



CLOSING GUANTÁNAMO AND RESTORING THE RULE OF LAW

It has been often repeated that closing Guantánamo will be a challenge. The reality is that the restoration of the rule of law to that offshore prison—and this country—should be significantly less complicated than the dismantling of the law has been. The time to close Guantánamo is long overdue—and it can be done in three months.

The new administration must repatriate those who can be released safely, secure safe haven in the United States and other countries for those who cannot be repatriated safely, and prosecute in federal criminal courts those who should be prosecuted. Only 250 of 779 men remain in the prison camp. Most can be returned to their home countries through vigorous diplomacy. A smaller number need to be offered protection in the United States or third countries, many of whom have already begun to come forward to offer help to the new administration. There is no justification for continued detention without trial or the creation of special courts; such proposals would continue the human rights disaster rather than end it.

Who Are the Guantánamo Detainees?

The U.S. began to detain alleged “enemy combatants” at the U.S. Naval Base on Guantánamo in January 2002. Approximately 779 men have been imprisoned at Guantánamo over the last seven years, and approximately 250 remain there today.

The Bush administration has consistently overstated both the threat posed, and the intelligence value presented, by the Guantánamo detainees. Even the CIA concluded in a seemingly ignored 2002 report that many of the detainees were never terrorists and were, at worst, either low-level minions or innocents caught in the wrong place at the wrong time. In long-delayed hearings, federal judges looking at the government’s best evidence have been similarly skeptical of the government’s justifications for detention. In the first hearings in which detainees were able to challenge the legality of their detention—coming nearly seven years after the prison opened due to government resistance to any legal review—judges recognized that 22 of 25 were improperly detained.

This should not be a surprise. Fewer than 10 percent were captured by the United States. The remainder were turned over to the United States, most at a time when the U.S. military was dropping bounty flyers promising “wealth and power beyond your dreams” during the chaos of wartime Afghanistan and Pakistan when people were fleeing the U.S. invasion. Others were picked up as far afield as Bosnia and the Gambia. In the seven years of the prison’s existence, fewer than 5 percent have ever been charged. The first two people convicted by military commission—Australian David Hicks (time served plus nine month sentence served in Australia) and Yemeni Salim Hamdan (time served plus six months sentence served in Yemen)—are home now; both are now free. Yet 250 remain in Guantánamo, the overwhelming majority uncharged and with no expectation of ever being charged.

More than 500 men have been transferred out of Guantánamo. Virtually all former Guantánamo detainees were released soon after their repatriation; in very few cases did the receiving countries consider that prosecution was merited. Almost all of those released are struggling to re-integrate into society after years of arbitrary detention, torture and abuse. As a recent joint report by the University of California at Berkeley and the Center for Constitutional Rights highlighted, this has not been easy—and the stigma of Guantánamo presents a major barrier to re-integration.

Those at Guantánamo now—seven years on—are, in large part, the unlucky ones: diplomatic pressure has not resulted in release, or they cannot be safely repatriated. On December 16, 2008, three individuals were transferred to Bosnia as a result of a judge's decision that these men were not properly classified as enemy combatants and should be released. But these men are the exception. All others have been transferred out of Guantánamo due to diplomatic pressure, public advocacy, or the threat of litigation. Those remaining behind are most often there because of a failure of diplomacy and the Bush administration's repeated challenges to timely litigation that would compel a transfer. In most cases, the allegations lodged against those who remain at Guantánamo are no more severe than the allegations against the more than 500 men already released.

The single most important determinant of whether an individual remains at Guantánamo in 2009 is his country of nationality. The men from European countries were released early on; virtually all the Yemenis remain behind. Ironically, it took a conviction in the military commissions to allow Salim Hamdan to return to his native Yemen, while scores of other Yemenis, including more than a dozen cleared for release, remain in Guantánamo waiting for an end to the diplomatic impasse. In addition, approximately 60 men remain at Guantánamo because they cannot be returned to their home countries safely due to a fear of torture or persecution, and they await safe haven in the United States or elsewhere.

How Should Guantánamo Be Closed?

- ❖ ***Announce the immediate restoration of fundamental principles.*** The Obama administration should announce immediately that the Geneva Conventions apply without exception; that torture and inhumane treatment will not be tolerated and will be prosecuted, as required by domestic and international law; and that all U.S. agencies that conduct interrogations or detention, including the CIA, will be bound by the Army Field Manual.
- ❖ ***Rapidly implement a charge or release policy.*** Within three months, the Obama administration should make final determinations about who they will prosecute. Prosecutions for terrorism related offenses have long occurred in federal criminal courts with success and credibility. All others should be either repatriated or offered protection in a third country. The administration must reject the notion that there is a third category of prisoners who are dangerous but who cannot be charged. First, the government has not demonstrated that any actual detainees fit that third category. Second, there is no law that authorizes detention without trial. Even if there could be an argument that detention without charge would be lawful for a very small category of detainees, such detention is unnecessary and would be viewed domestically and internationally as an unacceptable continuation of Guantánamo.

- ❖ ***Ensure the safe and speedy repatriation of those detainees releasable to their home countries.*** The Obama administration should renew active diplomacy in countries where repatriation has been delayed or blocked, most notably Yemen, the home of 40 percent of the remaining detainees (approximately 100 men). The other two largest categories of detainees are from Afghanistan (approximately 25 men) and Saudi Arabia (approximately 15 men). The Afghan detainees should be repatriated to Afghanistan, but not to continuing arbitrary imprisonment or proxy detention. The Saudi government has established a respected rehabilitation program that has been highly praised by the U.S. government and successfully applied to the 119 Saudis repatriated. The remaining Saudis should be repatriated through that program as well. In smaller numbers, many others come from countries to which they could be released with renewed diplomatic efforts. For example, the last remaining known UN mandate refugee could be returned to Somaliland, but remains in Guantánamo because of a failure of diplomacy. After seven years of unlawful detention without charge, there is no justification for the continued detention of these and other individuals who would be welcome to return to their home countries. Detainees who can safely return—and whose countries would accept them—constitute the overwhelming majority of the remaining detainees at Guantánamo. The Obama administration should renew active diplomacy in order to facilitate the closure of the prison and the end to the indefinite detention of these individuals.

- ❖ ***Secure safe haven for those detainees who cannot be released to their home countries for fear of torture or persecution, or because of statelessness.*** The Obama administration should accept the Uighurs into the United States, as ordered by a federal district court judge in October 2008. The Obama administration should then renew efforts to find safe third countries where detainees with protection concerns can reside. This could be done in collaboration with the United Nations High Commissioner for Refugees (UNHCR) building on efforts begun by habeas counsel, foreign lawyers and non-governmental organizations in various countries. Efforts to secure protection in third countries will be more achievable if (a) the U.S. accepts some men, with the Uighurs being the most logical group; (b) the Obama administration lodges a renewed request to various countries; (c) the Obama administration commits in word and deed to closing Guantánamo—and not replacing it with another regime—by either charging individuals in fair processes in federal court or releasing them; (d) the Obama administration acknowledges that the Convention Against Torture’s non-refoulement provision applies to transfers from Guantánamo as a matter of law; and (e) the Obama administration clears the names of those wrongly imprisoned, including in such ways as by inviting the UNHCR to conduct refugee status determinations at Guantánamo with lawyers present, or by re-classifying those wrongly imprisoned as non-enemy combatants.

- ❖ ***Prosecute individuals for crimes through tested methods and end the military commissions.*** Detainees who can lawfully be charged with a crime should be charged before the ordinary federal criminal courts. The domestic system is tested and it works. It has been used successfully for many terrorism-related cases. There are systems in place to handle classified information in federal courts, including the Classified Information Protection Act (CIPA) to accommodate testimony by intelligence experts without leaks. The military commissions are unlawful and have the same notorious symbolic resonance domestically and overseas as Guantánamo itself. The Obama administration must not allow them to continue.

- ❖ ***Ensure humane conditions at Guantánamo for the short remainder of the prison's use while a charge or release policy is implemented.*** The Obama administration should immediately close Camps 5 and 6 and end the use of solitary confinement at Guantánamo. Independent health professionals must be allowed access to the facility, in particular where there are requests from detainees or their counsel. Independent human rights organizations and international bodies must be allowed access to the facility, including to the detainees. Detainees must have access to one another and the ability to communicate by telephone to their families and their counsel.
- ❖ ***Allow habeas hearings to progress without obstruction.*** Finally, after seven years of obstruction, habeas hearings are beginning to take place. No further obstruction—either through legislation or through executive action—should be encouraged or permitted. Hearings should move forward with urgency, and with more information in the public domain; evidence must not be improperly classified. The Department of Justice must provide all exculpatory evidence and allow reasonable discovery. Good faith “meet and confer” should be required. A broad enemy combatant definition must be rejected. The Obama administration should permit, and indeed encourage, lawyers for the detainees to meet directly with the Department of State to facilitate repatriation and third-country protection.
- ❖ ***Acknowledge error.*** The Bush administration has courted disaster in the creation of the detention facility at Guantánamo and the transfer of hundreds there with no meaningful process. This has been disastrous for human rights and the U.S. reputation, and it has also been disastrous for the lives and reputations of these men. Error in policy and practice should be acknowledged, as should error in individual cases. The reclassification of individuals as non-enemy combatants would facilitate their re-integration into society and help them overcome the stigma that accompanies detention at the world's most infamous prison.
- ❖ ***Ensure accountability.*** Closing Guantánamo is an important step. But the Obama administration must also ensure that the policies and practices of the last seven years never happen again, and that justice is available for the victims of the U.S. government's abusive detention and interrogation practices. This can only happen through a transparent accounting of both policy and practice, compensation for victims, and prosecution for perpetrators.

Why Must Guantánamo Be Closed?

Guantánamo is illegal as a detention and interrogation facility intended to hold individuals outside of the rule of domestic or international law. Its operation has had, and continues to have, ruinous consequences for the individuals there and their families, for the U.S. reputation in the world, and indeed, as noted by the Senate Armed Services Committee report of December 2008, for our national security. The Obama administration must close the prison without creating processes in its place that will continue, or be seen as continuing, the practices that the prison represents.

The Center for Constitutional Rights is a non-profit legal and educational organization. CCR brought the first Guantánamo case, Rasul v. Bush, in early 2002. After a Supreme Court victory, CCR began representing other detainees and coordinating efforts of hundreds of habeas counsel. CCR has led the legal battle over Guantánamo—sending the first ever habeas attorney to the base and the first attorney to meet with a former CIA “ghost detainee.”

GUANTÁNAMO DETAINEES BY NATIONALITY

A Detainee's Country of Nationality is the Single Most Important Determinant of Whether He Remains at the Prison in 2009.

Need for Repatriation:

Yemen	97	(of 113)
Afghanistan	27	(of 223)
Saudi Arabia	13	(of 134)

Bosnia (3, of 6), Canada (1), Chad (1), Ethiopia (1), Indonesia (1), Iraq (6), Kazakhstan (1, of 3), Kenya (1), Kuwait (4, of 12), Malaysia (2), Mauritania (2, of 3), Morocco (2, of 15), Pakistan (4, of 66), Palestine (1), Somaliland (2, of 3), Sudan (3, of 12), Tanzania (1), United Arab Emirates (1, of 3)

TOTAL: approximately 190

Need for Third Country Protection (for some or all detainees from these countries):

Algeria	12	(of 20; note: only <i>some</i> with protection concerns; 7 already transferred to Algeria, 1 to Albania, 1 to the U.K.)
Azerbaijan	1	
China	17	(of 22; 5 already transferred to Albania to live as refugees)
Egypt	3	(of 5; note: only <i>some</i> with protection concerns; 1 repatriated as non-enemy combatant; 1 transferred to Albania as refugee)
Libya	7	(of 10; 2 already transferred to Libya and disappeared without charge in Libyan prisons)
Palestine	3	(of 3; note: only <i>some</i> with protection concerns)
Russia	1	(of 8; 7 already transferred to Russia with documented persecution)
Syria	10	(of 11; 1 already repatriated with no information about status)
Tajikistan	1	(of 12; 11 already repatriated, some with persecution)
Tunisia	10	(of 12; 2 already repatriated with documented persecution)
Uzbekistan	4	(of 6; one transferred to Albania in 2006, 1 already transferred likely to Uzbekistan with no information known about status)
TOTAL:	62	

Note: The total is not the sum of the figures listed by nationality because not all individuals from the above-listed countries have protection concerns preventing their repatriation.

Countries where all detainees have been repatriated:

Australia (2), Bahrain (6), Bangladesh (1), Belgium (2), Denmark (1), France (7), Iran (3), Jordan (8), Maldives (1), Qatar (1), Spain (1), Sweden (1), Turkey (5), Turkmenistan (1), Uganda (1), United Kingdom (8)

Note: Numbers may vary from government or other records by a small margin, due to cases of dual citizenship, uncertain nationality or incomplete information.