



PATRICIA M. HYNES
PRESIDENT
Phone: (212) 382-6700
Fax: (212) 768-8116
phynes@nycbar.org

November 24, 2008

Dear President-Elect Obama:

Congratulations on your recent election. We wish you every success in your presidency.

You now have a historic opportunity to restore America's reputation in the international community and among the people of the world. It is with that in mind that I write on behalf of the Association of the Bar of the City of New York (the "Association"), to offer suggestions about the detention, treatment and trial of terrorism suspects.

Since its establishment in 1870, the Association has worked to advance and defend the rule of law. Over the past seven years in particular, the Association has issued thoroughly researched and thoughtfully reasoned reports and letters to promote America's long-term security through respect for lawful and humane policies.¹

¹ Many of these works are collected in James R. Silkenat and Mark R. Shulman, editors, *The Imperial Presidency and the Consequences of 9/11: Lawyers Respond to the Global War on Terror* (2007).

The principal lesson we have derived from our work is that full and faithful respect for the rule of law strengthens our country. Our system of justice – based on time-tested constitutional and international norms – is a source of strength, not vulnerability. Since 9/11, certain U.S. policies for the detention, treatment, and trial of persons suspected of membership in, or support of, al Qaeda, the Taliban or associated groups have violated our traditions of fair process and respect for human dignity and the rule of law. In that spirit, we offer these concrete suggestions for restoring the rule of law and strengthening our national security. You can implement some of these proposals quickly and unilaterally; others will require careful deliberation and appropriate action by the executive branch, Congress and the judiciary. These proposals have been developed by the Association's Task Force on National Security and the Rule of Law, which oversees and coordinates the Association's work on issues pertaining to the balancing of civil liberties and national security.

Detention

Since 9/11, certain U.S. detention policies have disregarded the norms and values enshrined in our Constitution and have drawn wide public opprobrium upon our nation, ultimately undermining our security. We should assure that our detention policies reflect our greatest strengths: the values upon which our nation was founded and which we have long advocated on the international stage.

- We applaud and endorse your intention to close the most visible symbol of failed policies: the detention facilities at Guantanamo. As soon as possible, a team of qualified military personnel, professional prosecutors, law enforcement agents, and intelligence officers should carefully review the evidence and case histories for each of the individuals currently being held at Guantanamo. After that review is completed, we believe that the detainees will fall into two or perhaps three broad categories.

First, Guantanamo detainees against whom there is sufficient admissible evidence of violations of U.S. criminal laws should as a rule be prosecuted in federal court without delay. It is conceivable that some detainees could be subject to trial before a court martial or, if absolutely necessary, in a reconstituted military tribunal, but only if such a tribunal

were endowed with procedural protections and transparency that would leave no doubt about the fairness and legitimacy of the proceedings. We urge you to prosecute as many of the detainees as is proper based on the evidence and the law.

Second, as to those detainees the United States will not charge with a crime, the government should seek expeditiously to return most if not all of them to their home countries or another appropriate nation, subject to Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (“CAT”)² and the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”)³, which prohibit the transfer of any person to another country where there are substantial grounds for believing the person would be in danger of being subjected to torture. In the case of those detainees, like the Uighur detainees, as to whom there is no evidence that they engaged or planned to engage in hostilities against the United States but who cannot be returned to their home country consistent with Article 3 of CAT and FARRA, and for whom the United States has been unable to arrange for their transfer to an appropriate country, such detainees should be released immediately into the United States subject to appropriate supervision. These actions will mark a significant step toward America’s rehabilitation in the eyes of the world.

Third, it is possible that a conscientious review of the evidence may reveal that there are a small number of detainees who cannot responsibly be prosecuted (because of insufficient admissible evidence required for a criminal prosecution) or repatriated, but as to whom the government nevertheless believes there is sufficient evidence to warrant continued detention under traditional principles of the law of armed conflict. For

² Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, 1465 U.N.I.S. 85 (Ratified by U.S. Oct. 21, 1994).

³ Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (codified as note to 8 U.S.C. § 1231 (2000)).

these individuals, the government should make the showing required by those principles under procedures fully satisfying due process before the federal courts that are currently handling habeas litigation in the United States District Court for the District of Columbia.

- Prolonged, secret, incommunicado detention of any person in the custody or control of a state is prohibited by international law.⁴ You should shut down all secret detention facilities, end extraordinary rendition, and ensure that the International Committee of the Red Cross has access to and can register all persons in the custody of the United States or another state if the person is held pursuant to custody arrangements with the United States.
- You should disclose and ensure transparency of the policies and procedures governing any U.S. detention operations abroad, including those in Iraq and Afghanistan.
- In recent months, some commentators have proposed the enactment of a preventive detention system for persons suspected of terrorism. We believe such proposals are premature and unnecessary and that any such system would raise serious constitutional concerns. The President has the power already to detain certain individuals under the international law of armed conflict; others pursuant to various forms of domestic authority, which include detention of those facing immigration action, trial, or examination as a material witness in a criminal investigation; and those convicted and sentenced to a term of imprisonment by a regularly constituted tribunal.⁵ Experience shows that these powers suffice to ensure security and deliver justice.⁶ Persons residing in the United States as to whom there is probable cause to believe that they are engaging or planning to engage in terrorism or conspiring with terrorist organizations like al Qaeda should not be subject to military detention but should be arrested, detained, charged and prosecuted subject to the protections of our criminal justice system.

⁴ See *Human Rights First, Ending Secret Detentions* 19-22 (June 2004) Available at www.humanrightsfirst.org.

⁵ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 512-13, 518-21 (2004); Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Courts* 65-75 (May 2008) available at www.humanrightsfirst.org (“In Pursuit of Justice”).

⁶ *Id.*

Treatment

Over the past seven years, U.S. treatment of detainees has brought shame on this nation, frequently harming our long-term security. The sooner we end mistreatment and policies and practices that authorized or contributed to it, the faster we can restore our reputation and rebuild relations of trust and cooperation with our friends and allies. We welcome the reformation of Department of Defense detention practices, which promises to bring treatment of military detainees back to historical U.S. standards.⁷ However, we remain concerned by practices employed at facilities maintained by the intelligence community which appear to be at odds with U.S. law and traditions.

- Torture and cruel, inhuman, or degrading treatment of any person in the custody or control of a state are prohibited by domestic and international law.⁸ International law does not permit any derogation from, or exception to, the torture prohibition.⁹ The same prohibition applies to extraordinary renditions and the outsourcing of interrogations by U.S. officials to countries known to engage in torture.¹⁰ You should unequivocally order that no agency or agent of the United States will engage in these odious acts. The opinions prepared by the Department of Justice's Office of Legal Counsel restricting the definitions of torture and cruel, inhuman and degrading treatment and authorizing interrogation practices that conflict with the Revised Army Field Manual and international humanitarian standards should be repudiated. With respect to extraordinary rendition, the CIA and the Department of Defense should be directed to immediately promulgate and implement regulations pursuant to FARRA¹¹ to ensure that no individual is transferred by U.S. authorities to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture.
- International standards regarding the treatment of persons in custody in connection with armed conflict, such as the minimum humanitarian standards of

⁷ See Field Manual 2-22.3, Human Intelligence Collector Operations (2006) ("Revised Army Field Manual").

⁸ See 18 U.S.C. § 2340; CAT, *supra* n. 2; See, e.g., Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 ("Common Article 3").

⁹ CAT, Article 2.2.

¹⁰ CAT, Article 3.

¹¹ FARRA directs all relevant agencies to promulgate regulations to implement CAT Article 3. The Department of Homeland Security and the Department of State have implemented such regulations.

Common Article 3 of the Geneva Conventions prohibiting torture and cruel, degrading and humiliating treatment, apply to *all* persons acting on behalf of our government including CIA personnel, our armed forces, and private contractors. All such persons should be directed to conform to those standards.

- As detailed in the Association's July 7, 2008 Report entitled "Reaffirming the U.S. Commitment to Common Article 3 of The Geneva Conventions: An Examination of the Adverse Impact of the Military Commissions Act and Executive Order Governing CIA Interrogations" ("Report"),¹² certain provisions of the Military Commissions Act ("MCA")¹³ and Executive Order 13,400 concerning CIA Interrogations¹⁴ seriously undermine our commitment to this fundamental principle of international law. The Report recommends, among other things, repealing provisions of the MCA limiting the scope of the War Crimes Act, which previously criminalized all violations of Common Article 3, to certain narrowly defined "grave breaches" of Common Article 3; restoring the War Crimes Act to its earlier scope; repealing MCA provisions delegating authority to the President to define conduct prohibited by Common Article 3 beyond grave breaches; repealing MCA provisions preventing courts from considering international authorities in construing the War Crime Act and precluding litigants from invoking the Geneva Conventions as a source of law; replacing Executive Order 13,400 with an order making the Revised Army Field Manual applicable to all government personnel; repealing provisions of the MCA stripping the courts of jurisdiction to entertain action concerning treatment of detainees; and providing a mechanism for compensating victims of violations of Common Article 3.
- As discussed below, we believe it preferable that the MCA be repealed in its entirety. If that is not possible, at a minimum, we recommend that the MCA be amended as suggested in our Report. Should the MCA be repealed in its entirety,

¹² http://www.nycbar.org/pdf/report/GC_Report0702.pdf.

¹³ Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

¹⁴ Exec. Order, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency (July 20, 1977), available at <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>.

we also urge that the jurisdiction stripping provisions of the Detainee Treatment Act also be repealed and that the War Crimes Act be restored to its earlier form as amended in 1997, making criminal all violations of Common Article 3 of the Geneva Conventions.

Trial

At the core of any legitimate legal system is access to a fair hearing. After careful consideration of the many arguments on the issues, we believe that the federal system of civilian courts and courts martial is adequate to try anyone accused of terrorist activities. The delays in prosecuting notorious accused terrorists held at Guantanamo are inexcusable, and we urge you to move swiftly to bring such individuals to justice in our regular court system. We do not believe there is any need for a special court to try terrorism suspects, and would urge you to work with Congress to repeal the Military Commissions Act. But if we must have military tribunals, then we urge you to order a review of the MCA provisions that deviate from those in federal courts or for courts martial under the Uniform Code of Military Justice and ask Congress to repeal or amend them to comport with those requirements. Most notably:

- Revise the definition of “unlawful enemy combatant” to comport with the laws of war.
- Ban absolutely the use of evidence obtained through torture, cruel, inhuman or degrading treatment.
- Revise the classified evidence and other evidentiary rules, including with respect to hearsay, to comport with existing federal law (the Classified Information Procedures Act and the Federal Rules of Evidence).
- Repeal those provisions intended to limit the scope of judicial review or the sources of law that courts may apply.
- Order the preservation of all evidence of interrogations conducted upon detainees after 9/11, disclose such evidence as exists in any cases in which persons interrogated have been charged with crimes and make such evidence available to any lawful investigative authority examining charges of misconduct or abuse connected with these interrogations.

Accountability

In order to restore America's status as a beacon of liberty and the rule of law, you should work with the Legislative and Judicial branches to ensure accountability. At the least, this means establishing a fair and reasonable process to compensate those who suffered injustices, returning to a presumption of transparency, and undertaking a bipartisan public inquiry into post 9/11 policies pertaining to the detention and treatment of detainees. These steps will help our nation avoid the mistakes and abuses of the past.

- To restore America's credibility, we must fairly compensate those who have suffered unduly in our quest for security. People have been unlawfully detained and abused, suffering not only the direct harms but also loss of income, reputation, opportunity and a personal sense of security. Insofar as possible, subject to reasonable limitations, we should make them whole. In our Report we have proposed the creation of an administrative process for that purpose.
- With respect to access to government records under the Freedom of Information Act, you should rescind the current instruction to federal agencies in which the presumption is against disclosure. Instead, federal agencies should return to the long-standing practice that government documents will be released in a systematic and timely fashion and that FOIA requests will be granted unless it is "reasonably foreseeable that disclosure will be harmful."
- The claim of state secrets privilege in litigation must be scrutinized to ensure that it is not misused as a shield to protect government from embarrassment or criminal sanctions, or to deny legitimate claims to restitution. We urge you to support the State Secrets Protection Act (S. 2533), which includes provisions modeled after the Classified Information Procedures Act applicable to criminal cases and extends similar protections to civil cases and seeks to permit the litigation of claims concerning unlawful government conduct while protecting legitimate state secrets.
- You should establish a process to explore the origins of post-9/11 policies, and steps taken to implement them, preferably with the appointment of a bipartisan, blue ribbon national commission that might include former federal judges and other people with the necessary type of expertise and who are respected for their

objectivity and impartiality. This will establish a definitive record and thereby enable us to make appropriate restitution, to avoid some mistakes in the future, and provide a basis for further steps which may be required to assure future accountability under the law.

Our nation has long been the leader in the on-going struggle to ensure security and human dignity through a robust and faithful respect for the rule of law. We believe that implementation of these recommendations will be a positive first step for your Administration in re-establishing America's long-established role in promoting the rule of law and respect for human rights.

Sincerely yours,

A handwritten signature in blue ink, reading "Patricia M. Hynes". The signature is fluid and cursive, with the first name "Patricia" being the most prominent part.

Patricia M. Hynes