

After Guantanamo



A Special Tribunal for International Terrorist Suspects

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U.S. detainee policies have been surrounded by controversy from the early days of the war on terrorism. In the wake of rapid military success in Afghanistan, the Bush Administration crafted policies for the detention and trial of what was expected to be a large number of high-ranking al Qaeda prisoners. Indeed, the United States has captured hundreds of suspected terrorists and put them in detention camps. But after more than four years, the prison at Guantanamo Bay, Cuba holds few al Qaeda leaders and not a single detainee has been convicted in the specially created Military Commissions designed to try terrorist suspects.

Interrogations at Guantanamo have not produced reliable or valuable intelligence and may compromise future prosecutions. In some cases, detainees that pose an ongoing threat to U.S. and allied forces have been released. Furthermore, the indefinite nature of the detentions and the procedures of the Military Commissions violate fundamental principles of American justice, impair our relations with even our most supportive allies, and provide our enemies with more tools in the battle for hearts and minds.

U.S. policy on detainees captured during the war on terrorism must achieve each of the following goals:

- Ensure that detainees who pose a real security threat remain securely imprisoned;
- Make accurate determinations of guilt or innocence, and assess the proper punishments;
- Restore the United States to its traditional leadership position in the promotion of human rights and respect for the rule of law;
- Strengthen the alliance against terrorism; and,
- Establish sustainable structures that increase the capacity of states allied against international terrorism to handle these types of cases in the future.

Guantanamo fails to meet any of these goals. In the interest of U.S. national security, President Bush should close the prison at Guantanamo, take decisive steps to regain the offensive against terrorists, and demonstrate that the United States can protect itself while expanding freedom and democracy and deepening respect for human rights and the rule of law.

The best solution to the challenges of Guantanamo lies in working with our allies to create a Special Tribunal for International Terrorist Suspects in order to share the responsibility of detaining, trying, and imprisoning terrorists. This Tribunal should capitalize on the experiences of previous tribunals that have handled some of the most serious threats to international peace and security. It should include the following elements:

- Two separate Divisions to reflect the two general classes of detainees; one led by the United States to deal with al Qaeda and other international terrorist suspects that pose an ongoing threat to the American people; the other operated in partnership with the Afghan government and other key allies that will hear

cases of detainees connected only to the war in Afghanistan but who were not combatants against the United States;

- An international team of investigators to assess the security threat of detainees and develop evidence for trials;
- Internationally recognized trial procedures that reliably reach accurate, fair, and legitimate verdicts and that dispense appropriate punishment;
- A database on all released prisoners that is shared by the intelligence and law enforcement agencies of states allied against terrorism;
- A mandate to build capacity in the judicial and prison systems in nations allied against terrorism; and,
- A host country, such as Turkey, that can act as a bridge between the West and the Muslim world and help bring together players that want to be part of the solution.

The debate about the future of Guantanamo has lacked legitimate and substantive alternatives. Supporters of the prison refuse to accept that it is a liability and insist that the status quo must be maintained. Opponents are quick to call for its closure, but often fail to take into account the difficult and unique challenges of detaining and putting on trial terrorist suspects. This proposal addresses each of those challenges with practical policy solutions and presents a concrete alternative to the fatally flawed policy President Bush has pursued on detainees.

Background

The U.S. military base at Guantanamo Bay occupies an area of land slightly larger than Manhattan on the southeastern tip of Cuba and is the oldest existing U.S. military base not on American soil.¹ The United States leased the base from the Cuban government in 1903 shortly after the Spanish-American War in an agreement that gave the United States territorial jurisdiction of the base but recognized the Cuban government's ultimate sovereignty over the land.²

The Cuban government that came to power in the 1959 revolution led by Fidel Castro does not recognize the U.S. lease and describes the U.S. military presence as an occupation of Cuban territory.³ This leaves Guantanamo, unlike other American military bases on foreign soil, without an agreement with the host government regarding ultimate sovereign control of the territory of the base. This means Cuban courts do not exercise any jurisdictional control over the base.

Guantanamo had been used as a detention center before the war on terrorism.⁴ In the early 1990s, President George H. W. Bush used Guantanamo to hold Haitian refugees who were intercepted off the coast of Florida. President Bill Clinton continued that policy until he ordered U.S. military forces to restore Haiti's democratically elected president to power, which allowed many of the detainees to be sent home.

In late 2001, the Bush Administration decided to establish a detention center outside of the theater of ongoing military operations in Afghanistan. It was believed that it was necessary to remove "high-value" al Qaeda detainees to a more secure facility and the search for a suitable location quickly focused on Guantanamo. Guantanamo was a desirable location not only because it was a highly

protected military base, but because the Bush Administration believed its unsettled legal status placed it outside the jurisdiction of any court. The lease agreement grants the Cuban government ultimate sovereign control of Guantanamo and Bush Administration lawyers believed this barred U.S. courts from exercising jurisdiction.⁵ And as noted above, Cuban courts will not take any action regarding the base.

The first makeshift cells were built at Camp X-Ray on the grounds of Guantanamo and prisoners captured in connection with U.S. military operations in Afghanistan began arriving in January 2002.⁶ In the four years since it opened, nearly 800 detainees have passed through its gates and Guantanamo now holds prisoners captured in the Middle East, Africa, and Europe. Around 270 of those detainees have been released,⁷ and the majority of the approximately 500 detainees still at Guantanamo are from just four nations: Afghanistan, Pakistan, Saudi Arabia and Yemen.⁸

In December 2001 President Bush ordered the creation of Military Commissions to put on trial al Qaeda and other terrorist suspects for violations of the laws of war.⁹ That order bypassed the U.S. criminal justice system and existing military courts. The procedures for the Commissions raised serious doubts among civilian and military legal experts about the fairness and impartiality of the process and the legitimacy of any verdict.¹⁰ The Commissions may be conducted in secret at any time and the defense may be refused access to any evidence

– including material that may go towards establishing innocence. The Executive Branch maintains complete control over the proceedings, with no appeal available to any civilian court. President Bush retains the final review of any Commission verdict.¹¹

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In February 2002, President Bush declared that no detainee captured in the war on terrorism was entitled to prisoner of war status, instead designating them “unlawful combatants.” Prisoners of war can be charged with war crimes, but they are immune from prosecution for actions incidental to armed conflict, such as firing on the enemy. Unlawful combatants, however, can be prosecuted for their actions on the battlefield. The declaration that all war on terrorism detainees are unlawful combatants violates the Geneva Conventions’ requirement that detainees captured in connection to armed conflict are presumed to be prisoners of war until determined otherwise by a competent tribunal.¹² President Bush’s decision left detainees who had not been charged by the Military Commissions without the ability to dispute the basis for their detention.

Some detainees sought remedy from U.S. courts and challenged the Bush Administration’s view that no U.S. court could hear cases of Guantanamo detainees. In 2004, the Supreme Court rejected the Bush Administration’s claim and ruled that detainees must have a venue to contest their designation as unlawful combatants. Later that year, the Bush Administration created the Combatant Status Review Tribunals (CSRTs) to review cases of detainees to determine if he should continue to be designated an unlawful combatant.¹³

The procedures of the CSRTs fail to meet the requirements of the Geneva Conventions or the principles of American justice, however, as the detainees are presumed to be unlawful combatants

and face the burden of disproving the government's case. They are given a personal representative, although neither the representative nor the panel of military officers that decide the cases are required to have legal training.¹⁴

Congress has made a bad situation worse. Instead of launching an effort to rectify the serious problems with procedures of the Military Commissions and CSRTs, in 2005, Congress chose to restrict the ability of Guantanamo detainees to contest the conditions of their confinement.¹⁵ Guantanamo detainees are now prohibited from petitioning a U.S. court to review the lawfulness of their detention until they have been convicted in the Military Commissions were determined to be enemy combatants by CSRTs.

Problems with detainee policy are not limited to Guantanamo. The National Security Council halted all new transfers of prisoners to Guantanamo in September 2004 after widespread condemnation of the prison.¹⁶ As a result of this decision, the detention center at Bagram air base in Afghanistan has swollen to more than 500 detainees. The conditions of confinement and the procedures established to review detainee cases at Bagram are even worse than those at Guantanamo and fall well below the standards we helped establish for the new Afghan government's police, prosecutors and courts.¹⁷

The Failure of Guantanamo

The prison at Guantanamo Bay and the system of Military Commissions created to put suspected terrorists on trial do not satisfy the requirements for which they were established. They fail for the following five reasons:

- Guantanamo is not keeping detainees who are real threats locked up;
- The Military Commissions and CSRTs fail to accurately assess guilt or innocence or assess the proper punishment;
- Guantanamo undermines American leadership;
- Guantanamo strengthens our enemies and jeopardizes the alliance against terrorism; and,
- Guantanamo does nothing to assist in developing long-term solutions to this conflict.

Guantanamo Not Keeping Threats Behind Bars

By the Bush Administration's own admission, in at least 15 instances – or one out of every 20 detainees released from Guantanamo – released prisoners have once again taken up arms against America and our allies.¹⁸ The war on terrorism shows no signs of ebbing, with terrorist attacks tripling in the last three years and insurgencies raging in Iraq and Afghanistan. In this environment, it is vital that the United States have confidence that it can keep captured enemy fighters from returning to the battlefield, wherever it may be.

Little is known about the detainees who have returned to the battlefield after being released from Guantanamo. But we do know enough about some detainees still held at Guantanamo to know that they pose serious threats to the United States and that the policies of the Bush Administration have jeopardized their continued detention.

Among the 8 percent of Guantanamo detainees accused of being al Qaeda fighters¹⁹ is Mohammed al-Qahtani, who is suspected of being the “20th hijacker” and was captured during the battle of Tora Bora. His resistance to interrogation began the chain of events that witnessed the changes in policy that led to abuses at Guantanamo, and ultimately, Abu Ghraib.²⁰ FBI agents at Guantanamo reported that during interrogations al-Qahtani exhibited “behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours).” Al-Qahtani eventually told his interrogators that he saw 30 fellow Guantanamo inmates at Tora Bora. Al-Qahtani and those 30 detainees are still at Guantanamo; however, any future prosecution of al-Qahtani and those he identified may be compromised as a result of the interrogation techniques favored by the Bush Administration.

Military Commissions and CSRTs Not Working

The systems established by the Bush Administration are not adequately constructed to make accurate decisions about guilt or innocence or dispense appropriate punishments. According to an analysis of government filings in the CSRTs, a majority of the detainees (55 percent) are determined not to have committed any hostile acts against the United States or our allies yet they remain imprisoned at Guantanamo.²¹

The Military Commissions are so flawed that the Department of Defense was forced to suspend all trials after a U.S. District Judge ordered one trial halted.²² Even military attorneys assigned to the detainees by the Pentagon have challenged the procedures of the Commissions, compounding the delays.²³ As a result, only ten cases have been referred for trial and the prison at Guantanamo does not hold a single convicted terrorist.

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Determining guilt or innocence is a tough job in any situation, but it has been made even more difficult by America’s early dependence on foreign forces in Afghanistan and the region’s history of conflict and instability.²⁴ Eighty-six percent of detainees were captured by the Northern Alliance or Pakistan while only 5 percent of detainees were captured by U.S. forces.²⁵ Allegations against these detainees often come second- or third-hand, or worse, and it is very difficult to establish a proper chain of evidence or custody.

Guantanamo Undermines US Leadership on Human Rights and Rule of Law

The Bush Administration’s detainee policies have cost the United States much of its credibility in the world and its moral standing as a leading promoter of human rights and the rule of law. The rejection of the Geneva Conventions and its denial of prisoner of war status for the detainees reversed 100 years of military policy. The deliberate decision to place the detainees in this legal black hole brought widespread condemnation from multilateral institutions and human rights organizations, as well as a rebuke from the U.S. Supreme Court.²⁶

The Bush Administration also re-wrote the rules for interrogations to allow new, more aggressive techniques that crossed the line into cruel, inhuman and degrading treatment prohibited by domestic and international law. The consequences of that decision have been felt far beyond Guantanamo as the well-documented abuses of detainees in Iraq and Afghanistan clearly demonstrate. The International Committee of the Red Cross, in a confidential report intended to be shown only to the Bush Administration, described these interrogation techniques as “tantamount to torture.”²⁷

FBI agents and a special study conducted by the CIA concluded that these interrogation techniques were not producing useful or reliable intelligence and might compromise future prosecutions.²⁸ The situation grew so bad that Senator John McCain, himself a former prisoner of war and victim of torture, led Congress to pass legislation prohibiting the president from ordering the use of abusive interrogation techniques.²⁹

Guantanamo Strengthens Our Enemies and Jeopardizes Alliance Against Terrorism

Guantanamo provides anti-American groups more opportunities to incite their followers to take action against U.S. interests. It serves as one of their most potent weapons against the United States and our allies.³⁰ Many of our enemies are attempting to broaden support for their aims by casting this conflict as a battle between the West and the Muslim world. Controversies surrounding the torture and abuse at Abu Ghraib and the revelation of secret CIA-run black prisons in Eastern Europe and North Africa have exacerbated these tensions.

Even British Prime Minister Tony Blair has called Guantanamo “an anomaly.”

Some of the United States’ most important allies in the war on terrorism oppose Guantanamo. British Prime Minister Tony Blair, undoubtedly America’s closest ally, has called Guantanamo “an anomaly” and urged its closure.³¹ Italian Prime Minister Silvio

Berlusconi, perhaps the European leader who most shares President Bush’s political philosophy, called for Guantanamo to be closed “as soon as possible.”³² The new German Chancellor Angela Merkel has pledged to improve relations with the United States, but concerns about Guantanamo and secret U.S.-run prisons dominated her first meeting with President Bush.³³ Our enemies have demonstrated that they can capitalize on tensions between the West and the Muslim world. We must not allow the terrorists the opportunity to exploit cracks in the alliance against them.

Guantanamo Is Not a Long-term Solution

The Bush Administration has chosen to be the world’s warden in the war on terrorism and the United States bears the entire burden of detaining terrorism suspects, whether at Guantanamo, Bagram or secret CIA prisons. This unbalanced division of labor may in part be fueled by a lack of capacity of some nations in the alliance, but it has done nothing to address these serious deficiencies or build sustainable institutions in those countries. It also gives some of our allies a free pass to criticize U.S. policy without sharing in the responsibility of detaining terrorists.

General Bantz Craddock, the Commander-in-Chief of the U.S. Southern Command – which includes Guantanamo – has advocated the return of many prisoners to their home countries for continued detention.³⁴ Since last summer, the State Department has been attempting – so far unsuccessfully – to negotiate the return of hundreds of Afghan, Saudi, and Yemeni detainees.³⁵

There are clear obstacles to the States Department’s efforts. Many countries are privately content with the United States detaining these suspected terrorists, as some of the detainees pose just as much of a threat, if not more, to these regimes. This threat is real. On February 3, 2006, 23 convicted al Qaeda terrorists escaped from a Yemeni intelligence prison. This episode illustrates that many of these countries lack capacity in their judicial and prison systems to securely detain those who require additional imprisonment.

Even if these countries had the capacity, the Convention Against Torture prohibits the transfer of prisoners to countries where the threat of torture exists. This year's State Department report on Country Human Rights Practices, for example, criticizes Saudi Arabia for arbitrary arrest, beatings, and torture and abuse aimed at obtaining false confessions.³⁶

Debate on Alternatives to Guantanamo Has Gone Stale

Opponents of the Bush Administration's detainee policies quickly recognized the problems associated with Guantanamo and the Military Commissions. They proposed two basic alternatives: use the U.S. civilian or military courts or use an existing United Nations-sponsored international tribunal.³⁷ In late 2001 and 2002, each of these options was a reasonable and practical alternative and each was vastly superior to Guantanamo and the Military Commissions.

More than four years later, however, the United States has lost much of its standing and credibility in the international community. These options no longer solve enough of the problems of the current crisis in U.S. detainee policy to recommend their use as alternatives. These two options also overlook another possible, though not perfect, alternative for resolving the problems of Guantanamo.

U.S. Courts

U.S. criminal courts have successfully handled the prosecution of terrorist suspects in the past and are widely respected as fair arbiters of guilt or innocence. For example, in the 1990s, both the mastermind and those who carried out the first World Trade Center bombing were convicted in federal court.³⁸ In 2001, four al Qaeda terrorists were convicted of carrying out the bombings of the U.S. embassies in Kenya and Tanzania.³⁹

The Uniform Code of Military Justice and the rules for General Courts-Martial abide by the principles of American justice and include numerous due process safeguards that are better than the procedures of the Military Commissions. Had the Bush Administration chosen to employ existing criminal or military courts for high-ranking al Qaeda terrorists, U.S. detainee policy would not have been nearly as controversial or problematic.

What has transpired in the four years since the Bush Administration chose to bypass existing U.S. courts, however, has made any process operated exclusively by the United States much less desirable as a solution to the problems and challenges of detainee policy. The credibility of the United States has been damaged to such a degree that any trials would likely not be viewed as legitimate in many segments of the international community. Furthermore, the majority of Guantanamo detainees are not accused of engaging in hostile actions against the United States or our allies and it would be extremely difficult to charge them with a crime in U.S. courts.

UN-sponsored International Tribunal

Some experts have recommended that the mandate of the International Criminal Tribunal for the Former Yugoslavia (ICTY) could be expanded to include international terrorism suspects. The United Nations Security Council established the ICTY to handle cases dealing with some of the most serious threats to international peace and security of recent decades – the atrocities committed during the violent break-up of Yugoslavia in the 1990s.⁴⁰ It has demonstrated that it can cope with high-security detainees, and it has done so while strengthening respect for the rule of law.

Winning approval from the Security Council to expand the mandate of the ICTY, however, would be neither easy nor advisable. Whatever goodwill existed at the UN toward the United States after 9/11 has been squandered by the Bush Administration, making it nearly impossible to secure the backing of Security Council. And it is highly unlikely that it – or any U.S. government – would ever agree to the surrender of control necessary to transfer detainees to an expanded ICTY. Additionally, going to the Security Council could be fraught with peril, as governments could attempt to further broaden the scope of the ICTY to include the actions of U.S. officials related to abuses at Guantanamo, Bagram, and Abu Ghraib.

Another Possible Alternative: The Lockerbie Tribunal Model

The Lockerbie Tribunal was created by an agreement between Britain and Libya to establish a tribunal to hear the case of those accused of bombing Pan Am flight 103 over Lockerbie, Scotland. It was based in a third country, the Netherlands, but the court used Scottish law and was presided over by Scottish judges.⁴¹ By transferring the trials out of Britain, the Libyans received some measure of assurance to assuage their concerns that the defendants would not receive a fair trial in Britain. By using Scottish law and Scottish judges, the British were able to ensure that they still controlled the process. And the special tribunal was located in an extremely secure facility, a former American air base in the Netherlands.

Credibility and legitimacy again become a problem, however, if a Lockerbie-style tribunal operates exclusively under U.S. law. And if the goal was to use only U.S. law and judges, the Bush Administration would be hard pressed to find a country willing to host the tribunal.

A Special Tribunal is needed that is designed specifically to meet the unique challenges presented by international terrorism suspects captured after September 11, 2001.

A Special Tribunal for International Terrorist Suspects

A Special Tribunal is needed that abides by the fundamental tenets of American justice and builds upon the experience of the ICTY and the Lockerbie Tribunal, but that is designed specifically to meet the unique challenges presented by international terrorism suspects captured after September 11, 2001.

The Establishment, Competence and Jurisdiction of the Special Tribunal

The president should negotiate a series of bilateral agreements, similar to the agreements that created the Lockerbie Tribunal,⁴² with Afghanistan and other key allies that would establish a Special Tribunal for International Terrorist Suspects.

The Special Tribunal would have the power to prosecute any individual captured during the war on terrorism adjudged an unprivileged belligerent by a competent tribunal⁴³ and accused of the crimes listed below committed since August 23, 1996.⁴⁴ On that date, the *Al Quds Al Arabi* newspaper published a fatwa from Osama bin Laden titled “Declaration of War against the Americans Occupying the Land of the Two Holy Places.”⁴⁵ After that date, members of Al Qaeda were dedicated to waging war on the United States and they should be held accountable for their actions since that time even though it pre-dates the September 11, 2001 attacks and the subsequent U.S. military operations in Afghanistan.

The offenses prosecutable by the Special Tribunal should include grave breaches of the Geneva Conventions of 1949,⁴⁶ violations of the laws or customs of war,⁴⁷ crimes against humanity,⁴⁸ terrorism,⁴⁹ and membership in al Qaeda.⁵⁰ Any individual who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of one of the above referenced crimes shall be personally responsible for the crime and subject to prosecution by the Special Tribunal.⁵¹

With detainees hailing from such a large number of countries, often captured in a second country, perhaps by forces of even a third country, the issue of concurrent jurisdiction and the relationship of the Special Tribunal to national courts must be clear. Pursuant to the terms of the terms of the bilateral agreements, the Special Tribunal should have primacy over national courts and no person should be tried by a national court for an act for which he or she has already been tried by the Special Tribunal.

Organization of the Special Tribunal

The Special Tribunal would address the three main aspects to any criminal or judicial process – investigation, trial, and incarceration. First, the Special Tribunal would have an Office of the Prosecutor and an experienced team of international investigators that can draw on the best regional and local knowledge. Second, the Special Tribunal would have two Divisions to ensure that cases are heard in the proper venue and an appropriate balance is struck between U.S. and international participation. Third, the Special Tribunal would have a mandate to work with allied nations to build capacity in their prison systems to securely imprison convicted terrorists.

Office of the Prosecutor with an International Team of Investigators

In order to improve the accuracy of information and evidence prepared for trial, the Special Tribunal should establish an independent Office of the Prosecutor with an international team of investigators that draws on contributions from regional allies and partners in the Special Tribunal. This team would be able to develop its own lines of investigation, freeing the Special Tribunal from dependence on information obtained during tainted interrogations.

American investigators sometimes lack experience and understanding of the complexities, rivalries, and tribal affiliations prevalent in Afghanistan and Pakistan, sometimes resulting in the wrong people being released and the wrong people being detained. In many cases, a proper chain of custody is very difficult to ascertain, particularly because detainees and evidence may have changed hands two or three times before being turned over to the United States. The regional and local knowledge of the team of investigators should help uncover the most relevant information that points toward the guilt or innocence of detainees.

The Office of the Prosecutor should operate as a separate organ of the Tribunal and decisions on how to proceed with individual cases should be made independently. The Prosecutor should not be bound by guidance or instructions from any government.

A Competent Tribunal

The Combatant Status Review Tribunals fail to meet the standards of a “competent tribunal” outlined in the Geneva Conventions. Transferring detainees from Guantanamo, Bagram, or any other detention facility in the war on terrorism to the custody of the Special Tribunal first

requires bringing each detainee before a properly constituted “competent tribunal” distinct from the Special Tribunal. The competent tribunals will make a determination of the legal status of each detainee – whether a detainee is a lawful prisoner of war, a non-combatant who should be released,⁵² or an unprivileged belligerent subject to prosecution for his or her actions. This process would ensure that detention and any trials satisfy the requirements of international law.

Few, if any, of the detainees would qualify for the prisoner of war status. Those detainees who are prisoners of war are immune from prosecution for their actions on the battlefield, but still could be liable for war crimes. Prisoners of war not accused of war crimes should be handed over to the government of Afghanistan for detention until its conflict with Taliban insurgents has ended.

Recently released transcripts from the CSRTs provide a great deal of information about the detainees and indicate that those determined to be unprivileged belligerents fall into two general categories.⁵³ The first category consists of al Qaeda and other international terrorism suspects captured during operations since September 11, 2001. The second category is made up of detainees that are connected only to the wars in Afghanistan but who are not accused of hostile acts against the United States. The second phase of transferring detainees to the custody of the Special Tribunal will be to charge the competent tribunals with making determinations regarding which detainees belong in which category.

Two Divisions to Handle Trials

The Tribunal will be constructed in two Divisions to appropriately dispose of cases in each of those categories: Division One, established under the leadership of the United States to handle international terrorism suspects; and, Division Two, formed in partnership with NATO governments, Afghanistan, and other key allies to hear cases of detainees connected to the wars in Afghanistan.

Separating the Special Tribunal into two Divisions would ensure that these different types of cases would come before the proper venue and should increase the accuracy of the verdicts. This division of labor can also help find the appropriate balance between necessary U.S. control and a level of international participation that will enhance the legitimacy of the process.

Division One should have one Presiding Judge and a mixture of judges permanently assigned to Division One and judges who can rotate between Division One and Division Two. Division Two should have three Joint Presiding Judges and a mixture of judges permanently assigned to Division Two and judges that rotate between the Divisions. The judges will elect a President of the Special Tribunal and will determine the rules of procedure and evidence.

Many of the procedures of the ICTY meet the security requirements of handling prosecutions of this nature. The United States and other NATO governments regularly provide the ICTY with intelligence, and the court has a sterling record of protecting that sensitive information, even while maintaining the rights of the accused. It has judges from around the world, including several Muslim jurists. It operates with the highest practical level of transparency and its judges issue thorough written verdicts. These verdicts provide significant details of the atrocities committed during the wars in the former Yugoslavia and have contributed greatly to the historical record. Following these internationally recognized procedures would ensure greater confidence in the accuracy and fairness of the verdicts.

More importantly, adopting these procedures would help stand up the Special Tribunal more quickly and the process of putting terrorist suspects on trial might finally begin. It is hard to fathom that even the admitted terrorists at Guantanamo have not been convicted after many years of detention.⁵⁴ Trials of unrepentant terrorists can be a valuable tool in the struggle to expose the murderous ideology of our enemies.

Division One: International Terrorism Suspects Led by the United States

The United States must maintain control over the proceedings in cases of detainees that could pose an ongoing threat to the American people. But allies in the West and in the Muslim world must have confidence in the impartiality and fairness of the Tribunal for it to be a departure from the Military Commissions. To find the appropriate balance, the Presiding Judge for Division One should be an American, but a minimum of one permanent and one rotating judge should not be from the United States. The Chief Prosecutor for Division One should also be an American.

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Division Two: Afghan War Detainees Not Accused of Hostile Acts Against U.S.

Determinations of the guilt or innocence of the large number detainees at Guantanamo who are *not* accused of engaging in hostile acts against the United States will be improved with the contributions of the new government of Afghanistan and other allies with experience in the region. The new Afghan government has a significant interest in the decisions of this Division. It recognizes the prison at Bagram is not a long-term solution and is eager to assert greater control over detentions in the ongoing fight with Taliban insurgents.⁵⁵ It has chosen a democratic system of government that respects the ethnic and tribal dimensions of the country in order to break the long cycle of invasion, civil conflict, and instability that has plagued Afghanistan for decades. The government must learn how both to operate within that system, and to deliver security and opportunity to its people.

An Afghan, an American, and a representative of another NATO country should make up the three Joint Presiding Judges of Division Two, with a maximum of one permanent judge and one rotating judge being nationals of the United States. The Chief Prosecutor for Division Two should be an Afghan.

Intelligence Sharing System on Released Prisoners⁵⁶

Under this proposal, it is likely that a large portion of the detainees will be released either as non-combatants or as a result of a lack of evidence for trial. This is not without danger given the ongoing nature of the war on terrorism and the insurgency in Afghanistan. But the United States has faced a similar situation before and the lessons learned in that experience can be particularly instructive.

At the conclusion of World War Two, the Allies held captive a large number of mid- and low-level Nazis, some of whom might have committed acts of terrorism and sabotage if they were released. It was impossible to determine which of these Nazis posed a serious threat and which simply wanted to get on with their lives. What was clear, however, was that the Allies could not maintain large numbers of German citizens in detention camps long after the war had ended.

As a solution to this problem, Britain, France and the United States established a vast, evolving international database that included the identities, photographs, fingerprints and biographies of the released Nazis. They also pooled their police, intelligence and military resources to monitor them, ultimately until their deaths. This brought together the intelligence services of the allied countries and forced cooperation on sometimes reluctant agencies.

A similar, and expanded, model should be applied to prisoners released from detention in the war on terrorism. Much more information can be collected and fed into the database, including biometric data, iris scans, and voice prints. The database should be available to every country allied against terrorism and could induce more cooperation between countries than currently exists.

Detention

To date in the war on terrorism, the United States has borne much, if not all, of the burden of incarcerating terrorist suspects. The Special Tribunal would construct a detention center to house defendants as they await and during trial. But just as it is with the investigation and trial aspects of the Special Tribunal, the United States should work with our allies to share the responsibility of detaining those convicted by the Tribunal.

Those convicted of serious crimes in Division One should be housed in a special section at the U.S. Disciplinary Barracks at Ft. Leavenworth, Kansas. Ft. Leavenworth was established as the U.S. Disciplinary Barracks in 1874 and currently houses more than 1,000 inmates from all the branches of the armed services. Its personnel are the best trained and most experienced in managing a prison population in the U.S. military.⁵⁷

But Ft. Leavenworth should not be viewed as a potential detention center for those convicted by Division Two. The United States must work with our allies to build capacity in their judicial and prison systems to better equip them to share in the responsibility of imprisoning convicted terrorists.

Some effort has been made in this area – largely by the United States – although it has not met with much success.⁵⁸ It is in the interest of the international community, not just the United States to improve these institutions so countries can deal with the threats posed by terrorists. Significant international participation in the Special Tribunal would greatly enhance the legitimacy of any effort to build institutional capacity in the judicial and prison systems in nations allied against terrorists.

Funding the Special Tribunal

The prison at Guantanamo has cost nearly \$500 million in the four years since it opened – \$100 million to construct the prison and approximately \$95 million a year in operating costs.⁵⁹ That is roughly comparable to the \$135 million annual budget for the ICTY. The principal difference, however, is that the costs of the ICTY are shared by UN Member States while the United States bears the entire costs of Guantanamo.

The Special Tribunal would have a larger staff than Guantanamo and would likely cost slightly more to operate as a result. But if the ICTY model is adopted to spread the costs among the nations that participate in the Tribunal, U.S. expenditures would likely decrease as other nations contribute funds to support the Tribunal.

Location of the Special Tribunal

We recommend that the United States follow the Lockerbie model and ask Turkey to host the Special Tribunal. As a secular, Muslim democracy, Turkey lies between two worlds. Strategically located on the edge of Europe, Turkey has long desired greater integration with the continent and the West. Turkey is a member of NATO and, despite some recent difficulties over U.S. policy in Iraq, enjoys an excellent relationship with the United States.

However, there are drawbacks to Turkey as a potential host for the Special Tribunal. For centuries, the Turks ruled much of the Arab world as an imperial power and animosity persists in some areas. Many Arab nations also view Turkey with suspicion because it has cooperated with Israel more than any other Muslim country in the region. The Turks have a history of human rights abuses, particularly in dealing with Kurdish separatists. And some European countries question whether Turkey could ever become a full partner in the European Union.

On the other hand, the Turks have made significant changes to their judicial and prison systems that have improved their human rights practices.⁶⁰ Playing host to the Special Tribunal with internationally recognized procedures would help Turkey consolidate the gains of recent years. Turkey is also eager to prove to the world – and particularly the European Union – that it respects human rights and the rule of law.

Given the recent tensions between the West and the Muslim world, it is important to find opportunities to bring the sides together. Like no other nation, Turkey can be a bridge between the two worlds and help to identify players that want to be part of the solution.

Endnotes

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and other allied factions for many battlefield functions, including the capturing of prisoners. As retreating Taliban and al Qaeda fighters found their way into Pakistan, the United States was once again reliant on nominally allied intelligence services to navigate an unfamiliar landscape.

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- ⁴⁰ For more background and information on the International Criminal Tribunal for the Former Yugoslavia, *see* <http://www.un.org/icty/glance-e/index.htm>.
- ⁴¹ For more background, information, and the verdict of the Lockerbie Tribunal, *see* the Lockerbie Trial page at the Scottish Courts website, *available at*: <http://www.scotcourts.gov.uk/library/lockerbie/index.asp>
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- ⁴³ As noted in the background section on page 3, the CSRTs do not satisfy the requirements of the Geneva Conventions for a "competent tribunal" to determine the legal status of detainees. This proposal recommends the creation of competent tribunals to make those legal determinations. These competent tribunals are distinct from the Special Tribunal and are discussed in detail later in this paper, on page 10.
- ⁴⁴ It is necessary to establish a date that defines the parameters of jurisdiction for the Special Tribunal. We recommend using this date as it is the best known reference to the beginning of al Qaeda's war on the United States. As with other details of this proposal, however, it would be subject to negotiation and could change.
- ⁴⁵ The text of bin Laden's fatwa is *available at*: http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html.
- ⁴⁶ Grave breaches of the Geneva Conventions of 1949 include: willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; taking civilians as hostages. *Source*: Article 2 of the Statute for the International Tribunal (ICTY), *available at*: <http://www.un.org/icty/legaldoc-e/index.htm>.

- ⁴⁷ Violations of the laws of war include: failure to wear a uniform or other identifying insignia on the battlefield; failure to carry arms openly; use of civilian population as defensive shield; employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; wanton destruction of cities, towns or villages, or devastation not justified by military necessity; attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; plunder of public or private property. *Source*: Ibid, Article 3.
- ⁴⁸ Crimes against humanity include: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts. *Source*: Ibid, Article 5.
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- ⁵⁰ Al Qaeda is clearly not the only international terrorist organization that poses a grave threat to the security of the United States and other nations. However, for al Qaeda, war against the United States is one of its principle aims and simple membership is a belligerent act and should be prosecutable by this Tribunal. Membership in other terrorist organizations could be added to the list of crimes under the jurisdiction of the Tribunal at a later date if it is warranted.
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- ⁵³ The Department of Defense recently released transcripts from the CSRTs in response to a Freedom of Information Act request and lawsuit filed by the Associated Press. The transcripts provide a great deal of information about the detainees and are available at: <http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html>.
- ⁵⁴ One such example is Ghassan Abdallah Ghazi al-Shirbi, who has never denied that he is a member of al Qaeda, declaring to his CSRT that “it is my honor to have this classification in this world until the end.”
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- ⁵⁶ This portion of the proposal draws largely on a recommendation from Professor Timothy Naftali of the University of Virginia’s Miller Center for Public Affairs. Professor Naftali is the author of US Intelligence and the Nazis, and this recommendation was made in an op-ed in the *Los Angeles Times*, titled “A Smart Way to Close Guantanamo.” Timothy Naftali, *A Smart Way to Close Guantanamo*, Los Angeles Times, July 18, 2005, *available at*: <http://www.kuwaitifreedom.org/media/pdf/Los%20Angeles%20Times%20op%20ed%20July%2018,%202005.pdf>
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