Preventive Detention and Preventive Warfare: U.S. National Security Policies Obama Should Abandon

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At the January 2009 Association of American Law Schools' Section on National Security Law panel discussion, I and others urged the incoming Obama administration to make a clear and decisive break with the Bush administration's national security policies. Six months later, the new Administration has not done so. Rather, it has acted in a contradictory manner, boldly asserting in its first days that it would ban torture and close Guantánamo,[1] but in practice continuing many of the Bush antiterrorism policies.[2] President Obama's major speech on Guantánamo and other national security issues reiterated his desire to close Guantánamo, but also argued that the United States could hold detainees in custody indefinitely without trial or try them by military commissions.[3] The Administration has adopted the Bush administration position that detainees held in U.S. custody in Afghanistan indefinitely have no right to seek habeas corpus in U.S. courts.[4] It has also continued to assert the state secrets privilege to attempt to block lawsuits seeking accountability for extraordinary rendition and torture.[5]

Obama's continuation of key Bush national security policies is troubling. This essay will discuss four key areas in which a decisive departure from the past policies is necessary and warranted.

I. REJECTION OF THE PREVENTIVE PARADIGM

First, the Obama administration must reject President Bush's basic paradigm for combating terrorism. That model, dubbed by former Attorney General John Ashcroft as the "preventive paradigm," posits that to fight

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1. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009); Exec. Order No. 13,491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4893 (Jan. 22, 2009).

2. *See* Michael D. Shear & Peter Finn, *Obama To Revamp Military Tribunals*, WASH. POST, May 16, 2009, at A1.

3. Remarks by the President on National Security (May 21, 2009), Office of the Press Secretary, *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

4. Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009), *appeal granted*, 620 F. Supp. 2d S1 (D.D.C. 2009)

5. Mohamed v. Jeppesen Dataplan Inc., 563 F.3d 992 (9th Cir. 2009).

terrorism, the United States must use forceful preventive coercion to lock people up, coercively interrogate suspected terrorists, or attack other countries.[6] The justification for this paradigm shift was that after September 11 we no longer had the luxury of simply defending against terrorist attacks, but needed to use state power aggressively and forcefully to prevent future attacks.

The prevention of attacks is, of course, far preferable to prosecuting or responding to attacks after they occur. What is objectionable is not prevention per se – after all, we all use prevention in our daily lives – preventive medicine, exercise, eating right, brushing our teeth daily. It is the marriage of prevention with state coercion that is so troubling. Each alone is acceptable. Under the traditional rule of law, a state is permitted to use coercive force, but only to respond to past, present, or imminent wrongdoing. By wedding prevention to state coercion, the Bush administration detained thousands of innocent people, invaded another country unnecessarily, and tortured people for the purpose of obtaining information to prevent future attacks. The Bush administration damaged our relations with our allies and our moral standing in the world, undoubtedly creating more terrorists.

To return to the preventive medicine metaphor, while brushing our teeth is a healthy preventive device, most of us would not and should not adopt a policy of having random root canals. If we had invasive procedures like root canals whenever we were suspicious or had some evidence that a tooth might decay in the future, we would likely be left with no teeth fairly quickly.

II. REJECTION OF PREVENTIVE MILITARY ACTION

Specifically, the Obama administration must reject and renounce the doctrine of unilateral preventive military action set forth in both the 2002 and 2006 National Security Strategies, which openly incorporated that doctrine into U.S. policy.[7] That doctrine permits a U.S. military attack against another nation not merely in response to an armed attack or imminent attack against us, but rather in response to serious threats to national security such as the threat posed by an Iranian effort to develop nuclear weapons. The Bush administration's attack on Iraq was a major test of the doctrine of preventive war and illustrates the grave danger of a policy permitting a preemptive attack against another country based on

6. For a more in-depth description of this paradigm, see DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (2007).

7. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002), *available at* http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf; WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Mar. 2006), *available at* http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/nss2006.pdf.

suspicions or predictions of what that nation is planning to do in the future, rather than the objective evidence that the nation has already attacked another nation,[8] or at least is taking concrete steps to launch such an assault imminently.[9]

The Iraq War demonstrated two key flaws with the preventive war doctrine and the preventive paradigm more generally. First, the war was initiated based not on reliable, tested, objective evidence, but rather on intelligence information, suspicions, surmises, or statements from defectors. As Hans Blix, the director of the U.N. Inspection Committee during the run up to the Iraq War, later wrote of his disagreement with the Bush administration, he had not been "asked by the Security Council to submit suspicions or simply convey testimony from defectors." "Assessments and judgments in our reports," Blix believed, "had to be based on evidence that would remain convincing even under critical international examination."[10] In contrast, the Bush administration was guided by "the principle of actionable suspicion," as one former intelligence chief called it.[11] "We were operating, frantically, in a largely evidence-free environment. But the whole concept was that not having hard evidence shouldn't hold you back."[12] As Vice President Dick Cheney argued, if there is just a one percent chance of the unimaginable happening, we have to treat that chance as a certainty.[13] That view, dubbed by journalist Ron Suskind as the one percent doctrine, relied heavily on actionable suspicions as opposed to objective facts. As Secretary of State Colin Powell later admitted, he had no "concrete evidence about the connection" between Iraq and al Qaeda, but "the possibility of such connections did exist."[14]

Second, whereas international law prohibits the use of force in self-defense by one nation against another except in response to an attack or imminent attack against it, preventive war doctrine substitutes the more, vague, ambiguous, open-ended concept of a dangerous threat. The Bush administration sought to redefine the imminent attack requirement for self-defense from its traditional meaning of close at hand, or ready to take place, or as Secretary of State Daniel Webster put it in 1842 "instant,

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8. U.N. Charter art. 51.

9. The customary law rule, articulated by Daniel Webster in 1842, is that self-defense is permitted only where there is an armed attack, or where the threat is "instant, overwhelming, leaving no choice of means and no moment of deliberation." Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), *quoted in* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906).

10. HANS BLIX, DISARMING IRAQ 264 (2004).

11. RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11, at 166 (2006).

12. *Id.*

13. *Id.* at 62.

14. Christopher Marquis, *Powell Admits No Hard Proof in Linking Iraq to Al Qaeda*, N.Y. TIMES, Jan. 9, 2004, at A10.

overwhelming and leaving no choice of means and no moment of deliberation"[15] to a more open-ended cost benefit calculation based on the probability of the threat eventuating and the gravity of the threat.[16] But this open-ended standard eviscerates the notion of legal rules controlling warfare. Abram Chayes, the legal advisor to the State Department during the Cuban missile crises, explained that the Kennedy administration refused to rely on preventive self-defense to justify its actions because to allow such a justification where there is no threatened imminent attack would mean that "there is simply no standard against which this decision [to use force] could be judged."[17] Therefore, even if it could be demonstrated by clear and convincing evidence that Iraq in 2003, or North Korea or Iran today, was developing weapons of mass destruction, the United States could not legally unilaterally use force against that nation in the absence of objective evidence that an attack was imminent. Such action would and should require the approval by the U.N. Security Council. The answer to such threats is to be found in collective diplomacy, sanctions and as a last resort, collective military action approved by the United Nations, and not the unilateral use of force. As history has shown, and the framers of the U.N. Charter recognized, the devastation wrought by warfare requires that individual nations not be allowed to go to war whenever they perceive (legitimately or illegitimately) that another nation poses a serious threat to their national security.

Preventive warfare has a long and troubling pedigree.[18] Many of the most devastating wars in history were justified by nations in preventive terms. World War I has been classified as a preventive war by many historians because German leaders believed that it had to "fight a preventive war so as to beat the enemy while [it] could still emerge fairly well from the struggle."[19] As German Chief of Staff Helmuth von Moltke told Kaiser Wilhelm in December 1912, "War is inevitable, the sooner the better."[20]

So, too, the Japanese attack on Pearl Harbor which drew the United States into World War II was viewed by Japanese leaders as a preventive strike. Hitler also justified Germany's launching of the war in Europe in preventive terms. In August 1939, Hitler told a meeting of his top military commanders that "We are faced with the hard alternative of either striking or the certainty of being destroyed sooner or later."[21] German attacks on

15. *See supra* note 9.

16. NATIONAL SECURITY STRATEGY (2002), *supra* note 7, at 13-16; John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 735 (2004).

17. ABRAM CHAYES, THE CUBAN MISSILE CRISIS 65 (1974).

18. *See* COLE & LOBEL, *supra* note 1, at 147-88; Jules Lobel, *Preventive War and the Lessons of History*, 68 U. PITT. L. REV. 307 (2006).

19. DALE C. COPELAND, THE ORIGINS OF MAJOR WAR 71 (2000).

20. JAMES JOLL, THE ORIGINS OF THE FIRST WORLD WAR 87 (1984).

21. *See* ALFRED VAGTS, DEFENSE AND DIPLOMACY: THE SOLDIER AND THE CONDUCT OF FOREIGN RELATIONS 315 (1956).

Norway, Denmark, Holland, Belgium, and particularly the Soviet Union were all justified by Hitler and his generals as preventive measures.[22]

Preventive wars launched to forestall gathering threats have ancient roots. The Peloponnesian War from 431 B.C. to 404 B.C., which wreaked terrible destruction on Greek society, was launched preventively by Sparta because of its fear of the growth of Athenian power, even though Sparta faced no immediate military threat from Athens.[23] The third century B.C. war between Carthage and Rome was also a preventive war launched by Carthage in fear of Rome's rising power.[24] Examining more recent history, historians conclude that virtually all of the major wars in Europe between the sixteenth and twentieth centuries were propelled by preventive motivations, and generally brought disaster on their originators.[25] In 1760, Edmund Burke concluded that the use of military force to prevent emerging threats had been the source of "innumerable and fruitless wars" in Europe.[26]

Obama's position on the use of preventive military force is unclear. He clearly opposed the Iraq War from the outset. During the 2008 Presidential election campaign, however, Obama stated that he would never take the military option off the table to prevent Iranian acquisition of nuclear weapons.[27] This position was reaffirmed by White House Press Secretary Robert Gibbs.[28] Some important Obama and State Department advisors firmly believe that the Administration must retain the option of a U.S. or Israeli military action against Iran to persuade Iran to forgo its nuclear program. For example, a recent report drafted by neoconservatives and sponsored by the Bipartisan Policy Center[29] argued that the new President should make clear from his first day in office that he was prepared to use preemptive military force if Iran refused to give up enriching uranium in the face of increasing U.S. and international diplomatic efforts. The report was signed by former Ambassador Dennis Ross, a key Obama administration foreign policy advisor and Middle East diplomat under Bill Clinton.[30]

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22. *See id*. at 319.

23. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 49 (London: Penguin Books 1972).

24. COPELAND, *supra* note 6, at 211.

25. *Id*. at 214-233; A.J.P. TAYLOR, THE STRUGGLES FOR MASTERY OF EUROPE, 1848-1918, at 166 (1954); STEPHEN VAN EVERA, CAUSES OF WAR: POWER AND THE ROOTS OF CONFLICT 76 (1999).

26. *See* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 76 (1977).

27. David Rieff, *But Who's Against the Next War?*, N.Y. TIMES MAG., Mar. 25, 2007, at 613.

28. Ross Colvin, *U.S. Says All Options on Table To Deal with Iran*, REUTERS, Jan. 30, 2009.

29. BIPARTISAN POLICY CENTER, MEETING THE CHALLENGE: U.S. POLICY TOWARD IRANIAN NUCLEAR DEVELOPMENT (2008), *available at* http://www.bipartisanpolicy.org/ht/a/GetDocumentAction/i/8448.

30. Ross was first appointed special advisor to the State Department on Iran and has

At the risk of being labeled naïve, I would advise Obama to take the unilateral military option off the table. The Administration should make clear that it is not considering a preemptive military attack against Iran and that it renounces such an option as illegal and counterproductive. The present turmoil in Iran reinforces the need for a clear U.S. position against such a unilateral military option to counter Iranian claims of unlawful U.S. interference with Iranian sovereignty. The Administration should also remove the references to preemptive military attacks that appeared in the 2002 and 2006 National Security Strategies when it prepares a new strategy in 2010. It should promise the world that, henceforth, the United States will use military force only in accordance with the prescriptions contained in the U.N. Charter and customary international law and not in response to potential gathering threats.

There are two basic reasons that the new Administration should forswear a unilateral preemptive military strike against Iran or North Korea. First, virtually all experts agree that such a military strike would accomplish little and undoubtedly prove to be counterproductive. Second, it would also violate international law and undermine Obama's determination to restore American credibility, legitimacy, and leadership in the world community.

A. Preemptive Strike Against Iran Would Be Counterproductive

To succeed, preemptive strikes require extremely good intelligence regarding the exact location of nuclear facilities, intelligence that we are currently lacking. As President Bush's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction found in 2005: "Across the board, the Intelligence Community knows disturbingly little about the nuclear programs of many of the world's most dangerous actors. In some cases, it knows less now than it did five or ten years ago."[31] That same year, a U.S. Army College report concluded that "the United States and Israel lack sufficient targeting intelligence to [eliminate Iran's nuclear capabilities]. In fact, Iran has long had

recently been given an expanded portfolio as senior advisor at the National Security Council. *See* Press Release, U.S. Dep't of State, Appointment of Dennis Ross as Special Advisor for the Gulf and Southwest Asia (Feb. 23, 2009), *available at* http://www.state.gov/r/pa/prs/ps/2009/02/119495.htm; *see also* Glenn Kessler, *The Man Behind Iran Policy Faces Big Task*, WASH. POST, June 10, 2009, at A3; Massimo Calabresi & Michael Scherer, *Dennis Ross, Iran Adviser, Moves to White House*, TIME, June 15, 2009, *available at* http://www.time.com/politics/article/0,8599,1904788,00.html; Massimo Calabresi, *Obama Looks to Dennis Ross for Strategic Advice*, TIME, June 25, 2009, *available at* http://www.time.com/nation/article/0.8599,1907021,00.html.

31. COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 4 (Mar. 31, 2005), *available at* http://www.gpoaccess.gov/wmd/pdf/overview_fm.pdf.

considerable success in concealing nuclear activities from U.S. intelligence analysts and IAEA [International Atomic Energy Agency] inspectors."[32]

More recently, a 2008 report by the Washington-based Institute for Science and International Security written by former U.N. weapons inspector David Albright, one of the most important civilian experts in the United States on nuclear programs, and several co-authors, concluded that "current knowledge of [Iran's centrifuge] complex is lacking" and "[w]ithout such information, an attack is unlikely to significantly delay Iran's mastery of enrichment with gas centrifuges."[33] The report quotes U.S. participants at recent meetings between senior U.S. and Israeli military commanders who left the meetings "unconvinced that the Israelis have enough intelligence on where to strike, and with little confidence that they will be able to destroy the nuclear program."[34]

Equally important, Iranian leaders have apparently learned the lessons of Israel's preventive 1981 strike, which destroyed an Iraqi nuclear reactor at Osirak, and have dispersed and hidden their nuclear facilities, particularly their centrifuge manufacturing sites as well as their estimated 200 tons of uranium hexafluoride.[35] That amount is enough to produce weapon grade uranium for over thirty nuclear weapons, and is stored in many, relatively small, thick metal canisters.[36]

Moreover, Iran's major fuel enrichment facilities, such as the Natanz fuel enrichment plant, have been buried far underground in hard rock. In April 2006, Seymour Hersh of *The New Yorker* and reporters for *The Washington Post* reported that the Administration was actively studying options for a military strike against Iran.[37] Those reports underscored the difficulty of actually launching such a preventive strike. For example, because conventional weapons probably could not destroy Iran's deep underground facilities,[38] Pentagon planners contemplated the use of tactical

32. GETTING READY FOR A NUCLEAR-READY IRAN: REPORT OF THE NPEC WORKING GROUP 5 (Henry Sokolski & Patrick Clawson eds., 2005), *available at* http://www.npec-web.org/Books/Book051109GettingReadyIran.pdf.

33. DAVID ALBRIGHT, ET AL., INSTITUTE FOR SCIENCE AND INTERNATIONAL SECURITY, CAN MILITARY STRIKE DESTROY IRAN'S GAS CENTRIFUGE PROGRAM? PROBABLY NOT 1 (Aug. 7, 2008), *available at* http://www.isis-online.org/publications/iran/Centrifuge_Manufacturing_7August2008.pdf; Joby Warrick, *Study Cautions Against Strike on Iran's Nuclear Facilities*, WASH. POST, Aug. 7, 2008, at A6.

34. ALBRIGHT ET AL., *supra* note 33, at 2, *citing* Tim Shipman, *U.S. Pentagon Doubts Israeli Intelligence over Iran's Nuclear Program*, TELEGRAPH, July 5, 2008.

35. ALBRIGHT ET AL., *supra* note 33, at 3-4.

36. *Id*. at 7.

37. Seymour M. Hersh, *The Iran Plans*, NEW YORKER, Apr. 17, 2006, at 30; Peter Baker, et al., *U.S. is Studying Military Strike Options on Iran*, WASH. POST, Apr. 9, 2006, at A1.

38. Roger Speed & Michael May, *Dangerous Doctrine*, BULLETIN OF THE ATOMIC SCIENTISTS 38 (Mar.-Apr. 2005), at 42.

nuclear weapons.[39] Hersh reported that senior officials were considering resigning over such a threatened first use of nuclear weapons and that the Joint Chiefs of Staff were strongly opposed. A senior Administration official admitted that an attack could be undertaken only at great political cost, and that because of inadequate intelligence, it still might "not set them back."[40] Moreover, the tactical nuclear weapon that the Administration reportedly contemplated using – the B61-11 bunker buster – cannot penetrate the hard rock under which valuable targets are often buried.[41]

Furthermore, a military attack on Iran would run a substantial risk of Iranian retaliation. Iran has an arsenal of fifty to eighty conventional missiles that could target either Tel Aviv or American military installations in Iraq and the Persian Gulf.[42] Admiral Michael Mullen, Chairman of the U.S. Joint Chiefs of Staff, said in 2008 that an attack on Iran would open a "third front" with unpredictable consequences for American forces in the Middle East.[43] Iran could also turn off its oil taps, sending the price of oil skyrocketing and further destabilizing an already reeling world economy. It could disrupt the flow of oil from the Middle East by closing the Strait of Hormuz, through which one-quarter of the world's oil is transported.[44] Such a closure "tops the list of global energy security nightmares," according to one recent study.[45] Finally, a military attack would likely provoke a nationalistic reaction in Iran, leading Iran to sever ties with the U.N. IAEA and to launch a crash program to obtain nuclear weapons quickly.[46]

In short, a military attack on Iran would, at best, temporarily delay the Iranian development of a nuclear program – and it would do so at considerable risk to the United States, Israel, and the world. That calculus undoubtedly led the Bush administration, reportedly, to reject Israel's request that it support a military attack on Iran in the waning days of the Administration.[47] A similar calculation also led the Bush administration to

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39. Hersh, *supra* note 37.

40. Baker et al., *supra* note 37.

41. Speed & May, *supra* note 38; Benjamin Phelan, *Buried Truths: Debunking the Nuclear Bunker Buster*, HARPER'S MAGAZINE, Dec. 1, 2004, at 70 (quoting the Defense Department's Nuclear Posture Review for 2001, which states that the B61-11 "cannot survive penetration into many types of terrain in which hardened underground facilities are located").

42. Robert W. Gee, *Bush Is Convenient to Israel in Terms of Iran*, SEATTLE POST INTELLIGENCER, July 18, 2008, *available at* http://www.seattlepi.com/opinion/371318_israelonline20.html.

43. Josh White, *A Shortage of Troops in Afghanistan; Iraq War Limits U.S. Options, Says Chairman of Joint Chiefs*, WASH. POST, July 3, 2008, at A1.

44. Gee, *supra* note 42.

45. Caitlin Talmadge, *Closing Time: Assessing the Iranian Threat to the Strait of Hormuz*, 33 INT'L SECURITY 82, 82 (2008).

46. Warrick, *supra* note 33, quoting ALBRIGHT ET AL., *supra* note 33, at A6.

47. David E. Sanger, *U.S. Rejected Aid for Israeli Raid on Nuclear Site*, N.Y. TIMES, Jan. 11, 2009, at A1; *see also* David E. Sanger, *Iranian Overture Might Complicate*

conclude eventually that a preemptive military strike against North Korea was unfeasible and too dangerous. After almost five years of preventive war rhetoric, the Bush administration turned to negotiating with the North Koreans, urging patience, and rejecting as unacceptably risky, suggestions that it launch a precision strike against North Korea's missile launching pads.[48] Thus far, Obama has correctly not threatened or suggested that a military strike against North Korea is an option, and has instead pursued collective measures through the U.N. Security Council.[49]

B. A Unilateral Preemptive Strike Against Iran or North Korea Would Violate International Law

Not only would a military attack on Iran or North Korea be ineffective and counterproductive, it would also violate international law and undermine Obama's determination to restore American credibility, legitimacy, and leadership in the world community. Such leadership must be premised on an adherence to international law and the basic values and principles enshrined in the U.N. Charter, other basic international agreements, and customary international law. One of those fundamental principles – undoubtedly the basic principle contained in the Charter – is that individual nations forswear the unilateral use of force against other nations except in self-defense in response to an armed attack or an imminent attack. By removing the military option against Iran from the table, clearly and decisively rejecting the doctrine of preventive attack, and committing itself to adhere to the U.N. Charter, the Obama administration would demonstrate a decisive break with the Bush administration as well as the Clinton administration – which while not trumpeting a preventive military strategy as Bush did, nonetheless refused to so commit itself to following the Charter's rules on use of force.[50]

Relations with Israel, N.Y. TIMES, Feb. 11, 2009, *available at* http://www.nytimes.com/2009/02/11/us/politics/11web-sanger-in-was-14-48.html. The Obama administration should also make clear to the new Israeli government that an Israeli attack on Iran would be unacceptable.

48. David E. Sanger, *Don't Shoot, We're Not Ready*, N.Y. TIMES, June 5, 2006, at 1.

49. David E. Sanger, *Tested Early by North Korea, Obama Has Few Options*, N.Y. TIMES, May 25, 2009, *available at* http://www.nytimes.com/2009/05/26/world/asia/26nuke.html; S.C. Res. 1874, U.N. Doc. S/RES/1874 (June 12, 2009).

50. For example, Secretary of State Madeline Albright refused to commit the United States to following the views of the Security Council with respect to the use of force against Iraq in the late 1990s, arguing that we had to "pursue our national interests." *See* Dan Morgan, *Administration Weighs Steps in Case U.N.-Iraq Deal Doesn't Satisfy U.S.*, WASH. POST, Feb. 23, 1998, at A15; *see also* Madeline Albright, *The United States and United Nations: Confrontation or Consensus?*, LXI VITAL SPEECHES OF THE DAY 354 (Apr. 1, 1995), for the view that "multilateralism is a means, not an end."

An international law approach requires enlisting the aid of the U.N. Security Council in dealing with dangerous threats such as those posed by North Korea or Iran. Such a law-abiding approach enhances American leadership and foreign policy goals by encouraging the cooperation of our allies, strengthening those international institutions that in the long run will serve both our and the world's interest in peace, and isolating threatening regimes. Of course, the Security Council and United Nations are far from perfect and could use significant reforms. In particular, the veto power of each of the permanent members of the Council presents a potential problem. Certainly, the Obama administration would face a real dilemma if it had reliable evidence that North Korea, Iran, or Pakistan was selling nuclear weapons to terrorist organizations, and one member of the Security Council unilaterally vetoed a resolution authorizing the use of military force. In such a case, where the overwhelming majority sentiment on the Security Council favors military action, the United States could invoke an alternative procedure: The U.N. General Assembly can take action by majority vote under the Uniting for Peace Resolution adopted in the 1950s.[51]

The argument for preserving the preventive military option against Iran rests on its purported usefulness in pressuring Iran to bow to diplomatic and economic measures and stop enriching uranium. But neither evidence nor logic supports the proposition that preserving a military option will have that effect. It hasn't thus far, even though the Bush administration apparently seriously explored using the option, and the threat of such an attack during that Administration was credible. Moreover, as a logical matter, why would the Iranians feel pressure from a military threat that they knew even Western analysts believe would not seriously set back their nuclear program? The main practical function of keeping the military option on the table appears to be to provide the Iranian leadership with a rationale and argument that they need nuclear weapons and other military measures to defend themselves from a bellicose United States and Israel that may be planning to attack them. In sum, there is no point of preserving a unilateral military option against Iran or North Korea when such an option is unfeasible, unworkable, ineffective, illegal, provocative, and allows states like North Korea or Iran to claim a need for self-defense.

51. U.N. GAOR, 5th Sess., Supp. No. 20 at 10, U.N. Doc. A/1775 [1950]. The resolution states, "If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security, [the General Assembly] may make appropriate recommendations for collective measures, including in the case of a breach of peace or act of aggression the use of armed forces when necessary, to maintain or restore international peace and security." *Id.*

III. GUANTÁNAMO AND PREVENTIVE DETENTION

Obama stated during the election campaign that he would close Guantánamo, and one of his first actions upon taking office was to sign an Executive Order committing the government to close Guantánamo within a year.[52] Yet the question remains about what to do with the approximately 220 prisoners currently detained at Guantánamo.[53] President Obama recently stated in a major national security speech that there may be a number of detainees at Guantánamo who cannot be prosecuted for past crimes "yet who pose a clear danger to the American people" and therefore must be subject to some preventive detention legal regime.[54]

Various proposals for a preventive detention statute have been articulated by scholars. Jack Goldsmith, former head of the Justice Department's Office of Legal Counsel in the Bush administration, and Neal Katyal, who is currently Deputy Solicitor General for the Obama administration, proposed in 2008 that a new national security court be established by Congress to detain "suspected terrorists" after a hearing that provided substantial procedural safeguards.[55] Other scholars have also argued for a preventive detention law that would give a national security court jurisdiction "over citizens and non-citizens who operate in a loose network for terrorist purposes – whether here or abroad."[56] Professor David Cole, however, rejects any broad preventive detention authority to detain suspected terrorists, as well as the creation of a special national security court, but would nonetheless permit the government to preventively detain those who are found to be fighters for al Qaeda – whether they are captured on battlefields in Afghanistan or in the United States – after a fair hearing before a military tribunal.[57]

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

53. Peter Finn, *Guantánamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A1; William Glaberson, *Post-Guantánamo: A New Detention Law?*, N.Y. TIMES, Nov. 15, 2008, at 13; Benjamin Wittes, *Wrenching Choices on Guantánamo*, WASH. POST, Nov. 21, 2008, at A23.

54. Remarks by the President on National Security (May 21, 2009), *supra* note 3.

55. Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19.

56. Harvey Rishikof, *Is it Time for a Federal Terrorist Court?*, 8 SUFFOLK J. TRIAL & APP. ADV. 1, 5 (2003); *see also* Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 New ENG. J. INT'L & COMP. L. 1 (2006) (calling for homeland security courts to detain and try terrorists in the "Global War on Terror"); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1120-23 (2008) (discussing various possible criteria for detention of individuals "in al Qaeda and its co-belligerent terrorist organizations").

57. David Cole, *Closing Guantánamo: The Problem of Preventive Detention*, BOSTON REVIEW (Jan./Feb. 2009), internet-only publication *available at* http://www.bostonreview.net/BR34.1/cole.php.

All of these proposals are premised on the rationale that the normal criminal process is insufficient to address the problem of detaining captured terrorists. Some argue that most of the evidence available against suspected terrorists is predicated on intelligence information or other classified information and that the government should not be forced to choose between disclosing this information to the terrorist suspect in order to try him criminally, or releasing the detainee to avoid compromising such confidential, national security sensitive material.[58] In addition, some argue that the standards of proof required for evidence to be admitted in a federal criminal trial might not be met for evidence collected on battlefields abroad.[59] Another argument for some form of preventive detention is that the burden of proof in criminal cases requiring the government to prove culpability beyond a reasonable doubt is prohibitively high.[60]

There are several reasons that the Obama administration should reject a system of preventive detention and the establishment of a separate national security court. First, a long-term, indefinite preventive detention scheme for suspected terrorists poses grave dangers for the rule of law and constitutional governance. To deprive someone of their liberty for what could very well be their entire lifetime without charging them with any crime and without having the evidence necessary to convict them in a regular court strikes at the heart of our core constitutional values. Second, such a system has not been shown to be necessary as either a legal or a practical matter.

To adopt a preventive detention scheme generally requires the government to show a necessity for one. All preventive detention policies hitherto recognized in the United States provide for the detention of individuals who cannot be tried by the normal judicial system because they have committed no crime. Thus, the Supreme Court has allowed the civil commitment of persons who are mentally ill and dangerous, but have committed no crime and therefore cannot be prosecuted.[61] Similarly, U.S. law allows preventive detention in the form of quarantine to isolate a person with a dangerous disease who could not be prosecuted criminally.[62] The Court has allowed detention without bail of persons who have been charged

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58. *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System*: *Hearing Before the Senate Comm. on the Judiciary*, 110th Cong. (2008) (statement of Prof. Amos N. Guiora).

59. Goldsmith & Katyal, *supra* note 55; James Jay Carafano & Paul Rosenzweig, *Time to Rethink Preventive Detention*, HERITAGE FOUNDATION (Oct. 4, 2004), *available at* http://www.heritage.org/press/commentary/ed100504a.cfm.

60. Cole, *supra* note 57, at 4; Matthew Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008) (arguing that the laws of war, particularly targeting decisions, can supply a level of certainty for detention decisions that is less than that required for criminal trial and that appropriately fits the conflict with al Qaeda).

61. *See* Addington v. Texas, 441 U.S. 418 (1979).

62. *See* O'Connor v. Donaldson, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring).

criminally and are deemed to pose a danger to the community or a risk of flight.[63] Again, we permit preventive detention in that circumstance because the criminal justice system cannot instantaneously adjudicate criminal liability, so preventive detention is viewed as a necessary measure imposed until the criminal process can reach a conclusion. Finally, the laws of war permit the detention of captured enemy soldiers for the duration of the war. Those soldiers, such as the hundreds of thousands of German soldiers held during World War II, have committed no crime. They are detained not because they are criminals, nor because they are generally dangerous, but to prevent them from returning to the battle on behalf of the enemy during the course of war.

In the current conflict with al Qaeda, in contrast to the typical wars that the United States has fought in the past, anyone who can be detained as an al Qaeda fighter will also, almost by definition, have committed a crime under U.S. law.[64] Therefore, unlike preventive detention permitted either domestically or pursuant to the laws of war authorizing the detention of enemy prisoners of war, the criminal justice system is theoretically available to prosecute and detain individuals found fighting for al Qaeda.[65] The fact that al Qaeda terrorists can be prosecuted by the criminal justice system thus removes the linchpin characteristic of all the current examples of preventive detention – that the criminal justice system cannot adequately provide for these individuals' detentions because they have committed no crimes, or because they need to be detained for a relatively short period of time while the criminal justice process determines whether they have committed crimes.

The argument for preventive detention of al Qaeda suspects, therefore, is not that it is theoretically impossible to criminally prosecute al Qaeda

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63. *See* United States v. Salerno, 481 U.S. 739 (1987).

64. In addition, it is not even clear whether al Qaeda fighters fall into the category of individuals who can be detained pursuant to the laws of war as enemy combatants. The International Red Cross and a number of international law scholars have argued that in non-international wars, such as that between a non-state actor like al Qaeda and the United States, there is no recognized legal category of enemy combatant. INT'L COMM. OF THE RED CROSS, OFFICIAL STATEMENT: THE RELEVANCE OF IHL IN THE CONTEXT OF TERRORISM, at 1, 3 (Feb. 21, 2005), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/ terrorism-ihl-210705. That view was adopted by a majority of the Fourth Circuit panel in *Al Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), and by four judges who participated in the *en banc* review of that ruling, Al Marri v. Pucciarelli, 534 F.3d 213, 233 (4th Cir. 2008) (*en banc*) (Motz, J., concurring). The case was later ordered dismissed as moot after the detainee was transferred from military custody to the criminal system. Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

65. The USA PATRIOT Act of 2001 amended the statute of limitations provisions of federal criminal law to provide for an eight-year statute of limitations (instead of the general five-year limitations period) for terrorism offenses, and also provided that there would be no limitation for any terrorism offense that resulted in, or created, a foreseeable risk of death or serious bodily injury to another person. Pub. L. No. 107-56, §809, 115 Stat. 272, 379-380 (codified at 18 U.S.C. §3386 (2006)).

terrorists, but rather that it is impractical or difficult to do so. Yet there is virtually no evidence beyond pure speculation that it is impractical to prosecute terrorists in criminal courts.[66] Indeed, the evidence is to the contrary. A recent lengthy, well-documented report for Human Rights First, written by two former federal prosecutors, examined the actual experience of more than 100 international terrorism cases that have been prosecuted in federal courts over the past fifteen years.[67] The authors conclude that, "contrary to the views of some critics, the court system is generally well equipped to handle most terrorism cases."[68]

More particularly, the two prosecutors conclude that the often asserted problem involving the government's need to introduce classified evidence is adequately addressed by the Classified Information Procedures Act (CIPA),[69] which allows for detailed procedures when classified evidence is at issue to ensure that such evidence is protected from disclosures.[70] The CIPA procedures have allowed the government to offer relevant classified evidence while protecting national security. Based on their review of the case law the authors concluded, "we are not aware of a single terrorism case in which CIPA procedures have failed and a serious security breach has occurred."[71] They discount the difficulty of introducing evidence into federal criminal trials pursuant to the Federal Rules of Evidence, arguing that they are not aware of any terrorism case in which an important piece of evidence has been excluded on authentication or other grounds.[72]

The Human Rights First report's conclusions are echoed by jurists with considerable experience in trying terrorism cases.[73] For example, Judge

66. David Cole has argued that "the fact that Al Qaeda is engaged in criminal warfare should not restrict the United States' options in defending itself." For him, the right of the United States to try al Qaeda fighters for either war crimes or ordinary crimes "does not mean that we should be *required* to try them in either forum, particularly while the conflict is ongoing Cole, *supra* note 57, at 4 (emphasis in original). But, as he recognizes, "we should depart from the criminal justice model only where the criminal process *cannot* adequately address a particularly serious danger." *Id*. at 3. Therefore, it is incumbent on those arguing for either a narrow war model preventive detention system tied to Congress' authorization of force against the September 11 terrorists, or a broader preventive detention scheme to detain terrorists generally, to demonstrate that the criminal courts cannot, as a practical matter, prosecute some significant number of terrorists.

67. Richard B. Zahel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, HUMAN RIGHTS FIRST (May 2008).

68. *Id*. at 5.

69. Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025, 2025-31 (1980) (codified at 18 U.S.C. app. 3)

70. Zahel & Benjamin, *supra* note 67, at 9.

71. *Id.* at 9.

72. *Id.* at 11.

73. *See* Judge Leonie M. Brinkema, Terrorism Cases in Civilian Courts: Balancing the Powers of Government, Address at Princeton University Woodrow Wilson School of Public and International Affairs (Apr. 28, 2008), event information available at http://lapa.princeton.edu/eventdetail.php?!D=160; *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System*: *Hearing Before the Senate Comm. on the*

John C. Coughenour testified before the Senate Judiciary Committee that the federal courts "are not only competent, but also uniquely situated to conduct terrorism trials."[74] Judge Coughenour's twenty-seven years of experience on the federal bench, which includes presiding over the trial of the so-called "Millennium Bomber" Ahmed Ressam in 2001, led him to conclude that the CIPA contains "extensive precautions" that were "more than adequate in that case," and that any shortcomings in the law can and should be addressed by further revision, rather than by a separate, parallel scheme of preventive detention.[75] While the federal courts may be stretching the bounds of what is constitutionally permissible by permitting the admission of evidence without sufficient safeguards[76] or by allowing prosecutions for "material support" crimes that are broadly and vaguely defined,[77] the answer is not to create a separate judicial or military process to preventively detain suspected terrorists for whom prosecution is difficult even under these flexible criminal procedures.

Moreover, neither the Bush or Obama administrations nor academic supporters of a preventive detention scheme have ever made any factual showing that there are a significant number of alleged terrorists detained who could not be tried on criminal charges in federal court, but nonetheless could be detained after a fair hearing in which evidence that they were indeed al Qaeda members or fighters was subjected to rigorous scrutiny. Indeed, the evidence adduced thus far is to the contrary; virtually all of the habeas cases that federal courts have decided to date of Guantánamo detainees have held that the government has no objective evidence justifying the detentions.[78] Most of these cases have been decided by conservative judges in the D.C. Circuit.[79] As one D.C. Circuit panel stated "Lewis Carroll notwithstanding, the fact that the government has 'said it thrice' does not make an allegation true."[80]

Judiciary, 110th Cong. (2008) (statement of Judge John C. Coughenour) [hereinafter Coughenour statement].

74. Coughenour statement, *supra* note 73.

75. *Id*.

76. *See, e.g.*, United States v. Moussaoui, 382 F.3d 453 (2004).

77. *See* COLE & LOBEL, *supra* note 6, at 49-50.

78. *See* Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008) (ordering either the release of the detainee or a new CSRT with new evidence supporting his detention); Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. 2008) (granting the release of five of six detainees who petitioned for writ of habeas corpus).

79. *See* cases cited, *supra* note 78.

80. *Parhat*, 532 F.3d at 848-849 (citing LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876) ("I have said it thrice: what I tell you three times is true.")).

Nor does it make much logical sense that there would be a significant number of detainees who could not be tried criminally but nonetheless could be detained preventively after a fair hearing. It seems unlikely that there would be many cases where the government has clear and convincing evidence that a detainee is an al Qaeda fighter or is plotting a terrorist crime and could convince a neutral judge that the person was a terrorist after a fair hearing which afforded the detainee a meaningful opportunity to respond to the government's evidence, but where the government nonetheless could not have convicted that person of a crime after a trial in federal court.

As is now widely recognized, the government should not be able to detain someone based on mere speculation or suspicion of what they might do in the future, but must have concrete evidence that they fought for al Qaeda, participated in al Qaeda attacks or were at least conspiring to engage in such attacks. Moreover, it also seems to be widely acknowledged that the Bush administration's system of military detainee review by the Combatant Status Review Tribunals contained woefully inadequate procedural mechanisms to review detainees' status, and that more robust procedural safeguards are required.[81] Reasonable procedural safeguards would ensure that detainees be provided a lawyer, that evidence procured by torture be deemed unreliable and inadmissible, that the military tribunal be constituted in a manner that is truly independent, that the detainee or his lawyer have access to and an opportunity to contest the factual information – whether classified or not – that forms the basis of the government's allegations, and that the government should have to make a substantial showing under "clear and convincing evidence" or some similar test.[82]

However, once clear and meaningful detention standards are set forth and robust procedural safeguards applied, it seems at best uncertain that any significant number of alleged enemy terrorists would be able to be detained who could not be prosecuted. Once we assume that the government has clear and convincing evidence that someone is an enemy terrorist and combatant and that it must accord the detainee or his lawyer sufficient access to that evidence that would afford him a meaningful right to respond and thus comport with due process – which is all that CIPA requires in a criminal trial – why would it be so difficult to prosecute that person criminally? It may well be that there are a few detainees who could be detained under an independent and rigorous system of military review that would comport with due process, yet would be acquitted in criminal trials, but it makes little sense for Congress to design an entire system of preventive detention with either military tribunals or a new national security court to deal with the hypothetical few cases. For Congress to do so there must, at minimum, be a strong factual showing that there are a considerable number of detainees for whom a criminal trial is impractical but who nonetheless could be detained under a system requiring robust review.

81. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008).

82. *See, e.g.*, Cole, *supra* note 57, at 7-8.

Such a showing has certainly not been made until now, and it seems unlikely that it can be made. In any event, that some suspected terrorists might be acquitted if prosecuted is no argument for a preventive detention scheme, for no fair criminal procedure system can or ought to guarantee the government a conviction in every case.

President Obama has suggested that it might be impossible to prosecute some detainees "because the evidence may be tainted."[83] But if the evidence against a detainee has been obtained by torture and is therefore "tainted," it is not only inadmissible, but also unreliable and ought to be inadmissible in either a military court or any fair proceeding. It would be contrary to our constitutional values and due process to detain someone preventively based on evidence procured by torture.

Finally, not only is a preventive detention scheme unnecessary, but it is also dangerous for two reasons. First, to detain persons who are dangerous because they are al Qaeda fighters for the duration of the conflict in all likelihood means to detain them for the rest of their lives, or at minimum for a very long time. The military conflict with al Qaeda has been ongoing now for over seven years and shows no signs of ending any time soon. In virtually all other modern warfare – even civil conflicts between insurgents and governments – there is some prospect of a negotiated settlement ending the conflict. Here there is none. Moreover, since al Qaeda has morphed into a loose network of affiliated groups in far-flung nations, there seems little possibility of a definitive military victory over al Qaeda, even if the United States were to achieve military success in Afghanistan and Pakistan. Preventive detention in this circumstance, therefore, means the virtually permanent incarceration in harsh conditions of people who often are not captured in any visible battleground, but in civilian areas.

The Supreme Court has recognized this danger. In *Boumediene*, the Court continually emphasized the lengthy duration of the conflict with al Qaeda and of the detentions of the Guantánamo prisoners, noting that "the cases before us lack any historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured, from September 11, 2001 to the present, is already among the longest wars in American history."[84] That Court recognized that where the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, "the risk of error is too significant to ignore."[85]

The Court ended its *Boumediene* opinion by again emphasizing the potentially indefinite and permanent nature of the conflict against terrorism: "Because our Nation's military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined.

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83. Remarks by the President on National Security, *supra* note 3.

84. *Boumediene*, 128 S. Ct., at 2275.

85. *Id.* at 2270.

If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."[86]

In *Boumediene*, the Court seemed to harken back to a point that the *Hamdi* plurality foreshadowed when it suggested that the virtually permanent and ambiguous nature of the war against terrorism could undermine the applicability of the preventive detention war model to alleged al Qaeda or Taliban detainees: "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [that the President has detention authority under the law of war] may unravel."[87] While the Court did not reach that question in *Boumediene*, the Court did seem to recognize that the practical circumstances in this conflict are sufficiently unlike prior military conflicts to render preventive detention for the duration of this conflict far more dangerous to liberty than in traditional wars. The danger of a virtually life imprisonment preventive detention scheme[88] suggests that, at minimum, it should not be adopted unless the criminal justice system has been demonstrably unavailable in a significant number of cases. That showing has simply not been made.

The experience of democracies with preventive detention against alleged terrorists illustrates its grave dangers. The United Kingdom experimented with preventive detention in the 1970s when it interned hundreds of suspected Irish Republican Army (IRA) members without trial. But the British later realized that this policy generated sympathy for the IRA and aided recruitment efforts, and changed its policy. The British Ministry of Defense later acknowledged, "With the benefit of hindsight, it was a major mistake."[89] Indeed, while there have been terrorist attacks in a number of countries in Europe before and after the September 11 attacks, and many European nations have combat troops fighting alongside U.S. armed forces in Afghanistan, no European country has adopted a long-term preventive detention scheme to detain al Qaeda operatives as enemy combatants. Instead, they all utilize their criminal justice systems to try alleged terrorists. Indeed, most European states do not have any preventive detention or coercive measures – apart from immigration regulations linked to the expulsion of foreign nationals – to address a situation where a person who is suspected of terrorist activities is considered a threat to national security but is not prosecuted.[90] Even the few who do have preventive

86. *Id.* at 2277.

87. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).

88. The suggestion that an inclusion of periodic reviews of a detainee's dangerousness might ameliorate the long-term nature of indefinite preventive detention for al Qaeda detainees would not seem to be useful for many detainees, for the dangerousness of a captured al Qaeda fighter or supporter would not diminish over time unless the individual renounced his or her affiliation with al Qaeda, or al Qaeda was destroyed.

89. *See* Kenneth Roth, *After Guantánamo*, FOREIGN AFF., May/June 2008, at 2, 2.

90. Commission of the European Communities Document SEC (2009) 225, Final Synthesis of the Replies From the Member States to the Questionnaire on Criminal Law,

coercive measures, such as Great Britain, generally restrict a person's liberty by placing them under special police supervision or imposing restrictions such as a curfew, but do not deprive a person of their liberty by detaining them.[91] No European country has thus far implemented a long-term preventive detention scheme of the sort Obama now suggests.

IV. A NEW PALESTINIAN-ISRAEL POLICY

The Bush administration put little pressure on Israel with respect to its use of military force against the Palestinians. The Administration appeared to give Israel a green light to attack Lebanon militarily in 2006 and to launch an assault on Gaza in December 2008. A key aspect of the United States playing an important role in moving a peace settlement forward between Israelis and Palestinians is for the new Administration to be perceived as a more neutral player than the strongly pro-Israeli tilt of its predecessors. This is particularly true with respect to Israel's use of military force against Palestinians.

Obama's position on the Palestinian-Israeli conflict is clearly an improvement over the Bush administration's. His speech at Cairo sought to establish a U.S. commitment to an even-handed approach to the Palestinian-Israeli conflict, particularly in its position against any further expansion of Israeli settlements.[92] Both Obama and Secretary of State Hillary Clinton appear to want to take a more proactive, assertive role in the Palestinian-Israeli conflict and peace discussions. The appointment of former Senator George Mitchell as a special Middle East envoy charged with rebuilding the Israeli-Palestinian peace process is clearly a positive development.[93]

Nonetheless, here again Obama's position is ambivalent. For example, both he and Secretary of State Clinton have taken what appears to be a kneejerk reaction that Israel was acting in legitimate self-defense when it

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Administrative Law/Procedural Law and Fundamental Rights in the Fight Against Terrorism, at 21.

91. *Id.* at 19-21 (describing German, Italian and British law). Great Britain's 2005 Prevention of Terrorism Act provided for the government to place restrictions in the form of control orders on persons who the government has reasonable grounds for suspecting is or has been involved in terrorism-related activity. Control orders issued pursuant to the Act have been subject to a considerable amount of litigation with the House of Lords imposing procedural restraints on the government's powers. *See, e.g.*, Sec'y of State v. AF, 2009 UKHL 28 (HL). The British statute provides for two kinds of control orders: non-derogating orders which only restrict a person's liberty and a derogating order which would deprive a person of their liberty and therefore would require the government to derogate from Article 5 of the European Convention on Human Rights. To date, Britain has never utilized a derogatory order which would deprive a suspect of his liberty. Commission of the European Communities Document SEC (2009) 225, *supra* note 90, at 20.

92. Remarks at Cairo University (June 4, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Cairo-University-6-04-09/.

93. *George Mitchell Named Special Envoy to the Middle East*, CNN, Jan. 22, 2009, *available* at http://www.cnn.com/2009/POLITICS/01/22/obama.mitchell/index.html.

massively attacked Gaza, wreaking enormous death and destruction on the Palestinian population there. "We support Israel's right to self-defense. The [Palestinian] rocket barrages which are getting closer and closer to populated areas [in Israel] cannot go unanswered," Clinton stated in her first news conference at the State Department. "It is regrettable that the Hamas leadership apparently believes that it is in their interest to provoke the right of self-defense instead of building a better future for the people of Gaza."[94] While Clinton later reportedly chided Israel for not getting humanitarian aid to the Gaza Strip fast enough, [95] her position on Israel's right to self-defense ignores a critical fact that undermines that asserted right.

In June 2008, Israel and Hamas indirectly negotiated a truce through Egyptian mediators that required Hamas to end its rocket attacks on Israel. Between June and November 2008, Hamas upheld its end of the bargain and complied with the truce, according to information provided by the Israel Ministry of Foreign Affairs. In a December 2008 report titled "The Six Months of the Lull Arrangement," from the Intelligence and Terrorism Information Center at the Israel Intelligence Heritage and Commemoration Center – which can be found on a website maintained by the Israel Ministry of Foreign Affairs – between June 19 and November 4, 2008, there was a "period of relative quiet" and a "marked reduction in the extent of attacks on the Western Negev population."[96] "The lull was sporadically violated by rocket and mortar shell fire, carried out by rogue terrorist organizations, in some instance in defiance of Hamas (especially by Fatah and Al-Qaeda supporters). Hamas was careful to maintain the ceasefire."[97]

For five months, therefore, Hamas maintained the ceasefire and stopped shooting rockets at Israel. However, on November 4, the Israeli Army carried out a military operation in Gaza that effectively ended the calm. As the Israeli report explains:

> On November 4 the IDF carried out a military action close to the border security fence on the Gazan side to prevent an abduction planned by Hamas, which had dug a tunnel under the fence to that purpose. Seven Hamas terrorist operatives were killed during the action. In retaliation, Hamas and the other terrorist organizations attacked Israel with a massive barrage of rockets . . . .[98]

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94. *Clinton: Israel Has Right to Respond to Gaza Rock Attacks*, HAARETZ, Jan. 21, 2009, *available at* http://www.haaretz.com/hasen/spages/1059209.html.

95. Barak Ravid & Avi Issacharoff, *Clinton Warns Israel Over Delays in Gaza Aid*, HAARETZ, Feb. 25, 2009, *available at* http://www.haaretz.com/hasen/spages/1066821.

96. CENTER AT THE ISRAEL INTELLIGENCE HERITAGE AND COMMEMORATION CENTER, SIX MONTHS OF THE LULL ARRANGEMENT INTELLIGENCE REPORT: INTELLIGENCE AND TERRORISM INFORMATION (Dec. 31, 2008), *available at* http://www.mfa.gov.il/MFA, or at http://www.rightsidenews.com/index2.php?option=com_content&do_ pdf=1&id=3157.

97. *Id.*

98. *Id.*

The question is why didn't Israel maintain the ceasefire and take defensive measures to protect against any suspected abduction plans by Hamas? There is no question that prior to the Israeli attack, Hamas was observing the ceasefire. Israel cannot claim self-defense for an escalation that it provoked by its own military attack violating the truce.

Moreover, on numerous occasions Hamas offered to extend the truce, demanding in return that Israel lift its blockage of Gaza, which Israel had promised to do. As late as December 23, after the truce had already expired and amidst escalating tensions, Hamas leaders were offering to renew the truce, while still insisting on an end to the blockade. Israel declined these Hamas offers.

In that context, the continued vindication by the United States of Israel's Gaza assault as an exercise of legitimate self-defense is misplaced. The United States must change its blind acceptance of Israel's use of military force against Palestinians as part of an overall strategy to be a neutral mediator of the Palestinian-Israeli conflict.

CONCLUSION

The Obama administration has taken some important first steps to reverse the disastrous Bush administration national security policies. It must, however, decisively abandon the prior Administration's preventive detention, preventive war, and knee-jerk acceptance of Israel's military policies to begin truly to reform American national security policy.