Closing Guantánamo

From Bumper Sticker to Blueprint

A report of the CSIS Human Rights and Security Initiative and the Working Group on Guantánamo and Detention Policy

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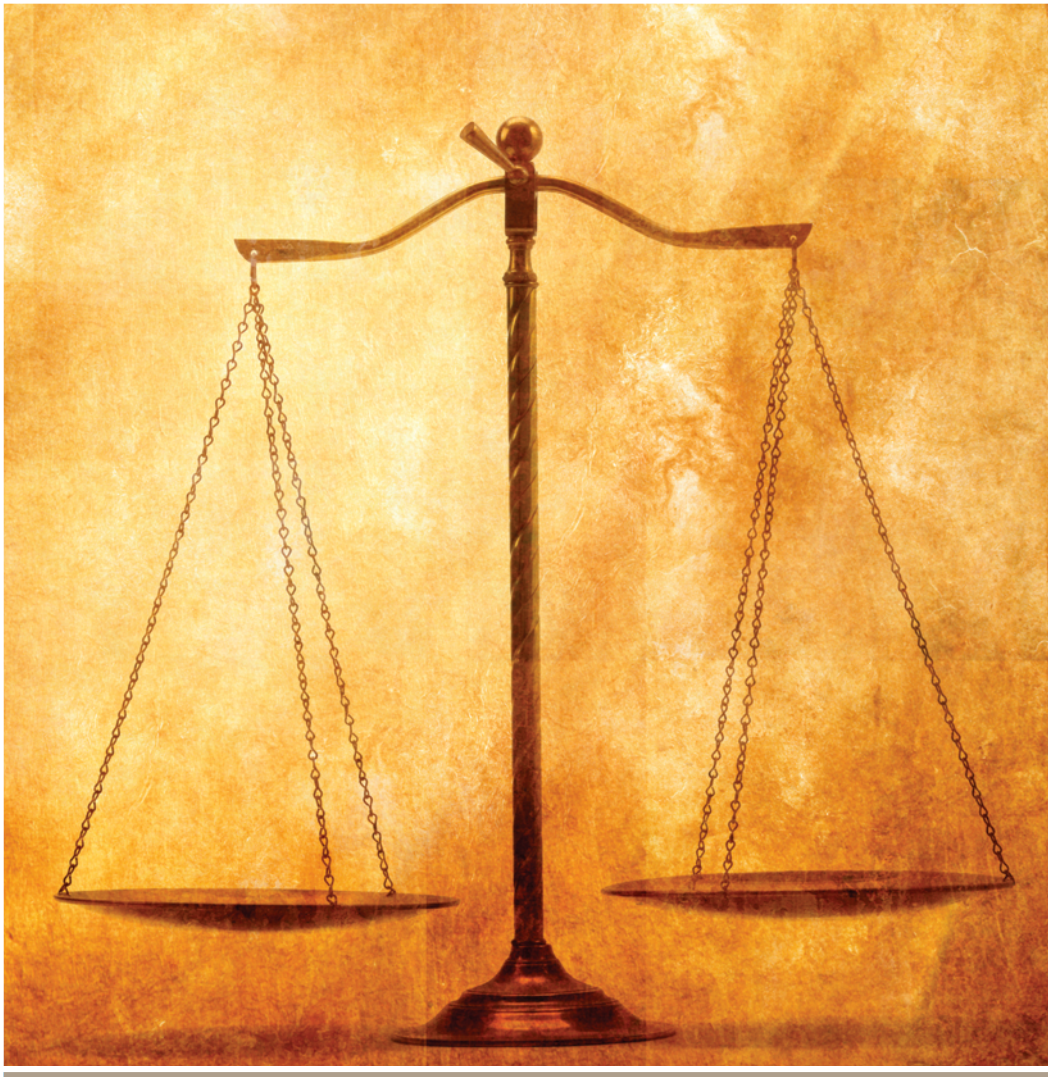
Sarah E. Mendelson



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Library of Congress Cataloguing-in-Publication Data
CIP information available on request.
ISBN: 978-0-89206-548-6

The CSIS Press
Center for Strategic and International Studies
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Web: www.csis.org

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ABOUT THE WORKING GROUP AND THE 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. We planned and executed a careful process, through an intensely collaborative effort meeting 18 times over seven months.[1] Early sessions were devoted to defining what questions needed to be asked and what sorts of experts were best suited to answering them. Later sessions were spent with 15 additional experts exploring the answers to the questions.[2] 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 or the final report—we did not aim to produce a "consensus document." Rather, our goal 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. We did this in two stages. We first released a draft report in mid-July 2008 for public comment, followed up with media appearances and briefings for those that requested them. Having gathered comments and suggestions, we now issue this final version of the report.

1. See Appendix A.
2. See Appendix B.

ACKNOWLEDGMENTS

The CSIS Human Rights and Security Initiative is grateful to the Ford Foundation for a grant supporting this work.

I want to thank all the members of the CSIS working group, several of whom provided extensive edits of the draft report, all of whom volunteered their time, and some of whom traveled long distances to be with us on a regular basis. It was an honor to work with these men and women on this difficult problem. The American Society of International Law (ASIL) cohosted a meeting with CSIS in October 2007 entitled "Beyond Guantánamo" that led to our forming this working group. Elizabeth Andersen was critical to that effort and the work that followed. I am grateful to her and to ASIL for support. At CSIS, I want to thank Craig Cohen for his advice on this project and for comments on the draft. I want to thank John Hamre, for his unflagging support and guidance regarding this project and for making me feel so welcome at CSIS over the last seven years.

On behalf of the working group, I also want 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. Also on behalf of the working group, I want to thank Jessica Scholes. She led our efforts logistically, organized us, took copious notes, and provided cookies and chocolate to make sure our energy did not flag. I want also to thank Amy Beavin, who stepped in for Jessie at a critical time, and for research support, many thanks go to Lauren Willard. Finally, thanks to the congressional staffers, embassy personnel, and legal experts who shared their thoughts and comments on the draft report.

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 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 the detainees would either be 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 versus 2 convictions.[1] 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 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.

1. Richard Zabel and James Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Court*, White Paper (New York: Human Rights First, May 2008), p. 26, http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

CLOSING GUANTÁNAMO
FROM BUMPER STICKER TO BLUEPRINT

Introduction: How to Go from Bumper Sticker to Blueprint

Closing Guantánamo is the stated desire and policy of the Bush administration.[1] It is the policy position of both the Republican and Democratic presidential candidates, Senator John McCain and Senator Barack Obama.[2] 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.[3] 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.[4] 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 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, whether 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

1. 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.

2. Barack Obama, "Plan to Secure America and Restore our Standing," speech delivered in Des Moines, Iowa, November 10, 2007, http://www.barackobama.com/2007/11/10/remarks_of_senator_barack_obam_33.php; 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.

3. For one example of the bipartisan call to close Guantánamo, see Richard L. Armitage and Joseph S. Nye Jr., *A Smarter, More Secure America*, report of the CSIS Commission on Smart Power (Washington, D.C.: CSIS, 2007), http://www.csis.org/component/option,com_csis_pubs/task,view/id,4156/type,1/.

4. For a recent exception, see Ken Gude, *How to Close Guantánamo* (Washington, D.C.: Center for American Progress, June 2008), http://www.americanprogress.org/issues/2008/06/pdf/Guantanamo.pdf.

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 heard European policymakers indicate their willingness to help the next administration.[5] 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.[6] They must be reassured that the policy solutions chosen are done so with their security in mind. The support of Congress is varied and unclear.[7]

Undoubtedly, there will be pressure on both candidates to clarify their positions about closing Guantánamo in light of recent and ongoing events.[8] None of the recommended policy approaches

5. In addition, see 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.

6. Polling data exist but are of limited use for projecting how the population will respond to specific policy recommendations made in this report or examining in a nuanced fashion how various populations understand issues relating to detention. For example, see "Gallup's Pulse of Democracy: The Patriot Act and Civil Liberties," Gallup, n.d., http://www.gallup.com/poll/5263/Civil-Liberties.aspx; "New Poll: Majority of American Voters Want Next President to Restore and Protect Civil Liberties; Seek a More Assertive Congress," American Civil Liberties Union (ACLU), October, 4, 2007, http://www.aclu.org/safefree/general/32084res20071004.html. A credible, nuanced set of survey data ought to be generated by social scientists tasked with assessing American views using a battery of questions derived from focus groups and then applying standard multivariate statistical analyses to assess correlations. Absent such data, we are left with a somewhat vague sense in late summer and early fall 2008 as to how the American public views issues related to the detention of terror suspects and Guantánamo.

7. See the bill introduced late on the evening of July 31, 2008, by Senators Lindsay Graham and Joseph Lieberman, *Enemy Combatant Detention Review Act of 2008*, S. 3401, p. 3, that "reaffirms that the President is authorized to detain enemy combatants in connection with the continuing armed conflict with al Qaeda, the Taliban, and associated forces, regardless of the place of capture, until the termination of hostilities." For bills previously introduced, see Senator Dianne Feinstein's bill to close Guantánamo, *To Require the President to Close the Department of Defense Detention Facility at Guantanamo Bay, Cuba, and for other Purposes*, S. 1249, April 30, 2007; and Senator Thomas Harkin's *Guantánamo Bay Detention Facility Closure Act of 2007*, S. 1469. May 23, 2007. See also Martha Moore, "Guantanamo Bay Puzzles Candidates," *USA Toda*y, June 18, 2007, http://www.usatoday.com/news/politics/2007-06-18-gitmo-candidates_N.htm.

8. These events include the Supreme Court's decision in *Boumediene v. Bush* (holding that detainees at Guantánamo have a constitutional right to habeas corpus review of their detention in U.S. courts), as well as subsequent actions by the administration, legal challenges in the courts, and ongoing military commissions trials. See Dan Eggen and Josh White, "Debate Over Guantanamo's Fate Intensifies," *Washington Post,* July 4, 2008, http://www.washingtonpost.com/wp-dyn/content/story/2008/07/03/ST2008070303855.html; *Boumediene v. Bush*, 553 (2008), http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf; Lyle Denniston, "New Challenges to War Crimes Trials," Supreme Court of the United States Blog (SCOTUSBLOG), July 3, 2008, http://www.scotusblog.com/wp/new-challenge-to-war-crimes-trials/; William Glaberson, "Bin Laden Driver Sentenced to a Short Term," *New York Times*, August 8, 2008, http://www.nytimes.com/2008/08/08/washington/08gitmo.html?scp=1&sq=hamdan&st=cse.

advocated so far are adequately tailored to the uniqueness of the situation at Guantánamo. They all presume 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 national security requirements. The 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 solutions.

Background

Evolution of U.S. Detention Policy since 9/11

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 report, the United States has transferred to the custody of other countries or released over 500 detainees from Guantánamo.[9] Since September 2006, the Bush administration has moved only 20 detainees to the facility.[10] 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*.[11]

Over time, the administration has been forced to create a review process for those held at Guantánamo, but this process nevertheless lacks credibility. Both the legitimacy and the legal sufficiency of the Combatant Status Review Tribunals and the Administrative Review Boards remain under attack.[12] The military commissions also lack credibility and their record in rendering justice

9. On the evolution of the policy, see Jane Mayer, *The Dark Side*: *The Inside Story of How the War on Terror Turned into the War on American Ideals* (New York: Doubleday, 2008).

10. "Defense Department Takes Custody of a High-Value Detainee," U.S. Department of Defense (DOD) news release, no. 494-07, April 27, 2007; "Terror Suspect Transferred to Guantanamo," DOD news release, no. 343-07, March 26, 2007; "Terror Suspect Transferred to Guantanamo," DOD news release, no. 703-07, June 6, 2007; "Terror Suspect Transferred to Guantanamo," DOD news release, no. 779-07, June 22, 2007; "Muhammad Rahim al-Afghani," DOD news release, no. 205-07, March, 2008; "Inayatullah," DOD news release, no. 1110-07, September 12, 2007. Department of Defense reports can be accessed at http://www.defenselink.mil/releases/. See also 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.

11. Eggen and White, "Debate Over Guantanamo's Fate Intensifies"; *Rasul v. Bush*, 542 U.S. 466 (2004), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=03-334; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2005), http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf; *Boumediene v. Bush*, 553 (2008), http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf; Denniston, "New Challenges to War Crimes Trials."

12. *Parhat v. Gates*, no. 06-1397 (U.S. Court of Appeals for the District of Columbia 2008), decided June 20, 2008, http://caselaw.lp.findlaw.com/data2/circs/dc/061397p.pdf. In the *Parhat* decision, the D.C. Court of Appeals overturned an ethnic Uighur's enemy combatant status as assigned through the Combatant Status Review Tribunal (CSRT) process. See also Josh White, "From Chief Prosecutor to Critic at Guantanamo,"

has been to date practically nonexistent. Since 2002, only two detainees have been convicted. David Hicks was convicted through a plea bargain that enabled him to leave Guantánamo. Today he is free and living in Australia.[13] In the first military commission trial in August 2008, Salim Ahmed Hamdan was acquitted of a conspiracy charge, convicted on a charge of material support for terrorism, and sentenced to five and a half years in prison, about half the amount of time he likely would have received for the same conviction in federal court.[14] The administration has indicated it may seek to detain him after his sentence is completed in December 2008.[15]

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 August 2008, approximately 260 detainees 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 presumed 20-year sentencing threshold); around 65 to 135 the government wants to release/transfer but has not yet been able to make an acceptable arrangement with an appropriate country; and about 50 to 120 categorized by the current administration as neither prosecutable nor transferable.[16]

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.

Washington Post, April 29, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/04/28/AR2008042802982.html; William Glaberson, "Defense Lawyers to Challenge Guantánamo Trials," *International Herald Tribune*, June 19, 2008, http://www.iht.com/articles/2008/06/19/america/gitmo.php.

13. Dan Ephron 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, http://www.newsweek.com/id/137627.

14. For the military commission's decision on Hamdan, see http://www.defenselink.mil/news/d2007Hamdan%20-%20Notification%20of%20Sworn%20Charges.pdf; on sentencing, see William Freivogel, "Bin Laden's Driver Gets Light Sentence—66 months," *Saint Louis Beacon*, August 7, 2008, http://www.stlbeacon.org/blogs/law_scoop/hamdan_gets_light_sentence_-_66_months.

15. On Hamdan's future, see Glaberson, "Bin Laden Driver Sentenced to Short Term."

16. Different sources offer varied figures. See, for example, Richard Willing, "Lawmakers to Work on Closing Gitmo," *USATODAY*, July 9, 2007, http://www.usatoday.com/news/washington/2007-07-08-lawmakers-gitmo_N.htm; working group meeting, May 1, 2008, Colonel Morris D. Davis, former chief prosecutor in Guantánamo Military Commissions. See also 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, Newark, N.J., February 8, 2006, 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: Penguin, 2008), pp. 74–86, regarding who has been detained at Guantánamo and the CSRT process.

It Is in the U.S. National Security Interest to Detain . . .

From the perspective of national security, and aside from those detentions that are regulated by the laws of armed conflict, who should the United States detain?[17] 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.[18] On the whole, the criminal justice system has acquired a good record for the task of incarcerating terrorists.

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.[19] 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. 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. Researchers at West Point's Combating Terrorism Center found scores of references by top al Qaeda leaders referencing Guantánamo (some in the same breath that they mention Chechnya) going back to 2002 and as recently as January 2008.[20] 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

17. *The American Heritage Dictionary* defines detain as "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.

18. Richard Zabel and James Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Court* (New York: Human Rights First, May 2008). See also John C. Coughenour, "The Right Place to Try Terrorism Cases," *Washington Post*, July 27, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/07/25/AR2008072502759.html.

19. 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 policy memos, sees Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005).

20. Author's e-mail correspondence, Natasha Cohen and Reid L. Sawyer, Combating Terrorism Center, West Point, N.Y. August 15, 2008. For a discussion of how abuses and symbols of alienation have fed recruitment, see Sherifa Zuhur, *Precision in the Global War on Terror: Inciting Muslims through the War on Ideas* (Carlisle, Pa.: Strategic Studies Institute, April 2008), http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB843.pdf; Abdullah F. Ansary, "Combating Extremism: A Brief Overview of Saudi Arabia's Approach," *Middle East Policy* XV, no. 2 (Summer 2008): 117–118; and retired FBI special agent John E. Cloonan, "Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know about Them?" testimony before the U.S. Senate Committee on the Judiciary, June 10, 2008, p. 2, http://judiciary.senate.gov/print_testimony.cfm?id=3399&wit_id=7228.

threats or attacks.[21] 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 retired intelligence and military officers suggested to us, however, that at this point those detained at Guantánamo provide neither substantial strategic nor tactical intelligence value.[22] These officers were unanimous in the view that any value that might have been gleaned was nonexistent six years into detention.[23] In fact, the experience of Guantánamo suggests that long-term detention solely to gather intelligence has been somewhat of a failure. Two retired intelligence officers, William D. Murray and Tyler S. Drumheller, 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.[24]

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. As a matter of policy, the standard we came to agree on 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.

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.[25]

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21. See Seth G. Jones and Martin C. Libicki, *How Terrorist Groups End: Lessons for Countering al Qa'ida* (Santa Monica, Calif.: RAND, 2008), http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf; David Cole, "The Brits Do It Better," *New York Review of Books* 55, no. 10 (June 12, 2008); UK Home Department, *Countering International Terrorism: The United Kingdom's Strategy* (London: Her Majesty's Stationery Office, July 2006), http://www.fco.gov.uk/resources/en/pdf/contest-report; Brice Dickson, "U.K. Perspectives: Detaining Suspected Terrorists," *American Bar Association National Security Law Report* 29, no. 1 (February 2007), http://www.abanet.org/natsecurity/nslr/2007/NSL_Report_2007_02.pdf.

22. At least one working group member, while not present for these particular meetings, did express the opinion that the detainee debriefings were never intended to yield tactical intelligence—but rather strategic intelligence—and argued that significant intelligence had been gained.

23. Working group meetings, February 28, 2008, retired senior intelligence officers William D. Murray and Tyler S. Drumheller; and April 3, 2008, Lieutenant General John R. Vines (USA Ret.), theater commander in Iraq (January 2005–January 2006) and Afghanistan (September 2002–October 2003). The Bush administration maintains that the Guantánamo detainees have produced "valuable information," http://www.whitehouse.gov/news/releases/2006/09/20060906-2.html.

24. Working group meeting, February 28, 2008, retired senior intelligence officers William D. Murray and Tyler S. Drumheller. 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, CSIS, Washington, D.C., June 18, 2008, http://www.csis.org/media/csis/events/080618_HumanRights.m3u; Cloonan, "Coercive Interrogation Techniques," p. 1, argues that his use of rapport building with al Qaeda members elicited information that "led to numerous indictments, successful prosecutions and actionable intelligence which was then disseminated to the CIA and the NSA…."

25. Relevant U.S. criminal law includes 18 USC §2339A; §2339B; §2339C; §2339D; 18 USC §2332; and §2332b. See U.S. Code Web site, http://www.access.gpo.gov/uscode/title18/parti_chapter113b_.html.

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 that much of the information on those currently held is classified, 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) and Muhammad Rahim al-Afghani (described as one of bin Laden's most trusted facilitators and procurement specialists).[26]

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. In other words, from a policy perspective, we are suggesting that the United States has no substantial national security interest in the long-term detention of such foot soldiers at Guantánamo and that the costs of holding these men indefinitely going forward greatly outweighs the benefits of holding them, whether it is done under the laws of war or not.[27] We are not challenging the need to hold combatants picked up in battlefield settings such as in Iraq and Afghanistan for operational security reasons in theater detention facilities, assuming the detentions and treatment take place in accordance with the laws of armed conflict.[28]

What Do We Do with the Guantánamo Detainees?

Given that there are people we assume fit our definition of those the United States should detain currently in Guantánamo, we then considered several options for how they ought to be handled. We examined carefully, and consulted with some experts who recommended, keeping Guantána-

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26. Denbeaux, *Report on Guantanamo Detainees*; "Detainee Biographies," Office of the Director of National Intelligence.

27. While we understand the U.S. government has approached these detentions from a law-of-war perspective, a majority of those in the group felt that the U.S. government's post-9/11 definition of unlawful combatant was overly broad and resulted in many people being detained in Guantánamo who should not have been. In addition, the "vagueness" and indefinite length of the conflict, as Zbigniew Brzezinski has suggested more generally in his analysis of these policies, have contributed to the problematic nature of these detentions from a policy perspective. See Zbigniew Brzezinski, "Terrorized by War on Terror," *Washington Post*, March 25, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301613.html. For a recent articulation of at least one administration official's views on the laws that govern these detainees, see "Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at the American Enterprise Institute for Public Policy Research," Washington, D.C., July 21, 2008, http://www.usdoj.gov/ag/speeches/2008/ag-speech-0807213.html.

28. See Geneva Conventions III and IV, "Convention (III) relative to the Treatment of Prisoners of War," Geneva, August 12, 1949, http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument; "Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva," August 12, 1949, http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument. For a discussion on the laws of war, see Adam Roberts, "The Laws of War in the War on Terror," in *International Law and the War on Terror*, ed. Fred L. Borch and Paul S. Wilson, vol. 79, *International Law Studies* (Newport, R.I.: Naval War College, 2003), pp. 175–231; Jelena Pejic, "Procedural Principles and Safeguards for Internment/administrative Detention in Armed Conflict and Other Situations of Violence," *International Review of the Red Cross* 87, no. 858 (June 2005): 375–391.

mo open.[29] 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 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 UN system, various nongovernmental organizations (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.)

In thinking through this option, we weighed the advantages and disadvantages of keeping Guantánamo open but making it more transparent. For example, retaining Guantánamo 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.[30] This approach would allow us to side-step the politicized issue of where in the United States to transfer detainees. The U.S. government has already invested millions of dollars in the facility, and the benefit of keeping Guantánamo as a detention facility included the fact that the infrastructure (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.[31] 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.[32] 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.[33]

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29. Working group meeting, February 7, 2008, former military commander.

30. It has been recently reported that the administration and members of Congress are currently developing plans for an administrative detention, or detention with out charge, regime. See Eggen and White, "Debate Over Guantanamo's Fate Intensifies." See also Graham and Lieberman, *Enemy Combatant Detention Review Act of 2008*.

31. 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," Program on International Policy Attitudes, University of Maryland, Washington, D.C., July 17, 2006, http://www.worldpublicopinion.org/pipa/articles/btjusticehuman_rightsra/229.php?nid=&id=&pnt=229; 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 UN High Commissioner for Human Rights, Geneva, November 22, 2007, http://daccessdds.un.org/doc/UNDOC/GEN/G07/149/55/PDF/G0714955.pdf?OpenElement.

32. On costs, see Matthew Waxman, "The Smart Way to Shut Down Guantanamo," *Washington Post*, October 28, 2007, 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.

33. 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

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.

Weighing all the options, we ultimately concluded that closing Guantánamo holds out greater possibility of achieving both real and perceived justice while also protecting national security. 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 two convictions, one of which was 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.[34] Some also suggest that closing Guantánamo is the key—perhaps a counterintuitive one—to *greater* security. The retired intelligence officers we consulted noted that in an advanced democracy, there should be no such thing as indefinite detention without criminal conviction. 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.[35]

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 might entail some 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.[36]

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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 therefore may be better suited for trial before a court martial. 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).

34. Zabel and Benjamin, *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, Kelly Moore; Morgan Lewis, former chief of the Violent Crimes and Terrorism Section in the Brooklyn U.S. Attorney's Office; and Richard Zabel, Akin Gump, former federal prosecutor in the U.S. Attorney's Office for the Southern District of New York.

35. Working group meeting, February 28, 2008, Murray and Drumheller. A recent sweeping study of over 600 terrorist organizations since 1968 suggests that there is a poor empirical record for governments using military approaches to address terrorism and that law enforcement and intelligence have proven much more effective. See Jones and Libicki, *How Terrorist Groups End*.

36. Eggen and White, "Debate Over Guantanamo's Fate Intensifies"; Jack Goldsmith and Neal Katyal, "The Terrorists' Court" *New York Times*, July 11, 2007, http://www.nytimes.com/2007/07/11/opinion/11katyal.html; Wittes, *Law and the Long War*.

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 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.[37]

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.[38] More importantly, the issue still remains: how to avoid importing the legal, political, and security problems of Guantánamo to the United States?

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, released, or, alternatively, 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 policy equivalent of "rebooting"

37. Sarah E. Mendelson, "Opt Back In to the International System Part I: Counterterrorism" (working paper, CSIS Commission on Smart Power, Washington, D.C., October 2007), http://www.csis.org/media/csis/pubs/071001_mendelson_counterterrorism.pdf, based on interviews with senior British intelligence and legal experts.

38. 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 the safe dismantlement and destruction of nuclear materials in the former Soviet Union known as "Cooperative Threat Reduction."

the system.[39] A team composed 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.[40] Representatives from the intelligence community would also be present on the team. The panel should provide as much transparency regarding its decisionmaking process as practicable, while remaining sensitive to prosecutorial considerations and to the need to protect sources and methods of intelligence collection. 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.[41] Given 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, D.C., area—although likely in numerous different agency files—enabling the panel access to what information currently exists.[42]

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 we should close Guantánamo, but whether 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.[43] We therefore considered whether we needed to develop a third alternative, a system of administrative detention, to address those cases in which an individual cannot be released or transferred because there is no legal basis for any other government to hold them, concern exists that they would be tortured by another government, or they are "too dangerous" to release. Such detention is sometimes referred to as "preventive detention" and can also be understood as detention without charge.

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39. The blue-ribbon panel and their staff would most likely have existing security clearances, but if not, they should be part of the expedited clearance process during transition recommended by Richard Armitage and Michèle A. Flournoy, "No Time for 'Nobody Home,'" *Washington Post,* June 9, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/08/AR2008060801688.html.

40. The working group agreed that in certain cases, UCMJ and courts martial might be the appropriate venue for prosecution.

41. Some members of the working group strongly urged that the target date for reviewing all files ought to be within six months of inauguration.

42. Author's discussion with Colonel Morris D. Davis, former chief prosecutor in Guantánamo Military Commissions, June 24, 2008.

43. For public arguments along these lines, see Editorial, "Workable Terrorism Trials," *Washington Post*, July 27, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/07/26/AR2008072601555.html; John Farmer, "A Terror Threat in the Courts," *New York Times*, January 13, 2008, http://www.nytimes.com/2008/01/13/opinion/13farmer.html?ref=opinion; and Wittes, *Law and the Long War*.

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 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.[44] 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 long term those 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 perpetuate one of the most delegitimizing 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.[45] Some problems with such systems could be diminished by adding strong due process protections.[46] Some members of the working group worried that a system of long-term detention, even with procedures, would be perceived as perpetuating Guantánamo by another name. Others argued that the more due process is added, the more the system would

44. Sands, *Torture Team*, documents the torture of al Qatani. Shortly after the publication of the book, the DOD dropped charges against al Qatani. See "Key 9/11 Suspect Charges Dropped," BBC News, May 13, 2008, http://news.bbc.co.uk/2/hi/americas/7398953.stm. See also Scott Shane, "China Inspired Interrogations at Guantanamo," *New York Times*, July 2, 2008, http://www.nytimes.com/2008/07/02/us/02detain.html.

45. For discussion in favor, see Wittes, *Law and the Long War*; Robert Chesney and Jack Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models," *Stanford Law Review* 60, no. 4 (February 2008). For a discussion opposing, see Deborah N. Pearlstein, "We're All Experts Now: A Security Case against Security Detention," *Case Western Reserve Journal of International Law* 40 (2008).

46. 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.

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.[47]

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 without charge 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.[48] 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) has been unable to move to other countries.

As the review process begins, staff for the blue-ribbon panel ought to consider current re-education and "counseling" programs, such as the one established by Saudi Arabia in 2004. The staff will need to assess strengths and weaknesses of the current programs and possibly work with governments receiving detainees to consider what programs might be developed for those specifically released from Guantánamo.[49] The staff ought also to consider the program previously run by General Douglas Stone in Iraq.[50]

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47. On that category, see Eggen and White, "Debate Over Guantanamo's Fate Intensifies."

48. Article 3, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment," Office of the UN High Commissioner for Human Rights, June 26, 1987, http://www2.ohchr.org/english/law/cat.htm.

49. Author's telephone conversation with Sherifa Zuhur, August 4, 2008, and e-mail correspondence, August 7, 2008. In the Saudi case, these programs are generally "designed to recreate ties to communities, to estranged families, and…lessen (the) likelihood of recidivism, and defuse the ideological sources for violence within jihadist thought." They are run by a mix of "clerics, academics, social scientists, and psychiatrists." The program has accepted 28 non-Saudis, but we do not know under what circumstances they came to be in the program or if the government would accept more.

50. Working group session, April 22, 2008, Marc Sageman, scholar in residence at the New York Police Department; author's telephone conversation, August 4, 2008, and e-mail correspondence, August 7, 2008 with Sherifa Zuhur. On the impact of the program, see Sherifa Zuhur, *Decreasing Violence (or Deradicalization) in the New Jihad in Saudi Arabia and Beyond* (Carlisle, Pa.: Strategic Studies Institute, forthcoming); Abdullah F. Ansary, "Combating Extremism: A Brief Overview of Saudi Arabia's Approach," *Middle East Policy* XV, no. 2 (Summer 2008): 111–142; Thomas Hegghammer and Stéphane Lacroix, "Rejectionist Islamism in Saudi Arabia: The Story of Juhayman Al-'Utaybi Revisited," *International Journal of Middle East Studies* 39

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.[51] The administration ought to invest in diplomatic, technical, and possibly strategic communications strategies designed to mitigate such risk.[52]

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. Allies, however, have been reluctant to accept detainees (with some exceptions) scheduled for release or transfer who could not be returned to their home country because of fears of torture.[53] 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.[54] The next administration must develop a plan to better ensure that no detainees are transferred to torture.[55]

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 and the blue-ribbon panel may want to explore the veracity of

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(2007): 103–122; Alissa J. Rubin, "U.S. Remakes Jails in Iraq, but Gains Are at Risk," *New York Times*, June 2, 2008, http://www.nytimes.com/2008/06/02/world/middleeast/02detain.html?_r=1&scp=1&sq=General%20Stone%20Iraq%20detention%20&st=cse&oref=slogin; Josh White and Robin Wright, "After Guantanamo, 'Reintegration for Saudis,'" *Washington Post*, December 10, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/12/09/AR2007120901411_pf.html.

51. Bryan Bender, "Ex-detainee Linked to Iraq Bombing: Suicide Attack Renews Guantanamo Dispute," *Boston Globe*, May 8, 2008, http://www.boston.com/news/nation/washington/articles/2008/05/08/ex_detainee_linked_to_iraq_bombing/; Jackie Northam, "Freed from Gitmo, Where Do Detainees Go?" *NPR Morning Edition*, July 30, 2007, http://www.npr.org/templates/story/story.php?storyId=12344597.

52. Technical strategies might include biometrics and enhanced border security. Working group meeting, February 28, 2008, with retired intelligence officers Murray and Drumheller.

53. Jeffrey Toobin, "Camp Justice: Everyone Wants to Close Guantánamo, but What Will Happen to the Detainees?" *New Yorker*, April 14, 2008, http://www.newyorker.com/reporting/2008/04/14/080414fa_fact_toobin; Michael Isikoff, "No Country for 270 Men," *Newsweek*, June 23, 2008, http://www.newsweek.com/id/141513; Jamey Keaten, "European Envoy: Shut Guantanamo Soon," Associated Press, June 25, 2008, http://www.boston.com/news/world/europe/articles/2008/06/25/european_envoy_shut_guantanamo_soon/.

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

55. For recommendations on how to improve the system, see Ashley Deeks, *Avoiding Transfers to Torture*, Council Special Report no. 35 (New York: Council on Foreign Relations, June 2008), http://www.cfr.org/content/publications/attachments/Assurances_CSR35.pdf.

claims as well as the criteria previously relied on that led to release.[56] The fact remains that the overwhelming majority have not, whether by choice or because former associates are unwilling to reengage 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.[57]

The working group considered the risks of some number of released or transferred detainees 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 venue for 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.[58] The assumption of the working group was that going forward

56. The Defense Intelligence Agency (DIA) reported that as of May 2008, 36 former detainees were "confirmed or suspected of returning to terrorist activities," although it only provided details for 10 of these. Some sources the DIA appears to have relied on, including some foreign security services that are alleged to be implicated in extra-legal killings, are questionable. See Joint Intelligence Task Force–Combating Terrorism, "Defense Analysis Report–Terrorism," Exploitation Division, Defense Intelligence Agency, Arlington, Va., May 12, 2008. A close analysis of Department of Defense data suggests the number is lower; the U.S. government figures have included those who write or speak about their detention, not just those that may have taken up arms. See Mark Denbeaux et al., "The Meaning of the Battlefield: An Analysis of the Government's Representations of 'Battlefield' Capture and 'Recidivism' of the Guantánamo Detainees," Seton Hall University School of Law, Newark, N.J., December 10, 2007, http://law.shu.edu/news/meaning_of_battlefield_final_121007.pdf. See also Mark Denbeaux et al., "Profile of Released Guantánamo Detainees: The Government's Story Then and Now," Seton Hall University School of Law, Newark, N.J., August 4, 2008, http://law.shu.edu/center_policyresearch/reports/detainees_then_and_now_final.pdf, which suggests the nationality of rather than the evidence against a detainee largely drove release determinations. Josh White, "Ex-Guantanamo Detainee Joined Iraq Suicide Attack," *Washington Post*, May 8, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/05/07/AR2008050703456.html.

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

58. Working group meeting, February 21, 2008, former prosecutors Moore and Zabel; Zabel and Benjamin, *In Pursuit of Justice.* See also Serrin Turner and Stephen J. Schulhofer, "The Secrecy Problem in

the majority of cases would be tried in civilian criminal courts.[59]

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.[60] 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, it also denies terrorists suspects the symbolic value of special, extra-judicial treatment. In making this argument, we do not mean to suggest that there are no challenges.[61] Indeed, some of the cases may pose difficult evidentiary challenges. But the U.S. government has a wide array of criminal laws available, such as material support statutes that do not require heavy evidentiary burdens and that can yield longer sentences than, for example, Hamdan received from the military commission system. Moreover, some detainees, such as Khalid Sheikh Mohammed, were indicted in federal court long before they were brought to Guantánamo. Presumably, the U.S. government has enough existing evidence in those cases that it would not need to rely on statements made while in custody. Finally, going forward, former prosecutors and retired FBI special agents also emphasize that the potential intelligence value of investigative and prosecutorial work has been undervalued and needs to be better understood and appreciated.[62] In some cases, detainees may be willing to enter plea deals in exchange for providing information critical to understanding terrorist networks and stopping attacks. Moreover, 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 Department of Defense personnel possible facilities that might be adapted to hold those awaiting trial, including Leavenworth, Pendleton, and Charleston. No option is ideal.[63] These facilities were originally constructed to detain military personnel who are being prosecuted or have been found guilty of a crime. Any fa-

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Terrorism Trials," Brennan Center for Justice at NYU School of Law, New York, 2005, http://brennan.3cdn.net/6a0e5de414927df95e_lbm6iy66c.pdf.

59. 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.

60. Teams of FBI officers would need to be deployed. Working group meeting, February 21, 2008, former prosecutors Moore and Zabel. We acknowledge that there are some differences between the kinds of cases that come before federal courts usually and the kinds of cases the U.S. 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 would 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 challenges and deserves additional inquiry. We note, however, that gathering evidence for actions and crimes that occurred overseas years prior is not unique to these cases. See, for example, the discussion of the Al-Moayad case in Kelly Moore, "The Role of Federal Criminal Prosecutions in the War on Terrorism," *Lewis and Clark Law Review* 11, no. 4 (Winter 2007): 841–845, and author's telephone conversation, New York, August 8, 2008.

61. The group varied in its assumptions about the nature of these challenges and included a minority that believed these were substantial.

62. Moore, "The Role of Federal Criminal Prosecutions in the War on Terrorism"; Working group meeting, February 21, 2008, former prosecutors Moore and Zabel; Cloonan, "Coercive Interrogation Techniques."

63. Working group meeting, May 21, 2008, DOD personnel.

cility would need to be reconfigured to handle civilian detainees awaiting trial in conformity with international standards. When the next president announces his plan for Guantánamo closure, if the military sites are deemed appropriate, then contractors will 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 work would likely cost the government.[64] 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.

Another more likely option—for reasons relating primarily to attorney-client access—may be that those detained ought to be held in the federal pretrial detention facilities of the respective courts that will hear their cases, most likely the Eastern District of Virginia and the Southern and Eastern Districts of New York—in which terrorist suspects have been successfully tried and convicted. There are numerous additional jurisdictions that might be considered including New Jersey, Connecticut, Boston, and Chicago.

Not discussed in any detail by the working group but clearly an issue worthy of serious consideration is the public safety aspect of such a plan. For Americans to help the next administration turn the page on the 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.

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 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.

A comprehensive, multitiered approach to closing Guantánamo, as opposed to the largely rhetorical stances taken to date by the current administration and both campaigns—will 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.

As a testament to the complexities of issues we discussed, it should be no surprise that we

64. DOD personnel reported to working group meeting, May 21, 2008, that no financial assessment of costs had to date been conducted.

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 that 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. Would it, however, push some in the U.S. government to increasingly rely on secret detention elsewhere or, alternatively, targeted killing?[65] Serious oversight and safeguards will need to be put in place to make sure a shift to the criminal justice approach does not mean an increased reliance by the U.S. government on practices that are as controversial as holding detainees at Guantánamo, if not more so.

Future interrogation policy regarding terrorist suspects is another issue that is beyond the scope of this study but which our work thinking through the Guantánamo regime not surprisingly touched on. Our recommendations for how to close Guantánamo have implications for future interrogation policy. If the federal criminal justise 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 on 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.[66] 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.[67] We are better than that. We can do better than that. We must prepare to do better than that.

65. See the comment in response to the July 15, 2008, draft of this report posted by Bobby Chesney at http://natseclaw.typepad.com/natseclaw/2008/07/sarah-mendelson.html.

66. 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; "Effectively Interrogating Terrorism Suspects: Lessons From the Field—Senior Level Interrogators Discuss What Works," CSIS and Human Rights First meeting, Washington, D.C., June 18, 2008, http://www.csis.org/component/option,com_csis_events/task,view/id,1703/.

67. Scott Shane, "China Inspired Interrogations at Guantanamo."

APPENDIX A
WORKING GROUP PARTICIPANTS AND ADVISERS

Affiliations appear for identification purposes only.

Working Group Participants

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APPENDIX B
WORKING GROUP MEETINGS

Some of those who met with us agreed to be listed by name while others wished to remain anonymous. The appearance of an expert's name does not indicate endorsement of the report's conclusions.

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: **Benjamin Wittes,** Fellow and Research Director in Public Law, Brookings Institution and author of *Law and the Long War: The Future of Justice in the Age of Terror*

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: **Kelly Moore,** Morgan Lewis, former chief of the Violent Crimes and Terrorism Section, U.S. Attorney's Office, Brooklyn, New York

Richard Zabel, Akin Gump, former federal prosecutor in the U.S. Attorney's Office, Southern District of New York

Intelligence Panel: The Role of Detention and Interrogation in Counterterrorism

February 28, 2008
4:00 p.m. – 6:00 p.m.

Guest experts: **William D. Murray,** retired senior intelligence officer, 36-year career in the CIA

Tyler S. Drumheller, retired senior intelligence officer, 25-year career in the CIA

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: **Lieutenant General John R. Vines (USA ret.),** Theater Commander in Iraq (January 2005–January 2006) and Afghanistan (September 2002–October 2003)

Alternatives to Criminal Justice System?

April 11, 2008
11:00 a.m. – 1:00 p.m.

Guest expert: **General officer with detainee experience**

How Well Do the Saudi Resettlement Programs Work?

April 22, 2008
3:00 p.m. – 5:00 p.m.

Guest expert: **Marc Sageman,** consultant and principal, Sageman Consulting, LLC; scholar in residence, New York Police Department; and associate professor, Columbia University

Alternatives to Criminal Justice System?

May 1, 2008
3:00 p.m. – 5:00 p.m.

Guest expert: **Colonel Morris D. Davis,** former chief prosecutor, Guantánamo Military Commissions

Closing Guantánamo: PowerPoint, 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**

Legal Challenges Involved in Bringing Detainees to the United States

May 27, 2008
11:00 a.m. – 12:00 p.m.

Conference call: **Brian M. Willen,** Mayer Brown, former U.S. Department of Justice attorney, Office of Legal Counsel (2005–2006)

Closing Guantánamo: PowerPoint, Draft II

May 27, 2008
3:00 p.m. – 5:00 p.m.

Closing Guantánamo: PowerPoint, Draft III

June 5, 2008
4:00 p.m. – 7:00 p.m.

Closing Guantánamo: PowerPoint, Draft IV

June 9, 2008
4:00 p.m. – 6:00 p.m.

Closing Guantánamo: PowerPoint, Draft V

June 24, 2008
3:00 p.m. – 5:30 p.m.

ABOUT THE AUTHOR

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 on 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 helped shape the NATO trafficking policy adopted in 2004 and the *U.S. Trafficking Victims Protection Reauthorization Act of 2005* (H.R. 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 Ph.D. in political science from Columbia University and her B.A. in history from Yale University. She is a member of the Council on Foreign Relations and 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 scholarly and public policy articles, she is author of *Changing Course: Ideas, Politics and the Soviet Withdrawal from Afghanistan* (Princeton University Press, 1998); coeditor of *The Power and Limits of NGOs: Transnational Networks and Post-Communist Societies* (Columbia University Press, 2002); and author of *Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans* (CSIS Press, 2005).