. Such criteria could include: GDP, population, military capacity, contributions to peacekeeping, commitment to democracy and human rights, financial contributions to the UN, non-proliferation and counter-terrorism record, and geographic balance. We have said that we can support adding two or so new permanent members based on those criteria. In addition, we would endorse the addition of two or three additional non-permanent seats, based on geographic selection, to expand the Council to 19 or 20. . . . While Security Council reform is an important issue, we cannot let discussion on expansion divert our attention from, and delay action on, other important, more urgently-needed UN reforms. It is our conviction that no single area of reform should be addressed to the exclusion of others. . . . As such, we do not think any proposal to expand the Security Council – including one based on our own ideas – should be voted upon at this stage.

R. Nicholas Burns, Under Secretary of State for Political Affairs, Testimony as Prepared Before the Senate Foreign Relations Committee (July 21, 2005), *available at* <http://www.globalsecurity.org/wmd/library/news/un/un-050721-usia01.htm>.

10. James Traub, *Shaking up the Boardroom at World Government Inc.*, N.Y. TIMES, Jan. 3, 2009, at WK4, *available at* <http://www.nytimes.com/2009/01/04/weekinreview/04traub.html>.

11. *Id.*

“procedural veto” that refers matters to a standing committee of the General Assembly, are possible.¹²

By taking the lead in this effort, the Obama administration would gain immense credibility in parts of the world where the U.S. image has been tarnished. Action on this issue would also demonstrate the Administration’s intention to reshape this and other international institutions in a way that advances U.S. interests, rather than allowing structures to evolve on their own in an uncoordinated fashion that would be potentially harmful to U.S. interests.

II. REAFFIRM ADHERENCE TO THE GENEVA CONVENTIONS

The question of what to do with captured enemy combatants arose during the early days of the “global war on terror.” The Bush administration determined early on that the Geneva Conventions would have to be avoided if the intelligence value of the detainees was to be maximized. Indeed, as Counsel to the President, Alberto Gonzales in 2002 famously referred to the Geneva Conventions provisions on the treatment of prisoners as “quaint” and urged that the treaty not be applied to captured al Qaeda and Taliban fighters.¹³ This view held sway as well with regard to which interrogation methods should be used on detainees.

Groups of Administration lawyers, including Gonzales, met to wrestle with such questions, but they were by no means all in agreement.¹⁴ William Howard Taft IV, the State Department Legal Adviser, represented Secretary Powell’s view that the Geneva Conventions should apply; otherwise, U.S. troops could not expect to be given such protections when they, in turn, were captured. Vice President Richard Cheney’s counsel, David Addington, vehemently disagreed.¹⁵ Ultimately, the view of Addington and Gonzales carried the day, and that cleared the way for the Central Intelligence

12. See Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319 (2000). Under this framework, the current five permanent members would retain their substantive veto power, but any new members acceding to permanent seats on the Security Council would wield a procedural veto rather than a substantive one. A procedural veto, when cast, would not kill a matter as a substantive veto does (or “withholding of assent” to use the U.N. terminology). Instead, a procedural veto would refer the matter to a standing committee of the General Assembly. Consequently, new permanent members would accede with a form of veto, but there would be no expansion of substantive vetoes on the Council.

13. See Memorandum from Alberto Gonzales to the President on the Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban, Jan. 25, 2002, available at http://www.washingtonpost.com/wp-srv/politics/documents/cheney/gonzales_addington_memo_jan252001.pdf.

14. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR 30 (2006).

15. JANE MAYER, THE DARK SIDE 304-305 (2008).

Agency to implement its elaborate system of rendition, and ultimately employ torture as a method of information extraction.¹⁶

Against the backdrop of prisoner abuse by U.S. military forces at Abu Ghraib prison in Iraq, the United States came to be seen by the world as a vicious and vengeful country that disrespected the rule of law and regularly abused basic human rights in its zeal to fight terrorists. Eventually, in 2006, the Supreme Court determined that the Bush administration had violated the Geneva Conventions in the case of the Guantánamo detainees.¹⁷

President Barack Obama's executive orders in January 2009 (see Appendix) seek to close down the detention facility at Guantánamo Bay, Cuba, within a year, to reverse the disastrous policies of the Bush administration, and to restore the United States as a defender of the Geneva Conventions. However, this initiative raises a raft of issues – not the least of which is what to do with the 226 detainees currently housed there.¹⁸ Their legal fate is one of many problem areas in the global struggle against terrorism that former President Bush left for the new President. In addressing this thorny question, President Obama said in his order that the closure would be “consistent with the national security and foreign policy interests of the United States and the interests of justice.”¹⁹

Most agree that many of the Guantánamo Bay detainees pose no threat to the United States and that whatever intelligence they may have had is no longer valuable. Consequently, they should be released back to their home countries, or to third countries if their home countries refuse to take them or would otherwise mistreat them. Several European states, including Germany, France, Sweden, Ireland, and Portugal, have offered to accept detainees who, if returned home, would face abuse or execution. Albania, one of the few Muslim states in Europe, accepted five Chinese Muslim Uighurs on humanitarian grounds, but was strongly rebuked by China for doing so, as China wanted the Uighurs returned to stand trial in China.²⁰ Failing repatriation to their home states or another state, release into the United States on some sort of immigrant status might be the only solution, although the federal appellate court for the D.C. Circuit has come down against this option.²¹ Sixty detainees have already been cleared for release.

16. Such prohibited interrogation techniques include waterboarding, painful restraint, extreme sleep deprivation, use of extremely cold air, violent shaking, and playing excessively loud music for prolonged periods.

17. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

18. See *The Guantanamo Docket, The Detainees*, <http://projects.nytimes.com/guantanamo>; Sheryl Gay Stolberg, *Obama Would Move Some Detainees to U.S.*, N.Y. TIMES, May 21, 2009, available at <http://www.nytimes.com/2009/05/22/us/politics/22obama.html>.

19. Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

20. See Peter Spiegel & Barbara Demick, *Uighur Detainees at Guantanamo Pose a Problem for Obama*, L.A. TIMES, Feb. 18, 2009, available at <http://articles.latimes.com/2009/feb/18/world/fg-uighurs-gitmo18>.

21. *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

Trial is warranted for the detainees who do present a threat, and section 4 of the executive order undertakes to review those who can be tried. But how and under what conditions? The evidence against them, obtained by coercion or torture, would not stand up in U.S. federal courts, as such evidence is likely inadmissible. Nevertheless, Obama promises in his order to determine whether trial before Article III courts is feasible. The faulty Bush military commissions are not an option for political reasons. The Obama administration has not yet specified the changes that will be made to the military commission system.

Regularly constituted military courts under the Uniform Code of Military Justice are an option, and the language of the order ostensibly provides enough wiggle room for this possibility, although the language is not explicit. The Supreme Court in *Hamdan* included violation of military law in its holding as it chastised the Bush administration for not adhering to statutory and treaty strictures in the Uniform Code of Military Justice and the Geneva Conventions with respect to its planned use of military commissions to prosecute Guantánamo detainees.²² Military prisons at Ft. Leavenworth, Kansas, and Camp Pendleton, California, would be likely venues for such military trials.

Establishing a new national security court within the U.S. judicial system has been championed by former Attorney General Mukasey, who as a U.S. District Court Judge for the Southern District of New York, tried the terrorists involved in the first World Trade Center bombings in 1993.²³ There is significant resistance to such a move, however, from civil libertarians, who worry that basic defense rights will be curtailed and secrecy will become a norm in prosecutions before such a panel.

A hybrid Afghan/international criminal tribunal in Kabul is another possibility, although a more remote one. Establishing ad hoc international criminal tribunals involves U.N. Security Council support and financing. The ad hoc tribunals for Rwanda and the former Yugoslavia have dragged on for years and have cost millions. The two hybrid tribunals (incorporating domestic and international legal experts and traditions) for Sierra Leone and Cambodia have experienced political setbacks. While such tribunals have traditionally prosecuted perpetrators of genocide, war crimes, and crimes against humanity only, the new Special Tribunal for Lebanon is a hybrid model and is set to break new ground by prosecuting perpetrators of terrorist acts.²⁴

22. See *Hamdan*, 548 U.S. 557, 625-635.

23. *UNITED STATES V. RAHMAN*, 861 F. SUPP. 266 (S.D.N.Y. 1994).

24. Kim Ghattas, *Lebanon's Groundbreaking Tribunal*, BBC NEWS, Apr. 21, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/4926536.stm. "The international court will be the first to try a crime described as 'terrorist' by the U.N. While other special tribunals have dealt with war crimes and crimes against humanity, like in Sierra Leone or Cambodia, it will be the first time that international justice tackles a political crime that

With such an opening, a joint Afghan/international criminal tribunal could try the remaining Guantánamo detainees who are not releasable for violations of the laws of war and/or terrorist involvement. Of course, the government of Hamid Karzai would have to agree. And the question of which Muslim legal experts would participate is of paramount importance. Further involvement by the Muslim legal community in determining the procedures of international criminal law (which are sadly lacking) would certainly be a beneficial by-product of this venture.

As indicated by the European states that have volunteered to take cleared detainees, the world may be ready to help President Obama with this tricky legal problem. He should graciously accept. Doing so, together with closing the detention facility, making amends with the International Red Cross by publicly agreeing with its official interpretation of the Geneva Conventions (which do not recognize the kind of lawless status for detainees created by the Bush administration), and equipping all soldiers involved in detention operations with pocket copies of the treaties (which they lacked at Abu Ghraib) would certainly mark America's newfound adherence to a storied treaty regime that it, after all, helped to create.

III. EMBRACE THE KYOTO PROCESS

The Bush administration stridently opposed the Kyoto Protocol²⁵ to the U.N. Framework Convention on Climate Change²⁶ from the beginning of Bush's term in office.²⁷ In the eight years that followed, the White House steadfastly undermined climate change research carried out by government agencies.²⁸ Eventually, even the Pentagon and the U.N. Security Council

targeted a specific person." *Id.*

25. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, available at <http://unfccc.int/resource/docs/convkp/kpeng.html>.

26. United Nations Framework Convention on Climate Change, May 9, 1982, 1833 U.N.T.S. 397, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

27. David E. Sanger, *Bush Will Continue To Oppose Kyoto Pact on Global Warming*, N.Y. TIMES, June 12, 2001 at A1, available at <http://www.nytimes.com/2001/06/12/world/12PREX.html>.

28. See Andrew C. Revkin & Katharine Q. Seelye, *Report by the EPA Leaves out Data on Climate Change*, N.Y. TIMES, June 19, 2003, at A1, available at <http://www.nytimes.com/2003/06/19/politics/19CLIM.html>; Ian Sample, *Scientists Offered Cash To Dispute Climate Study*, GUARDIAN (U.K.), Feb. 2, 2007, at 1, available at <http://www.guardian.co.uk/environment/2007/feb/02/frontpagenews.climatechange>; Union of Concerned Scientists, *White House Alters EPA Scientific Document on Climate Change*, available at http://www.ucsusa.org/scientific_integrity/abuses_of_science/white-house-alters-epa.html; Scientific Integrity in Policymaking, *Distorting & Suppressing Climate Change Research*, available at <http://www.web-exhibits.org/bush/5.html>.

When President Bush rejected the Kyoto Protocol on greenhouse gas emissions, he promised the American people that "my administration's climate change policy will be science-based." In fact, however, the Bush administration has repeatedly manipulated scientific committees and suppressed and distorted science in this area. One climate change expert, who resigned in March 2005 from the U.S.

had to acknowledge the overwhelming scientific evidence to the contrary and characterize climate change as a security threat.²⁹ Nevertheless, the Bush White House continued until the end of its term to stymie any meaningful climate change research while simultaneously saying that it would propose an alternate strategy to the Kyoto Protocol to address the issue.³⁰ That strategy never materialized.

President Obama, having called for an “about-face” on climate change during the general election campaign, is now positioned to move forward in this area with domestic and international support that is both deep and wide. Indeed, the new Administration cannot only embrace the Kyoto Protocol, but move beyond it. A key item listed on the White House website is to make the United States a leader on climate change.³¹

Obviously, to seize this leadership role requires that the United States join Kyoto, unleash a new domestic effort to cap carbon emissions, and begin the process of moving aggressively toward new post-Kyoto emissions limits.³² But there is a bolder, more symbolic move that would recast the negative opinions of the United States in the eyes of the world. Twinning the climate change issue with the Guantánamo Bay issue, the Obama administration should close the military base and establish a first-rate

Climate Change Science Program, has stated that “[t]he White House so successfully politicized the science program that I decided it was necessary to terminate my relationship with it.”

MINORITY STAFF REP., COMM. ON GOV'T REFORM, U.S. HOUSE OF REPRESENTATIVES, *THE ADMINISTRATION'S ASSAULT ON CLIMATE CHANGE SCIENCE I* (June 2005) (quoting White House, President's Statement on Climate Change (July 13, 2001), and Rick S. Plitz, *Censorship and Secrecy, Politicizing the U.S. Climate Change Science Program* (June 1, 2005) (alteration in original).

29. Mark Townsend & Paul Harris, *Now the Pentagon Tells Bush: Climate Change Will Destroy Us*, *GUARDIAN* (U.K.), Feb. 22, 2004, available at <http://www.guardian.co.uk/environment/2004/feb/22/usnews.theobserver>; CNA CORP., *NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE* (2007), available at <http://securityandclimate.cna.org/report/>; Kevin Whitelaw, *Intelligence Report Assesses Impact of Climate Change*, *U.S. NEWS & WORLD REP.*, June 24, 2008, available at <http://www.usnews.com/articles/news/national/2008/06/24/intelligence-report-assesses-impact-of-climate-change.html>; Press Release, Security Council, Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing Over 50 Speakers, U.N. Doc. SC/9000 (Apr. 17, 2007), available at <http://www.un.org/News/Press/docs/2007/sc9000.doc.htm>; John T. Ackerman, *Climate Change, National Security and the Quadrennial Defense Review*, *STRATEGIC STUDIES Q.*, Spring 2008, at 57; Nigel Purvis & Joshua Busby, *The Security Implications of Climate Change For The UN System*, (May 2004), available at <http://www.brookings.edu/views/papers/fellows/purvis20040501.pdf>.

30. *U.S. Plans 'Kyoto Alternative'*, *BBC NEWS*, Apr. 7, 2001, available at <http://news.bbc.co.uk/2/hi/americas/1265561.stm>.

31. White House, Energy & Environment, http://www.whitehouse.gov/agenda/energy_and_environment/.

32. The Kyoto Protocol expires in 2012, so moving the international community into a new post-Kyoto legal regime quickly is imperative. See Daniel H. Cole, *Climate Change and Collective Action*, 61 *CURRENT LEGAL PROBS.* 229, 253 (2009).

climate change research station that fully utilizes Guantánamo's ideal location in the tropics as well as its deep-water port for research vessels and its top-end air station.

Such a move would effectively turn the Guantánamo public relations nightmare into an international public relations success for the new Administration. Whatever happens to the navy base after the detainees are gone, it need not be used as a military base. The President's articulated priorities of becoming a global leader on climate change, putting new sources behind hard science, reengaging the international community and resurrecting the image of the United States as a human-rights defender committed to the rule of law all militate in favor of converting the base into a state-of-the-art scientific research station to address climate change.

The detention facility at Guantánamo has tarnished the reputation of that base to the point that the mere invocation of its name draws negative responses similar to Abu Ghraib – images of unlawful confinement, harsh treatment, torture-based interrogation, and illegal proceedings. That association with Guantánamo cannot be overcome so long as a military installation remains in place. President Obama is moving to close down the detention facility, but this will not rehabilitate Guantánamo. The entire military base must be replaced with something that is no longer associated with its previous reputation.

A climate change research station working to develop new science to help the global community deal with this problem is perfect. The base falls under the jurisdiction of the U.S. Department of Defense Southern Command, based in Miami. The Navy would not miss this base – no carrier fleets are housed there, and the Marine contingent can be easily relocated elsewhere.³³ Guantánamo got its start early in the twentieth century as a coaling station for pre-World War I battleships.³⁴

Moreover, the Intergovernmental Panel on Climate Change (IPCC), the U.N. body that reports on the climate and projects climate change patterns, is hobbled by the fact that the United States does not meaningfully engage in global warming concerns and thus does not fully commit resources to supporting the IPCC's work. The IPCC's reports rely on information from individual countries, which are fragmented in their commitment and do not use consistent methodology. The IPCC does not conduct its own data collection in the field.

33. The U.S. Coast Guard also uses the facility to avoid mass migrations from Cuba and Haiti, so an alternative modus operandi would need to be found for the Coast Guard to continue its migrant interception programs.

34. M.E. MURPHY, *The History of Guantánamo Bay, 1494 – 1964*, ch. 4 (1953), available at https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyvol1/gtmohistmurphyvol1ch4/CNIC_040565.

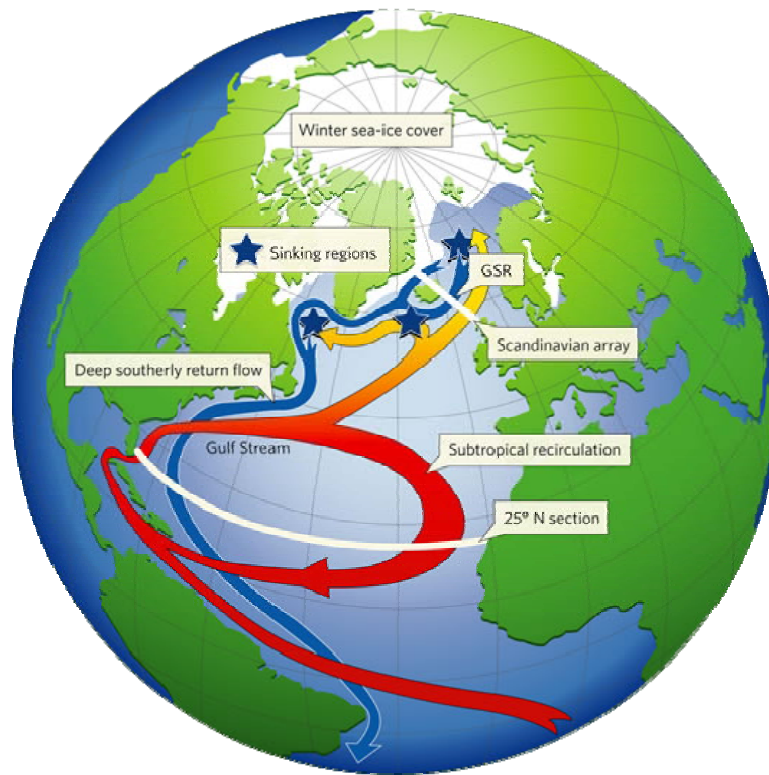
A significantly staffed and funded scientific effort that is not manipulated to support government policies is sorely needed. The United States can provide such an effort. A steady stream of reliable, standardized, and objective data funneling into the IPCC will bolster its reports and conclusions and move the policy makers involved in the Kyoto Protocol and at the United Nations closer to actionable emissions reduction plans.

Moreover, the departures of Cuban leader Fidel Castro and a Republican U.S. President who was captive to the older Cuban-American lobby have created a new opening for improved U.S.-Cuba relations. In this climate of cross-strait relations, a multi-pronged approach of small steps is needed.

Under current U.S. law, all property claims between the United States and Cuba must be resolved before the U.S. embargo against Cuba can be lifted.³⁵ President Obama is ready to consider lifting the embargo, and increasing numbers of Cuban-Americans are also enthusiastic. Cubans who live on the island desperately want the embargo to be eliminated. So there could be an effective three-prong foreign policy initiative: 1) resolving the property claims issue by creating a bilateral tribunal, 2) lifting the embargo, and 3) establishing a cooperative arrangement with Havana jointly to govern Guantánamo in its new purpose. This initiative could yield real results with, perhaps in exchange, a softening of political repression on the island. Not only would the world embrace the new commitment of the United States to research climate change, it would enjoy a new relationship with Cuba.

The research potential at Guantánamo stems from its data-gathering conditions. While it is possible to project climate change based on computer models – and this can be done anywhere – the effects of climate change cannot be *reliably* projected without fresh, corroborated data. The absence of such data makes it easier for those who oppose decreasing emissions to claim that climate change projections are based on computer manipulation rather than on what is actually occurring in the world. Collection of solid, uncorrupted data is critical for computer modeling. Guantánamo's location in the path of most hurricanes entering the Gulf of Mexico and its strategic position at the source of the Gulf Stream (see map below) give scientists an opportunity to gather information on changes in hurricane intensity and warming/cooling trends in the oceans and vital currents. Scientists could be stationed on site at Guantánamo, deploy research vessels and planes, and use Guantánamo's facilities.

35. See CREIGHTON UNIV. SCH. OF LAW & DEP'T OF POLITICAL SCI., REPORT ON THE RESOLUTION OF OUTSTANDING PROPERTY CLAIMS BETWEEN CUBA & THE UNITED STATES (2007), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=michael_kelly.

FIGURE 1: CUBA LOCATED AT NEXUS OF ATLANTIC CURRENTS³⁶

IV. ENGAGE THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC), created by the Rome Statute in 1998 (entered into force in 2002), can be a more robust force for good in the world if only the United States would join the Court. The United States signed the Rome Statute on December 31, 2000, at the end of the Clinton administration. But the neoconservatives within the Bush administration wasted no time in seeking to distance the United States from this much-hated treaty that created, in their view, a significant threat to U.S. sovereignty. President Bush ordered that a diplomatic note be deposited with the United Nations announcing the intention of the United States not to ratify the treaty and then negotiated bilateral immunity agreements (BIAs) with 102 nations that, under Article 98 of the Rome Statute, immunized U.S. citizens from ICC legal process while in those countries. The threat held over the heads of these states to induce the signing of the BIAs was the

36. Quirin Shiermeier, *Atlantic Currents Show Signs of Weakening*, NATURE, Nov. 30, 2005, available at <http://www.nature.com/news/2005/051128/full/news051128-9.html> (reprinted with permission from Macmillan Publishers Ltd.).

withdrawal or reduction of U.S. military aid. Forty-six of the BIAs are with Rome Statute parties.³⁷

Thus, to engage the ICC, the Obama administration would need to pull back from these 102 BIAs, withdraw the diplomatic note renouncing America's participation, and ratify the Rome Statute. Because Washington was so heavy-handed with many of the small countries with which it negotiated BIAs, it may very well be that these states would want something in return for now releasing the United States from the agreements.

In 2008, the American Society of International Law (ASIL) convened a Task Force on U.S. Policy Toward the International Criminal Court. The recommendations developed by the study reflect an emerging consensus — one that many academics reached years earlier — that the United States should constructively engage the International Criminal Court:

The Task Force has reviewed U.S. policy, from the negotiating history of the Rome Statute through to the present, as well as the performance of the Court. It has also studied the complex legal issues presented in this area. The Task Force is preparing a report containing detailed findings and recommendations for release at the ASIL Annual Meeting in late March. Pending completion of that report, the Task Force has agreed upon the following recommendations.

The ASIL Task Force on U.S. Policy Toward the International Criminal Court takes note of the desirable evolution in the de facto policy of the United States toward the Court in the last few years. In light of the Court's record over the past seven years and its involvement in compelling situations — such as Darfur, Uganda, and the Democratic Republic of Congo — that are of great concern to the United States, there is an auspicious opportunity to put U.S. relations with the Court on an articulated course of positive engagement. The Task Force recommends that the President take prompt steps to announce a policy of positive engagement with the Court, including:

- a stated policy of the U.S. Government's intention, notwithstanding its prior letter of May 6, 2002 to the U.N. Secretary General, to support the object and purpose of the Rome Statute of the Court;

37. Coalition for the International Criminal Court, *Status of Bilateral Immunity Agreements*, Dec. 11, 2006, available at http://www.iccnw.org/documents/CICCFIS_BIA_status_current.pdf.

- examination of methods by which the United States can support important criminal investigations of the Court, including cooperation on the arrest of fugitive defendants, the provision of diplomatic support, and the sharing of information, as well as ways in which it can cooperate with the Court in the prevention and deterrence of genocide, war crimes, and crimes against humanity;
- examination of U.S. policy concerning the scope, applicability, and implementation of “Article 98 Agreements” concerning the protections afforded to U.S. personnel and others in the territory of States that have joined the Court;
- U.S. participation as an observer in the Assembly of States Parties to the Rome Statute, including the Special Working Group on the Crime of Aggression and the 2010 Review Conference of the Rome Statute;
- the issuance of any presidential waivers in the interests of the United States that address restrictions on assistance to and cooperation with the Court contained in the American Service-members’ Protection Act of 2002 (ASPA) and advice to the Congress on the need for further amendments of ASPA;
- identification of a high-ranking official to serve as the focal point within the executive branch to coordinate U.S. cooperation with the Court and monitor ICC performance in order to inform the further development of U.S. policy in this area;
- U.S. development assistance focused on rule-of-law capacity building, including that which enables countries to exercise their complementary jurisdiction to the Court effectively;
- support for the continued development of contacts between the various branches of the U.S. Government and the Court;
- support for the legislative agenda detailed below; and
- an inter-agency policy review to re-examine, in light of the Court’s further performance and the outcome of the 2010 Review Conference, whether the United States should become a party to the Rome Statute with any appropriate understandings and declarations as other States Parties have done.

The Task Force further recommends that Congress pursue a legislative agenda on the Court that includes:

- amendment of the American Service-members’ Protection Act and other applicable laws to the extent necessary to enhance

flexibility in the U.S. Government's engagement with the Court and allies that are State Parties to the Rome Statute;

- consideration of amendment to U.S. law to permit full domestic U.S. prosecution of crimes within the jurisdiction of the Court so as to ensure the primacy of U.S. jurisdiction over the Court's jurisdiction under the complementarity regime; and
- hearings to review and monitor Court performance in order to identify means by which the United States can support the Court consistent with the interests of the United States and the international community and to re-examine whether the U.S. should become a party to the Rome Statute with any appropriate understandings and declarations as other States Parties have done.³⁸

The United States must renew its willingness to work with and through multinational institutions such as the ICC, so that when it does, the country will once again be seen, as it has historically been regarded, as a great power interested in improving the lot of humanity. The values found in the U.S. Constitution can only be imbued in the ICC by those working within its apparatus. The Obama administration surely realizes that the United States must not sit on the sidelines, along with states such as North Korea, Iran, and China, while the rest of the civilized world engages in important justice- and diplomacy-building projects.

V. EXPORT U.S. LEGAL EDUCATION

A fifth initiative that the Obama administration should seriously consider is to export U.S. legal education. This initiative does not involve any aspect of public international law – and thus it was not included in the four recommendations listed earlier. The proposal *is* geared toward assisting developing countries to adhere to international legal standards. The recommendation is that Washington establish a new foreign aid

38. Press Release, Am. Soc. of International Law, ASIL Task Force Issues Recommendations on U.S. Policy Toward the International Criminal Court (Feb. 2, 2009), at 2-4, *available at* <http://www.asil.org/pdfs/pressreleases/pr090202.pdf> (emphasis omitted). Members of ASIL's Task Force on the ICC included

former Legal Advisor to the State Department and Deputy Secretary of Defense William H. Taft, IV, and former U.S. federal appellate and International Criminal Tribunal for the Former Yugoslavia (ICTY) Judge Patricia M. Wald. Other members of the Task Force are former Congressman Mickey Edwards, Vanderbilt Law School Professor Michael A. Newton, former Supreme Court Justice Sandra Day O'Connor, former International Court of Justice President Stephen M. Schwebel, former Deputy Prosecutor of the ICTY David Tolbert, and Johns Hopkins School for Advanced International Studies Professor Ruth Wedgwood.

Id. at 1.

program that would enable U.S. law schools to invite young government officials from the developing world to study in the United States — not just in their Master of Law (LLM) programs, but also their juris doctor (J.D.) curricula.

Law schools in this country are three-year-long boot camps that instruct students in due process, the rule of law, human rights, constitutional values, delivery of justice, and governing paradigms. Students in the J.D. program form life-long bonds with their classmates, forged in the common undertaking of absorbing a challenging schedule and difficult subjects. What they take with them as lawyers is a set of critical thinking skills unmatched by other legal programs anywhere in the world.

A program to export U.S. legal education would require a commitment of time and money, but the payoff could be measured by the number of government officials in places like Morocco, Kenya, Paraguay, and Vietnam capable of defending the rule of law and human rights. These officials might, over time, become state leaders. Thus this program can be seen as a U.S. foreign policy initiative that would bear fruit only many decades after the original investment and implementation. Nevertheless, if government officials within developing countries share an understanding of and affinity for a common set of principles, they are more likely to buy into U.S. foreign policy goals.

Law schools that could likely deliver the most efficient, integrative and cost-effective educations for these foreign J.D. students are institutions located in mid-sized cities such as Minneapolis, Louisville, Kansas City, Omaha, Madison, Denver, Indianapolis, Cincinnati, Boulder, Winston-Salem, Baton-Rouge, Ithaca, Cleveland, and Sacramento. This is certainly not an exclusive list of possibilities, but costs of living and education are lower, law school curricula are solid, and visitors would tend not to get lost in the big city milieu. U.S. law schools are the jewels in our rule-of-law society. Exporting what the schools do and the values they instill in young lawyers is an untapped resource available to the Obama administration. The payoff would be a more stable community of states with an increasingly shared vision of collective rights over the long term.

CONCLUSION

The above policy recommendations can be summed up then in the story of a lunch I enjoyed in 2004 with Vygaudas Ušackas, the Lithuanian Ambassador to the United States, while he was visiting Creighton University in Omaha, Nebraska.³⁹ The question put to him was why Lithuania, a small Baltic state far removed from the Middle East and with

39. Mr. Ušackas currently serves as the Foreign Minister of Lithuania.

no discernable interest in Iraq, would have contributed 120 soldiers to the U.S.-led coalition that invaded Iraq in 2003.⁴⁰

The Ambassador replied simply, “because you asked.” As heads turned and eyebrows rose in confusion, he explained more fully. The Lithuanian decision to respond positively to the American request had nothing to do with Iraq. Indeed, it had nothing to do with the Middle East at all. He said that when his country was annexed by the Soviet Union in 1940, the United States refused to recognize the Soviet action. In the wake of World War II, as the Soviet reoccupation commenced, Lithuania saw the national tricolor lowered at its embassies around the world, and the buildings sold off. But Washington decided to keep the Lithuanian embassy open and the national flag flying. The United States even paid for the upkeep of the building and never wavered from its insistence on Lithuanian independence.

Ušackas said that throughout the darkest days of the Cold War and decades of Soviet suppression, Lithuanians looked to that distant flag flying over the embassy in Washington and took heart. It kept them going. And, in the end, their small country regained independence. They never forgot what the United States of America did for them, and, he said, they never will. So when the United States asked for troops in 2003, Lithuania did not hesitate. It did not ask why. It did not have to. It was enough that Washington had asked.

This is the country that we were. The United States inspired hope, not fear. That a small country would selflessly offer whatever it could just because we asked, based on a principled decision taken a half-century ago in an obscure room of the State Department that was contrary to our own national interest but grounded on notions of international justice is testament to the power of positive association.⁴¹

This is the United States of America that we can become again. The Obama administration can put the United States back on course to being the country we were. Embracing international law as a vehicle for reengaging the world is essential to accomplishing this goal. Respect for the rule of law and human rights has historically been the cornerstone of U.S. foreign policy. This cannot remain closeted as Washington fights terrorism globally. It is manifestly in our national security interest to respect, build, and follow international law.

40. The Lithuanian contingent was deployed near Hillah to help guard Camp Echo and near Basra, where they undertook patrol duty.

41. The Stimson Doctrine, in play since 1932, held that the United States should not recognize territorial changes effected by use of force.

APPENDIX

Thursday, January 22nd, 2009 at 12:00 am
Review of Detention Policy Options

**EXECUTIVE ORDER – REVIEW OF DETENTION
POLICY OPTIONS⁴²**

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice, Thereby order as follows:

Section 1. Special Interagency Task Force on Detainee Disposition.

(a) *Establishment of Special Interagency Task Force.* There shall be established a Special Task Force on Detainee Disposition (Special Task Force) to identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.

(b) *Membership.* The Special Task Force shall consist of the following members, or their designees:

- (i) the Attorney General, who shall serve as Co-Chair;
- (ii) the Secretary of Defense, who shall serve as Co-Chair;
- (iii) the Secretary of State;
- (iv) the Secretary of Homeland Security;
- (v) the Director of National Intelligence;
- (vi) the Director of the Central Intelligence Agency;
- (vii) the Chairman of the Joint Chiefs of Staff; and
- (viii) other officers or full-time or permanent part-time employees of the United States, as determined by either of the Co-Chairs, with the concurrence of the head of the department or agency concerned.

(c) *Staff.* Either Co-Chair may designate officers and employees within their respective departments to serve as staff to support the Special Task Force. At the request of the Co-Chairs, officers and employees from other departments or agencies may serve on the Special Task Force with the concurrence of the heads of the departments or agencies that employ such individuals. Such staff

42. Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

must be officers or full-time or permanent part-time employees of the United States. The Co-Chairs shall jointly select an officer or employee of the Department of Justice or Department of Defense to serve as the Executive Secretary of the Special Task Force.

(d) *Operation.* The Co-Chairs shall convene meetings of the Special Task Force, determine its agenda, and direct its work. The Co-Chairs may establish and direct subgroups of the Special Task Force, consisting exclusively of members of the Special Task Force, to deal with particular subjects.

(e) *Mission.* The mission of the Special Task Force shall be to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.

(f) *Administration.* The Special Task Force shall be established for administrative purposes within the Department of Justice, and the Department of Justice shall, to the extent permitted by law and subject to the availability of appropriations, provide administrative support and funding for the Special Task Force.

(g) *Report.* The Special Task Force shall provide a report to the President, through the Assistant to the President for National Security Affairs and the Counsel to the President, on the matters set forth in subsection (d) within 180 days of the date of this order unless the Co-Chairs determine that an extension is necessary, and shall provide periodic preliminary reports during those 180 days.

(h) *Termination.* The Co-Chairs shall terminate the Special Task Force upon the completion of its duties.

Sec. 2. General Provisions.

(a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA
THE WHITE HOUSE,
January 22, 2009.

* * *

Thursday, January 22nd, 2009 at 12:00 a.m.

Closure of Guantanamo Detention Facilities

**EXECUTIVE ORDER – REVIEW AND DISPOSITION OF
INDIVIDUALS DETAINED AT THE GUANTÁNAMOBAY NAVAL
BASE AND CLOSURE OF DETENTION FACILITIES⁴³**

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. Definitions. As used in this order:

(a) “Common Article 3” means Article 3 of each of the Geneva Conventions.

(b) “Geneva Conventions” means:

- (i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6UST 3114);
- (ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6UST 3217);
- (iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6UST 3316); and
- (iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6UST 3516).

(c) “Individuals currently detained at Guantánamo” and “individuals covered by this order” mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. Findings.

(a) Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by

⁴³ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009)

releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.

(b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.

(c) The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention.

(d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.

(e) New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.

(f) Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109-366, as well as of the military commission process more generally.

Sec. 3. Closure of Detention Facilities at Guantánamo. The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. Immediate Review of All Guantánamo Detentions.

(a) *Scope and Timing of Review.* A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

(b) *Review Participants.* The Review shall be conducted with the full cooperation and participation of the following officials:

- (1) the Attorney General, who shall coordinate the Review;
- (2) the Secretary of Defense;
- (3) the Secretary of State;
- (4) the Secretary of Homeland Security;
- (5) the Director of National Intelligence;
- (6) the Chairman of the Joint Chiefs of Staff; and
- (7) other officers or full-time or permanent part-time employees of the United States, including employees with intelligence, counterterrorism, military, and legal expertise, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

(c) *Operation of Review.* The duties of the Review participants shall include the following:

(1) *Consolidation of Detainee Information.* The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) *Determination of Transfer.* The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals

currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) *Determination of Prosecution.* In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) *Determination of Other Disposition.* With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) *Consideration of Issues Relating to Transfer to the United States.* The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. Diplomatic Efforts. The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. Humane Standards of Confinement. No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

Sec. 7. Military Commissions. The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Sec. 8. General Provisions.

- (a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.
- (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA
THE WHITE HOUSE,
January 22, 2009.