

**Testimony before the U.S. Senate,  
Committee on the Judiciary,  
Subcommittee on the Constitution**

***“RESTORING THE RULE OF LAW”***

A Statement by

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Chairman Feingold and Members of the Subcommittee:

Thank you for inviting me to submit this written testimony for this session devoted to restoring the rule of law. My name is Sarah Mendelson. I direct the Human Rights and Security Initiative at the Center for Strategic and International Studies (CSIS), where I am also a senior fellow in the Russia and Eurasia Program.

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? My comments here outline an answer to this specific question and draw on the report that CSIS is releasing today entitled “Closing Guantánamo: From Bumper Sticker to Blueprint.” In addition to this testimony, I wish to submit the entire report for the record.

## **I. Background**

If I may, I'd like to begin on a personal note. I have spent the better part of nearly 15 years working along side many colleagues to support the development of democracy and human rights in Russia. Over the last several years, this work became increasingly difficult and indeed freighted by not only the actions of the Putin government but by specific policies adopted by the Bush administration concerning detention and torture. The work I was doing, for example trying to draw international attention to detention and torture in Chechnya, was increasingly overtaken by the reality that U.S. policies concerning detention, and in particular the detention facility at Guantánamo Bay, were condemned world wide. For that reason, I have spent much of the last year, together with a dedicated team, working on this issue. I look forward to the next administration restoring the rule of law concerning detention and interrogation issues. Then I might once again focus on the human rights abuses that occur elsewhere.

I want also to recognize the lengthy and collaborative process by which we came to the recommendations made in 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. We did not begin with either the idea that it ought to be closed or left open. Our nonpartisan working group combined executive branch, intelligence, military, human rights, and international law experience. We planned and executed a careful process, meeting 18 times over seven months. Early sessions were devoted to defining what questions needed to be asked and what sorts of experts were best suited to answer them. Later sessions were spent with 15 additional experts

exploring specific issues. Then we engaged in a lengthy debate within the group concerning specific recommendations and policy positions.<sup>1</sup>

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 and followed up with media appearances and briefings for those that requested them. After gathering comments and suggestions, we now issue this final version of the report.

At this stage, it will likely fall to the next administration to carry out this new 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. Our review of these issues concluded that 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.<sup>2</sup> Overall, we found that a rather straightforward policy—review, release/transfer and try—can help restore our reputation as a country that is built on and embraces the rule of law.

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. 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. In fact, researchers at West Point’s Combating Terrorism Center have 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.<sup>3</sup> Restoring the U.S. reputation will also have national security benefits.

## II. How to 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 establish-

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<sup>1</sup> For a full list of working group participants, advisers and additional experts with whom we met, see Sarah E. Mendelson, “Closing Guantánamo: From Bumper Sticker to Blueprint,” CSIS, September 2008, pp. 19-22.

<sup>2</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), p. 26.

<sup>3</sup> Author’s e-mail correspondence, Natasha Cohen and Reid L. Sawyer, Combating Terrorism Center, West Point, N.Y. August 15, 2008.

ment 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.

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” the system.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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. It would also likely involve, as a signal to the world that there is real change in policy, the United States accepting some detainees whom the Bush administration has slated for release but (with the exception of a few) has been unable to move to other countries.

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<sup>4</sup> 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.

<sup>5</sup> The working group agreed that in certain cases UCMJ and courts martial might be the appropriate venue for prosecution.

<sup>6</sup> Some members of the working group strongly urged that the target date for reviewing all files ought to be within six months of inauguration.

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.

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. The administration ought to invest in diplomatic, technical, and possibly strategic communications strategies designed to mitigate such risk.<sup>7</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. 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. 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. The next administration must develop a plan to better ensure that no detainees are transferred to torture.

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 claims as well as the criteria previously relied on that led to release. 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.

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

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<sup>7</sup> Technical strategies might include biometrics and enhanced border security. Working group meeting, February 28, 2008, with retired intelligence officers William Murray and Tyler Drumheller.

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.

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. Put simply, 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.<sup>8</sup> The assumption of the working group was that going forward the majority of cases would be tried in civilian criminal courts.

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>9</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, 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.<sup>10</sup> 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,

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<sup>8</sup> Working group meeting, February 21, 2008, former prosecutors Kelly Moore and Richard Zabel; Zabel and Benjamin Jr., *In Pursuit of Justice*.

<sup>9</sup> 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 who 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.

<sup>10</sup> The group varied in its assumptions about the nature of these challenges and included a minority that believed these were substantial.



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.<sup>11</sup> 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.<sup>12</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 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.<sup>13</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.

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.

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<sup>11</sup> Moore, “The Role of Federal Criminal Prosecutions in the War on Terrorism”; Working group meeting, February 21, 2008, former prosecutors Moore and Zabel; 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.”

<sup>12</sup> Working group meeting, May 21, 2008, DOD personnel.

<sup>13</sup> DOD personnel reported to working group meeting, May 21, 2008, that no financial assessment of costs had to date been conducted.

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.

### III. Conclusions

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 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? 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 touched on. Our recommendations for how to close Guantánamo have implications for future interrogation policy. If the federal criminal justice 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 who 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. 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. We are better than that. We can do better than that. We must prepare to do better than that.

Thank you.