

**Closing Guantánamo: From Bumper Sticker to Blueprint****Draft Report****Principal Author: Sarah E. Mendelson<sup>1</sup>*****Based on  
The CSIS Working Group on Guantánamo & Detention Policy*****July 15, 2008**

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<sup>1</sup> I want to thank the members of the CSIS working group, three of whom provided extensive edits of this draft report, all of whom volunteered their time, and some of whom traveled long distances to be with us on a regular basis. On behalf of the working group, I want also to thank the numerous men and women who met with us, sharing their insights, humor, and frustrations gleaned from years working to keep the United States safe from harm. Their commitment was inspiring. Jessie Scholes led our efforts logistically, organizing us, taking copious notes as well as feeding us cookies. I will always be grateful for her help, and to Amy Beavin who stepped in at a critical time, and for research support, many thanks go to Lauren Willard. The CSIS Human Rights and Security Initiative is grateful to the Ford Foundation for a grant supporting this work. Finally, I want to thank John Hamre, for his unflagging support and guidance regarding this project.

**Contents**

About the Working Group and the Draft Report

Executive Summary

I. Introduction: How to Go From Bumper Sticker to Blueprint?

II. Background

III. How Do We Close Guantánamo?

IV. Conclusion and Remaining Issues

Appendix A: List of Working Group Participants and Observers

Appendix B: Schedule of Working Group Meetings

About the Author

## About The Working Group and the Draft Report

CSIS first convened the Guantánamo and Detention Policy working group in late November 2007 in order to develop thoughtful policy recommendations concerning what ought to be done with those currently detained at Guantánamo. The nonpartisan working group combined executive branch, intelligence, military, human rights and international law experience. The participants, contributors, and observers met 18 times over seven months.<sup>2</sup> Early sessions were devoted to defining what questions needed to be asked, and what sorts of experts could answer them. Later sessions were spent with 15 additional experts identified to help us answer the questions.<sup>3</sup> Then we engaged in a lengthy debate within the group concerning specific recommendations and policy positions.

At the end of the seven months, we came to general agreement on an outline of the policy recommendations. Not every working group member or observer agreed with every point in the outline—we were not aiming for a “consensus document.” Rather, our aim was to produce actionable policy recommendations that CSIS would issue for either this administration or, more likely, the next, on how best to deal with Guantánamo. In writing this *draft* report, we followed that agreed upon outline. We planned and executed a careful process, through an intensely collaborative, nonpartisan, effort. CSIS now is issuing this *draft* report for public comment. We plan to make revisions and to publish the final report in late August or early September.

Numerous individuals and organizations supported us in this work. While the product is truly a collaborative piece of work, the mistakes are ours alone.

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<sup>2</sup> The names of working group members and their affiliations have been withheld pending permission to list them.

<sup>3</sup> The names of those the working group met with have been withheld pending permission to list them. They include former prosecutors, former and current military personnel, and former intelligence officers, all of whom met with us on a volunteer basis.

## Executive Summary

The President of the United States and the two presidential candidates agree that the United States ought to close Guantánamo. But how can we expand a position that has been little more than a bumper sticker—“Close Guantánamo!”—and turn it into a blueprint for real policy change? This *draft* report outlines our answer to this question.

It will likely fall to the next administration to carry out this policy. The challenges are considerable. There is no “silver bullet.” In fact, there are only imperfect options. That said, we have concluded that the costs of keeping Guantánamo open far outweigh the costs of closing it.

The process of closing Guantánamo should be achieved through a policy we call R2T2:

- Review
- Release/Transfer
- Try

During his first week in office, the next President of the United States should announce the date for closure of Guantánamo as a detention facility in conjunction with announcing the establishment of a new policy. Implementation of this new policy would be charged to a blue-ribbon panel of eminent Americans named at the same time the President announces the date for closure, and tasked to review the files on all remaining Guantánamo detainees. The duties of the panel would include categorizing all detainees to be transferred to the custody of another government or released, or, alternatively, to be held for prosecution in the U.S. criminal justice system. Once that sorting of the detainees is done, then they would be either moved to the destination of release or transfer, or to the United States for prosecution. The final element of the new policy would be to prosecute them through the U.S. criminal justice system. The record of the criminal justice system concerning the prosecution of international terrorism cases far outshines that of the Guantánamo military commissions: since 2001, 145 convictions vs. 1.<sup>4</sup> Overall, this straightforward policy—R2T2—can help restore our reputation as a country that is built on and embraces the rule of law.

Restoring the U.S. reputation will have national security benefits. The working group concluded that the United States has been damaged by Guantánamo beyond any immediate security benefits. Our enemies have achieved a propaganda windfall that enables recruitment to violence, while our friends have found it more difficult to cooperate with us.

The *draft* report represents our firm belief that this conundrum is a nonpartisan issue requiring nonpartisan solutions. We hope that our effort stimulates public discussion as well as refinements to our proposed solution.

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<sup>4</sup> Richard Zabel and James Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Court A White Paper*. (New York: Human Rights First, May 2008), p. 26.

## I. Introduction: How to Go From Bumper Sticker to Blueprint?

Closing Guantánamo is the stated desire and policy of the Bush administration.<sup>5</sup> It is the policy position of both the Republican and Democratic presidential candidates, Senator John McCain and Senator Barack Obama.<sup>6</sup> In the nearly seven years that Guantánamo has been used as a detention facility for terrorist suspects, there has been growing bipartisan agreement that the legal and security terrain created by the administration to handle them was at best flawed, and at worst, damaging to our national security.<sup>7</sup> In short, by 2008, we find widespread consensus within policy circles that Guantánamo ought to be closed. But how? For all the agreement on the necessity for policy change, there has been a striking lack of specificity on how to achieve this goal, particularly as we seek also to protect real national interests and the security of U.S. citizens.<sup>8</sup> In short, how does one take a policy that has to date been little more than a bumper sticker—“Close Guantánamo!”—and turn it into a blueprint? This *draft* report outlines our answer to this question.

We convened the working group cognizant of the constraints upon us. This policy issue is one of the single most difficult confronting the United States in 2008. The current administration has been unable to implement the stated goal of closing the facility. The next administration will confront a series of imperfect options. There is no “silver bullet” that eliminates all concerns. In the summer of 2008, this is the legal, security, and political situation in which we find ourselves. We hope this document helps increase awareness of how difficult—but also how timely and necessary—a shift in policy will be.

All options carry some risk. The status quo—keeping Guantánamo as is, even modulating the detention regime there—carries risks. At the same time, we assume—given stated positions and past comments—that the next President, either McCain or Obama, will want to close the facility as quickly as possible. The United States cannot achieve this goal alone. We will need help from friends and allies. As of this writing, the willingness of allies to assist the United States in this process during 2009 is simply unknown—and unknowable. While some allies have accepted released or transferred Guantánamo detainees, the Bush administration has run into general reluctance from allies to take significant numbers of detainees. At international gatherings, we have

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<sup>5</sup> President George W. Bush, “Press Conference of the President,” June 14, 2006, <http://www.whitehouse.gov/news/releases/2006/06/20060614.html>. This policy position refers to closing the Guantánamo Bay Detention Facility.

<sup>6</sup> Barack Obama, “Plan to Secure America and Restore our Standing,” Speech delivered in Des Moines, Iowa, November 10, 2007, <http://www.barackobama.com/issues/foreignpolicy>; John McCain, “Remarks To The Los Angeles World Affairs Council,” March 26, 2008, <http://www.johnmccain.com/Informing/News/Speeches/872473dd-9ccb-4ab4-9d0d-ec54f0e7a497.htm>

<sup>7</sup> For one example of the bipartisan call to close Guantánamo, see Richard L. Armitage and Joseph S. Nye, Jr., *CSIS Commission on Smart Power: a smarter, more secure America* (Washington, DC: Center for Strategic and International Studies).

<sup>8</sup> For a recent exception, see Ken Gude, “How to Close Guantánamo,” Center for American Progress, June 2008, <http://www.americanprogress.org/issues/2008/06/pdf/Guantanamo.pdf>

heard European policy makers indicate their willingness to help the next administration.<sup>9</sup> We proceed on the assumption that this sentiment will translate into action when the next administration takes office.

Equally unclear (and possibly more problematic) is how the American public perceives the problem and how it will respond to specific recommendations to close Guantánamo. Most Americans seem at least somewhat aware of the damage to the U.S. reputation that has been sustained internationally because of counterterrorism policies involving indefinite detention. Yet we do not know how Americans will respond when they are asked by the next president to help repair that damage and to accept some risk in doing so. They must be reassured that the policy solutions chosen are done so with their security in mind. The support of Congress is also unclear.<sup>10</sup>

Undoubtedly, there will be pressure on both candidates to clarify their positions about closing Guantánamo in light of recent and ongoing events.<sup>11</sup> None of the recommended approaches advocated so far are adequately tailored to respond to the uniqueness of the situation at Guantánamo. They all presume policy solutions without first providing for the essential task of carefully evaluating all of the individual cases at Guantánamo, about which much still remains classified. Guantánamo will likely be closed, but a central unresolved issue is the fate of the people confined in it.

These are a few of the myriad constraints before us. Below we lay out our attempt to give the next administration the blueprint that will allow us to achieve the longed for policy goal shared by many at home and abroad in a manner that takes into account both the U.S. reputation and U.S. national security requirements. The *draft* report represents our firm belief that this conundrum is a nonpartisan issue requiring nonpartisan solutions. We hope that our effort stimulates public discussion as well as the refinement of solutions.

## II. Background

### *Evolution of U.S. Detention Policy Since 9/11*

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<sup>9</sup> In addition, see the recent debate, European Parliament, “Will Europe take in Guantánamo Bay prisoners?” March 3, 2008, [http://www.europarl.europa.eu/news/public/story\\_page/015-22619-058-02-09-902-20080229STO22569-2008-27-02-2008/default\\_en.htm](http://www.europarl.europa.eu/news/public/story_page/015-22619-058-02-09-902-20080229STO22569-2008-27-02-2008/default_en.htm)

<sup>10</sup> For previous Congressional responses see, Guantánamo Bay Detention Facility Closure Act of 2007. S. 1469. May 23, 2007, (Senator Harkin) to require the President to close the Department of Defense detention facility at Guantánamo Bay, Cuba, and for other purposes. (Introduced in Senate) S. 1249, April 30, 2007 (Senator Feinstein) (Senator Feinstein), Brennan Linsley, “Guantanamo Bay Puzzles Candidates,” *USA Today*, June 18, 2007. [http://www.usatoday.com/news/politics/2007-06-18-gitmo-candidates\\_N.htm](http://www.usatoday.com/news/politics/2007-06-18-gitmo-candidates_N.htm)

<sup>11</sup> These events include the Supreme Court’s recent decision in *Boumediene*, as well as subsequent actions by the administration and ongoing legal challenges in the courts. See Dan Eggen and Josh White, “Debate Over Guantanamo’s Fate Intensifies,” *The Washington Post*, July 4, 2008, <http://www.washingtonpost.com/wp-dyn/content/story/2008/07/03/ST2008070303855.html> ; *Boumediene v. Bush* (2008) United States Supreme Court Decision ; <http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf>.; “New challenges to war crimes trials,” <http://www.scotusblog.com/wp/new-challenge-to-war-crimes-trials/>

The Bush Administration's detention policy has, in fact, evolved over time. From the opening of Guantánamo as a detention facility through the date of this *draft* report, the United States has transferred to the custody of other countries or released over 500 detainees from Guantánamo.<sup>12</sup> Since September 2006, the Bush administration has moved only 20 detainees to the facility.<sup>13</sup> The process by which the administration has determined the status of those detained has also evolved over time, mainly in response to Supreme Court decisions concerning the legality of the administration's policies and procedures. Indeed, this process of response is ongoing, given the June 2008 Supreme Court decision in *Boumediene v. Bush*.<sup>14</sup>

Over time, the administration has been forced to create a review process for those held at Guantánamo, but this process still lacks credibility. Both the legitimacy and the legal sufficiency of the Combatant Status Review Tribunals and the Administrative Review Boards remain under attack.<sup>15</sup> The military commissions also lack credibility and their record in rendering justice has been to date practically nonexistent. Since 2002, only one detainee has been convicted through a plea bargain that enabled him to leave Guantánamo. David Hicks is today free and living in Australia.<sup>16</sup> The first actual military commission trial is scheduled to begin later this month (July 21), but imminent legal challenges (with oral argument set in U.S. District Court for July 17) could prevent it from going forward.<sup>17</sup>

### ***Who is Detained Now at Guantánamo?***

Since early 2002, nearly 800 men have been held at Guantánamo, though at most it has held approximately 700 at a time. As of July 15, 2008, approximately 265 detainees

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<sup>12</sup> Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into the War on American Ideals* details some of this evolution, according to Josh Warrick, "A Blind Eye To Guantanamo," *The Washington Post*, July 12, 2008, p. 2; Josh White, "Ex-Guantanamo Detainee Joined Iraq Suicide Attack," *The Washington Post*, May 8, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/07/AR2008050703456.html>

<sup>13</sup> President George W. Bush, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," September 6, 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>

<sup>14</sup> Dan Eggen and Josh White, "Debate Over Guantanamo's Fate Intensifies," *The Washington Post*, July 4, 2008, <http://www.washingtonpost.com/wp-dyn/content/story/2008/07/03/ST2008070303855.html> ; *Rasul v. Bush* (2004) United States Supreme Court Decision.

<http://64.233.167.104/search?q=cache:BAqQM3YeWUJ:www.supremecourtus.gov/opinions/03pdf/03-334.pdf+SHAFIQ+RASUL+supreme+court&hl=en&ct=clnk&cd=5&gl=us> ; *Hamdan v. Rumsfeld* (2005). United States Supreme Court Decision. <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf> ;

*Boumediene v. Bush* (2008) United States Supreme Court Decision ; <http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf>.; "New challenges to war crimes trials," <http://www.scotusblog.com/wp/new-challenge-to-war-crimes-trials/>

<sup>15</sup> Josh White, "From Chief Prosecutor To Critic at Guantanamo," *The Washington Post*, April 29, 2008; William Glaberson, "Military lawyers at Guantánamo refuse to toe U.S. line," *The International Herald Tribune*, June 20, 2008.

<sup>16</sup> Dan Efron and Daniel Stone, "Gitmo Grievances; Assigned to try detainees in the War on Terror, three former Guantánamo prosecutors now say the military-commission system is badly damaged," *Newsweek*, May 26, 2008.

<sup>17</sup> "New challenges to war crimes trials," <http://www.scotusblog.com/wp/new-challenge-to-war-crimes-trials/>

remain there. According to the Department of Defense, this number includes the 14 “high value detainees” who were transferred from secret detention sites in September 2006; about another 60 detainees the government seeks to prosecute through the military commissions (based on a 20-year sentencing threshold); about 70 the government wants to release/transfer but has not yet been able to make an acceptable arrangement with an appropriate country; and about 120 categorized by the current administration as neither prosecutable nor transferable.<sup>18</sup>

## II. Central Framing Questions

We began our review process not by assuming that Guantánamo ought to be closed (or kept open) but by considering a series of broader questions: who should the United States detain, long-term, in the interest of national security; why; and on what legal basis? We then asked: who at Guantánamo actually fits that description? How was that determination made, and according to what process? Only then did we consider the question of what to do with those still held at Guantánamo.

### *It is in U.S. National Security Interest to Detain ...?*

From the perspective of national security, and putting aside those detentions that are regulated by the laws of armed conflict, who should the United States detain?<sup>19</sup> Why? How? The next administration needs to assess whether and whom we should bring to the United States (or to some special facility away from active combat zones) for the purpose of long-term deprivation of liberty as part of a strategy for fighting terrorism. Most importantly, given the record of the last several years, what should be the legal basis for any such detention?

The most common justification for long-term detention (beyond those detained during armed conflict and covered by the laws of war) relates to detention as punishment for crimes committed. The process by which the United States has prosecuted and sentenced terrorist suspects since 2001 has been detailed in a recent study led by former prosecutors, currently attorneys with Akin Gump Strauss Hauer & Feld.<sup>20</sup> On the whole, the criminal justice system has acquired a good record for the task of incarcerating terrorists.

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<sup>18</sup> Working group meeting, May 1, 2008, senior military official. See Mark and Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*. Seton Hall University School of Law, February 8, 2006, [http://law.shu.edu/news/Guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/Guantanamo_report_final_2_08_06.pdf); “Detainee Biographies,” Office of the Director of National Intelligence, <http://www.dni.gov/announcements/content/DetaineeBiographies.pdf>; Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*. (New York: The Penguin Press, 2008), pp. 74-86 on who is held and the CSRT process.

<sup>19</sup> *The American Heritage Dictionary* defines detain: “to keep from proceeding; to keep in custody; confine.” This working group was not attempting to redefine or alter the existing laws of war relating to the detention of combatants.

<sup>20</sup> Richard Zabel and James Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Court*. (New York: Human Rights First, May 2008).

An emotionally compelling argument for long-term detention, particularly immediately after an attack such as 9/11, is that such detention can, in the short term, reduce the danger and risk to U.S. citizens, facilities, and interests.<sup>21</sup> However, if beyond combat zones the United States adopts a policy whereby it attempts to hold every young male who poses a threat to U.S. security, we would create hundreds, if not thousands, of Guantánamos. Sustaining symbols of alienation such as Guantánamo have served as a recruitment tool for individuals and groups who seek to harm the United States, increasing—not decreasing—danger. Moreover, this approach, one that would involve long-term detention without charge, is not consistent with how our closest allies or advanced democracies have come to respond to terrorist threats or attacks.<sup>22</sup> Yet it is an approach that in some policy circles is being discussed as a viable option. The working group spent considerable time discussing this issue, and we return to it below.

Finally, we addressed detention as it relates to intelligence collection and the related value of holding someone over the long-term. Our working group meetings with former intelligence and military officers suggested to us, however, that at this point those detained at Guantánamo provided neither substantial strategic nor tactical intelligence value. They were unanimous in the view that any value that might have been gleaned was nonexistent six years into detention.<sup>23</sup> In fact, the experience of Guantánamo suggests that long-term detention solely to gather intelligence has been somewhat of a failure. Two former intelligence officers, with decades of experience overseas working terrorist cases, including after 9/11, were especially compelling in their discussion of how and when the most reliable tactical intelligence is gathered—immediately upon capture, and mainly through analyzing what is on the suspect, such as numbers in cell phones, or any physical material on the person.<sup>24</sup>

Through deliberations and meetings with outside experts, the CSIS working group came to the assessment that the United States indeed has a national security interest in seeking to detain certain individuals long-term. The standard we came to agree upon includes:

- Those who have committed terrorist attacks against U.S. citizens, property, and installations; and
- Those within terrorist networks targeting U.S. citizens, property, and installations who are of critical importance to the organization.

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<sup>21</sup> This reaction appears (in part) to have driven some of the policy responses that have proven so politically and legally damaging. For a collection of the policy memos, see Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib*. (Cambridge: Cambridge University Press, 2005).

<sup>22</sup> David Cole, “The Brits Do It Better,” *The New York Review of Books*, Volume 55, Number 10, June 12, 2008; *Countering International Terrorism: The United Kingdom’s Strategy*. HM Government (London: The Stationary Office, July 2006).

<sup>23</sup> Working group meetings, February 28, 2008, former senior intelligence officers; April 3, 2008, former senior military officer. The Bush administration maintains that the Guantánamo detainees have produced “valuable information.” <http://www.whitehouse.gov/news/releases/2006/09/20060906-2.html>

<sup>24</sup> Working group meeting, February 28, 2008. See also “Effectively Interrogating Terrorism Suspects: Lessons From the Field—Senior Level Interrogators Discuss What Works,” CSIS Human Rights and Security Initiative and Human Rights First Event, June 18, 2008, available at [http://www.csis.org/media/isis/events/080618\\_HumanRights.m3u](http://www.csis.org/media/isis/events/080618_HumanRights.m3u)

This standard includes key leaders, such as masterminds and planners of terrorist attacks. It will also include those who provide significant financial, logistical, and technological support. As of 2008, these are all activities that violate U.S. criminal law.<sup>25</sup>

### ***Who at Guantánamo Fits This Detention Standard?***

Next, we considered who at Guantánamo might fit the description for detention that we agreed to be a legitimate guide for U.S. policy. Given security classification of information on those currently held, we simply cannot say precisely. Clearly, however, some will meet the standard. Of the recent transfers to Guantánamo, most if not all arguably fit this definition. These would include the category of masterminds and planners—Khalid Sheikh Mohammad, Hambali (alleged mastermind of Islamic extremist group Jemaah Islamiya), and Abd Al-Hadi Al-Iraqi (described as one of al-Qaeda’s most high ranking operatives). It would include those who provide other critical support such as Mustafa Ahmad al-Hawsawi (alleged financial facilitator for 9/11), Muhammad Rahim al-Afghani (described as one of bin Laden’s most trusted facilitators and procurement specialists).<sup>26</sup> Just as certainly our criteria would exclude many currently held, including those for whom evidence suggests they served as Taliban foot soldiers or spent a night in an al-Qaeda safe-house.

### ***What Do We Do With the Guantánamo Detainees?***

Given that there are currently in Guantánamo people we assume fit our definition of those the United States should detain, we then considered several options for how they ought to be handled. We examined carefully, and consulted with some experts who recommended, keeping Guantánamo open.<sup>27</sup> We considered a number of steps that could promote its legitimacy and thought about what steps ought to be included in order to make it more transparent and humane that would allow the next administration essentially to continue using Guantánamo as a detention facility over the long term. Such steps include shifting to a genuine courts-martial system, utilizing the Uniform Code of Military Justice (UCMJ) as the basis for prosecution; the declassification of files or information on those detained; and increased access to detainees by, for example, the special rapporteurs that are part of the United Nations system, various NGOs, family members, as well as defense attorneys and the media. (Access to the facility for NGOs and the media has been available for some time, and indeed several members of our working group have observed military commissions’ proceedings there or toured the facility. They have had no access to detainees.)

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<sup>25</sup> 18 USC §2339A; §2339B; §2339D; §2332, §2332b. See United States Code Website, [http://www.access.gpo.gov/uscode/title18/parti\\_chapter113b\\_.html](http://www.access.gpo.gov/uscode/title18/parti_chapter113b_.html)

<sup>26</sup> Mark and Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*. Seton Hall University School of Law, February 8, 2006, [http://law.shu.edu/news/Guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/Guantanamo_report_final_2_08_06.pdf); “Detainee Biographies,” Office of the Director of National Intelligence, <http://www.dni.gov/announcements/content/DetaineeBiographies.pdf>

<sup>27</sup> Working group meeting, February 7, 2008, former military commander.

In thinking through this option, we weighed the advantages and disadvantages of keeping Guantánamo open but making it more transparent. For example, retaining Guantanamo as a detention facility might help avoid developing a new detention regime inside the United States that itself might be subject to a new round of domestic legal contestation and to international criticism.<sup>28</sup> It obviously would allow us to side-step the political issue of where in the United States to transfer detainees. The United States government has invested millions of dollars in the facility, and the benefit of keeping Guantánamo as a detention facility included the fact that the infrastructure (including medical facilities and courtrooms) already exists there to hold detainees.

Even with such changes, however, the fundamental political and strategic policy problems would not be addressed or solved. In the view of many around the world Guantánamo represents indefinite detention, torture, and abuse.<sup>29</sup> Its continued existence is a potent recruiting tool for our enemies and discourages cooperation with our friends. No amount of tinkering—even substantial changes—would fix *this* problem. Guantánamo does serve as a recruitment tool for al-Qaeda. It has cost the United States leverage in many policy realms.<sup>30</sup> Guantánamo’s location means that there are access constraints that no policy fix could physically change. Finally, regardless of greater access, we anticipated that there would be continued legal challenges. There is simply no clear way to bring the U.S. criminal justice system—a more effective legal instrument than the current military commissions—to Guantánamo.<sup>31</sup>

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<sup>28</sup> The *Washington Post* recently reported that the administration and members of Congress are currently developing plans for an administrative detention, or detention with out charge, regime. Dan Eggen and Josh White, “Debate Over Guantanamo’s Fate Intensifies,” *The Washington Post*, July 4, 2008, <http://www.washingtonpost.com/wp-dyn/content/story/2008/07/03/ST2008070303855.html>. There are additional legal complexities that might arise from moving detainees to the United States, discussed in working group conference call, May 27, 2008 with legal expert.

<sup>29</sup> Philippe Sands, *Torture Team: Rumsfeld’s Memo and the Betrayal of American Values* (New York: Palgrave, 2008); Steven Kull, *American and International Opinion on the Rights of Terrorism Suspects* (Maryland: Program on International Policy Attitudes, July 17, 2006) [http://www.worldpublicopinion.org/pipa/articles/btjusticehuman\\_rightsra/229.php?nid=&id=&pnt=229](http://www.worldpublicopinion.org/pipa/articles/btjusticehuman_rightsra/229.php?nid=&id=&pnt=229); Mr. Martin Scheinin, “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism - Mission to the United States of America,” Office of the United Nations High Commissioner for Human Rights., November 22, 2007, <http://daccessdds.un.org/doc/UNDOC/GEN/G07/149/55/PDF/G0714955.pdf?OpenElement>

<sup>30</sup> Matt Waxman, “The Smart Way to Shut down Guantanamo,” *The Washington Post*, October 28, 2007 on costs, [http://www.washingtonpost.com/wp-dyn/content/article/2007/10/26/AR2007102601761\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/10/26/AR2007102601761_pf.html); and see comments by Louise Arbor, cited in Marlise Simons, “Departing Rights Official Raised Volume On Issues,” *New York Times*, July 6, 2008, [http://www.nytimes.com/2008/07/06/world/europe/06arbour.html?\\_r=1&oref=slogin](http://www.nytimes.com/2008/07/06/world/europe/06arbour.html?_r=1&oref=slogin).

<sup>31</sup> Over time, the working group moved toward a presumption that all prosecutions of Guantánamo detainees should be in the regular civilian criminal courts. However, there may be some “outlier” cases—rare instances of prosecutions on the basis of facts that relate purely to conduct on the “battlefield” (e.g., Omar Khadr is being prosecuted before a military commission for his conduct in the course of a firefight with U.S. military personnel in Afghanistan) that may be considered less suitable for judgment by a civilian jury. And there may be a few cases in which extraterritorial jurisdiction is unavailable under otherwise applicable U.S. Code Title 18 criminal offenses, but such jurisdiction would be available under analogous provisions of the Uniform Code of Military Justice (UCMJ).

Just as we discussed keeping Guantánamo open, we weighed the positives and negatives of closing Guantánamo as a detention facility. The necessary steps would include: the release and transfer of some detainees to third countries, moving those that were not released or transferred to the United States, and using the regular civilian criminal justice system (or where appropriate possibly the UCMJ) to prosecute individuals.

A comprehensive, multi-tiered approach to closing Guantánamo, as opposed to merely the rhetorical stances taken by the current administration and both campaigns—would require a significant policy shift. If declared decisively at the beginning of the next administration and implemented aggressively, this shift should signify to the world that the next administration was moving to repair the well-documented damage done to U.S. credibility and influence as a result of Guantánamo, and the detention and interrogation practices there. Closing Guantánamo holds out greater possibility of achieving both real and perceived justice. The U.S. criminal justice system's track record on convictions in terrorist cases easily trumps that of the military commissions. The military commissions, as of this writing, have produced one conviction and that through a plea bargain. In contrast, the U.S. criminal justice system has convicted 145 terrorist suspects since 2001, with no damage to the U.S. image abroad.<sup>32</sup> Some also suggest that closing Guantánamo is the key—perhaps a counterintuitive one—to *greater* security. Even some former intelligence officers we consulted noted that in a democracy, there should be no such thing as indefinite detention. The criminal justice system offers a more reliable and legitimate way of detaining long-term those who commit crimes and who fall into the category of those the government wants to detain for national security purposes, while releasing those who are innocent or do not fall into the detain-for-compelling-national-security-purposes category.<sup>33</sup>

Any administration will face challenges in closing the detention facility. Practical, logistical issues will need to be addressed: Where should detainees await trial? What of the medical facilities that will be needed to treat those detained? The security of the facility will need serious scrutiny and construction. Among additional important security concerns is the fear that some of those released or transferred may engage in future acts of violence. There are also concerns that the necessary “price” of Guantánamo’s closure is the creation of a new administrative detention scheme inside the United States.<sup>34</sup>

Nevertheless, through careful deliberation and consultation with over a dozen additional experts, we came to the determination that U.S. national security is better served by another approach than the current Guantánamo regime. Closing Guantánamo was

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<sup>32</sup> Zabel and Benjamin Jr., *In Pursuit of Justice*, p.26. There will be legal challenges; new evidence will need to be gathered. We acknowledge that there is a difference between those who were convicted and originally put into the U.S. criminal justice system and those who were held for lengthy periods of time, and then put into the justice system. Nevertheless, former prosecutors maintained that prosecution of some individuals currently held in Guantánamo could and should be pursued. Working group meeting, February 21, 2008.

<sup>33</sup> Working group meeting, February 28, 2008.

<sup>34</sup> Eggen and White, “Debate Over Guantanamo’s Fate,” *The Washington Post*, July 4, 2008; Jack Goldsmith and Neal Katyal, “The Terrorists’ Court” *The New York Times*, July 11, 2007; Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*. (New York: The Penguin Press, 2008).

preferable to keeping it open even on a modified basis. We are conscious that this policy is not risk free. We are recommending a shift in U.S. policy to focus on risk reduction rather than the current pretense that Guantánamo eliminates all risk by holding men indefinitely who may pose a danger, without giving them access to the federal criminal justice system. Again, our closest allies have undertaken risk management for decades in their counterterrorism policies, and have rejected long-term detention without charge or conviction.<sup>35</sup>

In the end, our policy recommendations are rather straightforward. The process of closing Guantánamo should be achieved by:

- Review
- Release/Transfer
- Try

We lay out the details of the R2T2 approach below. We are conscious, of course, that our blueprint, like most policies, could itself be boiled down to a bumper sticker.<sup>36</sup> More importantly, the issue still remains: how to avoid importing the legal, political and security problems of Guantánamo to the United States?

### **III. How Do We Close Guantánamo?**

During the first week in office, the next President of the United States should announce the date for closure of Guantánamo as a detention facility in conjunction with announcing the establishment of a new policy. Implementation of this new policy would be charged to a blue-ribbon panel of eminent Americans named at the same time the President announces the date for closure. The panel would be tasked to review the files on all remaining Guantánamo detainees and to categorize all detainees to be transferred to the custody of another government or released, or, alternatively, to be held for prosecution. Once that sorting of the detainees is done, then the detainees would be either moved to the destination of release or transfer, or to the United States for prosecution. The final element of the new policy would be to prosecute them through the U.S. criminal justice system.

#### ***The Review Process***

In recommending that the President appoint a nonpartisan, blue-ribbon panel of eminent persons to review all available information on those held at Guantánamo and to assess who should be released/transferred or prosecuted, we are advocating essentially the

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<sup>35</sup> Sarah E. Mendelson, “Opt Back In To the International System Part I: Counterterrorism” *CSIS Commission on Smart Power*, based on interviews with senior British intelligence and legal experts. <http://www.csis.org/hrs/counterterrorism>

<sup>36</sup> Consider the Bush Administration’s “zero tolerance” policy on human trafficking, and its motto of “prevent, protect and prosecute.” Or the long-standing bipartisan effort on dismantlement and safe handling of nuclear materials in the former Soviet Union known as “Cooperative Threat Reduction.”

policy equivalent of “rebooting” the system.<sup>37</sup> A team comprised jointly of Department of Justice and Department of Defense prosecutors and support personnel would serve as staff to the panel and help evaluate the government’s ability to prosecute detainees—on the basis of available evidence or evidence that reasonably could be developed—in U.S. district courts.<sup>38</sup> The panel should provide as much transparency regarding its decision-making process as practicable, while remaining sensitive to issues relating to sources and methods of intelligence collection and national security. The panel would then make recommendations to the President on a rolling basis as files are reviewed. The administration will need to set a date by which the work of the panel ought to conclude. Without having seen the files, it is impossible to determine if that date might be met by December 31, 2009, or sooner. Based on our discussions, our understanding of the quantity of existing documents on some detainees, and the amount of time it may take to try to gather additional information on some detainees, we are uncertain if it can occur in less than a year. We were able to determine that the files (or rather information on those held) for the detainees that the government currently has slated to prosecute through the military commissions are available in the Washington DC area—although likely in numerous different agency files—enabling the panel access to what information currently exists.<sup>39</sup>

### ***What about an Alternative Regime of Long-Term Detention without Charge?***

Before we detail the additional elements of the R2T2 policy recommendations, we want to convey that by far the most difficult discussions and contentious issues the working group grappled with related not to whether or not we should close Guantánamo, but whether or not there ought to be an additional, third category into which the blue ribbon panel could sort detainees—a category other than “Release/Transfer” or “Try.” We talked with some supporters as well as critics of Guantánamo who argued that the U.S. criminal justice system is not capable (to some) or not best suited (to others) to prosecute certain dangerous individuals.<sup>40</sup> We therefore considered whether we needed to develop a third alternative, a system of administrative detention, to avoid releasing or transferring to the custody of other governments persons deemed “too dangerous” to release or who were likely to be tortured if returned. Such detention is sometimes referred to as “preventive detention” and can also be understood as detention without charge

Such a regime would mean incapacitating detainees believed to pose a threat but who may be impossible to prosecute because they have not committed a crime over which

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<sup>37</sup> The blue-ribbon panel and their staff would most likely have existing security clearances, but if not, they should benefit from the excellent, bipartisan recommendation made recently about expedited clearance processes during transition. Richard Armitage and Michèle A. Flournoy, “No Time for ‘Nobody Home,’” *The Washington Post*, June 9, 2008. <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/08/AR2008060801688.html>

<sup>38</sup> The working group agreed that in certain cases, UCMJ and courts martial might be the appropriate venue for prosecution.

<sup>39</sup> Discussion with senior DOD official, June 24, 2008.

<sup>40</sup> For public arguments along these lines, see John Farmer, “A Terror Threat in the Courts” *The New York Times*, January 13, 2008. Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*. (New York: The Penguin Press, 2008).

U.S. courts have jurisdiction; or critical evidence against them would be inadmissible at trial (for example, because it was tainted due to being obtained through torture or some form of harsh interrogation techniques) or otherwise is merely insufficient to meet the prosecution's evidentiary burden.<sup>41</sup> If such an administrative detention regime included robust procedural protections (e.g., judicial review, access to counsel, transparency), it could in theory be seen as more legitimate than Guantánamo. Some in the working group felt that if the regime were successful in its main purpose—detaining those long-term who are deemed dangerous but who the government cannot prosecute—it might also diminish incentives for the U.S. government to channel detainees into secret detention.

However, the negatives of such an approach are considerable. First, the working group agreed that the next administration must make a clean, decisive break with current policy, and the working group developed a strong sense that only a bold shift would convey to the world that the United States is indeed turning the page on its post-9/11 counterterrorism policies. A primary concern with Guantánamo is its very construction on the concept of detention without charge. Thus, to propose some new scheme of administrative detention as part of the policy solution to closing Guantánamo inevitably would simply perpetuate one of the most de-legitimizing aspects of Guantánamo itself—albeit in a different form and a different place. Such a system unavoidably would be viewed as yet another departure, just like Guantánamo, from traditional U.S. values. Far from “preventive,” it likely would perpetuate Guantánamo's unintended, negative consequence of creating a recruiting slogan for America's enemies. Second, building a new detention system from scratch would likely result in yet more years of legal challenges. And third, just as such a system might relieve the pressure from those in some government agencies that favor or advocate secret detention, so also would such a system provide a disincentive for criminal prosecution—because a criminal prosecution is difficult and carries of course the possibility of acquittal. One member of the working group suggested that if we build a new administrative detention system, one can be sure that—like Kevin Costner's baseball field in the movie *Field of Dreams*—“they will come.” Thus while an administrative detention system might be sold on the basis that it would only be intended for those very dangerous people who are said to be impossible to prosecute or transfer, it soon could be filled by those who are merely difficult to release, prosecute, or even by those for whom the government is simply unwilling to risk an acquittal.

Could these negative aspects be mitigated in any way? Certainly proposals regarding detention without charge are not all alike.<sup>42</sup> Some problems with such systems could be

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<sup>41</sup> Sands, *Torture Team* documents the torture of al Qatani. Shortly after the publication of his book, the DOD dropped charges against al Qatani. <http://news.bbc.co.uk/2/hi/americas/7398953.stm>. See also Scott Shane, “China Inspired Interrogations at Guantanamo,” *The New York Times*, July 2, 2008, <http://www.nytimes.com/2008/07/02/us/02detain.html>

<sup>42</sup> For discussion see, Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror*. (New York: The Penguin Press, 2008); Robert Chesney and Jack Goldsmith, “Terrorism and the Convergence of Criminal and Military Detention Models,” *Stanford Law Review*, Volume 60, Number 4, February 2008.

diminished by adding strong due-process protections.<sup>43</sup> The more due process is added, however, the more the system would come to look like the federal criminal courts, and the less “utility” it would have in dealing with the hard cases that many fear exist.<sup>44</sup>

Ultimately, the majority of the working group decided not to recommend administrative detention for Guantánamo detainees as an option for the blue-ribbon panel. Repair to U.S. moral authority requires a fundamental shift from the system of indefinite detention that is one of the hallmarks of Guantánamo. To offer administrative detention as an option for the blue ribbon panel (and for the next administration) is to provide a temptation that could result in a situation in which closing Guantánamo really means little more than moving Guantánamo. The costs and risks of administrative detention are high, and we believe they likely outweigh the benefits. The experience of the last several years shows that other options—namely, prosecution and transfer—are viable. The next administration should thoroughly pursue these options, doing everything possible to move all remaining Guantánamo detainees into the release/transfer or prosecution categories.

### ***How Does Release/Transfer Work?***

The process for release and transfer depends in substantial part on the willingness of allies to help the United States. With a comprehensive plan to close Guantánamo and end problematic policies and practices, allies are expected to prove more likely to help, and the next administration ought to explore immediately after inauguration the possibility of a “Grand Bargain.” This process would involve negotiations conducted by senior administration officials concerning return arrangements consistent with non-refoulement obligations and principles.<sup>45</sup> It would also likely involve, as part of the signaling to the world that there is real change in policy, the United States accepting some detainees (some thought most likely the Uighurs,) whom the Bush administration has slated for release but (with the exception of a few of them) has been unable to move to other countries. Current reintegration programs, such as the one recently established by Saudi Arabia, ought to be monitored and supported, and replication elsewhere ought to be explored.<sup>46</sup>

There are a host of post-release issues that must be carefully monitored by the next administration. These will include the possible abuse of detainees by the host or home government, as well as concern relating to possible acts of violence by those released.<sup>47</sup>

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<sup>43</sup> Another suggestion involved an outer time-limit of two years for detention without charge. In effect, the government would have to prosecute or release within two years.

<sup>44</sup> On that category, see Eggen and Josh White, “Debate Over Guantanamo’s Fate Intensifies.”

<sup>45</sup> Article 3, “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment,” June, 26, 1987,” Office of the United Nations High Commissioner on Human Rights, <http://www2.ohchr.org/english/law/cat.htm>

<sup>46</sup> Working group session, April 22, 2008, terrorism expert.

<sup>47</sup> Bryan Bender, “Ex-detainee linked to Iraq bombing Suicide attack renews Guantanamo dispute,” *The Boston Globe*, May 8, 2008; Jackie Northam, “Freed from Gitmo, Where Do Detainees Go?” *Morning Edition*, July 30, 2007, <http://www.npr.org/templates/story/story.php?storyId=12344597>

The administration ought to invest in diplomatic, technical, and possibly strategic communications strategies designed to mitigate such risk.<sup>48</sup>

The Bush administration faced the obstacle of possible post-release violence against detainees in numerous ways. In cases where the administration concluded that it could not release detainees to governments because those governments might torture them, the administration sought other, third countries to take these people. According to various sources, because of numerous issues relating to counterterrorism policies such as indefinite detention, many allies (with important exceptions) have been reluctant to accept detainees scheduled for release or transfer who could not be returned to their home country because of fears of torture.<sup>49</sup> To the extent that European governments in particular will be more willing to work with the next administration and take some or more detainees, abuse concerns would likely (or substantially) be alleviated. In other circumstances, the current system of diplomatic assurances has in multiple cases proven inadequate.<sup>50</sup> The next administration must develop a plan to better ensure that no detainees are transferred to torture.<sup>51</sup>

To be sure, there are security risks associated with releasing or transferring detainees from Guantánamo. Some of those released (either directly by the U.S. government, or subsequently by a government to whom the U.S. government transfers custody) may undertake hostile acts against the United States or allies' forces, citizens or facilities. Some have reportedly done so already, although the number is debated.<sup>52</sup> The overwhelming majority have not, whether by choice or because former associates are unwilling to re-engage with those released. Moreover, such risks are not unique to Guantánamo detainees: according to Multi-National Force-Iraq figures, on average, 30 to 50 security detainees in Iraq are released from U.S. detention every day.<sup>53</sup>

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<sup>48</sup> Technical strategies might include biometrics, and enhanced border security. Working group meeting, February 28, 2008.

<sup>49</sup> Jeffrey Toobin, "Camp Justice; Everyone wants to close Guantánamo, but what will happen to the detainees?" *The New Yorker*, April 14, 2008; Michael Isikoff, "No Country For 270 Men," *Newsweek*, June 23, 2008; Jamey Keaten, "European envoy: Shut Guantanamo soon," *The Associated Press*, June 25, 2008.

<sup>50</sup> Human Rights Watch, "The 'Stamp of Guantanamo:' The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States, March 2007, <http://www.hrw.org/reports/2007/russia0307/>; Human Rights Watch, "Ill Fated Homecomings: A Tunisian Case of Guantanamo Repatriations" September 2007, <http://hrw.org/reports/2007/tunisia0907/tunisia0907web.pdf>; Human Rights Watch, "Empty Still at Risk Diplomatic Assurances No Safeguard Against Torture," April 2005, <http://hrw.org/reports/2005/eca0405/>; Human Rights Watch, "Empty Promises:" Diplomatic Assurances No Safeguard against Torture," April 2004, <http://hrw.org/reports/2004/un0404>.

<sup>51</sup> For specific recommendations on how to improve the system, see Ashley Deeks, "Avoiding Transfers to Torture," Council Special Report, Council on Foreign Relations, no. 35, June 2008, available at [http://www.cfr.org/content/publications/attachments/Assurances\\_CSR35.pdf](http://www.cfr.org/content/publications/attachments/Assurances_CSR35.pdf)

<sup>52</sup> Bryan Bender, "Ex-detainee linked to Iraq bombing Suicide attack renews Guantanamo dispute," *The Boston Globe*, May 8, 2008; Jackie Northam, "Freed from Gitmo, Where Do Detainees Go?" *Morning Edition*, July 30, 2007, <http://www.npr.org/templates/story/story.php?storyId=12344597>

<sup>53</sup> Walter Pincus, "U.S. Official Cites 'Hardening' of Iraqi Detainees: Decreasing Violence Allows Commanders to Better Determine Definite Security Threats," *The Washington Post*, June 10, 2008, Page A12, <http://www.washingtonpost.com/wp-dyn/content/story/2008/06/10/ST2008061000047.html>

The working group considered the risks of some number of released or transferred detainees either being abused by their new country or engaging in violence against the United States or others, and determined that, while these risks exist, they are not as great as the risks resulting from damage incurred to U.S. interests by continuing to hold detainees without charge indefinitely. We cannot guarantee nor will we pretend that the risk of releasing or transferring detainees is zero, or for that matter that the risk is quantifiable with any certainty. The next administration can, however, develop a plan with allies to reduce and mitigate these risks by, for example, investing resources in law enforcement, detention facilities, guard training, and reintegration programs in states with weak infrastructure that might receive detainees. It could put the names of those transferred out of Guantánamo on internationally shared watch-lists, if there are sufficient reasons to do so. In short, a number of solutions, including technological, diplomatic, and intelligence-based ones, are available and ought to be explored as part of a comprehensive policy package for closing Guantánamo.

### ***Transfer Remaining Detainees to the United States and Prosecute***

The process and the rationale for transferring those that the blue-ribbon panel determines ought to be prosecuted rests ultimately on an established system of law, viewed as legitimate internationally, with an impressive record of convictions since 2001. As of 2008, the U.S. criminal justice system, especially when compared with the military commissions, has proven an effective approach in prosecuting terrorist suspects. It bears repeating: the established U.S. criminal justice system has brought to justice since 2001 more than 107 jihadist terrorist cases with multiple defendants that have resulted in 145 convictions. In doing this, the criminal justice system has handled difficult international terrorism cases.<sup>54</sup> The assumption of the working group was that going forward the majority of cases would be tried in civilian criminal courts.<sup>55</sup>

The transfer to the United States would occur after a detainee's indictment. Additional evidence in some cases might need to be gathered for trial.<sup>56</sup> Information gathered through coercive interrogation techniques could not be used and would not qualify as evidence. In using the criminal justice system to convict those who (returning to our categories of who should be detained) have allegedly engaged in terrorist activity, or have played key roles in organizations engaged in such activity, the next administration not only asserts the new policy of turning the page and closing Guantánamo, but it also denies terrorists suspects the symbolic value of special, extra-judicial treatment. Finally,

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<sup>54</sup> Working group meeting, February 21, 2008; Zabel and Benjamin Jr., *In Pursuit of Justice*.

<sup>55</sup> Again, the working group allowed for the possibility that a minority of cases might be tried under UCMJ depending on the specifics of the case.

<sup>56</sup> Teams of FBI officers would need to be deployed. Working group meeting, February 21, 2008, former prosecutors. We acknowledge that there are some differences between the kinds of cases that come before federal courts usually and the kinds of cases the United States government has sought to prosecute at Guantánamo. In the former, the government usually develops its case before it detains someone; for those detainees currently at Guantánamo that the blue-ribbon panel concludes ought to be prosecuted, the United States will effectively decide to try some of these people well after they were detained. We also acknowledge gathering evidence six years after a crime has occurred presents serious challenges. How best to address these challenges requires additional research and inquiry.

some research as well as discussion within the working group suggests that the potential intelligence value of investigative and prosecutorial work needs to be better appreciated and explored.<sup>57</sup> Bringing those who have committed crimes or have been plotting to commit crimes to justice provides greater finality than an indefinite detention regime with dubious legal grounding.

There are numerous policy issues relating to trials and convictions that the next administration will need to address. The working group discussed with DOD personnel possible facilities that might be adapted to hold those awaiting trial, including Leavenworth, Pendleton and Charleston. No option is ideal.<sup>58</sup> These facilities were originally constructed to detain military personnel who are being prosecuted or have been found guilty of a crime. Any facility would need to be reconfigured to handle civilian detainees awaiting trial. When the next President announces his plan for Guantánamo closure, contractors would need to begin work almost immediately on adapting whatever facility is chosen. The facility should be made ready to receive detainees within 120 days of the announcement. The funding mechanism for this work will need to be addressed. We could find no figure assessing how much this would likely cost the government.<sup>59</sup> Among several issues relating to construction, we noted the need to establish medical facilities, heightened security for the facility, housing for support staff and transport, court access, and the ability for family to visit.

Not discussed in any detail by the working group but clearly an issue worthy of serious consideration is the public aspect of such a plan. For Americans to help the next administration turn the page on this Guantánamo system will require that at least some of these detainees be brought to justice through the U.S. criminal justice system. The public will need and should be reassured that their security will be protected as this occurs. They should be reminded that the United States has convicted and put away dangerous terrorists who threatened to blow up airplanes. They are locked away for life. Our justice system did that.

#### **IV. Conclusion and Remaining Issues**

Seven months and 18 meetings later, the conclusions of the working group on Guantánamo revolved around a straightforward set of policy recommendations: a panel of eminent persons should preside over a fresh review of who is held there; they must make decisions about who should be released and transferred to another country, including to the United States. The rest ought to be brought to the United States, following indictment, and where necessary, the United States should make serious efforts to gather fresh, untainted evidence, and bring detainees to justice through the tried and true U.S. criminal justice system. Our criminal justice system has a record that far

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<sup>57</sup> Kelly Moore, "The Role of Federal Criminal Prosecutions in the War on Terrorism," *Lewis and Clark Law Review*, Volume 11, Number 4, Winter 2007; Working group meeting, February 21, 2008, former prosecutors.

<sup>58</sup> Working group meeting, May 21, 2008, DOD personnel.

<sup>59</sup> DOD personnel reported to working group meeting, May 21, 2008, that no financial assessment of costs had been conducted.

outshines that of the current military commissions. Our reputation as a country that is built on and embraces the rule of law will be restored, and this restoration will have national security benefits.

As a testament to the complexities of issues we discussed, it should be no surprise that we were not able to address some large ones that will pose additional challenges for the next administration. Chief among these is future detention policy for terrorist suspects. Going forward, how should it work? The details of the future detention policy writ large were beyond the scope of the working group. Guantánamo closure has implications for this future detention policy however. Specifically, a focused commitment to criminal prosecution as a main vehicle for incapacitation would undoubtedly reduce the legal, diplomatic, and practical challenges that the United States has faced over the last seven years with the Guantánamo population.

Future interrogation policy regarding terrorist suspects is another issue that is both beyond the scope of the study but which our work thinking through the Guantánamo regime not surprisingly touched upon. Our recommendations for how to close Guantánamo have implications for future interrogation policy. If the federal criminal system is used to handle future detainees, that system precludes the use of involuntary or coercive interrogation techniques. We need to accommodate these prohibitions, and we need professionals trained in noncoercive techniques that the administration can call upon and deploy at a moment's notice. The next administration should develop a program to grow a cadre of interrogators with language skills, drawing lessons learned from experienced professionals to interview alleged terrorist suspects.<sup>60</sup> Never again, if our country is attacked, should we frantically engage in techniques that our enemies have used against our uniformed service members in times of war.<sup>61</sup> We are better than that. We can do better than that. We must prepare to do better than that.

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<sup>60</sup> Scott Shane, "Inside a 9/11 Mastermind's Interrogation," *New York Times*, June 22, 2008, [http://www.nytimes.com/2008/06/22/washington/22ksm.html?incamp=article\\_popular\\_4](http://www.nytimes.com/2008/06/22/washington/22ksm.html?incamp=article_popular_4); "Effectively Interrogating Terrorism Suspects: Lessons From the Field—Senior Level Interrogators Discuss What Works," CSIS Human Rights and Security Initiative and Human Rights First Event, June 18, 2008 [http://www.csis.org/media/csis/events/080618\\_HumanRights.m3u](http://www.csis.org/media/csis/events/080618_HumanRights.m3u)

<sup>61</sup> Scott Shane, "China Inspired Interrogations at Guantanamo," *The New York Times*, July 2, 2008, <http://www.nytimes.com/2008/07/02/us/02detain.html>

## **Appendix A: List of Working Group Participants and Observers<sup>62</sup>**

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<sup>62</sup> The names of working group members and their affiliations have been withheld pending permission to list them.

## **Appendix B: Schedule of working Group Meetings<sup>63</sup>**

### How Do We Close Guantánamo?

November 29, 2007

12:00 p.m. – 2:00 p.m.

### What Do We Need to Know and Who Do We Ask? Part 1

December 18, 2007

12:30 p.m. – 5:00 p.m.

### What Do We Need to Know and Who Do We Ask? Part 2

January 14, 2008

12:30 p.m. – 2:30 p.m.

### Who Exactly Is Held in Guantánamo?

January 31, 2008

4:00 p.m – 6:00 p.m.

- Guest Expert: analyst

### Military Panel: Should Guantánamo Be Closed?

February 7, 2008

3:00 p.m. – 5:30 p.m.

- Guest Experts: former senior military officers

### Prosecutor Panel: Experience of Using the Criminal Justice System for Prosecuting Terrorist Suspects

February 21, 2008

4:00 p.m. – 6:00 p.m.

- Guest Experts: former prosecutors

### Intelligence Panel: The Role of Detention and Interrogation in Counterterrorism

February 28, 2008

4:00 p.m. – 6:00 p.m.

- Guest Experts: former senior intelligence officers

### What Do We Agree On And How to Move Forward?

March 6, 2008

4:00 p.m. – 6:00 p.m.

### Military Panel: Guantánamo From a Theater Commander's Perspective

April 3, 2008

3:00 p.m. – 5:00 p.m.

- Guest Expert: former senior military officer

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<sup>63</sup>The names of experts with whom the working group met have been withheld pending permission to list them.

Alternatives to Criminal Justice System?

April 11, 2008

11:00 a.m. – 1:00 p.m.

- Guest Experts: former DOD official, former senior military officer

How Well Do the Saudi Resettlement Programs Work?

April 22, 2008

3:00 p.m. – 5:00 p.m.

- Guest Expert: former intelligence officer

Alternatives to Criminal Justice System?

May 1, 2008

3:00 p.m. – 5:00 p.m.

- Guest Experts: senior military officer

Closing Guantánamo: From Bumper Sticker to Blueprint—Power point, Draft I

May 6, 2008

3:00 p.m. – 5:00 p.m.

Military Barracks Options

May 21, 2008

3:00 p.m. – 5:00 p.m.

- Guest Experts: DOD personnel

Working Group Meeting on Guantánamo

May 27, 2008

11:00 a.m. – 12:00 p.m.

Conference call with Guest Expert: former DOJ official on issues relating to transfer of detainees to the United States

3:00 p.m. – 5:00 p.m. Closing Guantánamo Power point, Draft IIWorking Group Meeting on Guantánamo

June 5, 2008

4:00 p.m.– 7:00 p.m. Closing Guantánamo: Power point, Draft IIIWorking Group Meeting on Guantánamo

June 9, 2008

4:00 p.m. – 6:00 p.m. Closing Guantánamo: Power point, Draft IVWorking Group Meeting on Guantánamo

June 24, 2008

3:00 p.m. – 5:30 p.m. Closing Guantánamo: Power point, Draft V

## About the Author

**Dr. Sarah E. Mendelson** directs the Human Rights and Security Initiative, begun in January 2007, at the Center for Strategic and International Studies. She is also a senior fellow in the Russia and Eurasia Program. Since coming to CSIS in 2001, she has run a number of human rights projects. She has collaborated on over a dozen random sample surveys measuring attitudes concerning human rights in Russia. Her current work includes leading the working group on Guantánamo and Detention, and a Transatlantic Policy Dialogue on Human Rights and Counterterrorism. She has also researched the links between trafficking in humans and peacekeeping operations and along with a team of activists helped shape the NATO trafficking policy adopted in 2004 and the U.S. Trafficking Victims Protection Reauthorization Act of 2005 (House Resolution 972). Before coming to CSIS, she was a professor of international politics at the Fletcher School of Law and Diplomacy at Tufts University. She has worked since the early 1990s on issues related to human rights and democracy including with the National Democratic Institute in Moscow in 1994-1995. She received her PhD in Political Science from Columbia University and her BA in History from Yale University. She is a member of the Council on Foreign Relations, the editorial board of *International Security* and has served on the advisory committee of Human Rights Watch's Europe and Central Asia Division since 2002. Her current research is supported by the Ford Foundation and the Gruber Family Foundation. In addition to numerous peer-reviewed and public policy articles, she is author of *Changing Course: Ideas, Politics and the Soviet Withdrawal from Afghanistan* (Princeton University Press, 1998); co-editor of *The Power and Limits of NGOs: Transnational Networks and Post-Communist Societies* (Columbia University Press, 2002) and *Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans* (CSIS Press, 2005).