PERSPECTIVES

Restoring the Rule of Law to American National Security and Foreign Policy

Damon A. Terrill

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In Brief

- In order to make Americans safer and the United States stronger, the next President and Congress must act immediately to restore the rule of law to its rightful place at the center of U.S. national security and foreign policy.
- The National Security Council should coordinate work in those areas requiring the most urgent action.
- Supporting a thorough review and comprehensive reform of the law must be an ambitious public diplomacy effort to restore America's moral authority.

For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other. ~Thomas Paine, *Common Sense*, 1776

For generations, a deliberate commitment to the rule of law has formed the foundation of U.S. national security and foreign policy. American presidents, members of Congress, and military leaders understood that the United States could and should act to establish, maintain, and strengthen a rules-based system of international relations, whether in the conduct of war, the management of global commerce, or the protection of basic human rights. Simply put, the United States

From August of 2002 to January of 2006, Damon A. Terrill was an Attorney-Adviser in the Office of the Legal Adviser at the U.S. Department of State, where he earned the Department's Superior Honor Award in 2005. A graduate of the University of Iowa, Mr. Terrill earned his M.A. in international affairs from American University's School of International Service, where he was a Hurst Scholar and fellow. He received his JD from New York University School of Law, and was Editor-in-Chief of the NYU Journal of Legislation & Public Policy. Mr. Terrill has taught European Union Law, public international law, and international affairs at George Mason University School of Law, George Washington University, and at the School of International Service. He is now Senior Vice President & General Counsel for International Legal and Regulatory Affairs at Integrated DNA Technologies, Inc.

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treated and developed the law as a tool to promote international stability, increase prosperity, and to support American leadership globally.

The administration of George W. Bush has undermined both the reality and perception of America's decades-old commitment to the rule of law and the values upon which it rests. Rather than employ the law as an instrument of American national security and foreign policy, the executive branch under President Bush has consistently treated the law as a constraint best circumvented or simply ignored. At home, the executive has acted to evade both Congress and the Judiciary in its pursuit of policies it suspected would survive neither effective oversight nor objective legal review. Tragically misguided policy has been one result. The damage done to the constitutional balance of authority between the branches may be more costly still.

Paradoxically, the Bush Administration's failures have also weakened the presidency that he and his ideological supporters sought to set beyond the reach of its co-equal branches. The same mistrust of independent oversight and impartial review undermined the deliberative process within the Executive that allows the president to receive accurate and reliable counsel, whether from intelligence officials, military officers, or legal advisers. The unfortunate and predictable consequences have included inaccurate intelligence reports "stove-piped" through the interagency system, patently wrong "torture memos" catastrophically employed, and a system of detention and trial for suspected terrorists nearly undone by the United States Supreme Court, to name a few. The next president will inherit an office in desperate need of repair.

Beyond the injury to the American polity and system of government, at no time in modern history have America's allies so deeply and widely doubted the reliability of the United States as a treaty partner, a fellow alliance member, or as a representative and practitioner of commitments held in common to the rule of law. The perceived failure by the United States to honor well-established international legal commitments, along with its real refusal to contribute to the development of badly needed systems of new rules in response to urgent and emerging problems, have profoundly diminished American influence and reduced the capacity of the United States to secure its most basic interests, including the safety of the American people.

Americans understand that they need the law to safeguard their liberty at home. Their next president must understand that the United States needs the law to achieve the country's critical national interests abroad.

Overview

To make America stronger and its people more secure, the new president and Congress must work together to restore the rule of law to its rightful place at the center of American foreign policy, and to regain international confidence in America's commitment to the values it champions.

This memorandum identifies three areas requiring the most urgent action:

(1) Detainees in the global fight against terrorists;

(2) Disclosure, oversight, and the separation of powers; and

(3) Binding executive legal opinions relating to national security and foreign policy.

In each case, I describe the nature of the policy and legal problem that the new administration will inherit, set out the initial and highest priority research and review tasks that each problem necessitates,[1] and offer a general statement of the policy or reform objectives that should inform the leadership's work.

With notable exceptions, the executive branch is best placed to conduct the review of presently effective policy and legal positions, and to recommend the most urgently-needed reforms. The White House should coordinate that effort through the National Security Council. The Attorney General, the principal legal officers of the Departments of State and Defense, as well as of the Office of the Director of National Intelligence and the Central Intelligence Agency, should together serve as an executive committee to direct and oversee the work, which will require the resources and expertise of each.

The National Security Adviser should report that body's findings and its recommendations for reform to the president no later than the fall of 2009. As the research and review process reveals the need for more urgently necessary revisions to or restatements of legal policy, the National Security Adviser might receive and make interim recommendations while the committee's work is ongoing.

The president can and presumably will restate and (to the extent necessary) correct the legal and policy positions that have their source in earlier acts of the executive. Durable reform in several areas will require close coordination with Congress, however. The executive committee should therefore provide regular reports of its progress to the appropriate House and Senate committees.

Immediately after the executive committee completes its work, the National Security Adviser and others should share the results with Congress[2] and begin to consult about the objectives of, and the best measures to achieve, its reform agenda. Preliminary observations about which elements of needed reforms lend themselves to executive action, and which by their nature require or would benefit from statutory treatment, are set out below.

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1 The discreet research and review tasks will of necessity require elaboration and further development once properly qualified personnel have access to the complete record of confidential and classified material, in addition to what is now public.

2 Consultation with Congress will of course require the use of well-established mechanisms to protect classified material, including properly classified legal opinions. Throughout, references to disclosure to Congress assume the possibility that such disclosure could be limited, in appropriate circumstances, to classified disclosure, for example, to the Senate Select Committee on Intelligence.

Detainees in the Global Fight Against Terrorists

During the first year of the new administration, the president and Congress must act individually and collaboratively to conduct a comprehensive review, restatement, and reform of how the United States government captures, detains, interrogates, tries, and continues to imprison (or releases) suspected terrorists.

The questions requiring the most urgent review and resolution follow.

Apprehension and Transfer

Research and Review

1. Since September of 2001, under what circumstances, and according to what legal rules and operational guidance, has the United States used "rendition" to cause the transfer of detainees under U.S. government control from custody in one country to another?

2. What is the (a) legal and (b) operational or practical difference between "rendition" and "extraordinary rendition," if any? If there is a difference, according to what legal rules and operational guidance has the United States used "extraordinary rendition" to affect the transfer of detainees from custody in one country to another?

3. As presently formulated, it is the "policy" of the United States government not to transfer detainees (by whatever means) to countries where they may be tortured. Is this "policy" required by U.S. law? If so, what is the content of that law?

Policy Restatement or Reform Objective

1. Whether related to rendition or not, what changes can and should be made to U.S. policy and practice related to the transfer of prisoners from the countries where they are apprehended to the place of their initial or ongoing detention, in order to ensure that (a) the United States complies with its international legal obligations, and (b) U.S. government employees and others acting at the direction of the U.S. government can carry out their work legally?

2. What role (if any) should "rendition" – whether "extraordinary" or otherwise – play in U.S. efforts to obtain custody of and/or to transport suspected terrorists? Is new legislation or the issuance of new rules needed to make those practices consistent with the international legal obligations of the United States and with applicable U.S. law?

3. Is new legislation, or are other measures, necessary in order to make explicit whether it is legally permissible for a person acting at the direction of the United States government to cause the transfer of a detainee to a country in which it knows, or has reason to suspect, the detainee will be tortured? If so, what should the content of those measures be?

Detention

Research and Review

1. *Where* can the United States legally detain suspected terrorists? Specifically, what has been the legal basis for the detention of suspected terrorists *prior to and in the absence of a criminal indictment or other lawfully issued criminal charge*:

(a) In the United States (in either or both military and civilian prison facilities)

(b) At Guantanamo Bay, Cuba

(c) In facilities operated by the U.S. military outside the United States

(d) In facilities operated by U.S. intelligence agencies outside the United States

(e) In the military or civilian prison systems of and located in foreign countries?

2. Specifically with respect to the military or civilian prison systems of and located in foreign countries, does U.S. law or do the international legal obligations of the United States prohibit or condition the use of such facilities *in particular countries* to detain suspected terrorists for or on behalf of the United States? If so, what is that law, what is its content, and to which countries do its prohibitions or restrictions presently apply?

Policy Restatement or Reform Objective

1. What should the next president do to end or to continue the use of each of the foregoing locations for the detention of suspected terrorists? To the extent that the United States will continue to use any of the locations for that purpose, is new legislation or are other measures required in order to make their use consistent with U.S. law and with the international legal obligations of the United States?

2. If the United States currently detains or causes to be detained suspected terrorists in facilities or countries in which that detention is unlawful, what can and should the president do immediately to make such detention lawful or to end the detention (and, as the case may be, to transfer affected detainees elsewhere)?

<u>Interrogation</u> ("enhanced techniques" and torture)

Research and Review

1. How can persons acting at the direction of the United States government *legally interrogate* terrorism suspects? Specifically, does the legality of an interrogation method vary with whether:

(a) the interrogator is a member of the United States military, an intelligence agency (CIA), or a law enforcement agency (FBI)

(b) the interrogator is an employee of the United States government (any of the above) or a contractor (e.g., a Blackwater employee)

(c) the interrogator is neither an employee of nor a contractor to the United States government, but is demonstrably acting at its direction or behest

(d) the subject of the interrogation is a U.S. national (citizen or lawful permanent resident)?

2. Federal law (18 U.S.C. § 2340A and § 2441) makes clear that the use of torture in interrogation or otherwise is a criminal act, prosecutable and punishable in the United States. Considering the precise terms of those statutes and other relevant law:

(a) What *is* torture under U.S. law? Specifically, is "water boarding" torture?

(b) Is it ever legal for an interrogator acting at the direction or on the behest of the United States government (whether or not the interrogator is an employee of or contractor to the U.S. government) to torture a detainee? Specifically:

(i) Does the legality of the use of torture ever vary with the *purpose* of the torture (e.g., to obtain intelligence needed to prevent an imminent attack)

(ii) Is it ever legal for employees of the United States government to arrange for others to use otherwise impermissible interrogation techniques (including torture) on suspects in U.S. custody or under U.S. control?

Policy Restatement or Reform Objective

1. Is new legislation or are other measures (including the issuance and/or publication of new binding executive legal opinions, new executive orders, or new or revised agency rules) needed to set forth authoritatively answers to any or all of the above questions?

2. What happens (or should happen) to U.S. government employees or others who have used (or ordered or overseen the use of) impermissible interrogation techniques (including torture) on suspected terrorists?

(a) Does it and should it matter whether, at the time an impermissible technique was used (or ordered used), an agency of the U.S. government with apparent authority to determine a technique's legality maintained that it was legal?

Status Review and Trial

Research and Review

The international and U.S. constitutional law applicable to the current system of detainee status review and trial has been the subject of extensive treatment by the executive, the Congress, and the Supreme Court. The task of research and review is thus largely done, and the body of relevant law well known.

The principal task for a new administration and Congress is thus to evaluate and interpret that law in the light of new policy objectives and with a view to establishing a consensus approach to the status review and trial of terrorist suspects. Legal policy questions that could shape that process of evaluation and interpretation should include:

1. Is it either possible or wise to attempt to apply the system of status review and trial as foreseen by the Military Commissions Act (MCA) and the Detainee Treatment Act (DTA) after the U.S. Supreme Court's decisions in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene*?

2. If (after *Boumediene*) detainees at Guantanamo Bay, Cuba (and potentially others) will have access to U.S. federal courts in *habeas* proceedings, what should the next president and/or Congress do to ensure the orderly and timely conduct of those proceedings, while safeguarding critical U.S. intelligence and other interests?

3. If the MCA/DTA system is unworkable, and if *habeas* proceedings in U.S. courts are either impractical or otherwise undesirable, what realistic alternative approach(s) might the next President and Congress take if they chose to create a new system to determine the status of and to try non-military (non-POW), alien detainees suspected of activity related to terrorism now held at Guantanamo Bay or elsewhere outside the United States?

Policy Restatement or Reform Objective

A comprehensive evaluation and interpretation of applicable statutes, regulations, and judicial opinions relating to the system by which the United States determines the status of suspected terrorist detainees and tries them, with a view to that system's reform so that it is effective, practical, and permits the protection of vital U.S. intelligence and other national security interests, and comports with the United States Constitution, with U.S. international legal obligations, and with American values.

Ongoing Detention or Release

Research and Review

The United States can (and does) imprison terrorists convicted of crimes in federal court in the federal penitentiary system. The United States military can prosecute and imprison terrorists who are members of a foreign state's military for violations of the laws of war.

But the creation since 2001 of new classes of people detained by the United States government (e.g., "unlawful enemy combatants") creates novel challenges for their ongoing detention. Circumstances in many cases peculiar to the modern fight against terrorists – in particular when they do not act at the direction or on behalf of any state – compound those challenges and complicates further the question of how to release them (if and when that decision is reached).

Regardless of how the next Congress and president decide to reform and operate the U.S. system of status review and trial for suspected terrorists, the United States government will almost certainly need to establish clear and legally permissible mechanisms to provide for the ongoing detention or release of terrorist suspects who have been convicted neither by a U.S. court nor by a military commission of a crime. In at least one case (very likely just the first), the next president will need to determine whether and how to release a person convicted by a Guantanamo Bay military commission (under the MCA) of crimes related to terrorism but whose sentence will have run; Osama bin Laden's Yemeni driver, Salim Ahmed Hamdan, will complete service of his prison term in early 2009. In another (also very likely just the first), the next president will need to work with Congress and the Judiciary to establish workable and legally acceptable rules to manage the release into the United States of prisoners cleared of any

wrongdoing or connection to terrorism, but who have nowhere else to go; the same challenge presented by the Uighur detainees will almost certainly arise from other commission decisions and successful *habeas* suits.

As Congress and the president act to establish a reformed system to try detainees, they must also create mechanisms to enable the ongoing imprisonment or release of the prisoners the system will process. With that fact in mind, the executive committee should research and produce legal and policy guidance on the following questions.

Policy Restatement or Reform Objective

1. Should the United States close the military prison at Guantanamo Bay (Gitmo)? When, and subject to what conditions?

2. If the United States closes Gitmo, what must the next president and Congress do to ensure the disposition of the prisoners there consistent with the U.S. Constitution, other applicable U.S. law, and with the international legal obligations of the United States, while protecting vital U.S. national security and foreign policy interests? Specifically:

(a) If there are detainees that the U.S. would want to or must release, to where should they be released?

(b) What if the country of a detainee's citizenship refuses to repatriate a released detainee?

(c) What if a detainee objects to his return to the country of his citizenship?

(d) What if the United States believes that a detainee would face grave violations of fundamental human rights (including torture) if returned to the country of his or her citizenship (or some other country willing to accept the detainee)?

(3) If a detainee's trial or other lawful proceeding determines that a detainee has committed an act of terrorism in the past and poses a threat of repeated terrorist activity, under what authority, where, and for how long can and should such detainees be held?

(4) If it is not possible to subject a suspected terrorist to trial or to another lawful proceeding designed to determine the detainee's connection to terrorist activity (and there thus is not and will not ever be a "conviction"), but if the United States government nonetheless believes that the detainee poses a serious threat in the future, under what authority, where, and for how long can and should such detainees be held?

Is new legislation or are other measures (including the issuance and/or publication of new binding executive legal opinions, new executive orders, or new or revised agency rules) needed to set forth authoritatively answers to any or all of the above questions?

Oversight and the Separation of Powers

The next Congress and president must undertake a cooperative effort to ensure that U.S. law both requires and promotes effective consultation with and oversight by Congress of the legal aspects of U.S. national security and foreign policy, and to reestablish a transparent, workable, and constitutional distribution of authority in relation to U.S. legal policy in its international affairs.

The executive committee should work closely with the new Congress immediately to undertake the necessary research and to propose a reform agenda with respect to three critical issue sets. The use of signing statements has often obscured the content and practical effect of legislation even as it becomes law. Inadequate disclosure may prevent Congress and the public from knowing and overseeing how the executive interprets and applies the law to itself and to all Americans. And even purportedly "binding" executive legal opinions, when they are issued and applied in secret, may permit agencies of the U.S. government and their employees to act in ways at odds with the object and purposes of statutory law.

Signing Statements

Research and Review

1. Has the Bush administration's use of signing statements that purport to circumscribe the executive's obligation to comply with the law as set forth in statutes been substantively different than the approach taken by previous presidents? If so, how, and to what concrete effect concerning which statutes that relate to U.S. national security and foreign policy?

Policy Restatement or Reform Objective

1. What can and should the next president do to establish a different approach to signing statements and their legal effect, in particular with respect to statutes that purport to direct or constrain the executive on matters relating to the substance and conduct of U.S. national security and foreign policy?

Disclosure and Oversight of Legal Policy Generally

Research and Review

1. In which substantive areas of legal policy relating to U.S. national security did the Bush Administration fail to disclose sufficient information to Congress (a) in which the Congress has a legitimate interest or (b) the disclosure of which was required by law, that the next president should or must disclose?

Policy Restatement or Reform Objective

1. Should the next president and Congress cooperate to craft legislation that would require disclosure as to particular substantive areas of legal policy related to national security so that

oversight can take place with appropriate protections, be more transparent, and benefit from a clear legal foundation applicable to future presidents and congresses?

(a) Does the Constitution permit such legislation to bind the executive?

(b) As to what substantive areas of policy should such legislation apply (at least initially)?

Disclosure of Binding Executive Legal Opinions

Research and Review

1. Did the Bush Administration issue legal opinions purporting to bind the agencies and employees of the executive that directed or permitted them to act in contravention of the objects and purposes of then-effective statutes or other federal law (for example, applicable federal court decisions)?

2. If so, what is the effect of those opinions after a new president takes office? Which opinions require withdrawal or restatement with the greatest urgency?

Policy Restatement or Reform Objective

1. Is it ever appropriate for the executive to adopt legal opinions relating to the conduct of U.S. national security and foreign policy that purport to "bind" executive branch agencies and their employees (e.g., with respect to legally permissible methods of interrogation) and that it neither publishes nor discloses to the Congress? If so, under what conditions and by application of which standards?

2. Is new legislation or are other measures required in order to establish a regular means and process for disclosure of such opinions to Congress, to specify when disclosure is unnecessary, or to provide for protection of classified or confidential material?

3. Should disclosure to Congress be required before such opinions may bind (and protect) executive agencies and their employees? *See also below.*

The Creation of Binding Executive Legal Opinions (the OLC "Torture Memos")

The next president must restore rigor, predictability, and transparency to the system that produces binding executive legal opinions on matters relating to U.S. national security and foreign policy.

Those opinions, now produced by the Justice Department's Office of Legal Counsel ("OLC"), by practice determine for the President and the rest of the executive branch what U.S. law is, including in areas related to national security and foreign policy. The system that produced the secret "torture memos" and contributed to their disastrous consequences requires a thorough rethinking and reform, which the next President can and should accomplish by executive order within his first 100 days in office.

The purpose and function of a reformed system should be to ensure that agencies with foreign policy and national security expertise are involved appropriately in the production of legal opinions purporting to describe authoritatively to the President what U.S. law is and to define for the United States as a sovereign what its international legal obligations are. That system must both protect U.S. international legal and policy interests and provide clear and reliable guidance to military, intelligence, law enforcement, and diplomatic personnel who carry out U.S. policy.

Research and Review

1. What is the legal basis for the OLC's present role in providing purportedly "binding" opinions concerning U.S. international legal obligations and U.S. law as they relates to national security and foreign policy?

2. What does "binding" mean, in either the civil or criminal contexts, or in other respects?

   (a) Specifically, does the existence of an OLC opinion purporting to permit conduct by an employee of the executive branch, or a person acting at the direction of the executive branch, create a defense in a criminal prosecution or civil suit if a court determines that the conduct was in fact illegal or impermissible?

Policy Restatement or Reform Objective

1. How can and should the next president act to change the legal basis of OLC's role to *require* the involvement of other agencies (e.g., the military services regarding treatment of prisoners of war, the State Department concerning the interpretation of treaties, the CIA concerning intelligence authorities and operations) when drafting binding executive legal opinions?

   (a) Specifically, is it possible or desirable to establish a new system for the creation of binding executive legal opinions on matters relating to national security and foreign policy that would condition their effectiveness on adoption or issuance by agencies or offices different from, or in addition to, the Justice Department's OLC?

   (b) If the next president adopts such a reform by executive order, is new legislation needed or desirable to make that reform more durable?

2. What can and should the next president do systematically to discover purportedly binding legal opinions that may now be classified or otherwise confidential, and to revise or restate the law as needed?

3. What substantive OLC (or other) opinions made public during the Bush Administration should the next president act urgently to revise or replace, and how should that be done?

4. What (new) substantive legal opinions relating to U.S. national security and foreign policy should the next president request soonest in order to establish or clarify U.S. law and international legal obligations on matters of critical importance, but as to which the law is now unclear, is insufficiently developed, or has been stated incorrectly in the past?

Conclusion

This memorandum has described what the next president and Congress must do to restore the reality of America's commitment to the rule of law in its national security and foreign policy–or at least to begin the process. An ambitious diplomatic effort must complement that project so that the new reality replaces old perceptions.

Members of the executive committee and the president himself (with the support of the diplomatic corps) must explain to the leaders of our democratic allies why the United States has undertaken the review and provide details of the reforms that it suggests. They should explain the measures that the president will enact and the legislation that Congress will consider and adopt to make those reforms concrete and enduring.

Even more important than the diplomatic work with allied governments, the president should deliver the message of America's legitimacy as a leader and reliable partner on these issues to the public–both here and abroad. If Americans are to trust their government with their security, they must also trust that theirs is a government of laws. If the countries with which the United States must work are to embrace American leadership, their peoples must also have confidence in the binding strength of American values.

Restoring the reality and recognition of the American commitment to the rule of law is among the most pressing challenges facing the next president and Congress. A revitalized U.S. national security and foreign policy will depend on their success.

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Building a New American Arsenal

The American Security Project (ASP) is a bipartisan initiative to educate the American public about the changing nature of national security in the 21st century.

Gone are the days when a nation's strength could be measured by bombers and battleships. Security in this new era requires a New American Arsenal harnessing all of America's strengths: the force of our diplomacy; the might of our military; the vigor of our economy; and the power of our ideals.

We believe that America must lead other nations in the pursuit of our common goals and shared security. We must confront international challenges with all the tools at our disposal. We must address emerging problems before they become security crises. And to do this, we must forge a new bipartisan consensus at home.

ASP brings together prominent American leaders, current and former members of Congress, retired military officers, and former government officials. Staff direct research on a broad range of issues and engages and empowers the American public by taking its findings directly to them.

We live in a time when the threats to our security are as complex and diverse as terrorism, the spread of weapons of mass destruction, climate change, failed and failing states, disease, and pandemics. The same-old solutions and partisan bickering won't do. America needs an honest dialogue about security that is as robust as it is realistic.

ASP exists to promote that dialogue, to forge consensus, and to spur constructive action so that America meets the challenges to its security while seizing the opportunities the new century offers.

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