



# How to Close Guantánamo

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Ken Gude June 2008



Center for American Progress



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# Executive Summary

President George W. Bush is fond of saying that his administration tackles challenges head-on and refuses to leave tough decisions to his successors. No description could be further from the truth when applied to his policy at Guantánamo.

Regardless of what happens over these last months of the Bush administration, the next president will inherit a detainee policy in total disarray. Transfers out of Guantánamo have stalled; the easier cases have already been shipped out, leaving a population stabilizing at around 270 detainees. Trials of Guantánamo detainees in Military Commissions are sputtering as the unproven system struggles to get through simple procedural hearings. Future prosecutions have been thrown into doubt as charges were dropped against a detainee once thought to be the “20th hijacker” on 9/11 because too much of the evidence against him was obtained through torture.

In its third successive decision rebuking the Bush administration’s detention policies, the Supreme Court recently ruled that the Guantánamo detainees have a constitutional right to habeas corpus. This decision will finally allow the detainees to contest the lawfulness of their confinement in a truly impartial hearing before a federal judge, rejecting the Bush administration’s contention that Guantánamo existed outside the law. And beyond the prison’s walls on the eastern tip of Cuba, serious problems have arisen in Afghanistan as both U.S.- and Afghan-run detention camps are replicating the worst excesses of Guantánamo.

One critical conceptual error of the architects of Guantánamo within the Bush administration—an exclusive focus on the threat posed by the detainees themselves—has frustrated the efforts of senior officials like Secretary of Defense Robert Gates to overcome the prison’s deficiencies. This myopic vision has completely discounted the strategic impact Guantánamo has had on the global security environment. In the Bush administration’s paradigm, the risk of transferring or releasing any one detainee is measured only against the potential harm that individual might do if set free, a calculus always tilted in favor of continued detention in cases when doubt exists. In this context, the status quo gives the illusion of perfect security dramatically increasing the burden on those arguing for alternatives to Guantánamo.

The reality is that the potential harm from Guantánamo detainees to American interests is not limited to the prospect of violence perpetrated after release. Guantánamo as currently constructed has become a symbol of a rogue American hegemony that disregards the rule



of law, even as it uses calls for freedom and democracy as a weapon to assert its influence across the globe. The perpetuation of that symbol does great damage to American interests. Recognizing this new paradigm significantly alters the landscape when considering the future of Guantánamo and strongly favors closing the prison and pursuing alternative regimes for those detainees that require additional imprisonment.

Counterintuitively, reaching the threshold decision to close Guantánamo will be the easiest part of cleaning up the catastrophe of U.S. detention policy. The next president will confront numerous obstacles in any effort to make changes at Guantánamo and to all U.S. detention policy, including: overturning the massive current credibility and legitimacy deficit of the United States; satisfying the real security challenges posed by some the detainees and respecting legitimate anxieties and fears about future acts of terrorism; building a far greater level of international cooperation, because even though this is an American problem, the United States cannot solve it on its own; deciding who among the Guantánamo detainees should stand trial, which trial venue is most appropriate, and what evidence can be used in those trials; and finding a new home for those detainees that are not going to be tried.

To overcome these obstacles, the president will have to overturn the Bush administration's stubborn refusal to imprison any of the Guantánamo detainees within the United States and end the poorly conceived notion that all efforts to reduce the population at Guantánamo be based on nationality. The next president will also have to walk a fine line between the urgency to resolve the fate of many at Guantánamo in limbo for more than seven years and political realities that accompany such an emotive issue as the threat of future terrorist attacks. To accomplish these goals, the next administration should pursue a five-phase plan to close Guantánamo:

**Phase One:** Immediately change the dynamic at Guantánamo by announcing a hard 18-month timetable to close the prison, and for the remainder of its existence, making it as transparent as possible. These are meaningful actions that signal real change from the Bush administration, yet allow appropriate time to work through all the challenges of getting the Guantánamo population down to zero.

**Phase Two:** Bring a small number of detainees into the United States to stand trial in regular federal or military courts. Scrapping the flawed Military Commissions and rejecting any effort to establish National Security Courts in favor of established U.S. courts will get trials moving faster and is a major step to restore confidence in the legitimacy of America's actions.

**Phase Three:** Create a resettlement and rehabilitation program in partnership with allied countries and international organizations to find homes for detainees that can't be returned to their home countries and to smooth the re-integration of detainees into society. This program should be based on similar programs currently used by the U.S. military in Iraq and the Saudi Arabian government to assist in the transition of militants from detention to release.



**Phase Four:** After U.S. courts demonstrate their effectiveness and legitimacy, transfer those remaining detainees selected to stand trial into the United States. These detainees should be held at either the U.S. Penitentiary Administrative Maximum Facility, also known as the “Supermax,” at Florence, Colorado, or at the U.S. Military Detention Barracks at Ft. Leavenworth, Kansas, depending on whether they are slated for trial in federal or military courts.

**Phase Five:** Some detainees will remain at Guantánamo who are not candidates for trial, but who were captured during military operations in Afghanistan and may represent a threat to coalition forces still fighting in that country if they are released. Transfer this group back to Afghanistan and hold them in a NATO-controlled detention program along with prisoners captured by coalition forces during ongoing military operations.

This program can reduce the population of Guantánamo to zero within 18 months, but problems could arise in one or more of the steps, and the next administration should be prepared for the only two choices available for any remaining detainees: create a preventive detention regime and hold them indefinitely in the United States, or release them.

Choosing the preventive detention route would mean falling at the last hurdle in the long effort to eradicate the festering sore of Guantánamo. Any move to release even what is likely to be only a handful of detainees carries some genuine security threat and will be politically difficult, but it is an acceptable level of risk when measured against the significant strategic gains of the permanent closure of Guantánamo.

After more than six years of repeated failures, Guantánamo is a policy that stands squarely in the way of justice. We can shuffle the likes of Khalid Sheik Mohammed through little more than politically motivated show trials that draw attention away from his grievous crimes. Or we can believe in the strength of our system of government, bring this unrepentant terrorist to New York, and expose him as one of the world’s worst mass murderers in a courtroom near Ground Zero. There would be no better demonstration that although he was able to orchestrate an attack on the United States that claimed the lives of 3,000 people, he utterly failed to destroy America and all that it stands for.

Guantánamo can be closed. It can be done safely. And it can be done in a manner that reinforces the values that Americans have fought so long and so hard to preserve.

# Guantánamo: January 2009

After more than six years of constant controversy, it really does look now as if Guantánamo's days are numbered. Five former secretaries of state—Henry A. Kissinger, James A. Baker III, Warren Christopher, Madeleine K. Albright, and Colin Powell—each among the most respected figures in the United States and within the American foreign policy establishment, issued a collective call in March 2008 to close down the prison.<sup>1</sup> This bipartisan group of former secretaries argued that the next president should move swiftly to close the prison for both strategic and moral reasons.

The June, 2008 Supreme Court decision in *Boumediene vs. Bush* further narrowed any legal distinction between holding the detainees at Guantánamo or within the territorial boundaries of the United States. By ruling that the Guantánamo detainees have a constitutional right to habeas corpus, the Court left Congress no realistic avenue to overturn its decision. The constitutional right of habeas corpus can only be withheld during times of invasion or rebellion, a situation that clearly does not currently exist.

Even though one of the Republican presidential hopefuls infamously pledged to “double Guantánamo,” John McCain's position as his party's presumptive nominee now means that both of the remaining candidates have taken the secretaries of states' advice and pledged to end this national tragedy. As we all know, campaign promises do not always translate into administration policy, and it is the responsibility of advocates for closure to keep pressing for change and to develop practical alternatives to Guantánamo.

This lesson is particularly instructive given McCain's reaction to the *Boumediene* decision. He has described the Court's ruling extending habeas corpus rights to Guantánamo as “one of the worst decisions in the history of this country.”<sup>2</sup> Yet, his proposal to close Guantánamo and move the detainees to Ft. Leavenworth, Kansas would result in the same outcome because there is no doubt the detainees would possess habeas rights if they were held within the United States.<sup>3</sup>

On January 20, 2009, President Bush will hand over the keys to Guantánamo, satisfied that he has left all the difficult decisions to his successor. Barring an unlikely shift in numbers in either direction, the detainee population of Guantánamo will be around 270. Despite the Bush administration's one-size-fits-all policy, the next administration will find that Guantánamo holds both detainees who have been determined to be of no threat to the United States and those that loudly proclaim their dedication to its destruction. Most of those detainees have

been imprisoned for nearly seven years without any impartial hearing on the lawfulness of their confinement that meets the standards of fairness expected from American justice.

The floundering Military Commissions the Bush administration established to pursue war crimes trials faces more upheaval after *Boumediene*.<sup>4</sup> It is possible that one of the already-charged detainees could persuade a federal judge to suspend his trial pending the outcome of a habeas hearing. Such an outcome could force the Defense Department to suspend all Military Commissions trials. The CIA's admission that it used a form of torture called waterboarding that dates to the Spanish Inquisition on at least three detainees—an action the United States has previously prosecuted as a war crime<sup>5</sup>—opens a Pandora's Box into the official policy of abusive interrogation, contaminating a significant amount of evidence that can no longer be used at trial in any venue. Complicating matters further, the next administration's ability to maneuver will be constrained by a domestic and international environment that holds a very dim view of the Bush administration's detention policy and will be extremely impatient for change.

Disturbingly, the bankruptcy of the Bush administration's detainee policy extends beyond Guantánamo. Under an agreement between the U.S. and Afghan governments, most Afghan detainees have been returned to their homeland and held at Pul-i-Charki prison, a Soviet-era detention center renovated with American money.<sup>6</sup> This transfer removed a large percentage of Guantánamo detainees and could have been a positive step toward closing the prison, but conditions at Pul-i-Charki are so poor that detainees recently sewed their mouths shut with wire in a hunger strike.<sup>7</sup> Trials of these detainees, usually lasting only minutes and based exclusively on secret U.S. intelligence reports, bear no resemblance to fair hearings despite an American commitment to help build respect for the rule of law in Afghanistan.

The plight of these detainees transferred out of Guantánamo will be a rude awakening for the next administration, but so will those of the detainees who never made it to Cuba. The war in Afghanistan is ongoing, and shows no signs that it will be over by 2009. American and other NATO forces fighting alongside the Afghan National Army regularly take prisoners during military operations against a resurgent Taliban and Al Qaeda. Contrary to the earlier phases of this war, these detainees are no longer sent to Guantánamo, rather they are held at the Bagram Theater Internment Facility at Bagram Air Base outside Kabul.<sup>8</sup>

Bagram was only thought to be a temporary detention site, but now the Bagram Theater Internment Facility is Guantánamo's mostly hidden bigger brother. More than 600 detainees are held in the kind of wire pens that blighted Guantánamo's landscape for the first years of its existence and expose prisoners to toxins from the remnants of Soviet aircraft that litter the compound.<sup>9</sup> Though in American custody, these detainees do not share even the limited ability to review their detention afforded their fellow detainees at Guantánamo.

The continuing need to detain such prisoners, and the poor existing facilities at Bagram and other Afghan prisons, has caused the Bush administration to conclude that the United States should build a large American-run detention camp outside Kabul, ensuring that the next president will inherit Guantánamo and all of its siblings.<sup>10</sup>

# Who are the Detainees?

Since Guantánamo accepted its first detainees in January 2002, at least 778 individuals have passed through its gates from at least 48 countries. The population grew for several years until a late 2004 decision by the National Security Council, which halted most transfers to Guantánamo, began to reverse the trend. Approximately 500 of the detainees have now been transferred back to their home countries either for further imprisonment or more often for release, leaving a current population of approximately 270, according to the Department of Defense.<sup>11</sup>

Information on these detainees is scarce, but an analysis of publicly available data reveals the names and nationalities of 428 detainees who have been transferred and six who have died in custody, and nationality alone can be confirmed for another 44 detainees.<sup>12</sup> A broad picture of the remaining detainee population emerges from this data even if this list cannot account for all of the detainees who have left Guantánamo.

More Afghans than any other nationality have been imprisoned at Guantánamo—217 of the 774 total detainees to pass through its gates. The U.S. and Afghan governments reached an agreement to send most of those prisoners back to Afghanistan, and as a result, only 30 remain, still the second-largest national group at Guantánamo.<sup>13</sup> Many detainees from Saudi Arabia and Pakistan have also been returned to their home countries; now 20 Saudis and only nine Pakistanis remain in Cuba. These national groups have experienced the most reductions; it is those that have not had these reductions that present the most significant challenges to closing Guantánamo.

Yemenis are the largest nationality still at Guantánamo, with close to 100 detainees, or more than one-third of the total prison population. Only a handful have been sent home out of the 109 brought to the prison since 2002.<sup>14</sup> And even though neither Algeria, Tunisia, nor China had particularly large original populations, nationals from these countries make up a significant portion of those who remain, with 48 still at Guantánamo from a combined original population of 57 detainees. None of the other 28 nationalities remaining at Guantánamo number any more than eight.

Understanding the detainee population goes beyond national identification, however, and any effort to close Guantánamo must begin with the recognition that it is not a homogeneous body. It is composed of at least three distinct groups that require different solutions to reduce their numbers.

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## Category One: Detainees Selected for Criminal Prosecution

Suspected Al Qaeda terrorists and other detainees slated to be prosecuted are the group that the Bush administration originally believed would make up the entire population. Indeed, this was the impetus for both locating the prison camp in Guantánamo and establishing the Military Commissions. But it turns out that these detainees represent a far smaller percentage of the Guantánamo population than first suggested, and range from high-value detainees that can be appropriately labeled the “worst of the worst,” such as 9/11 mastermind Khalid Sheik Mohammed, to those accused of much lower levels of terrorist activity, such as Osama bin Laden’s driver, Salim Ahmed Hamdan.

Charges have already been filed against 19 Guantánamo detainees, and the Pentagon hopes to ultimately bring a case against as many 80 detainees in the current Military Commissions system.<sup>15</sup> This estimation from the Bush administration would certainly be the upper boundary of this group; given its track record categorizing these detainees, it is likely that the actual number that could stand trial in some venue is significantly lower.

Attempting to determine the low end of this group is not any easier. Prior to the June 2006 Supreme Court decision, 10 detainees had been charged in the original construction of the Military Commissions.<sup>16</sup> In September of that year, the president authorized transferring 14 “high-value” detainees to Guantánamo that had been held at secret CIA-run prisons.<sup>17</sup> These detainees included top Al Qaeda figures such as Khalid Sheik Mohammed, Abu Zubaydeh, and Ramzi bin al Shibh, and it is safe to assume that evidence exists to support criminal charges against each of them in some trial venue. Adding these two groups together, a reasonable low-end estimation of the number of detainees who will stand trial is roughly 25.

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## Category Two: Detainees Selected for Transfer

The second category of detainees are individuals who have either been designated as no longer enemy combatants, or NLECs, by a Combatant Status Review Tribunal or those who could be transferred back to their home countries, but for a variety of reasons, that

transfer has not yet occurred. This group has seen the largest reduction in its numbers, as it constitutes the overwhelming majority of detainees that have been transferred out of Guantánamo. But in many ways, the next president will be a victim of the success in reducing the numbers of this group, because most of the easiest cases have already been sent home, leaving a number of challenging dilemmas still to be resolved.

The Bush administration has cleared for transfer at least 65 detainees who are still languishing at Guantánamo.<sup>18</sup> The most well-known segment of this group is the 17 remaining Uyghurs out of the original 22 captured in Afghanistan in 2001. The Uyghurs are a Central Asian, Muslim ethnic minority currently residing in western China that has resisted the control of the Beijing government. Were they to be returned to China, they would certainly face prison, likely torture and abuse, and probably execution.

In May 2006, five Uyghurs that had filed habeas corpus petitions were transferred to Albania just prior to their hearings.<sup>19</sup> The Chinese government called that transfer a violation of international law, and continued Chinese protests have hampered the effort to move the rest of the Uyghurs, even though they now classified as NLECs and it was determined they were never a threat to the United States.<sup>20</sup>

Serious impediments also exist in transferring other nationalities even if they do not rise to the same level of geopolitical maneuvering. Included in this group are the 22 Algerians and 10 Tunisians stuck at Guantánamo because of legal prohibitions barring their transfer to countries where they face the prospect of torture or abuse. This dilemma is not a smoke-screen for holding additional detainees, such as when a federal judge blocked the Bush administration's attempted transfer of one of the Tunisians in 2007.<sup>21</sup>

On the other side of the spectrum are the close to 100 Yemeni detainees still being held at Guantánamo not because of the threat of mistreatment in prison, but due to the likelihood of release or escape upon their return home. Yemenis are the largest group of detainees remaining at the prison precisely because the Yemeni government lacks sufficient control over its prison system. All of the Al Qaeda terrorists convicted of involvement in the bombing of the USS Cole in the Yemeni port of Aden in 2000 have either been released or have escaped under suspicious circumstances.<sup>22</sup>

The Bush administration has been understandably reluctant to return detainees to Yemeni control in such an environment. It is hard to place an estimate of the size of this group. It is likely that the at least half of the 95 Yemeni detainees, along with the Algerians, Tunisians, and Uyghurs, fall into this category, making its size at least 100 and probably more.

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## Category Three: Detainees Who Cannot Be Tried, But Are Too Dangerous to Release

These first two groups present challenges regarding the implementation of decisions that have largely already been made—how to put detainees accused of crimes on trial and how to move detainees out of Guantánamo after it has been determined that they can be transferred. Those are certainly hard issues to resolve, but at least those challenges are defined. The last category of detainees enjoys no such clarity.

Detainees in this group are not good candidates for trial in any venue as there is little real evidence of criminal activity or at best little information that could be used in court even under the most permissive rules. Many of these detainees, however, were captured in connection with military operations and are believed to be an ongoing threat to the United States and its allies, making them equally poor candidates for transfer or release. This is the group most affected by the Bush administration's perfect security paradigm.

The Defense Intelligence Agency contends that as many as three dozen detainees released from Guantánamo have taken up arms against coalition forces in Afghanistan and other fields of battle. The Pentagon has only provided evidence of six cases, and many outside groups dispute the larger figure, yet hard evidence does exist that a former detainee participated in a suicide attack in Iraq in April 2008.<sup>23</sup>

It is entirely possible that the majority of this group poses little or no ongoing threat. A reasonable argument can be made, however, that it is appropriate to keep some these detainees in custody, especially while fighting is still ongoing in Afghanistan. Policymakers are groping for viable alternatives that satisfy both of these security requirements and provide a lawful basis for continued detention. As a result, this group is both figuratively and literally stuck in Guantánamo.



## Detainee profiles as illustrations of the types of detainees in each category.

### Category One: Candidates for Trial

Ahmed Khalfan Ghailani, a Tanzanian estimated to be in his mid-thirties, was arrested in July 2004 in Gujarat, Pakistan with the assistance of Pakistani authorities. He was subsequently transferred to CIA custody and detained for more than two years at an undisclosed location.<sup>24</sup> In 2006, he and 14 other “high-value detainees” were transferred to Guantánamo. A hearing before a Combat Status Review Tribunal resulted in Ghailani being labeled an unlawful enemy combatant.<sup>25,26</sup>

Ghailani is reported to have travelled to Liberia on behalf of Al Qaeda to engage in the trade of “conflict diamonds” in order to fund further terrorist operations.<sup>27</sup> He is also reported to have acted as a forger, trainer, and soldier for Al Qaeda following their expulsion from Afghanistan after the 2002 U.S. invasion.<sup>28</sup> On March 31, 2008, Ghailani became the 15th detainee to have charges sworn against him under the Military Commissions Act.<sup>29</sup> He has been charged with murder in violation of the laws of war, attacking civilians, and providing material support to terrorism. The charges potentially carry a capital sentence.<sup>30</sup>

Ghailani, however, was well known to American officials long before his arrest in Pakistan and his subsequent detention by the CIA. In December 1998, he was indicted in the Southern District of New York for his role in the bombing of the U.S. Embassy in Dar es Salaam, Tanzania earlier that year.<sup>31</sup> He was accused of procuring detonators and oxygen gas tanks to amplify the force of the blast, after which he fled to Afghanistan. Ghailani debuted at number eight on the FBI’s Most Wanted Terrorists list issued in October 2001.<sup>32</sup>

### Category Two: Candidates for Transfer or Release

Mohammed Abdul Rahman is a Tunisian citizen in his early 40s who was arrested by Pakistani authorities in Quetta and subsequently detained in Guantánamo. In his Combatant Status Review Tribunal hearing, Rahman was determined to be an enemy combatant and accused of having associated with Al Qaeda and the Taliban, staying at several guest houses frequented by suspected terrorists in Afghanistan and Pakistan.<sup>33</sup> Prior to arriving in Pakistan, Rahman was also alleged to have ties to the Tunisian Combat Group, based in Italy, and the Algerian Armed Islamic Group.<sup>34</sup>

During Administrative Review Board hearings conducted in April 2005, he gave the name Lufti Bin Ali; according to the summary of evidence against him, Rahman admitted to having used over 50 aliases between 1988 and 1998.<sup>35,36</sup> At his Combatant Status Review Tribunal, Rahman denied any knowledge of these groups or any associations with terrorists. His protestations of innocence carried enough weight with authorities that the Pentagon approved a recommendation for Rahman’s transfer back to Tunisia in September 2005. He never made it.

Rahman’s attorneys argued that despite his claims of innocence, the allegations that he was associated with the Tunisian Combat Group meant that he would likely be imprisoned and mistreated in Tunisia. In October 2007, Judge Gladys Kessler of the U.S. District Court for the District of Columbia agreed and issued an injunction against transferring Rahman to his native Tunisia on the grounds that he could suffer “irreparable harm” there. Rahman was the first detainee to successfully challenge his repatriation in the courts on the grounds that he would face possible torture or death.<sup>37</sup>

Human Rights Watch and lawyers for previously transferred Tunisian detainees Abdullah bin Omar and Lotfi Lagha reported that Tunisian authorities had defied pledges to the U.S. government that they would not be mistreated, and a State Department human rights report from the same year concluded that Tunisian security agencies routinely used “sleep deprivation, electric shocks, submersion of the head in water, beatings and cigarette burns.”<sup>38,39</sup> Following the ruling, Rahman remains in Guantánamo under uncertain status.

### Category Three: Not Good Candidates for Trial or Release

Very little biographical information is publicly available for Uthman Abdul Rahim Mohammed Uthman, who Defense Department records identify as a Yemeni citizen born in Aden in 1979.<sup>40</sup> According to the unclassified proceedings of his September 2004 Combatant Status Review Tribunal hearings, which he refused to attend in person, Uthman was captured in connection with military operations in the Tora Bora region of Afghanistan following the fall of Kabul. It was further alleged that he had received military training at Al Qaeda facilities in Tarnak Farms and had stayed at Taliban safe houses in Quetta, Pakistan.

In a written response, Uthman maintained that he had travelled to Peshawar and turned himself over to Pakistani authorities in an attempt to return home through the Yemeni embassy, but was subsequently deported back to Kandahar and labeled a member of Al Qaeda instead. Uthman denied all charges and any affiliation with Al Qaeda, and maintains that he was present in Afghanistan from March 2001 through December 2001 as a teacher of the Koran.<sup>41</sup> The 2004 CSRT process affirmed Uthman’s enemy combatant status, but he has not been charged under the Military Commissions Act, and is believed to still be at Guantánamo.



IN THIS IMAGE REVIEWED BY THE U.S. MILITARY, A GUANTANAMO DETAINEE PEERS THROUGH A PLASTIC WINDOW IN CAMP IGUANA DETENTION FACILITY ON THE U.S. NAVAL BASE IN GUANTANAMO BAY, CUBA, WEDNESDAY, NOV. 19, 2008. SOURCE: AP PHOTO

# Obstacles to Closing Guantánamo

As long as the United States aggressively confronts its terrorist enemies, there will be a need to detain those who are captured, punish their actions, and ensure that they are not able to return to the fight against America or its allies. That principle is fairly straightforward, but it has been polluted by the toxic detainee policies of the Bush administration.

Guantánamo is now such a mess that numerous difficult choices will have to be made in order to place U.S. detainee policies back on sound moral and legal footing. There will be many different positions to consider, each with reasonable arguments from supporters and opponents, and no one will be completely satisfied with the outcome. The following are some of the major obstacles in the path to closing Guantánamo.

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## Political Will

It is abundantly clear that some of the detainees at Guantánamo are extremely dangerous and unrepentant mass murderers. These admitted terrorists must be dealt with resolutely, but also justly and fairly. Supporters of Guantánamo tend to view the entire population through the lens of these most dangerous detainees, and it is likely that their criticism of any new policy will center on favoring the rights of terrorists over the security of Americans.

Yet equally clear is the fact that not all of the detainees fit into the “very bad guy” category. From the dramatic arrival of the first hooded and shackled detainees in 2002, the Bush administration has portrayed the Guantánamo detainees as not only terrorists guilty of fighting against American soldiers, but the “worst of the worst,” plucked from large numbers of captured Al Qaeda and Taliban prisoners in Afghanistan. We now know that many of the detainees were either completely innocent, or simply low-level militia fighters who had at one time participated in one of the many conflicts that have plagued Afghanistan for decades. In fact, a recent investigation of released detainees found at least seven that were working for, not fighting against, the Afghan government, but were imprisoned based on false accusations from anti-government forces.<sup>42</sup>

Still, that initial impression has been difficult to shake off, and Americans are conflicted about the future of Guantánamo. The most recent available sampling of American opinion, albeit dating from 2007, shows a nation completely divided, with 46 percent in favor of keeping it open and 45 percent backing closure.<sup>43</sup>

Supporters of the Bush administration have repeatedly manipulated justifiable public anxiety about future acts of terrorism for distinct political advantage, and there is no reason to think that similar efforts will not be made in the debate over ultimately closing Guantánamo. The next president should have no illusions, and supporters of the prison will fight back hard against any effort to close it. That effort will not end with a presidential decision to close the prison, as critics will agitate throughout the process of getting the population to zero.

Detainees returning to the battlefield, regardless of how many have actually done so, have not yet been a major part of the debate surrounding Guantánamo. That will certainly change if the next president attempts to close it. The next president will need to summon the courage to decide to close Guantánamo and the commitment to see the project through to the end.

The Boumediene decision and backlash against it provide a glittering example of the rhetorical fury that will cascade down on the next president throughout any effort to close Guantánamo. It began in the opinion itself when Justice Antonin Scalia delivered a blistering dissent punctuated with the charge that the ruling “will almost certainly cause more Americans to be killed.”<sup>44</sup> Sen. Lindsey Graham (R-SC) distinguished himself among many who castigated the Court’s decision when he called it a “tremendously dangerous and irresponsible ruling.”<sup>45</sup> If this is the level of discourse about a Supreme Court ruling that only allows for the opportunity of a hearing, imagine what it will be like when the next president gets to the business of closing the prison.

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## Legitimacy

After more than six years, three defeats in the Supreme Court, four suicides, and only one politically motivated, plea-bargained conviction, it is safe to say that Guantánamo is judged to be among the least legitimate institutions in an established democracy in the world today. Selected precisely because the Bush administration believed Guantánamo to be outside the law, the prison continues to be a legal black hole that undermines America’s position in the world.

Former and current prisoners, their lawyers, and rule of law advocates in the United States and abroad have long held that Guantánamo is unlawful and its newly crafted legal procedures are a sham. Just in the last year, those criticisms have been given additional weight by allegations from within the uniformed military legal establishment that confirm some of the most serious allegations against Guantánamo.

A former panelist serving on the Combatant Status Review Tribunals, Lt. Col. Stephen Abraham, said that the prosecutors relied on weak and vague intelligence information to make their case, and that superiors pressured the review boards to rule against the detain-

ees.<sup>46</sup> In a sworn affidavit, Abraham said, “What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence.”<sup>47</sup>

Then came the resignation of Col. Morris D. Davis, the chief prosecutor overseeing the Military Commissions. Davis charged that his superiors in Washington had exercised undue influence over the Commission process, that Defense Department General Counsel William J. Haynes told him categorically that “there will be no acquittals,” and that throughout 2007, the senior legal advisor to the Commission convening authority, Brig. Gen. Thomas W. Hartmann, pressed for “sexy” cases that could have “strategic political value” prior to the 2008 elections. Davis resigned in October 2007.<sup>48</sup>

On February 11, 2008, Gen. Hartmann addressed the world’s media, announcing that six Guantánamo detainees, included alleged 9/11 mastermind Khalid Sheik Mohammed, would be charged with war crimes and could face the death penalty.<sup>49</sup> The decision to proceed to the most complex case in any courtroom—a death penalty case—before there had even been a pretrial hearing that was free of problems, puzzled many legal scholars and renewed concerns that these charges were politically motivated.<sup>50</sup>

The announcement of the first charges brought against 9/11 conspirators should have been a historic moment of great importance and value for democracies and the rule of law. Unfortunately, that moment was tainted by revelations the previous week by CIA Director Michael Hayden that Khalid Sheik Mohammed and at least two other detainees had been waterboarded. Serious debate continues to rage about whether the Military Commissions were anything more than show-trials, creating a huge legitimacy deficit that will have to be overturned before our system of justice and global standing can return to equilibrium.<sup>51</sup>

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## Security

Criticizing the Bush administration’s pursuit of perfect security should not be conflated with an effort to minimize the real threats posed by some Guantánamo detainees. Even though a large portion of the detainees should never have been described as the “worst of the worst,” some of them clearly are.

In addition to Khalid Sheik Mohammed, there are other senior Al Qaeda figures at Guantánamo such as Ramzi bin al Shibh and Abu Zubaydeh, as well as individuals implicated in the attacks on U.S. embassies in Africa and the U.S.S. Cole. It is a heavy burden to ensure that these terrorists are kept locked away, but existing U.S. institutions have had a great deal of experience dealing with these types of dangerous terrorists.

The Supermax in Florence, Colorado, currently holds convicted terrorists Omar Abdel-Rahman (the “Blind Sheik”), Zacarias Moussaoui, Richard Reid (the shoe bomber), Jose Padilla, Wadhi el-Hage (1998 U.S. embassy bombings), and Ramzi Yousef, the master-

mind of the first World Trade Center bombing in 1993, among other notable high-security prisoners.<sup>52</sup> These terrorists are more securely detained than any at Guantánamo, as no doubt exists regarding the lawfulness of their detention.

Yet in many ways, the high-value detainees do not represent the greatest security challenge of those remaining at Guantánamo—they will be tried in some venue, the guilty will likely be convicted, and they will be sentenced to long prison sentences in secure facilities. Oddly, the detainees who are not as obviously dangerous as the Khalid Sheik Mohammeds of Guantánamo and are unlikely to ever face a trial in any venue are the ones who pose the greatest security challenge.

Whether it is the dozens of detainees that the Bush administration often cites, or far fewer, it is clear that some of the detainees transferred out of Guantánamo have committed violent acts upon release. Knowing which ones are likely to commit acts of violence or otherwise seek retribution is very difficult, although some detainees have reportedly told interrogators that they would if they are released. Former General Barry McCaffery conducted a review of Guantánamo and its detainee population for the U.S. Military Academy in June 2006 and reported that “eighty-five percent of Detainees tell U.S. interrogators that when released they will try and kill Americans.”<sup>53</sup>

That has led some to suggest as an alternative to Guantánamo that we create a new, more limited regime of preventive detention, often described as a National Security Court system, to ensure that these detainees are not able to follow through on those declarations.<sup>54</sup> This concept raises a number of problems, principally that it seems to criminalize some vague notion of intent of future action, creates another legally suspect system of detention and trial, and does not do anything to resolve the issue of how to decide when to release these detainees, something that will eventually have to occur unless advocates foresee life imprisonment.

Others recommend the outright release of these detainees, arguing that if no charge can be brought, then continued detention cannot be supported, and regardless, this group makes up only a tiny fraction of worldwide terrorist operatives, so releasing them does not represent significant additional risk.<sup>55</sup> That argument is persuasive on principle, but simply releasing large numbers of Guantánamo detainees does not seem any more wise or politically viable for a new administration than continuing the Bush administration’s plan of indefinite detention. It would seem prudent to explore alternatives to both preventive detention and outright release.

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## International Cooperation

The Bush administration has only itself to blame for the near total lack of meaningful international cooperation in detaining suspected terrorists captured since 9/11. The decision to transport the detainees out of the theater of operations in Afghanistan without



any recognized legal process to a U.S. military base cemented America's responsibility and problem. Labeling the detainees as the "worst of the worst" virtually guaranteed that few countries would want to take these detainees back.

Compounding many nations' reluctance was the adamant refusal of the United States to accept any of these detainees on the U.S. mainland. Many allied democratic governments were never comfortable with the controversial practices and policies at Guantánamo, and as international criticism grew, the prison became a hot issue in their domestic politics, further curtailing what limited cooperation existed.

The kind of international cooperation the Bush administration was getting—secret CIA prisons and shadowy extraordinary rendition over flights—was not the type of assistance that would be helpful in ultimately resolving the controversy surrounding Guantánamo.<sup>56</sup>

Yes, these problems are largely of America's own making. And yes, the United States does bear significant responsibility to take the first steps toward rectifying them. But they are serious problems nonetheless, and they are problems that the United States cannot solve on its own. Any final resolution of Guantánamo is going to depend on a significant amount of assistance and cooperation from America's allies, whether that is facilitating the transfer, release, or resettlement of detainees, or supporting a new administration as it seeks to craft a workable solution.

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## Trials and Evidence

If these previous obstacles were challenging, resolving the issue of terrorism trials, a thorny problem that blends concerns of legitimacy and security, is when closing Guantánamo starts to get really difficult. The subset of Guantánamo detainees at issue is surprisingly small—the Pentagon's maximum number is only 80—yet the implications of the resolution can either consign American justice to the trash heap of history along with Stalin's show trials or begin the rehabilitation of the United States as a champion of the rule of law.

The effort to put large numbers of suspected terrorists on trial does raise a host of non-frivolous problems. Previous federal terrorism trials, such as the African embassy bombings case, have resulted from massive federal investigations led by U.S. Attorneys cooperating with the FBI, been complicated and expensive efforts lasting years, and often required significant additional security procedures for participants in the case that can last well beyond the end of the trial. Furthermore, almost any trial of this nature would rely heavily on the use of classified and other sensitive intelligence information that may be difficult to use in open court.

Those cases seem straightforward when compared with prospective trials of suspected terrorists that require the cooperation not just of U.S. law-enforcement agencies, but also the military, and U.S. and foreign intelligence services operating 10,000 miles from the trial



venue. Confronting what at the time seemed like the prospect of dozens, if not hundreds of such cases, it is not unreasonable for policymakers to seek alternatives to clogging the federal courts for years.

We know now, of course, that the November 2001 decision by the Bush administration to circumvent existing civil and military courts and establish special military commissions was not a carefully considered move to protect the U.S. justice system. Rather it was a plan hatched in the vice president's office to organize the conviction of the Guantánamo detainees taken directly to President Bush for his approval.

The vice president's office cut the entire national security bureaucracy out of the loop, including National Security Advisor Condoleezza Rice and her top lawyer, White House Counsel Alberto Gonzales, Secretary of State Colin Powell and his legal team that had been leading a working group to develop a plan to put terrorism suspects on trial, and even Attorney General Ashcroft and most of the Justice Department.<sup>57</sup> This departure from convention has been a complete failure, spawned congressional legislation and numerous Supreme Court cases, and has managed to produce only one measly, plea-bargained conviction.

The latest Supreme Court setback has brought renewed attention to another proposed alternative to regular federal or military trials—National Security Courts.<sup>58</sup> While there are many different proposals to create such courts, the general conception is similar throughout: establish a distinct, specialized court system with jurisdiction to try some terrorist suspects and preventively detain others.<sup>59</sup> It is argued that this system could be crafted to avoid many of the procedural hurdles of regular courts yet still maintain a connection to the traditional American justice system.

Concerns about terrorism trials are not limited to security, however; some civil liberties advocates worry that terrorism trials could contaminate the federal criminal system. They fear that a large number of trials for Guantánamo detainees or other suspected terrorists would pollute the federal justice system with weak cases based exclusively on conspiracy or material support for terrorism charges that would force rulings so expansive that it would punish pre-criminal activity and blur the lines of innocent association.<sup>60</sup>

These concerns are justified, as the experience during another “war on,” this time on drugs, has wreaked havoc in the judicial system, producing numerous unwarranted arrests and convictions that disproportionately affected minority communities with laws that often tie the hands of many judges. It is not clear what the remedy would be, though these same civil liberties advocates have been among the harshest critics of the Bush administration's Military Commission system and would certainly not advocate for its continuation.



IN THIS IMAGE REVIEWED BY THE U.S. MILITARY, JOURNALISTS LEAVE THE HANGAR WHICH HOUSES THE MEDIA CENTER TO ATTEND A PRE-TRIAL SESSION FOR KHALID SHEIKH MOHAMMED AND HIS FOUR CO-DEFENDANTS ON CHARGES RELATED TO THE 9/11 ATTACKS AT CAMP JUSTICE, ON THE U.S. NAVAL BASE IN GUANTÁNAMO BAY, CUBA, MONDAY, DEC. 8, 2008. SOURCE: AP PHOTO.

Unfortunately for the next president, all the original problems remain, and a host of other ones that simply did not exist in 2001 have now been added to the list. Serious questions will be raised about the admissibility of a significant amount of the evidence against many of the detainees. Either it is of dubious reliability with hazy chains of custody, the trail has gone cold after more than six years at Guantánamo, it is based on intelligence information and the agencies involved are reluctant to have it aired in court, or it has been collected through interrogations that do not meet virtually any standard of admissibility.

The conditions of confinement and the treatment the detainees received in U.S. custody further complicate efforts to put them on trial, a situation only made worse by Director Hayden's recent admission on waterboarding. Finally, many of the detainees reportedly exhibit severe psychological trauma and may not be competent to stand trial.<sup>61</sup> These may be problems of the Bush administration's making, but they are problems nonetheless, and in order to close Guantánamo, they must be overcome.

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## Relocating Detainees

This is by far the most difficult part of closing Guantánamo, as there are problems related to each of the three categories of detainees and any effort to ultimately reduce the prison's population to zero will require many different solutions.



IN THIS IMAGE REVIEWED BY THE U.S. MILITARY, GUARDS ESCORT A GUANTANAMO DETAINEE CARRYING A BOOK AT THE CAMP 4 DETENTION FACILITY AT THE U.S. NAVAL OPEN AIR COMMON AREA AT THE U.S. MILITARY BASE, IN GUANTANAMO BAY, CUBA, EARLY MORNING TUESDAY, NOV. 18, 2008. SOURCE: AP PHOTO.

The Bush administration has pursued a strategy of nationality based solutions to reduce the numbers at Guantánamo. This requires a series of individual agreements with different countries, which can rarely be replicated.

The next administration will face resistance from within the United States to bringing detainees onto the U.S. mainland and numerous problems transferring detainees to their home countries. Additionally, the next administration will be a victim not only of the Bush administration's many failures, but also of some of its successes as most of the detainees with ready-made solutions, such as nationals of allied governments like Britain, France, and Spain, are already gone, leaving only the hard cases.

In the category of detainees who could be transferred out of Guantánamo, serious complications hamper efforts to send home detainees from Yemen, China, Tunisia, and Algeria. Perversely, problems exist on both ends of the spectrum, with justifiable fears that some governments will be too soft on returning detainees and concerns mixed with legal prohibitions barring transfer because other governments are too hard.

Yemenis are the largest group of detainees remaining at the prison precisely because the Yemeni government lacks sufficient control over its prison system. All of the Al Qaeda terrorists convicted of involvement in the bombing of the USS Cole in the Yemeni port of Aden in 2000 have either been released or have escaped under suspicious circumstances.<sup>62</sup> Under these conditions, it is understandable that so few have been sent back to Yemen, but to close Guantánamo, a solution will have to be found.

A solution will also have to be found to the vexing problem of the Uyghurs. The Chinese government wants them back, but international treaties prohibit the transfer of prisoners who face the likelihood of torture or mistreatment, as they surely would. Many countries fear repercussions from the Chinese if they accepted the Uyghurs, and so far only Albania has agreed to take nine of the 25 at Guantánamo. A federal judge cited those same treaty restrictions in blocking the transfer of Tunisian detainees and similar concerns have stalled efforts for Algerians, leaving a disproportionate number of those nationals toiling at Guantánamo.

The Bush administration's attempts to find a solution to these problems in Afghanistan have so far been a failure. Starting in 2006, many Afghan detainees were sent home as part of an agreement between the Bush and Karzai governments that saw the United States help rebuild prison facilities to handle Afghans at Guantánamo and those being held at the Bagram Theater Interment Facility. The Afghan prison at Pul-i-Charki, however, has if anything worsened the plight of the detainees sent there from Cuba.

At Pul-i-Charki, an infamous prison site once used by the Communist government during the 1980s, prisoners face the worst excesses of the original Bush administration detention scheme—closed door trials and secret evidence—prompting hunger strikes as have happened at Guantánamo.<sup>63</sup> Simply creating another Guantánamo that is someone else's problem is not a responsible solution.

Any effort to bring even a small number of Guantánamo detainees into the mainland United States will encounter political resistance. Given the long Bush administration campaign to label the detainees as the “worst of the worst,” not-in-my-backyard concerns should be expected. Added to the objections to imprisoning the Guantánamo detainees inside the United States will be fears that they will be released due to their uncertain legal status.

One un-named government official already stoked that fire in a recent Los Angeles Times article, warning that if one suggested alternative to Guantánamo—moving the detainees to the U.S. Military Disciplinary Barracks at Ft. Leavenworth, Kansas—was carried out, “then you would have 100-plus future sleeper cell members unleashed in Kansas” if they were released.<sup>64</sup>

# A Five-Phase Plan for Getting to Zero

There is no easy answer or silver bullet that will overcome all of the obstacles to closing Guantánamo in one fell swoop, and too much eagerness to demonstrate change could lead to new mistakes. The Bush administration's rushed decisions regarding detainees got us into this mess in the first place. Care must be taken to avoid similar mistakes getting out of it. This five-step plan is a practical solution to the legal, moral, and security challenges of closing Guantánamo.

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## Phase One: Immediately Change the Dynamic at Guantánamo

The next administration will have a period early in 2009 when it can demonstrate that American policy will be significantly different than it was under the Bush administration. It seems likely, however, that the window will be brief, as the United States has lost the benefit of its past leadership on human rights and the rule of law. Consequently, the next president must take immediate steps to change the dynamic at Guantánamo or risk consigning the United States as a whole to a similar standing as the Bush administration.

The challenge is that it will be impossible to make all the necessary decisions and changes to close Guantánamo before that window shuts. It will take time for the new administration to get a grip on the situation, creating a steep learning curve as it builds rapport and trust with the military and intelligence services that have overseen detainee policy since 9/11.

To signal a clear, early departure from the Bush administration without rushing important decisions, the next president should, soon after taking office, announce that the last detainee at Guantánamo will be transferred in no longer than 18 months. This move could come as soon as the Inaugural Address or the first week of the administration, meaning the target date for getting to zero would be around July 20, 2010.

A definitive statement will demonstrate that the next president has summoned the necessary political will to close the prison. There can be no hiding behind vague claims such as President Bush's disingenuous "I would like to close Guantánamo." It demonstrates a tangible shift in policy from the Bush administration, leaving no doubt that the new president will take U.S. detainee policy in a different direction.

The announcement will also establish a realistic 18-month timetable, which will give policy-makers the opportunity to work through the difficult challenges of getting to zero without drag-

ging the process out indefinitely. And it changes the frame of the debate from “should we close Guantánamo” to “how do we get it done?” Establishing a firm date to close the prison starts the clock ticking, creating additional motivation to find solutions to even the most difficult challenges related to closing the prison.

Establishing a firm deadline for closure will create an opening for the United States, but it will not completely change the dynamic at Guantánamo after seven years of mistrust. Actions will be required, not merely words, no matter how different they are from the past. Under President Bush, Guantánamo has become a symbol of lawlessness and those impatient for its closure will not look kindly upon a decision to continue the life of the prison for another 18 months, no matter the prudence of that course. Even as the next administration works to close the prison, it should also strive to turn what is now an emblem of secrecy into a model of transparency.

The next administration should invite representatives of any nation that has, or had, detainees at Guantánamo to tour the facility and publicly report its findings. Oversight should be sought from international organizations and American professional associations including the United Nations, NATO, the American Medical Association, the American Bar Association, and the American Psychiatric Association. Importantly, these groups should have appropriate access to the detainees themselves. (The International Committee of the Red Cross already has access to Guantánamo, but as a matter of organization policy, its reports are not made public). The active participation of these groups is vital to closing Guantánamo and the new message about the prison should be clear: the United States will no longer be afraid of examination because it no longer has anything to hide.

The last step in the first phase is to order a top-to-bottom review of the case against each Guantánamo detainee. This process is necessary to accurately determine whether a detainee is properly categorized, rather than relying on earlier classifications made in a tainted system. Only after this process is completed will the new administration have a clear understanding of the makeup of the detainee population at Guantánamo and be able to proceed with confidence toward the goal of closing the prison in 18 months.

Neither the timeline nor the process should be interpreted as a mechanism to keep the population of the prison at existing levels throughout the 18-month period. Real urgency exists to resolve the fate of these detainees, and the program to close Guantánamo should begin to move detainees out of the prison as rapidly as possible. Consequently, these reviews should take place in the first weeks of the new administration and be completed in a maximum of one month.

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## Phase Two: The First Transfers

Changing the dynamic at Guantánamo only gets the next administration to the starting line of the actual objective: getting the detainee population down to zero. The real challenge begins when the decision is made to transfer the first detainees out of the prison.



Hundreds of detainees have been moved out of Guantánamo with little appreciable effect on how the prison is perceived. Many nations, even some strong allies, have looked scornfully at these earlier transfers as an attempt by the Bush administration to pass off its problems onto other countries, particularly as it steadfastly refused to accept detainees within the United States. As a result, the next administration's first transfers will carry additional symbolic weight, as they will be the opening step in a process with a clear goal of closing the prison, not merely shipping out the easy or non-threatening cases.

The next administration should transfer into the United States as many as five, and as few as one or two, Guantánamo detainees accused of serious crimes, but not the gravest, to stand trial in either federal or military courts. This action can be accomplished with the greatest practical speed as it does not require any negotiation or agreement, simply a decision to move the location of detention and venue for trial while maintaining the detainees in U.S. custody.

Moving detainees first into the United States would be a strong signal to the international community that this new administration really is intent on pursuing a significantly different detainee policy than the Bush administration. Casting aside the failed experiment of Military Commissions and rejecting any new push to establish National Security Courts in favor of existing U.S. federal and military courts would also help return the United States to the path of fairness and justice.

The Bush administration's experiment with Military Commissions has been an abject failure. The next administration should not repeat President Bush's mistake by creating National Security Courts to serve as a substitute justice system when a perfectly good one already exists. There are procedural challenges to trials in regular courts, but any attempt to circumvent a structure designed to ensure a fair trial will be met with deserved scorn. Given the long history of litigation surrounding the Military Commissions, any National Security Court system would likely face legal challenges heaping additional delays on a process that has already been waylaid for more than six years.

Thinking beyond the immediate situation, establishing a National Security Court system for terrorism cases is extremely problematic. The model most often cited for National Security Courts is the Foreign Intelligence Surveillance Court, which was established by Congress in 1978 exclusively to hear government applications of surveillance warrants in national security cases.<sup>65</sup> It is noteworthy that the first time the court denied the government's request for a warrant was in 2002, and that decision was overturned on appeal.<sup>66</sup>

It is likely that such a court system would become very efficient at convicting defendants. In fact, one of the proposals goes so far as to "unapologetically" presume the defendants are guilty, reject a system of equality before the law, and establish a clear preference that defendants be convicted and harshly sentenced.<sup>67</sup> In such a scheme, why even bother with the hassle of a trial?

National Security Courts undoubtedly create a significant potential for abuse. A permanent National Security Court system that is exceptionally good at convicting defendants will become an irresistible avenue for the government to virtually guarantee successful prosecutions. Such a process would be less disturbing if the Bush administration had done a good job of identifying who the real bad guys are. But when we learn that Guantánamo not only held many innocents, but people who were actually on our side, creating a quasi-judicial rubber stamp of such potentially flawed decisions loses all appeal.

Bringing only a small number of detainees to the United States at first would not overly tax either federal or military courts and would allay public fears of the mass transfer of suspected terrorists into the United States. It would also be an opportunity to build confidence among the American people that existing institutions have the capacity to handle the trial and imprisonment of terrorists.

Two post-9/11 terrorism trials, those of Zacarias Moussaoui and Jose Padilla, highlight many of the challenges identified in the previous section: long-term confinement outside the traditional boundaries of the law; allegations of mistreatment at the hands of U.S. officials; access to intelligence and other classified information at trial; the psychological competence of the defendants; and the security of the court.

Moussaoui, in federal custody on 9/11, was originally believed to be the so-called “20th hijacker” and was the first and so far only individual charged with complicity in those attacks. Originally representing himself, Moussaoui peppered the court with diatribes and threatening rants in the guise of legal motions until the judge finally stepped in and reinstated his defense counsel.<sup>68</sup> During the case, the judge issued numerous orders to protect against the revelation of classified material, even at times allowing only defense counsel and not Moussaoui to view classified documents.<sup>69</sup>

The trial became bogged down over defense access to high-value Al Qaeda operatives in U.S. custody when the government defied the trial judge’s order to allow videotaped depositions of specific detainees.<sup>70</sup> The judge sanctioned the government for this defiance, ruling that it could not reference the 9/11 attacks during its case or seek the death penalty, but the U.S. Court of Appeals for the Fourth Circuit eventually overturned the district judge’s decision, and granted Moussaoui’s defense only the ability to present written statements from these witnesses. The Supreme Court concurred, allowing the trial to proceed after a two-year delay.<sup>71</sup>

Moussaoui then pled guilty, but prosecutors failed to persuade the jury to impose the death penalty, and Moussaoui is serving a life sentence at the federal penitentiary at Florence, Colorado, the “Supermax” prison that also holds numerous other convicted terrorists.<sup>72</sup>

Moussaoui’s prosecution was erratic, but simple when compared to Jose Padilla’s case. Padilla, an American citizen, was detained without charge as an “enemy combatant” without access to a lawyer or a venue to contest his detention amid suspicions that he was planning to detonate radiological or “dirty bombs” in the United States at the behest of Khalid Sheik Mohammad.<sup>73</sup>



Padilla's fate is similar to the Guantánamo detainees in that he was held for an extended period outside the law. It's not directly analogous because he was captured at Chicago's O'Hare airport, far from any battlefield. Several courts ruled in Padilla's favor, gradually improving the conditions of his confinement. Then just prior to his case being argued before the Supreme Court, the Bush administration transferred Padilla to civilian custody and indicted him and two others on charges of conspiracy to commit murder and material support for terrorism unrelated to the alleged dirty bomb plot.<sup>74</sup>

Padilla's attorneys argued that he was tortured during his detention as an enemy combatant and he was psychologically unfit to stand trial, but after court hearings on both matters, the judge rejected both defense arguments, yet also threw out the conspiracy to commit murder charges, thus ending the possibility that Padilla could be sentenced to life in prison.<sup>75</sup> The jury did not hear any evidence related to the alleged dirty bomb plot, nor did it hear from the defense that Padilla was held without charges for more than three years. He was eventually convicted, and is currently serving his 17-year sentence also at the Supermax.<sup>76</sup>

These cases, while at times extremely contentious, illustrate a judicial system working through the difficult aspects of terrorism trials. Moussaoui proved a difficult defendant who sought information the government was reluctant to provide, but a reasonable compromise was reached, and the trial eventually proceeded. Evidence of abuse did not emerge as a key aspect of Padilla's trial, as it likely will in any Guantánamo case. The case against him also appeared thin, drawing a rebuke from the judge that the indictment was "light on facts."<sup>77</sup> Yet, the prosecution was successful in demonstrating that the criminal justice system can handle hard cases.

There is plenty to criticize in each prosecution, but fears that judges and juries would merely rubber stamp the prosecutors' decisions proved unjustified. The bottom line is that established U.S. federal and military courts are vastly superior venues to work through the challenging issues of terrorism prosecutions than the poorly conceived Military Commissions or any new National Security Courts that appear as if they were organized to convict, rather than render fair decisions of guilt or innocence.

Without a thorough case-by-case review of the detainees, it is impossible to say exactly which detainees satisfy these requirements, but one case in particular is illustrative of the type that could qualify. In April, military prosecutors charged Ahmed Khalfan Ghailani, a Tanzanian, with war crimes for his role in the 1998 bombing of the U.S. Embassy in Tanzania in a military commission at Guantánamo. A senior Al Qaeda operative, Ghailani was captured by Pakistani forces in 2004 and handed over to the United States. He was then held at secret CIA-run prisons until he was transferred to Guantánamo along with 13 other high-value detainees in 2006.

The war crimes charges are not the only ones filed by U.S. officials against Ghailani; he was indicted in federal court in New York in 1998 for his role in the embassy bombing. Four other men were convicted in that case and are currently serving life sentences at Florence.

Ghailani's imprisonment by the CIA would undoubtedly be a complicating factor at any fair trial, whether it is in a U.S. court or Military Commission, but the fact that he is already under federal indictment, and that a successful case has already been made against others accused of involvement in this same crime, augurs that Ghailani could still be convicted in a U.S. court. No trial in a case like this would be speedy, but prosecutors could return to Ghailani's case and get it back into court faster than if they had to start from scratch.

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### Phase Three: Resettlement and Rehabilitation

Guantánamo is an American creation, and the first two phases in closing the prison are focused on actions of the U.S. government. Yet these steps will have only a small initial effect on the population of the prison, indicating that although Guantánamo is an American problem, any attempt to close it will require significant international cooperation and participation.

Nowhere is this more evident than in the cases of detainees that have been slated for transfer or release, but cannot be sent to their home countries in most cases because of concerns that they will be subject to mistreatment upon their return. Whether it is the fear of torture and abuse in Algerian and Tunisian prisons, or the likely execution of the Uyghurs should they ever fall into the hands of the Chinese government, these are classic instances when asylum is the only plausible route to release.

It would be a powerful symbol if the United States accepted some of these detainees. But that may be a bridge too far politically. There would be real concerns for their safety in the United States, and it is questionable whether any of them would actually want to reside in the country that imprisoned them for so long.

Asylum in a third country is the best option, yet few, if any, nations appear eager to assist in this process. This reticence can likely be explained by justifiable concerns about being associated with the disastrous policies of the Bush administration, and in the case of the Uyghurs, strong resistance from the Chinese government to any country accepting them.

With the yoke of the Bush administration removed, and the radically altered perception of Guantánamo gaining momentum early in 2009, this resistance may begin to recede. To further encourage this process, the new administration should establish a resettlement program specifically tasked with the mission of identifying countries willing to provide asylum to Guantánamo detainees that are determined to be of no continuing threat, but for whatever reason cannot be sent back to their home countries.

Finding new homes for the Algerians, Tunisians, and Uyghurs would remove nearly 50 detainees from Guantánamo. Surely other detainees are in similar predicaments, such as some of the nine Syrians, eight Libyans, six Sudanese, the three Egyptians, and five each from Tajikistan and Uzbekistan—all countries that have deplorable human rights records.

It is impossible to determine from the outside how many of these detainees would satisfy the requirements of those ready for release, but it is clear that a large portion of this group would. This part of the resettlement process could remove as many as one-third of the remaining population.

This effort should not conclude with only those detainees who have previously been slated for release. Programs designed to encourage radicals to give up militant ideology have shown signs of success, and offer a pathway back into society for detainees.

A religious rehabilitation program in Saudi Arabia hastened the transfer of numerous Saudis out of Guantánamo, a process that has seen more than 100 sent home.<sup>78</sup> Although not connected to Guantánamo, similar efforts are underway in both Indonesia and Singapore. These types of programs have even found their way into U.S. detention operations in Iraq, with opportunities for religious discussions and vocational training given to Iraqi detainees in an effort to smooth their re-entry into Iraq society.

Even in the midst of the intense fighting in Iraq, more than 8,000 detainees have been released after participation in this program, and less than 1 percent have returned to the battlefield or been recaptured.<sup>79</sup> That rate of recidivism is far below the 5 to 10 percent figures often cited by the Bush administration of the number of released Guantánamo detainees that return to the fight.<sup>80</sup> The Yemeni government has instituted a similar program, but it is widely perceived to be a cover to release the prisoners as they return from Guantánamo, another factor leading to so many Yemenis still in U.S. custody.<sup>81</sup>

It makes no sense to restrict these opportunities by nationality, and if a similar program has proven successful for U.S. detainee operations in Iraq, there is no reason not to institute it at Guantánamo. It is difficult to pinpoint exactly how many detainees would come through such a program ready for release, but it would likely push those eligible for resettlement to at least half of the 270 detainees currently at Guantánamo.

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## Phase Four: Pre-Trial Detention in the United States

The cases against Ghailani and any other detainees first transferred out of Guantánamo to the United States are the beginning of a chain of events that will inevitably lead to some number of detainees standing trial in U.S. courts. Just how many is hard to predict, but it will certainly be fewer than the Bush administration's very optimistic estimation that 60 to 80 Guantánamo detainees could ultimately be charged in Military Commissions.

Contrary to the urgency required for the detainees set for release, cautious deliberation is necessary to identify which detainees should be charged, whether they should be tried in federal or military courts, where those trials should take place, and where the detainees should be held prior to trial. Making those determinations will require unprecedented cooperation between the Department of Defense, the agency currently responsible for trials in military courts and

holder of all detainee information, and the Department of Justice, the agency responsible for any federal criminal trials and holder of all the experience with terrorism prosecutions in federal courts.

Clear lines of responsibility and accountability are necessary to ensure that this process is successful. The next president should therefore direct the National Security Advisor to create and oversee a joint Department of Defense-Department of Justice task force to review each case currently being considered for charges in Military Commissions. The task force would make recommendations about whether charges should be filed in federal or military courts, and whether any charges should be filed at all.

Most of the 16 detainees charged in the Military Commissions as of this writing are accused of actions that would be most appropriately tried in federal courts. One example is Salim Ahmed Hamdan, a Yemeni who was captured in November 2001 in Afghanistan and has been charged with providing material support for terrorism and conspiracy to commit terrorism.<sup>82</sup> Hamdan, known colloquially as Osama bin Laden's chauffeur, is the named plaintiff in the 2006 Supreme Court case that overturned the Bush administration's Military Commissions program.

Hamdan allegedly conspired with bin Laden and other senior Al Qaeda officials to, among other overt acts, transport weapons and other materials for Al Qaeda.<sup>83</sup> None of Hamdan's alleged activities took place on the battlefield, and they are much more analogous to material support for terrorism cases that have been prosecuted in federal courts, which would be the most appropriate venue for any trial in this case.

Simply examining the charges filed against Hamdan, it is impossible to know how much of the evidence that the government possesses would be admissible in federal court. Information from his interrogations will likely be viewed with skepticism, as will information related to Hamdan gathered during interrogations of other detainees. If some or all of Hamdan's own statements are ruled inadmissible, the case will turn on other evidence in the government's possession and whether it meets the standard of admissibility in federal court. The only way to find out is to work through the discovery process in court; prosecutors will learn a great deal about how judges will handle these difficult questions in the early stages of cases such as Hamdan's.

Identifying cases better suited for a general courts-martial among those already charged will be more difficult. One such case could be that of Mohammed Jawad, an Afghan captured in 2002, who has been charged with attempted murder in violation of the laws of war for allegedly throwing a hand grenade into a vehicle driven by U.S. military personnel near Kabul in December 2002.<sup>84</sup>

According to eyewitness accounts, Jawad was not wearing a military uniform and was not otherwise identifiable as an enemy soldier—the basis for the charge that Jawad's action violated the laws of war.<sup>85</sup> These charges are directly linked to the field of battle during active military operations; consequently the appropriate venue for Jawad's trial is a general court-martial on charges of violating the laws of war.

However, Jawad and the other detainee charged for actions that took place on the battlefield, Omar Khadr, were both minors when their alleged crimes took place. Jawad was 16 or 17 and Khadr 15. Khadr's case is more serious as his alleged crime is murder, rather than only attempted murder.<sup>86</sup> Even though the judge in the Military Commissions cleared the way for their prosecution, their status as child soldiers still hangs over any trial. It is unclear how a general court-martial would proceed with a case against either detainee since the UN Optional Protocol on the involvement of children in armed conflict is generally read to treat minors as victims of war rather than combatants.<sup>87</sup>

A review of other cases may lead to pursuing different charges than those filed in the Military Commissions. Ali Hamza Ahmad Suliman al Bahlul, for example, is charged with solicitation to commit murder for his work producing propaganda videos for Al Qaeda.<sup>88</sup> This case should most likely end up in federal court, where it may be difficult to make such a charge stick. However, that does not mean that the case should be dropped, since there appears to be ample evidence to pursue charges of material support for terrorism against al Bahlul.

These individuals' pre-trial detention location will depend on which venue is chosen for their prosecution. Cases that are brought to federal court should be heard in the jurisdictions that are both most affected by terrorist attacks and most experienced in handling cases of this type: New York City and the Eastern District of Virginia just outside Washington, D.C. New York has prosecuted the perpetrators of the first World Trade Center attacks and those responsible for the east Africa embassy bombings, while the Pentagon lies within the jurisdiction of the Virginia court, which was the venue for the Moussaoui trial. By channeling most cases through these two districts, these courts will develop experience and expertise in handling terrorism trials, attaining one of the hoped-for benefits of a National Security Court system without the accompanying drawbacks.

Two options should also be considered for detainees bound for trial in courts-martial: the U.S. Military Detention Barracks at Ft. Leavenworth, Kansas, and the brig at the naval base in Charleston, South Carolina. Ft. Leavenworth is the main detention center and only maximum-security facility in the entire military prison system and could easily accommodate the relatively small number of detainees that would likely be transferred from Guantánamo to face courts-martial at its 515-cell compound.<sup>89</sup> The Charleston brig held Jose Padilla during his incarceration as an enemy combatant and currently holds another former-detainee, Ali al-Marri.<sup>90</sup>

Working through these early trials will inform the next administration on how to proceed with the more challenging cases, such as those of Mohammad al-Qathani and Khalid Sheik Mohammed. Both of these detainees were originally charged in Military Commissions for the September 11 attacks, only for the case to be dropped against al-Qathani. Both of them also share the dubious distinction of having been subject to extremely abusive treatment while in custody, which was likely the primary reason that the case against al-Qathani was recently terminated.

It is not possible to forgo a prosecution of Khalid Sheik Mohammed, the self-described architect of 9/11, even though the CIA admitted that it tortured him. It will be important for

prosecutors to learn how judges are handling admissibility issues and what sanctions are levied against the government for the mistreatment of defendants before Khalid Sheik Mohammed's trial to avoid unnecessary mistakes.

Using earlier terrorism prosecutions as a guide, judges will most likely be firm in their demands that the government meet the recognized standards of traditional court procedure, but still be sympathetic to the needs of the prosecution on access and admissibility of evidence. Judges understand the stakes involved, and if the government can obtain a conviction against the likes of Moussaoui and Padilla, it is inconceivable that any federal judge would hastily order the release of a defendant like Khalid Sheik Mohammed, the admitted mastermind of 9/11.

The truth is that we simply do not know how these cases will work out in a fair adjudicative process, but if a case is to be brought into court, the prosecution must be prepared to lose—a risk the Bush administration was unwilling to assume.<sup>91</sup> It is likely that as a result of the Bush administration's catalogue of errors, the government could lose one or more of these cases, a risk to be sure, but an outcome that would add to the legitimacy of the process.

The risk of failure in any one case pales in comparison to the enormous symbolism of exposing Khalid Sheik Mohammad as one of the world's worst mass murders in a courtroom near ground zero.

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## Phase Five: The Ongoing Conflict

The remaining detainees—those detainees that fall between those set for trial or release—are the last remaining hurdle to getting to zero. The serendipitous solution would be for a review of their cases to discover that these detainees were not closely connected to the fighting in Afghanistan and do not pose a serious threat to America or its allies. But that is an outcome to hope for, not to plan on.

The size of this group is difficult to ascertain because it largely depends on progress in other phases of this process. The group will shrink as more detainees move through the rehabilitation and resettlement program, yet perhaps grow as some detainees originally thought to face war crimes charges are not candidates for trial in U.S. courts. As many as 150 could be transferred or resettled, and anywhere from 25 to 50 could be brought to the United States for trial, leaving up to 100 detainees still at Guantánamo after the other phases had been completed.

Devising solutions for this group has faltered because ideas have been trapped in a box created by the Bush administration. Trials in any venue—either Military Commissions or regular U.S. courts—are not possible because there is little or no hard evidence that would make it into any court proceeding. Bringing this group into the United States under some regime of large-scale preventive detention would require legal contortions that may not withstand constitutional scrutiny, a mistake that this exercise is trying to correct, not repeat. Wholesale release is thought to be too dangerous, as some former detainees have returned to the battlefield in

Afghanistan or beyond, inviting withering political criticism that could imperil the entire project to close Guantánamo. That leaves the status quo, which is obviously not an option.

The next administration, however, will not be constrained by this box, and looking beyond its walls, it is possible to recognize that this group of detainees is not that unusual at all.

It is rare that enemy fighters captured during military operations find their way into a courtroom of any kind; the entire purpose of detaining them during an ongoing conflict is because if they are released they could return to the battlefield. Yes, the United States has housed thousands of prisoners within its borders during previous wars, but in those instances, there were clear legal lines of legitimacy, something that certainly does not exist in this case.

These detainees could be released, but the majority of the prisoners in this category of detainees were captured in connection with military operations, and a careful review of their cases indicates that they continue to pose some level of threat. Prudence requires that other options be considered before wholesale release of this group.

Here is where the challenge of Guantánamo intersects with its larger brother at Bagram. Resolving the mess at Guantánamo without addressing the detainee issues related to the ongoing fighting in Afghanistan would only be a job half done. When this last group of detainees at Guantánamo is considered together with the enemy fighters imprisoned at Bagram and other Afghan detention camps, an elegant solution to both challenges emerges.

Neither the Americans nor the Afghans have proven to be particularly good jailors, and it is time they gave up exclusive control of this mission. The international coalition of military forces in Afghanistan is NATO-led; it should not require a significant change in mission to shift responsibility for detainee operations from American to NATO control.

Some of the fiercest criticisms of the Bush administration's detainee policies have emanated from NATO governments. Placing command of all coalition detainee operations in Afghanistan under the authority of NATO is therefore an opportunity for the alliance to demonstrate that it can deliver better results than the Americans. With the largest number of troops in Afghanistan, the United States should have a meaningful role in the oversight of detainee operations, but the ultimate authority will reside with the leadership of the NATO forces.

The current American plan to construct a large and more permanent detention camp near Bagram should go ahead as envisioned, but the costs of its development could be shared among NATO allies, lessening the financial burden on the United States. This new detainee mission should be operated with the same level of transparency and international cooperation as the transformed Guantánamo, establishing a permanent oversight board with the active participation of the International Red Cross and developing strong ties with local and tribal Afghans.

The last remaining Guantánamo detainees should be quite similar to those enemy fighters imprisoned in Afghanistan. These detainees are most likely not the terrorist masterminds or



the goat herders, not cases of mistaken identity or victims of score settling, neither completely guilty, nor completely innocent. These detainees fit the description of the types of enemy fighters that can justifiably be imprisoned during wartime regardless of whether they meet standards that would grant them privileged status as prisoners of war.

Analyzing this group of detainees without regard for their current location of detention, a strong argument can be made that they belong in the new NATO-led Afghan detention system. This is the last link in the chain of closing Guantánamo: transfer the remaining detainees to the custody of the NATO detention system in Afghanistan.

This process will have to receive the approval of NATO and the Afghan government, and be completed with the cooperation and assistance of the International Red Cross to ensure that it is consistent with America's obligations as the detaining power. If those agreements can be reached, and these last detainees satisfy the requirements of international law, then they can be transferred out of Guantánamo and the prison camp can finally be closed.

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## Remainders

This five-phase program can bring the population of Guantánamo to zero by July 20, 2010, but it is entirely possible that issues could arise in one or more of the phases that result in some prisoners remaining at Guantánamo as the clock ticks down toward the 18-month deadline.

Some of the prisoners in the final group may not meet the standards that would permit them to be detained in connection to their actions on the battlefield, even broadly defined. And prosecutors are unlikely to have a perfect conviction rate given the additional challenges heaped upon them by the catastrophic Bush administration interrogation policies.

The next administration will face a clear choice: pursue some form of preventive detention regime for these last remaining detainees, or simply let them go. This five-phase proposal is designed to avoid this very decision, but should the next administration still face such a dilemma at the end of this process, it is likely to involve only a handful of detainees, not hundreds.

Formalizing the Bush administration's preventive detention scheme and even extending it to inside the borders of the United States is an outrage that would deservedly undo all of the work done to rehabilitate America's moral standing and leadership. Even though part of the justification for making these recommendations is that outright release of a large number of detainees deemed dangerous is an unnecessary security and political risk, this justification only applies to considering such a move at the outset of the process of closing Guantánamo.

If the next administration has pursued a good faith effort, and all other alternatives are truly exhausted, a strong argument can be made that releasing the remaining detainees is the only plausible option left to once and for all put Guantánamo behind us.

# Conclusion

Every decision related to Guantánamo carries some measure of risk, from the often-heard concerns about future attacks perpetrated by released detainees to the danger of political backlash from all sides as no one will be completely satisfied with the result.

Rarely discussed, however, is the most serious risk involved in any decision about Guantánamo: choosing to preserve the status quo. An overwhelming majority of Americans believe the country is on the wrong track and are hungry for change. Not since the United States assumed the mantle of international leadership has its standing been so low or its position as the leader of the free world been in such jeopardy.

Guantánamo is very high on the list of what is wrong with current American policy and serves as a rallying cry against the United States for friend and foe alike. If Guantánamo is not closed by the next president, it can no longer be blamed on the failures of the Bush administration, and the United States risks permanently entering the consciousness of an entire global generation as no better than the dictators and oppressive regimes we have fought against on so many fronts.

Strategic threats to American interests would exist in all corners of the world, rendering insignificant by comparison concerns of retribution from a relative handful of men returning home after many years in captivity.

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