

## **A Blueprint for the New Administration: Five Priorities to Improve Law, Justice and Security**

The election of a new president presents many opportunities to improve the administration of law and justice, especially when, as of late, the rule of law has seen such threats. President-elect Obama has spoken eloquently about the need to restore America's commitment to democratic protection of rights and liberty and about the importance of prioritizing both security and freedom. His task now is to pursue policies and enact measures that implement those commitments, a responsibility that should ground federal policy in evidence-based practices that work.

The Center for Justice, Law and Society at George Mason University urges President-elect Obama and his administration to rethink a number of failed practices in law, justice, and security policy and to chart a course of reform that makes these processes more efficient, effective, and fair. There are undoubtedly other matters that require a new administration's energy, but five issues in the justice arena deserve the Obama administration's top attention. By moving quickly on these matters and relying upon evidence provided by research, the administration can significantly improve the administration of law and justice in America and by extension our image abroad.

### **Fill Open Federal Judgeships Through a Transparent and Timely Process**

For more than two decades now the nomination and confirmation of federal judges has been a contentious process. Many observers point to the 1990s as especially problematic, a period in which the White House and Senate leaders were locked in political squabbling over the president's nominees. There has been plenty of partisan wrangling in recent years as well. At one point, the Senate leadership even threatened to impose the "nuclear option," in which filibusters would be ruled out of order in considering judicial nominees, before a bipartisan "Gang of 14" crafted a compromise under which the majority of the president's nominees have been confirmed to the federal courts.

There is a better way to consider and confirm federal judges, and with many judicial openings expected in the next administration – some of them potentially on the U.S. Supreme Court – the Obama administration must begin planning to fill these seats. This summer the American Bar Association put forward a plan for nominating and confirming federal judges. It would create bipartisan commissions in the states to recommend district court nominees to home state senators, who in turn would forward a list of potential candidates to the White House for consideration. The plan also would speed up the Senate's consideration of nominees to the federal courts and ensure that future judges receive a timely vote.

This plan is a good starting point and deserves careful consideration by the Obama administration. Already, the Administrative Office of the U.S. Courts reports 36 vacancies on the federal bench, a number that is sure to rise by January 20<sup>th</sup>. The Obama administration and Congress have a rare opportunity to cooperate in the next few years to ensure that qualified nominees reach the courts with appropriate consideration and timely review. They should plan for that process now.

### **Close Guantanamo**

Scholars, commentators, and practitioners alike have called for the immediate closure of the Guantanamo Bay prison camp. President-elect Obama has said that he will do so, but swift action is advisable. The United States has received sharp criticism regarding Guantanamo from many quarters, including from some of its strongest allies. Certainly, those who oppose U.S. policies have found in Guantanamo an Achilles' heel: the prison camp was intended to bring to justice the "worst of the worst," those most guilty of terroristic offenses. But, having been built on controversial, untested, and repeatedly altered substantive and procedural law, it is easily dismissed as an unjust and unjustifiable institution. For that matter, the military commissions established to bring detainees to justice have faced extensive legal challenges that undermine their very basis and call into question the procedures used in the ad hoc tribunals. In short, the institution and the proceedings there lack legitimacy, and thus, the continued operation of the prison camp at Guantanamo Bay continues to damage our nation's credibility and security.

The few independent observers who have seen conditions at the Guantanamo facility have made shocking accusations about the treatment of detainees and the provision of justice there. Defense attorneys have raised numerous accusations that they lack access to clients, documents, and evidence, and former military attorneys have even questioned the independence of the prosecution and tribunals involved.

The nation needs President-elect Obama to end these practices as soon as possible, as we move toward a new phase in American justice that will properly adjudicate all detainees, punish adjudged terrorists, and restore America's reputation for fairness and security. Each Guantanamo detainee should be brought into an open court, whether military or civilian, in the United States or another recognized jurisdiction and charged using available evidence. U.S. allies and the United Nations have legal options as well, including universal jurisdiction for crimes against humanity, which may apply to some of the detainees. Turning to established legal institutions that meet international standards is the first step toward re-establishing America as a nation that embraces justice.

### **Reform the Federal Death Penalty**

It has now been about two decades since Congress reinstated the federal death penalty, imposing capital punishment for a growing number of federal offenses. Over that time, no fewer than 435 defendants have seen the Department of Justice "authorize" their cases for a capital prosecution. Of these defendants, however, only 26 percent were convicted and sentenced to death. A new study by the federal courts puts the cost of defending a capital prosecution at \$300,000 greater than cases resolved through life imprisonment. This means that the federal

government has spent more than \$130 million defending federal capital cases that were authorized for the death penalty but did not end in a death sentence; nor does this count the amounts spent by the prosecution. Surely, in a time of economic worry these funds could be put to better use.

It is not money alone, though, that counsels rethinking the federal death penalty. Most observers note that the expansion of federal efforts now has the government trying more “routine” matters in federal court when previously they would have been handled by state and local prosecutors. In usurping jurisdiction, federal prosecutors are bringing the death penalty to states that do not impose it in their own courts. Instead, we see an unwarranted and unintended explosion of capital cases in the federal courts, which clog dockets and consume judicial resources already stretched thin.

The federal death penalty was originally designed for the most serious crimes, those involving drug kingpins or terrorists, for example. But in extending its application, federal prosecutors have only increased the cost of these prosecutions without a corresponding justification. A death sentence is already the exception when federal prosecutors bring a capital case, and the likely result – life imprisonment – has proven an effective alternative to protect the public. It is time to acknowledge this reality and return the charge to its initial bounds, ensuring that when the Department of Justice authorizes a capital prosecution the result in court will be worth the cost expended.

### **Revise Drug Sentencing**

The “War on Drugs” in the 1980s saw a ratcheting up of federal sanctions for drug offenses. Mandatory minimum sentencing ensured that defendants possessing as little as five grams of crack cocaine would face no fewer than five years behind bars in a federal penitentiary. It is no surprise, then, that the federal prison population rose by 81 percent from 1995 to 2002. By contrast, a defendant possessing the same amount of powder cocaine might not even be charged with a state felony.

The drug trade is a serious threat to American security, both domestically and abroad, but federal sentencing policy must properly distinguish between those defendants who are a significant risk to the community and those who, while deserving of punishment, need not be relegated to a generation of prison time. Even federal defendants sentenced to long terms are likely to return to the community at some point, and the longer they are away the more difficult it is for them to transition back and find a life that neither threatens nor continues to drain resources from society.

The U.S. Sentencing Commission recently recommended a change in federal drug policy to balance more evenly the punishments for possessing crack and powder cocaine. Congress adopted this recommendation, which is a firm step forward.

The new administration should embrace this call to action by seeking to reduce recidivism among drug defendants. Evidence indicates that a two-pronged approach of intensive probation coupled with drug treatment reduces the rate of relapse among many first-time drug

defendants and diminishes their risk of future imprisonment. The reality is these intensive programs have been shown to work in states and localities that have been willing to follow evidence-based practices over political slogans.

An initiative like this will require a concentrated federal commitment, but the payoffs are considerable. No one benefits when reflexive imprisonment relegates those that could be reached to a wayward life of greater criminality. Not only will intensive probation and treatment pay for itself in money saved on imprisonment, but also in reclaiming lives for more productive paths, this initiative would restore faith in the criminal justice system.

### **Eliminate Torture as a Tactic of National Security Policy**

The current administration has seen considerable debate over the use of torture when interrogating suspects of terrorism. It is imperative that the Obama administration reaffirm in declaration and practice that the United States does not torture people, whether at home or abroad. As a matter of practicality, there is little evidence that torture leads to reliable information to protect the public. Indeed, the first manual on police interrogation, published more than 70 years ago, criticized torturous interrogation because “it does not produce the truth.” This conclusion has been validated by the American Psychological Association, which prohibits its members from participating in government interrogation that employs torture. But there is a larger point to be made by America’s clear rejection of torture – our need to reclaim America’s position among the leaders of the world in advancing civil liberties and human rights. For generations, the world has looked to the United States as a shining beacon of liberty and freedom, a vision now jeopardized by a myopic and wrongheaded approach to domestic security. There need not be a tradeoff between security and liberty; both are central to the American experience.

President-elect Obama has promised to restore America’s good name in the world. He can use the power of the bully pulpit to educate Americans about the importance of civil liberties and the rule of law in the face of a national crisis. Just as we expect the president to plan for the possibility of another terrorist attack, he should also speak frequently in defense of the Constitution, the very building block of our nation that must remain vital even in the event of another dreaded attack. Indeed, the president’s ability to stand up for the Constitution can be a transformative experience for Americans, either educating them to defend our system of law in the face of danger or showing them the arguments to make to dispense with it.

America should aspire to be and do better, and in a new administration we have an opportunity to correct past errors and move forward. It is imperative to base U.S. policy on empirical evidence of what works, a commitment that relies on evidence-based practices to improve justice processes. Americans urgently need leadership that protects their security and their liberty, and the world early awaits a renewal of the American example.

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- Advancing research and scholarly debate on questions of law and legal behavior.
- Bridging the gap between academe and practice so that policymakers and practitioners are better informed by the insights of academic research, and academicians have a better understanding of how the concepts they study behave in practice.
- Assisting policymakers and practitioners by applying empirical research to practical problems in the field.

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