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Forward: Security Detention

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Repository Citation
Scharf, Michael P. and Gillespie, Gwen, "Forward: Security Detention" (2009). *Faculty Publications*. 1065.
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FOREWORD: SECURITY DETENTION

Michael P. Scharf[*] & *Gwen Gillespie*[†]

In an effort to restore American integrity around the world—which has been shattered by the abuses of detainees at American military bases in Abu Ghraib, Iraq and Guantanamo Bay, Cuba—President Barack Obama has pledged to close the Guantanamo Bay detention center.[1] The Guantanamo Bay prison is symbolic of the fundamental controversy associated with security detention: when is a state justified in depriving a person of their liberty in order to protect itself from a potential threat to its national security?

While explained as a necessary component of the fight against terrorism, security detention—holding people without charging them with a crime—can violate fundamental American notions of liberty and the rule of law. Detainees often lack basic procedural rights, such as access to lawyers, to contest their detention and secure their release. Although western democracies such as Canada, the United Kingdom, and the United States, justify the minimal procedural protections on grounds of national security, these same governments rarely offer more than a cursory explanation as to why a given detainee constitutes such a threat.

In recognition of its extreme nature, security detentions were traditionally reserved only for times of armed conflict—referred to as interment in this context. However, states have increasingly begun to practice administrative detention—the peacetime equivalent of interment—in response to terrorism. Recognizing world-wide concern over growing use of security detention, the International Committee of the Red Cross (ICRC) and the Frederick K. Cox International Law Center at Case Western Reserve University organized a two-day experts meeting on security detention. During

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[1] *See* Steven Lee Myers, *Bush Decides to Keep Guantanamo Open*, N.Y. TIMES, Oct. 21, 2008, at A16.

this meeting, experts from governments, NGOs, academia, and the ICRC shared their thoughts and ideas regarding the legal and practical issues associated with the practice.

I. WHEN SCIENCE FICTION RESEMBLES REALITY: THE GENESIS OF THE EXPERTS MEETING[2]

Just eight months after the attacks of 9/11, when the Bush Administration was just beginning to implement its so-called "war on terrorism," with its policy of apprehending and detaining suspected terrorists and "enemy combatants" around the globe, Stephen Spielberg released his blockbuster film based on Philip K. Dick's famous novella, "Minority Report."[3] Set in Washington, D.C., in the year 2054, the film portrays a future justice system in which people are arrested and incarcerated for life based solely on the predictions of a group of three individuals with the unique "pre-cognitive" (psychic) ability to "see" crimes a few days before they are committed. The protagonist, played by Tom Cruise, is a police officer who heads "the Precrime Division." This officer discovers and sets out to expose the government's dirty little secret about the "Pre-Cogs"—their forecasts are not always accurate and as a result the incarceration centers are populated by innocent people who never would have committed the crime for which they were incarcerated.

I could not help but ponder the parallels between "Minority Report" and the Bush Administration's policy of incarcerating hundreds of foreign citizens at the sprawling detention facility in Guantanamo Bay, Cuba, when I testified before the House Armed Services Committee about the pending legislation on Military Commissions in July 2006.[4] During the question and answer period following my prepared remarks, I told the Committee that:

> focusing just on the procedures of the Military Commissions was to examine only the tip of the iceberg. Under the Bush Administration's security detention policy, those detainees who are not prosecuted, or who are prosecuted and acquitted, or who are prosecuted and given relatively short sentences, will still likely spend the rest of their lives in detention in Guantanamo Bay because they are perceived by government officials to constitute a continuing security threat to the United States. And these determinations are currently not subject to any type of independent judicial review,

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[2] First person references in this Section refer to Professor Scharf, organizer of the Experts Meeting.

[3] MINORITY REPORT (20th Century Fox 2002). The film is based upon a book by Philip K. Dick. *See* PHILIP K. DICK, THE MINORITY REPORT (Citadel Press 2002) (1960). For a detailed plot summary of the movie, *see* http://www.imdb.com/title/tt0181689/plotsummary.

[4] *Hearings on Standards of Military Commissions and Tribunals Before the H. Armed Serv. Comm.*, 110th Cong. (2006) (statement of Michael P. Scharf, Director, Frederick K. Cox International Law Center, Case Western Reserve University School of Law).

> constituting a clear violation of international treaties which this country has ratified.[5]

While the Committee members indicated little interest in taking up my invitation to pursue this issue, scholars and human rights experts around the world were becoming increasingly concerned about the way the United States and other countries had embraced an expansive policy of "security detention."[6] In May 2007, the Office of Legal Adviser of the ICRC approached me about hosting an experts meeting at Case Western Reserve University School of Law, which the ICRC would organize and fund. Case's Frederick K. Cox International Law Center had recently hosted an experts meeting on "Torture and the War on Terror." That meeting had produced a widely circulated document entitled, "The Cleveland Principles of International Law on the Detention and Treatment of Persons in Connection with 'The Global War on Terror,'"[7] and the ICRC felt that the time was ripe for a similar meeting on the issue of security detention, and that Cleveland would be an ideal venue for such a session.

Thus, on September 14–15, 2007, the ICRC and the Cox Center brought together twenty-five of the world's leading experts on security detention for an Experts Meeting at Case Western Reserve University. The meeting was divided into three sessions: (1) Security Detention—The International Legal Framework; (2) Security Detention in Practice; and (3) The Way Forward. The result was a detailed fifty-seven page report, which appears in this volume. In addition, many of the experts contributed articles related to the issues addressed in the report, which also appear in this volume. Together, the report and articles make a significant contribution to the scholarly debate on this extremely important and timely issue.

II. SECURITY DETENTION: OVERVIEW OF EXPERT SUBMISSIONS

Following the Experts Meeting on Security Detention Report, the issue begins with contributions from three authors regarding the international legal framework under which security detention schemes operate. First, Professor Doug Cassel analyzes the grounds, procedures, and conditions

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[5] *Id.*

[6] The United States has detained so-called Enemy Combatants in Guantanamo Bay, some for as long as seven years, based on suspicion that the detainee "directly supported al Qaeda, the Taliban or an associated group involved in hostile acts against the United States or its allies." Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. The term "security detention" denotes the detention of persons not for criminal prosecution for past crimes but rather because they pose a threat to the country's security.

[7] The Cleveland Principles of International Law on the Detention and Treatment of Persons in Connection with "The Global War on Terror," Oct. 7, 2005, http://www.pilpg.org/docs/Justice%20Program/Cleveland/ClevelandPrinciplesDec05.pdf.

required by International Human Rights Law (IHRL) for preventative detention of suspected terrorists as threats to security. He concludes that if preventative detention for security purposes is to be allowed, such use should be kept to a minimum and should be available only by formal derogation during national emergencies.[8] State Department Attorney-Adviser Ashley Deeks, writing in her personal capacity, then discusses the treaty rules governing detention procedures in international and non-international conflicts and argues that, as a matter of policy, several key principles drawn from these treaties should apply to all administrative detentions.[9] Finally, Laura Olson, until recently Director of the ICRC's Washington D.C. office, and currently Visiting Scholar at University of Notre Dame School of Law's Center for Civil and Human Rights, addresses the practical challenges of harmonizing the procedural regulation of internment under International Humanitarian Law (IHL) and IHRL.[10]

The next collection of submissions focuses on assessing the viability of systems of security detention currently in use in states across the globe. First, Professors John McLoughlin, Gregory Noone, and Diana Noone proclaim that America's current approach to security detention of terrorism suspects needs reform because the doctrines which form the current basis for the system (e.g., law enforcement and immigration) are stressed beyond their logical limit.[11] Professor Dominic McGoldrick next analyzes the United Kingdom's approach to security detention by focusing on indefinite detention provisions contained in various U.K. anti-terrorism policies and assesses the role of security detention within the context of other policy options that form part of an Anti-Terrorism Strategy.[12] In their article, Professor Maureen T. Duffy and Professor Rene Provost, Founding Director of the McGill Centre for Human Rights and Legal Pluralism, discuss the challenges Canada faces in instituting systems to prevent terrorist attacks which do not severely undermine human rights.[13]

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[8] Doug Cassel, *International Human Rights Law and Security Detention*, 40 CASE W. RES. J. INT'L L. 383, 400 (2009).

[9] Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 434 (2009).

[10] Laura M. Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law-Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict*, 40 CASE W. RES. J. INT'L L. 437, 438 (2009).

[11] John P. McLoughlin, Gregory P. Noone, & Diana C. Noone, *Security Detention, Terrorism and the Prevention Imperative*, 40 CASE W. RES. J. INT'L L. 463, 465-466 (2009).

[12] Dominic McGoldrick, *Security Detention—United Kingdom Practice*, 40 CASE W. RES. J. INT'L L. 507, 508 (2009).

[13] Maureen T. Duffy & Rene Provost, *Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions in Canada*, 40 CASE W. RES. J. INT'L L. 531, 560 (2009).

The issues essential to the future of security detention schemes are discussed in the final group of submissions. Jennifer Daskal, Senior Counterterrorism Counsel for Human Rights Watch, rejects the assertion that the U.S. cannot close the detention center at Guantanamo Bay without first enacting new and broader preventative detention laws and argues instead that the current criminal justice system in the U.S. can adequately deal with those persons whom the U.S. should be seeking to detain.[14] In her article, Deborah Pearlstein, Associate Research Scholar for Princeton University's Woodrow Wilson School, argues even if the U.S. were able to construct a preventative detention regime that satisfies U.S. and international legal restrictions, such a scheme might not operate in practice to incapacitate those who have the ability to inflict harm on the United States.[15] Finally, Professor Monica Hakimi argues that of the possible types of security detention regimes, a modified form of administrative detention holds the most promise of effectively balancing liberty and security with regard to the treatment of certain categories of terrorism detainees.[16]

The submissions of these authors illustrate the complexity of the issues surrounding how states should strike a balance between liberty and security. What seems clear, however, is that states must begin to consider alternative detention strategies and think beyond the traditional confines of the legal framework governing detention.

III. SIGNIFICANT DEVELOPMENTS FOLLOWING THE EXPERTS MEETING

In the months since our Experts Meeting, there have been several noteworthy developments affecting the issue of security detention, not the least of which was the election of a new U.S. President, Barack Obama, who pledged during the campaign to close down the Guantanamo Bay detention facility.[17] In addition, in June 2008, the U.S. Supreme Court issued its decision in *Boumediene v. Bush*, holding that the detainees at Guantanamo Bay were entitled to habeas corpus review in federal court of the legality of their confinement.[18]

Guantanamo was designed as a law-free zone, a place where the government could subject detainees to indefinite incarceration and harsh

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[14] Jennifer Daskal, *A New System of Preventative Detention? Let's Take a Deep Breath*, 40 CASE W. RES. J. INT'L L. 561, 562 (2009).

[15] Deborah Pearlstein, *We're all Experts Now: A Security Case Against Security Detention,* 40 CASE W. RES. J. INT'L L. 577, 578 (2009).

[16] Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict Criminal Divide*, 40 CASE W. RES. J. INT'L L. 593, 598-600 (2009).

[17] *See* Editorial, *Guantanamo's Final Days*, THE BOSTON GLOBE, Nov. 4, 2008, at A16.

[18] 128 S. Ct. 2229 (2008).

interrogation techniques without having to worry about the legality of such action. The *Boumediene* decision undercut a core rationale for keeping the detention facility off American soil. Currently, some 250 detainees remain at Guantanamo Bay, down from a high of about 700 in 2003. Of these, the Bush Administration slated only seventy or eighty to eventually be tried in the controversial Military Commissions.[19]

While former Defense Secretary Donald Rumsfeld famously described the Guantanamo prisoners as "the worst of the worst," the Pentagon recently has disclosed that only five percent of the detainees were apprehended by U.S. forces and only four percent were ever alleged to have actually been involved in fighting.[20] Rather, most of the "suspected terrorists" were turned over to U.S. forces by foreigners in Afghanistan and other countries in return for the $5,000 reward the U.S. government offered for each "enemy combatant."[21] Some of those that have been released from Guantanamo Bay have been transferred to trial in other countries, but most have been returned to their home countries and simply set free. According to the Pentagon, less than two percent of these individuals have been involved in any subsequent acts of violence or terrorist activity.[22] Like the revelations in "Minority Report," these statistics show that the overwhelming majority of detainees at Guantanamo were neither terrorists nor a threat to U.S. security.

Shutting down Guantanamo is a start, but it will not be a comprehensive solution to the question of security detention for the United States and other countries.[23] It is likely that security detention will continue to be utilized, though to a lesser extent and in different venues, by the new administration. Meanwhile, countries around the world (including several democracies) continue to experiment with various security detention regimes.

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[19] Editorial, *The Stain of Guantanamo*, ST. LOUIS POST-DISPATCH, Oct. 26, 2008.

[20] *See* Ken Ballen & Peter Bergen, *Get Them Out of Gitmo*, PITTSBURGH POST-GAZETTE, Nov. 2, 2008, at G4.

[21] *Id.*

[22] *Id.*

[23] With regard to the United States, Professor Scharf explains that "[p]erhaps no single issue better defines who we are as a nation than our treatment of detainees. I fully understand, based on my professional background, the enormous complexity of counter-terrorism policy, and deeply respect those bravely fighting terrorism world-wide. But denial of internationally recognized fundamental due process rights to detainees violates the core principles on which our great nation was founded, and in the long run will endanger American troops who have so bravely chosen to defend those sacred principles." *Hearings on Standards of Military Commissions and Tribunals Before the H. Armed Serv. Comm.*, 110th Cong. (2006) (statement of Michael P. Scharf, Director, Frederick K. Cox International Law Center, Case Western Reserve University School of Law), *available at* http://www.publicinternationallaw.org/publications/testimony.

The Experts Meeting on Security Detention Report and the articles contained in this volume indicate that international standards need to be clarified, adopted, and implemented to ensure that detainees are afforded prompt legal process and a meaningful opportunity to challenge the facts giving rise to their detention before a neutral arbiter. Moreover, extended security detention should be considered legitimate only where there is evidence that the detainee himself poses a serious security threat, an issue that must be subject to periodic review; and the longer the detention the higher must be the evidentiary burden of the State.

In closing, we express special thanks to the Cox Center's "Institute for Global Security Law and Policy Research Fellows," Kathleen Gibson and Tyler Davidson, who drafted the Experts Meeting on Security Detention Report, and to the staff of the ICRC Legal Offices in Geneva and Washington, D.C., which edited it. In addition, we are extremely grateful to the editors and staff of the *Journal of International Law*, who tirelessly worked to ensure the timely publication of this special issue on the fortieth anniversary of the founding of the Journal.