



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

[fff@fff.org](mailto:fff@fff.org) [www.fff.org](http://www.fff.org)

## **Closing Guantanamo: How to Do It (and How Not to Do It)**

**by Joanne Mariner**

*The following is a transcript of a speech given at The Future of Freedom Foundation's June 2008 conference, "Restoring the Republic 2008: Foreign Policy & Civil Liberties" held in Reston, Virginia.*

**Jacob Hornberger:** Our next speaker, Joanne Mariner, is the Terrorism and Counterterrorism Program Director at Human Rights Watch. Her work has entailed documenting war crime in Colombia, Kosovo, and Darfur, political violence in Haiti, terrorism, and the laws of war. She has researched and authored a report for Human Rights Watch on the rape crisis in American prisons. She has appeared before Congress and several UN bodies and on such national media outlets as ABC News, NPR, and CSPAN. A graduate of Yale Law School, Joanne clerked for the Ninth Circuit Federal Court of Appeals. You're familiar with our daily FFF e-mail update. Every month, or every week actually, we carefully look at a Web site called findlaw.com, because she publishes an article there every single month, and without fail we link to that article on our FFF e-mail update. Joanne is special. All the speakers here that I told you yesterday rank among the Sakharovs and the Solzhenitsyns of our time, and in this country Joanne certainly fills that bill. She just returned yesterday from Guantanamo Bay, where she was monitoring the arraignments on behalf of Human Rights Watch. Title of her talk is "Closing Guantanamo: How to Do It, and How Not to Do It." Please welcome Joanne Mariner.

**Joanne Mariner:** Thank you. Thank you very much for that kind introduction. Good morning everybody. I'm very pleased to be able to speak to you today on the topic of closing Guantanamo. As Jacob mentioned, I just returned from Guantanamo yesterday, and unfortunately I have to report that it's very much open for business. At present, the camp holds some 270 detainees. And in recent months the new Military Commission system, which you may have heard about, which is the Guantanamo version of justice, has started up again. And in fact, I attended the arraignments on Thursday of five of the alleged September 11<sup>th</sup> conspirators, which we can talk about, [which] I think was off to unfortunately a very bad start.

So Guantanamo remains open, but nearly everybody, I think, with the exception of Dick Cheney, agrees that the continued detention of hundreds of men without charge or trial at Guantanamo is a stain on America's reputation around the world. Every single Western ally of the United States has publicly called for Guantanamo's closure, and the operation of the camp has earned the United States round after round of condemnation from international bodies. Even members of the administration have publicly recognized that Guantanamo is a problem. Secretary of State Condoleezza Rice has said that we all want to close Guantanamo. Secretary of Defense Robert Gates, back when he was new on the job in March 2007, told Congress that there was a taint to Guantanamo and that the prison had to be closed.

But it remains open, and, in fact, last month Defense Secretary Gates told a Senate Appropriations Subcommittee that the effort to close Guantanamo had been brought to a standstill because of the difficulties in closing it. President Bush, who two years ago had said that he would like to see Guantanamo closed, has now admitted that he's going to be handing over the problem to his successor. The good news is that every single one, or both of the presidential candidates, I guess we can say at this point, have promised to close Guantanamo. The bad news is that it's a lot easier to make a mess than it is to clean one up. It's a lot easier to set up an abusive prison camp than it is to tear it down.

To create Guantanamo, all the administration needed was a naval base, a few wire mesh cages, and some irresponsible lawyers to write the legal justification for detaining people. To close the prison without creating an even larger mess is going to be difficult and may require some very hard choices. What should we do with the prisoners at Guantanamo who shouldn't be returned to their home countries because of a credible fear of torture or other abuse? How do we ensure that the problem of Guantanamo is not just exported elsewhere, to Bagram or another overseas facility where the U.S. courts are even less likely to assert jurisdiction? What do we do with people who are held in CIA custody for years, for whom the evidence of illegal criminal acts may be tainted by torture? And what do we do with people who are difficult to prosecute, but who nonetheless scare us because of their beliefs, their associations, and their expressed desire to do harm to the United States?

I'm going to run through what I think is a reasonable blueprint for closing Guantanamo. The recommendations that I'm going to make will stem from three underlying principles. First, I think a sensible counterterrorism strategy should focus on arresting, incapacitating, and prosecuting the truly dangerous people, the planners, the financiers, and the technological experts, not every low-level foot soldier who scares us. Second, I think it does more harm than good to U.S. efforts to curb terrorism to continue to hold hundreds of people without charge, whether on Guantanamo or elsewhere. And third, the benefits of closing Guantanamo will be squandered if the United States simply shifts detainees to prolonged detention without charge or torture elsewhere.

Let me give you a little background to the situation at Guantanamo to help you understand where we are now. It was on January 11<sup>th</sup>, 2002, that the first planeload of 20 detainees landed at the military base at Guantanamo, a place chosen because those irresponsible lawyers whom I mentioned a moment ago told the administration that the U.S. courts would not assert jurisdiction over it. It was, as the UK House of Lords said so famously, a legal black hole. The Bush administration famously described the detainees that it brought to Guantanamo as the worst of the worst. Then Secretary of Defense Donald Rumsfeld called them the most dangerous, best-trained, vicious killers on the face of the earth.

But as time went by, counterterrorism experts and knowledgeable military officials told a very different story. Despite the administration's overblown claims, many of the detainees were nothing more than low-level fighters, and many of them, in fact, were farmers, humanitarian aid workers, taxi drivers: people who were in the wrong place at the wrong time. As Lieutenant Colonel Thomas S. Berg, a member of Guantanamo's original legal team, explained, "It became obvious to us as we reviewed the evidence that in many cases we had simply gotten the slowest guys on the battlefield. We literally found guys who had been shot in the butt." Michael Sawyer, head of the CIA's bin Laden unit, was more blunt. He said, "We absolutely got the wrong people."

That's not surprising. In 2002 the United States was distributing bounty fliers throughout Pakistan and Afghanistan, offering rewards of thousands of dollars per detainee. Fliers promised, and I quote, "enough money to take care of your family, your village, your tribe, for the rest of your lives," simply for turning over al Qaeda suspects, which in practice often meant Arabs, just the fact of being Arab. Many of these unlucky men have since been returned home. Since Guantanamo opened, well over half of the detainees have been returned home. In fact, over 500 detainees have been returned home. But the prison camp still holds 270 people, and to close Guantanamo the U.S. is going to have to find a solution for each one of these men.

So I'm going to separate out the detainees of Guantanamo into a few categories that I think pose different problems. First, there are the detainees that even the United States acknowledges can be returned safely. Unfortunately, among this group are a sizable number, an estimate is somewhere between 50 and 70, who cannot and should not be returned to their home country because of credible fears of torture or other abuse upon return. Just to give you a sense of whom we're talking about, one subcategory in this group is a group of 17 Chinese Uighurs: Muslims from the western part of China who are sold to the United States by bounty hunters in Pakistan. The United States has long recognized that these men pose absolutely no risk to the United States or its allies, but it has also recognized to its credit that these men cannot be returned to China because they would be at serious risk of persecution and abuse, even possibly execution.

We've seen China execute Uighurs recently. All of these men have been accused of being part of a separatist movement in China's Xinjiang Province. In 2006 the United States convinced Albania, of all places, to take five of these men. But although the United States has been actively

pressing other governments to help with resettlement of the remaining Uighurs, it has had little luck, and it has refused to grant any of the Uighurs asylum in the United States. So even though everyone, except for China, recognizes that these men are not a threat, they remain on Guantanamo. They've been at Guantanamo now for six years.

Other prisoners, including several from Tunisia, Algeria, Libya, other countries with a well-documented record of torture, have expressed similarly credible fears of return, fears of persecution and abuse. In some cases, the U.S. has accepted these fears as legitimate and declined to transfer them back to their home countries. In other cases, however, the U.S. has either ignored their claims of abuse or fear of abuse, or has failed to ask them about it, or has accepted what are known as diplomatic assurances, which are diplomatic promises by these abusive governments that they won't abuse these people if they're returned.

Now think about it, accepting a promise from Syria or Libya or Algeria that they are going to treat these people humanely, and the U.S. accepts those promises. We now know of several Russians and at least one Tunisian detainee who were returned on the basis of diplomatic assurances, and abused upon return. And we also know of two Libyans who have been held in indefinite detention without charge since their return. We don't know how they've been treated because it's impossible to get information about people in Libyan custody, or at least very, very difficult. So that shows you, I think, the validity of these so-called diplomatic assurances.

In order to be more fair, I think the United States needs to create a system by which detainees are provided advance notice of the possibility of return, and an opportunity to object to their transfer, and to articulate why they would fear return. And they need to be able to do this before some kind of independent adjudicator, such as a federal court. Now the odds are good, and clearly in the cases of the Chinese Uighurs and some others, that there will be a group that an independent adjudicator will fairly assess should not be returned. So that raises the question of what do we do with these people?

The United States complains that no other country will accept people whom it cannot and should not return to their home countries. With the exception of Albania, no other country has accepted nonresident, third-country nationals. But think about it. Why would other countries decide to accept these people when the United States itself has refused to accept them? And I think that gets to the core of the problem. The rest of the world says you've created this mess, and you want us to solve it, without the United States even taking a step in the direction of trying to solve it itself. So I would propose that the United States should break the impasse about these people at Guantanamo who can't be returned by accepting at least some number of them into the United States. Perhaps the Uighurs-- of whom, by the way, there is a very well-established Uighur community in the United States that has expressed the willingness to integrate these people into their communities, and to help them resettle, and to help them acculturate, and so forth. If the United States were to accept some number of these people, I think it would then have a much

stronger case to make in its relations with other countries to encourage other countries to themselves accept these people. It would make it clear to the rest of the world that we're not trying to shift the entire burden, we're just asking for some kind of burden sharing. And I think at that point countries that have long condemned Guantanamo would be much more willing to couple their condemnation of Guantanamo with actual concrete action to help close it.

A second and sizable group of detainees, approximately 80 people, are those whom the United States says it intends to prosecute. Now, we are certainly in favor of prosecuting those people who are implicated in criminal acts. We believe by prosecuting them, the United States diminishes their status to common criminal. It is, I think, a much better alternative than calling them an enemy combatant, which gives them a status that many of them embrace. By prosecuting them, it legitimates their detention in the eyes of the world, and brings, I think, some closure to the victims of terrorist crimes. But it is fundamental that these trials have to meet the criteria of basic fairness. Otherwise, the verdict will lack legitimacy, and the court system, as much as the defendants, will be on trial.

This is certainly what we've seen to date with the Military Commissions process. As recent events have underscored, and maybe we can talk about this a bit in the question and answer period, the commissions lack independence, and they're vulnerable to political manipulation. And I would submit that that may be why we're seeing a sudden rush of prosecutions right now, after years in which the commissions have gone nowhere. The commissions lack basic due process guarantees, preventing, for example, defendants from being able to effectively confront the evidence against them, which is, of course, a basic attribute of a fair trial. The commissions do not even satisfy the criteria of swift justice, which was one of the justifications put forward when they were established. More than six years have passed since the administration announced the creation of these commissions. And to date they have only had one success, the conviction of an Australian, David Hicks, by guilty plea. So it wasn't even a full trial. And Hicks is now back in his home country. He's a free man. He served a nine-month sentence.

The Bush administration tries to justify the Military Commission system by arguing that it cannot try Guantanamo detainees in the civilian courts, because of stringent evidentiary rules and because it will be required to make public classified information. But as several former judges and prosecutors have argued in court, including in a very important report that was issued a couple of weeks ago by Human Rights First-- and if you're interested in this question, I suggest that you visit their Web site and look at this report-- as these prosecutors and judges have argued, concerns about the difficulty of trying these detainees in federal court are overblown and misleading.

In fact, a reading of the Military Commissions Act of 2006 suggests that the administration's real concern may be that much of the evidence it has obtained during the course of detaining these people has been tainted by coercion and abuse. This is evidence that would not be allowed in a federal court. But notably the rules of the Military Commissions allow the

introduction of evidence obtained through cruel and inhuman interrogation methods, so long as it was obtained prior to 2006, and does not rise to the level of torture; but, of course, that opens up a can of worms, because of the administration's very narrow and inaccurate definition of what constitutes torture, and is seen by a military judge to be reliable and probative. Because of these rules, combined with lax rules on hearsay in the Military Commission rules, evidence obtained through abuse may be allowed at trial without giving the defendant any opportunity to confront either his accuser or the interrogator that obtained this evidence.

Now, if the United States expects these verdicts to have any legitimacy either domestically or internationally, they should not be based on evidence obtained abusively. Nor should anyone be put behind bars for life or even potentially face the death penalty-- because I emphasize that the Military Commissions allow the death penalty-- on the basis of affidavit summaries of interrogation statements that the defendant faces, without the opportunity to confront the person who made those statements.

For these reasons, and others that we could go into, human rights and civil liberties groups have been extremely critical of the Military Commissions process. Yet it's not only the usual suspects that have been critical of the process. Even Colonel Morris Davis, who is the former chief prosecutor for the Military Commissions, has recently added his voice to the growing chorus of critics. In explaining his decision to resign his position in October 2007, Colonel Davis said bluntly, I quote, "I concluded that full, fair and open trials were not possible under the current system." This is the prosecutor speaking. Davis suggested that he was told acquittals were simply not an option, and he was pressured to bring cases before they were ready, and he was instructed not to second-guess the use of evidence obtained through abusive interrogation methods.

So what is the alternative? Well, I believe that America's traditional institutions of justice, namely the civilian federal courts, both can and should be used to deal with those who have committed, planned, or conspired to commit acts of terrorism. I think when it comes to the relative strength of traditional courts in handling these cases, all we have to do is look at the relative records of the past six and a half years. During that time the federal courts have prosecuted dozens of people accused of involvement in international terrorism, both inside and outside the United States. They have handled complicated and difficult trials. Some of these trials have been messy, but they have succeeded. The courts have disrupted conspiracies and attacks. They have put dangerous people away, and they have given us finality in a way that is widely seen as fair. You will not hear our allies criticizing the prosecutions in federal courts. We have not seen it; we will not see it. In contrast, every alternative to the traditional federal system, whether detention without charge or prosecutions before Military Commissions, has failed, has led to criticism, and has opened up a can of worms in terms of problems.

So that leads me to the final, and I think what is probably the most difficult group of detainees who are in custody at Guantanamo, those whom the government insists are dangerous,

but for whom it claims that it does not have evidence that would hold up in a court of law. To deal and-- yes, I think that that raises the question of why do they believe they're so dangerous if they have no evidence. But unfortunately, there are many people who believe that to deal with this category of people, the United States should pass a preventive detention law that would permit detainees to be held without charge or trial. And if you have been reading the op-ed pages of major newspapers in recent months, there's been a slew of op-eds to this effect. There have been academic articles. There have been think pieces published by the Brookings Institution and other organizations, advocating that Congress pass legislation that would allow preventive detention.

When I warned at the beginning of my talk that in closing Guantanamo we could create an even bigger problem, this is what I was referring to. I think it's notable that in the United States, since the founding, we have not had a system of preventive detention. We have survived crises without passing laws to allow preventive detention. That, in itself, I think, should caution against creating such a new system, even to confront what is clearly a serious problem of terrorism. But certainly this is something that I think we're going to see a public debate about in the next few months, and probably at the beginning of the next presidency.

So the precise contours of these proposals vary quite a bit from one proposal to the next. Nearly all of them assume this secret, classified evidence that is never shown to the defense. This is exactly what we see at Guantanamo right now, by the way. The use of classified evidence that the detainee does not see, of course would make it impossible for the detainee to meaningfully challenge this evidence, and would allow statements obtained through coercion and other abuse to be used. Again, just as we see at Guantanamo right now. So I think it should be obvious that such a solution, such a so-called solution, would look to the world like the U.S. was merely moving Guantanamo to the United States, making the Guantanamo system of detention without trial an established part of the United States' system of justice.

Such a system would obviously do harm to the United States. It would also set a terrible precedent in terms of countries like Egypt, Russia, China, Pakistan, countries in which we have long condemned the use of detention without trial. And it would do little to increase America's standing as a nation committed to the rule of law. I think the world would see it as Guantanamo lite.

Now, there may be a few dozen people at Guantanamo today who could reasonably be considered dangerous, but who cannot be tried. But, again, I would emphasize that nobody knows this for sure. And, I mean, we'll see this statement made quite a bit when people are asserting the need for a preventive detention system, but nobody knows this for sure, given that the intelligence that has been used to hold people at Guantanamo is so tainted and so secret. But even taking it as a given that there are some number of dangerous people at Guantanamo whom we can't try, we should recognize that there are probably tens of thousands of dangerous people

around the world who are potentially dangerous, who potentially pose a threat, that we do not have behind bars.

After all, there are many thousands of young men who went to Afghanistan before September 11<sup>th</sup>, who were committed to supporting the Taliban, who stayed in the same camps and developed the same associations as those dozens of people at Guantanamo now. There are many people around the world who subscribe to the same extremist ideologies as the men that are currently held in Guantanamo now, that have read the same literature, that surf the same Web site, watch the same videos, and that potentially could be recruits to terror cells. I think if the United States swept through cities like Kandahar, Afghanistan, or Karachi, Pakistan, tomorrow, and detained and interrogated a thousand young men at random, they could probably find at least a few dozen who would fit the profile of the people that are talking about the few dozen dangerous, but unprosecutable people at Guantanamo.

Leave those people at Guantanamo for six years, and they might well become even more dangerous. But with this sort of global reality in mind, I think we need to think hard about whether incapacitating a few dozen potentially dangerous men at Guantanamo, out of the thousands of such people in the world at large, is likely to weaken al Qaeda. If you think it would, then perhaps your response to preventive detention is “yes.” But if you have any trust in the U.S. Army’s Counterinsurgency Manual, which warns that punishment without trial is an illegitimate action that enemies exploit to replenish their ranks, then the answer to preventive detention is clearly “no.” It is no if you look at the Web site that uses images of Guantanamo to recruit more fighters to the terrorist ranks. It is no if you believe that April 2006 National Intelligence Estimate, which argues that to defeat al Qaeda, the United States needs to define terrorists from the [point of view of the] audience they seek to persuade, and make the Muslim mainstream the most powerful weapon in the war on terror; i.e., the United States needs to claim the moral high ground and convince the Muslim world that this is not a war against Islam. This is not a war against Muslims per se. This is a fair effort to fight criminals.

Unfortunately, there is no shortage of potential terrorist operatives around the world, but I believe that Guantanamo has made the problem worse, not better, probably creating far more enemies for the United States than it has incapacitated. A new system of preventive detention would rightly be seen as another departure from the United States’ commitment to the rule of law, and would compound the problem, not solve it.

So to conclude, I’ll just reiterate that I don’t think closing Guantanamo will be easy, but I think it is absolutely necessary. Convincing the American public to accept on U.S. soil some number of detainees that have been described for the past more than six years as the worst of the worst, will require strong leadership and admission of past failure. Securing international cooperation to help resettle other detainees who cannot be returned home, or whose countries will not take them back, will require patience, time, and resolve. Trying detainees in federal court

may be messy and challenging, but chiefly, given all the attention that these trials will likely incur, and conceding that some detainees may potentially pose a threat but should be released just the same, may be difficult for politicians to acknowledge. But we've seen that the alternatives are worse.

In a sense, the United States has been running a controlled experiment for the past six and a half years in how best to handle suspected terrorists. And the results are out. Those dangerous men who've been brought into the criminal justice system are, to use one of President Bush's favorite expressions, no longer a problem for the United States. If guilty, they have been convicted, put away, and are largely forgotten. Who outside of the United States worries about Moussaoui anymore? They are not being used for propaganda purposes by groups like al Qaeda. Their treatment has reinforced the United States' status as a country of laws. It has [not] undermined it. Meanwhile, every single person who remains in the alternative system at Guantanamo remains an enormous problem for the United States. I think the lessons are clear. We should stop experimenting, and we should absolutely not build another untested structure on a foundation of failure. Thank you.

**Q:** Thank you, Joanne, for the work you're doing.

**Joanne Mariner:** Thank you.

**Q:** You said you believed that the traditional criminal courts should be used for some of these men. But do you believe that Jose Padilla's trial down in Miami was fair? Reportedly some of the jury members wore color-coordinated clothes of red, white, and blue on trial day.

**Joanne Mariner:** I knew I could expect some tough questions here. I didn't know it would be the very first one. But that's a very good point, and I would not. I think the Padilla case is a really hard case. I didn't know about jury members wearing red, white, and blue, but I do know that the evidence against Padilla was very thin. For those of you who are not as familiar with the case of Jose Padilla, he was an American citizen of Puerto Rican descent who converted to Islam and was picked up at an airport in Chicago and held as an enemy combatant for, I believe, about two and a half years. So he's one of the very few people who had been held on United States soil in essentially a Guantanamo-like situation.

After a lot of litigation in the federal courts, the U.S. abruptly pulled Padilla out of his military detention and decided to prosecute him. Many people believe that this happened because there was a fear that the courts would condemn his detention as an enemy combatant. So he was added to a prosecution in Florida. And the evidence, you know, to the United States' credit-- and I think this shows the strong standards of the federal court-- the United States did not try to use any of the evidence it had obtained abusively against him during the time he had been held as an enemy combatant. So the evidence that it did use against him was very, very thin.

And I think it's fair to look at that verdict and wonder whether it was sufficient evidence to support a conviction and to support a long sentence. But that case really is one extreme. I don't

think it's necessarily the case to be most proud of in the federal system, but I would say if you look at the overall record of the federal courts in handling terrorism, it's really quite good. And where that case, I think, is somewhat anomalous or extreme in the federal court, a case like that would be good for the Military Commission system. So in making the comparison, let's be clear that Padilla may not be the best case in the federal courts, but it would be probably an average case or even a good case in Military Commissions.

**Q:** Actually, I'm following up on what he had done. I guess I was kind of stunned because I've written a lot of articles, including academic journal articles, dealing with the federal courts, and the federal criminal justice system is, I think at best, a travesty. It's a horrible, evil twin of what we have in the state system because of what can be admitted. And this is more of a comment, you know, because there are other cases, too. There's the Lackawanna Six case, which I think was a travesty, the Al-Arian case, with the professor at South Florida, in which the feds-- this was in federal court-- they start out with one set of charges-- this guy is the great terrorist leader of the world practically. And then as we start seeing their evidence, we find out they have none.

And has the system of justice in this country gotten to a point where we can literally hold the federal courts as some sort of standard of good? Because I can lay chapter and verse, time and again, of the things that go on with federal prosecutors. You might want to read Bill Moushey's ten-part series from 1998 called "Win at All Costs" about the lies of the federal system, or read Falkray [ph?] Roberts or Lawrence Strand's book that deals with the federal system. And so I guess my question is, have the standards of justice in this country gone so far as literally we can now hold the federal courts as some sort of shining beacon. Is that where we are now?

**Joanne Mariner:** Well, I think you and I have a different perspective on the federal courts. I clerked for a federal judge and I can really confidently say that there's no one who I would rather see handling one of these very difficult cases than the judge for whom I clerked. Yesterday, or Thursday, that is, I witnessed the arraignment of the five alleged September 11<sup>th</sup> conspirators, and I witnessed how that judge acted in court, which I thought was certainly substandard. I can think of a dozen federal judges who'd be qualified to handle that case. Now I agree with you that there has certainly been some overreaching in the past few years by federal prosecutors. But I think it's important to note that the courts have mostly not gone forward with those cases. There have been acquittals in some very politically controversial cases. And like Mo Davis, the former prosecutor of the Military Commission said, "Well, in the Military Commissions we're not going to have acquittals." In the federal courts you can expect to have acquittals. You can expect to have judges that will have the independence and courage necessary to acquit people who are being unfairly prosecuted. And I do believe you have strict standards of evidence, much stricter than what you see in the Military Commission system.

**Man 1:** My question is in regards to the 13<sup>th</sup> Amendment: “Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction, except slavery is not completely abolished.” Except. Can you comment on this and maybe think of there’s a link between the 13<sup>th</sup> Amendment and today and our prosecution of people like Guantanamo? Thank you.

**Joanne Mariner:** I think you are maybe pointing to the larger problem of just very repressive and inhumane conditions, not only at Guantanamo, but in our federal prisons. And Human Rights Watch is actually releasing a report next week about Supermax conditions at Guantanamo. In case people in this room aren’t familiar with that term, there are a bunch of super-maximum security prisons in the United States, and those conditions have now been replicated at Guantanamo. Super-maximum security prisons are prisons in which people are held 22 or 23 hours a day in solitary confinement in their cells. They are brought out once a day to exercise in a solitary way in a, you know, small sort of chicken run. So they essentially spend their lives alone. This is a problem within the United States. I think Human Rights Watch has released a number of reports about these prisons within the United States. This is an even worse problem at Guantanamo, in that at least prisoners in supermax conditions in the United States are allowed a minimum number of family visits and family phone calls. There are prisoners at Guantanamo who have spent six years in U.S. custody without ever being able to make a phone call home to their families. No prisoner at Guantanamo has ever received a family visit. There are prisoners at Guantanamo who are illiterate, so although they’re allowed to write letters to their families, that is small consolation to someone who can’t write and can’t read.

So, you know, what we’re hoping, of course, is that Guantanamo is going to close soon. But in the meantime, we’re going to be calling for the very dramatically bad conditions of confinement there to be improved.

**Man 2:** I have two questions, but they’re short ones. I wanted to be clear: When you talked about the proposed laws for preventative detention, is that for enemy combatants, or are you talking about criminal suspects in the regular civilian court system?

**Joanne Mariner:** There are a variety of proposals, but most of them would simply cover suspected terrorists. Now, the United States government, or the current administration, calls terrorists enemy combatants. But there are many people who want to leave that paradigm behind. They don’t, I mean-- I think it’s associated with the Bush administration. Many people believe it’s been a mistake to call this a war against terrorism. It’s sort of wrongly elevated the status of people who engage in terrorist activity by calling them sort of the enemy, rather than calling them criminals. So I think most of these proposals would not, would drop the enemy combatant paradigm, but they would simply allow the preventive detention of terrorist suspects.

**Man 2:** Okay. My second question really quickly is here in Virginia a federal judge allowed the torture testimony of Abu Ali, who was supposedly plotting to murder George Bush, and was tortured into saying so by the Saudis, and the same judge refused to allow the jury to hear where the confession came from. And I wonder if you believe that that undercuts the War Parties argument that we cannot try these people in civilian court here because torture testimony will not be allowed. Thank you very much.

**Joanne Mariner:** That's also, like the Padilla case, that's a very good case to point out. Abu Ali, for those of you who aren't familiar with him, he's an American citizen who was arrested in Saudi Arabia, and his parents filed suit in the United States alleging that he was being held in Saudi Arabia at the behest of the American government. He was later extradited to the United States for trial, and his counsel claimed that he had been abused while in Saudi custody, and that confessions had been obtained abusively. The court allowed testimony by human rights observers, and experts on the Saudi system to show that, in fact, torture is prevalent in Saudi Arabia, and there's a strong likelihood that those statements were obtained abusively. But the court, and I'd emphasize that in the federal courts when there's a prima facie case made that evidence was obtained abusively, the burden is on the prosecution to show that it wasn't. So it's actually a heavy burden to get these testimonies entered into evidence. But in any case, in that case, the court did not find that the statements were obtained abusively, and they were allowed into court. Now, you know, I don't know exactly what happened. I wasn't-- I'm not necessarily going to second-guess the court's decision, but I agree with you that that case raises some concerns.

**Man 3:** My question pertains to the Uighurs, and people in the same category, that you mentioned. These people evidently are not even candidates for prosecution by Guantanamo's standards. So it would appear that after having been held under terrible conditions for years, the United States owes these people something. The United States government has committed a grave wrong against these people by holding them all this time in violation of all our own ideas of justice. So I'm wondering what possible reason U.S. authorities could give for denying asylum to Uighurs or others in the same category. We admit people all the time to asylum in this country, even though the United States government may not be at fault in endangering them or harming them in the beginning. But in this case, the U.S. government is the cause of their harm, and definitely owes them some form of restitution.

**Joanne Mariner:** Well, I absolutely agree with you there, but as I mentioned these are people-- the Uighurs included, because the United States spokesmen were speaking just in generalizations-- these are people that were deemed the worst of the worst, the most dangerous men on earth. I think it was Rumsfeld who said that they might chew the hydraulic lines on the airplanes when they were dropped at Guantanamo, and therefore they had to be subject to such, incredible constraints. So after you've told the world that these people are terrifying, it would

take a lot of courage to then say, well, we made a mistake. They're not the worst of the worst. In fact, they're not bad at all, and we're going to resettle them into the United States.

Now, I'm hoping that the next administration is not going to be wedded to the failures of this administration, and that it will be easier for them to turn the page. I don't see-- I mean, George Bush is kind of notoriously bad at admitting mistakes. Nobody else in this administration is particularly good at admitting mistakes. It may be easier for a future president to say, you know, this has been a mistake. The Uighurs-- by next January the Uighurs will have been held about seven years. We owe them resettlement in the United States. For that matter, I would say that we owe them some kind of compensation, as well, and we may owe some several hundred people who've been returned to their home countries without as much as an apology some kind of compensation. And there I note that one of the many pernicious things in the Military Commissions Act of 2006, which was passed in response to, I think, a very good decision of the U.S. Supreme Court, is that it bars former enemy combatants from going to U.S. courts to seek compensation. So the government has thought about the fact that it sort of, in principle, owes these people some kind of compensation, and it has explicitly barred that avenue of relief.

**Man 4:** Thank you for your talk, and your personal efforts in trying to bring these changes about. I've really appreciated that. I know that King Richard and King George W. don't really listen to inputs from other people, and I know we're very independent minded. But there are people that have been dealing with terrorists and large-scale threats for quite a while. The French, for example. I know their legal system is a little different. And they do have special judges that are kind of sitting in corners and, of course, they have the Napoleonic Code, which is a little different. But they've been dealing and adjudicating, and these people are in prison for various times through the courts. They use a lot of information from Arab countries and from Interpol, in particular, which again the present administration doesn't like to take inputs from. But I just wanted, a suggestion. Have you studied that? I haven't read enough about it. Has this been studied? Is there any kind of paradigm like this we certainly could, in this case, learn from the French. Thank you.

**Joanne Mariner:** Absolutely. That's a very good point. And in fact three weeks ago I was at a conference in Europe which was meant to share experiences, share knowledge. So it had a bunch of American participants, and also a bunch of Italian, French, Spanish, and other European participants, including judges and prosecutors, who handle terrorism cases. And the Europeans were unanimously aghast at the American approach of the past six years. And they made the point that not only has it harmed the U.S.'s own efforts to fight terrorism, but, in fact, it's harmed European efforts because some of these people were and are wanted in European courts. Some of these people have information that the Europeans could have used.

And in fact there was very important case in Hamburg, I think in Hamburg, somewhere in Germany a few years ago, in which the case needed information that Ramzi Binalshibh had.

Ramzi Binalshibh, as you probably know, was held in CIA custody for several years, and the U.S. refused, of course, to provide Ramzi Binalshibh or his testimony to be used in court. And it almost led to the acquittal of some dangerous people in Germany. So I think the European experience is a really useful experience for Americans to look at. The European experience has been to prosecute these cases, and to successfully prosecute these cases. And in terms of a negative European experience that I think is also instructive, when we're thinking about experimenting with preventive detention, we should look back at the UK experience of holding members of the Irish Republican Army in preventive detention during the 1970's, what was called internment. That experiment is absolutely widely seen as a failure. And people in the United Kingdom on both the Right and the Left agree that interning these suspected terrorists did not harm their organization but, in fact, led to greater recruitment. It elevated their status. It was a boon to them as opposed to part of an effective effort to defeat them.

**Man 5:** Good morning. How many prisoners are being held because of the state secrets privilege, and please, if you can, give us an update on the 20 CIA agents on trial in absentia in Italy.

**Joanne Mariner:** Well, the state secrets privilege has been used. When we spoke about compensation a minute ago, there have been some efforts in U.S. courts to bring suit for violations against people who have been held in abusive CIA custody. So you may have heard of the case of Khalid El-Masri, who was a German citizen who was abducted in Macedonia and brought to a secret CIA prison in Afghanistan, and also the case of Maher Arar, a Canadian citizen who was sent to Syria to be tortured. They brought case and suits in U.S. court for compensation, and those cases were tossed out based on the state secrets privilege. So it's essentially been used as a shield. And not just a shield in a way that, you know, possibly might be at least somewhat legitimate to protect against the revelation of classified material. No. It's been used as a shield to just absolutely throw these cases out of court, which is extremely disappointing.

Now, in Europe, we have-- Europe right now or Italy in particular, is the only place in which there is some effective effort at accountability. And I was actually just in Milan two weeks ago to see the first testimony in what's known as the Abu Omar trial, which is the trial of 26 Americans, including 25 CIA operatives, as well as a number of Italian intelligence officials, who are allegedly responsible for abducting an Egyptian cleric in Milan and delivering him to Egypt, where he was held in incommunicado detention and badly tortured for a period of years. That case is going forward and, in fact, that judge is one of the judges who's been most critical of Guantanamo and of U.S. counterterrorism.

**Man 6:** As I listened to your presentation, it seems like to me that there's one thread that is easy as a starting point to pull to bring back some respect to justice and the system, and that is the

elimination of the secret evidence and making that available and transparent. As a first step, that cleans up a lot of things going forward. Why isn't that being done?

**Joanne Mariner:** I could not agree with you more. I think that's really basic, and it's sad, when you read the transcripts of the status proceedings at Guantanamo, how many of these detainees say, okay, you say that I was in this place, or you say that I am a CIA operative, an al Qaeda operative. Who said that? How can I rebut this evidence if you won't tell me who is making this claim? But at Guantanamo it's secret evidence. Proposals for preventive detention would likely be based on secret evidence. Secret evidence is inherently unfair. Secret evidence is inherently something that the person who is facing accusations cannot effectively rebut. So I think.