



How to Close Guantanamo

BLUEPRINT FOR THE NEXT ADMINISTRATION

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FOR THE NEXT U.S.
ADMINISTRATION

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On human rights, the United States must be a beacon. Activists fighting for freedom around the globe continue to look to us for inspiration and count on us for support. Upholding human rights is not only a moral obligation; it's a vital national interest. America is strongest when our policies and actions match our values.

Human Rights First is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the struggle for human rights so we press the U.S. government and private companies to respect human rights and the rule of law. When they don't, we step in to demand reform, accountability and justice. Around the world, we work where we can best harness American influence to secure core freedoms.

We know that it is not enough to expose and protest injustice, so we create the political environment and policy solutions necessary to ensure consistent respect for human rights. Whether we are protecting refugees, combating torture, or defending persecuted minorities, we focus not on making a point, but on making a difference. For over 30 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership.

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“I have said repeatedly that I intend to close Guantanamo, and I will follow through on that.”

President-elect Obama, 60 Minutes, November 16, 2008

Introduction

Nearly four years ago, President Obama signed an executive order committing to close the detention facility at Guantanamo Bay.¹ At the time, there was significant bipartisan consensus, supported by the nation’s top national security officials, that Guantanamo undermines U.S. national security and compromises American values. Closing Guantanamo is a signature issue for the president’s legacy, and it can be accomplished in his second term.

Although there have been legal, practical, and political setbacks, the Obama Administration has made substantial progress towards closing Guantanamo. Upon coming to office, the administration established an interagency task force—composed of the relevant security, intelligence, and law enforcement agencies—to collect and analyze for the first time all the available information on each detainee. The task force recommended that the majority of detainees be transferred, while the balance would face criminal charges or be held in law of war detention. Since 2009, the administration has transferred 72 detainees from Guantanamo, taking steps to mitigate possible risks from those transfers. One hundred sixty-six men remain detained there. Significantly, no detainees have been

¹ Executive Order 13492: Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Close of Detention Facilities (Jan. 22, 2009).

brought to Guantanamo during President Obama’s first term.

As recently as this past October, President Obama reiterated his conviction that Guantanamo should be closed. Failure to close Guantanamo risks inflicting a blot on U.S. leadership and counterterrorism policy for years to come. Guantanamo remains a recruiting tool for al Qaeda and affiliated terrorist groups, placing U.S. troops and the nation at risk. Key U.S. allies oppose the detention and trial system at Guantanamo, and the United States may be unable to secure extradition of terrorism suspects if the result will be military detention or trial by military commission there. In an era of budget austerity, operating Guantanamo at a cost \$150 million per year, more than thirty times the cost of keeping captives on U.S. soil, is fiscally irresponsible when most detainees are already set for transfer.²

The imperative to close Guantanamo has increased as the United States prepares for the end of major combat operations in Afghanistan—the conflict in which most of the Guantanamo detainees were captured a decade or more ago. The United States is already transitioning detention operations in Afghanistan to the Afghans. By closing Guantanamo, the Obama Administration will align its policy objectives with a forward-looking post-war counterterrorism strategy that does not depend on maintaining active military detention facilities.

Moreover, Guantanamo detainees are being held under the 2001 Authorization for Use of Military Force, which provides detention authority only while hostilities are ongoing. As major combat operations in Afghanistan come to an end and the secretary of defense and other national security officials talk of the “strategic defeat” of core al Qaeda, courts are likely to take a renewed interest in whether there remains authority to hold Guantanamo detainees. Closing Guantanamo will help to place counterterrorism policies on a more stable and durable legal footing.

This blueprint outlines a three-stage plan for how the Obama Administration can close Guantanamo during the president’s second term.

² Carol Rosenberg, *Guantanamo: The Most Expensive Prison on Earth*, The Miami Herald, Nov. 25, 2011.

How to Close Guantanamo

SUMMARY

President Obama should recommit to closing Guantanamo in his second term. Taking the following steps will help establish a framework to enable the transfer of prisoners out of Guantanamo.

STAGE 1

- Reaffirm publicly that Guantanamo will be closed before President Obama leaves office.
- Appoint a high-level White House official with responsibility to ensure timely and effective implementation of the president's plan to close Guantanamo.
- Redouble efforts to transfer cleared detainees to their home or third countries by:
 - Fighting and, if necessary, vetoing any legislation that imposes restrictions on the transfer of Guantanamo detainees to their home countries, third countries, or the United States.
 - Directing the secretary of defense, in concurrence with the secretary of state and in consultation with the director of national intelligence, to certify transfers and issue national security waivers to the fullest extent possible consistent with applicable law.
 - Reversing the executive branch moratorium on transferring detainees to Yemen.
 - Developing plans for responsibly mitigating risks associated with transfers.
- Suspend the use of military commissions for current and future cases that do not allege internationally recognized war crimes committed in armed conflict.
- Direct the attorney general, in consultation with the secretary of state and other relevant agency and department heads, to determine appropriate alternative dispositions for the remaining detainees designated for prosecution, including transfer to the United States or foreign countries for prosecution, or release.

- Direct the secretary of defense to immediately initiate Periodic Review Board hearings for eligible detainees, which should be completed in a timely and effective fashion pursuant to Executive Order 13567.

STAGE 2

- Transfer cleared detainees at an accelerated rate.
- Manage the risk posed by repatriation and resettlement by facilitating monitoring, rehabilitation, and security programs to ensure that transfers occur consistent with U.S. national security interests and obligations under international human rights and humanitarian law.
- Transfer detainees whom the attorney general believes have committed crimes against the United States to the United States for prosecution in federal court, where such transfers can be made consistent with applicable law. Alternatively, transfer for prosecution those detainees who may be tried in their home countries or in third countries, even if they cannot be tried in the United States.
- Direct the secretary of state and secretary of defense to initiate immediate efforts to transfer detainees for whom the secretary of defense, pursuant to the periodic review process, has determined detention is no longer warranted.

STAGE 3

- Arrange to have detainees who have been convicted by military commission serve the remainder of their sentences in the United States or in their home countries, if such arrangements can be made consistent with U.S. international legal obligations.
- Consistent with negotiated repatriations and resettlement agreements, complete the transfer of all remaining detainees.
- Continue to manage the risk posed by repatriation and resettlement by facilitating monitoring, rehabilitation, and security programs in countries receiving detainees.

How to Close Guantanamo

STAGE 1

RECOMMENDATIONS

President Obama should articulate a renewed commitment to responsibly close Guantanamo with a plan that is lawful and practical. Taking the following preliminary steps will help underscore this commitment and establish a framework that will enable the transfer of all detainees out of Guantanamo by the end of the president's second term.

President Obama should:

- **Reaffirm that Guantanamo will be closed before he leaves office.** President Obama should signal clearly that he intends to close Guantanamo by the end of his second term. A clear commitment to close Guantanamo will facilitate international cooperation and generate renewed incentives to confront the most challenging obstacles to closing the prison. It will also allow the administration to align policy objectives as the United States transitions away from military detention at the end of major combat operations in Afghanistan and strategically defeats core al Qaeda.
- **Appoint a high-level White House official with responsibility to ensure timely and effective implementation of the president's plan to close Guantanamo.** Currently, the Department of Defense, State Department, Department of Justice, the Office of the Director of National Intelligence, and other relevant agencies and departments all have responsibilities that pertain to closing Guantanamo. Those efforts should be coordinated by a high-level official in the White House to ensure that the president's goal is met.

- **Redouble efforts to transfer cleared detainees to their home or third countries by:**
 - **Fighting and, if necessary, vetoing any legislation that imposes restrictions on the transfer of Guantanamo detainees to their home countries, third countries, or the United States.** Congress has passed laws that require the secretary of defense, in concurrence with the secretary of state and consultation with the director of national intelligence, to certify that several impractical requirements are met prior to transferring detainees.³ These certification requirements place burdensome restrictions on transfers that effectively overrule the determinations made unanimously by the relevant intelligence and security agencies of the government. The president should fight to maintain the authority to follow through on his determinations regarding U.S. national security, and should veto any legislation that contains burdensome transfer restrictions.
 - **Directing the secretary of defense in concurrence with the secretary of state and in consultation with the director of national intelligence, to certify detainee transfers and issue national security waivers, to the fullest extent possible consistent with applicable law.** If the president is unable or unwilling to veto or have modified legislation that imposes transfer restrictions, he must find alternative ways to maintain the flexibility to transfer cleared detainees. For example, a recent change in law provides for an expanded national security waiver that allows the secretary of defense to avoid the most onerous of the certification requirements by establishing "alternative measures" that serve the same general purpose of ensuring safe and secure transfers.⁴ As fifteen

³ See National Defense Authorization Act for the 2012 Fiscal Year, § 1028, Pub. L. No. 112–81 (2011); Continuing Resolution for the 2013 Fiscal Year, H.J. Res. 117 (2012); Consolidated Appropriations Act, 2012, Pub. L. No. 112–74 (2011).

⁴ See National Defense Authorization Act for the 2012 Fiscal Year, § 1028(d), Pub. L. No. 112–81 (2011).

retired generals and admirals pointed out,⁵ this added flexibility in the law means that the president can direct the secretary of defense to certify transfer requirements and sign national security waivers to secure transfer agreements for those detainees who are cleared for transfer.

- **Reversing the executive branch moratorium on transferring detainees to Yemen.** There remains understandable concern about instability in Yemen, and in particular the threat posed by al Qaeda in the Arabian Peninsula. However, the blanket moratorium on transfers to Yemen effectively places a categorical ban on transferring any Yemeni detainees back to their home country irrespective of the risk any particular detainee poses. Transfer decisions should be made on an individual basis and only by reference to concrete, reliable, and specific information regarding the threat posed by a detainee.
- **Developing plans for responsibly mitigating risks associated with transfers.** Consistent with current policy and practice, the administration should pursue appropriate and lawful security measures to mitigate the risks associated with transferring detainees. In particular, there needs to be an early focus on how to transfer cleared Yemenis consistent with national security interests and the rule of law.
- **Suspend the use of military commissions for any current and future cases that do not allege internationally recognized law of war offenses.** The current use of military commissions to try Guantanamo detainees is unlawful, unwise, and unnecessary; continued reliance on the commissions is therefore a mistake. Should the Obama Administration continue to try Guantanamo detainees in “reformed” military commissions, it should recognize that many of the past, current, and pending military commission prosecutions fail to

allege internationally recognized war crimes or criminal conduct committed in armed conflict, as is required to establish jurisdiction in law of war military commissions. As a result, the D.C. Circuit Court of Appeals, in *Hamdan v. United States*,⁶ recently overturned a military commission conviction because the crime for which the defendant was convicted was not an internationally recognized war crime. The ruling in this case—coupled with uncertainty regarding the military commissions system as a whole—calls into question the stability of these prosecutions. Accordingly, the president should direct the secretary of defense to refrain from bringing any further military commission cases that do not allege clearly established internationally recognized war crimes. The president should also direct the secretary of defense and secretary of state to secure the release of detainees who have completed criminal sentences at Guantanamo.

- **Direct the attorney general, in consultation with the secretary of state and other relevant agency and department heads, to determine appropriate alternative dispositions for the remaining detainees designated for prosecution, including transfer to the United States for prosecution, or to foreign countries for prosecution or release.** Current law prohibits transfer of detainees to the United States for prosecution, imposing a historically unprecedented restriction on the ability of the executive branch to effectively prosecute criminal suspects.⁷ The president should work with Congress to overturn these transfer restrictions and veto any bill that would carry them forward. Some detainees may be transferred for trial in their home countries or third countries, even if they cannot be tried for crimes against the United States. Others who are referred for prosecution may be transferred if a Periodic Review Board or other competent authority determines that detention is no longer warranted. All such transfers should be made in accordance with

⁶ *Hamdan v. United States*, No. 11-1257 (D.C. Cir. 2012).

⁷ See National Defense Authorization Act for the 2012 Fiscal Year, § 1027, Pub. L. No. 112-81 (2011); Continuing Resolution for the 2013 Fiscal Year, H.J. Res. 117 (2012); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74 (2011).

⁵ Letter from Retired Generals and Admirals to President Barack Obama (January 20, 2012), available at <http://www.humanrightsfirst.org/wp-content/uploads/2012-01-20-Letter-to-Obama-APathToClosingGuantanamo.pdf>.

international human rights and humanitarian law obligations.

- **Direct the secretary of defense to immediately initiate Periodic Review Board hearings for eligible detainees, which should be completed in a timely and effective fashion pursuant to Executive Order 13567.** Although the executive branch asserts that 46 Guantanamo detainees may be held indefinitely in law of war detention, Executive Order 13567, codified in the Fiscal Year 2012 National Defense Authorization Act, establishes interagency Periodic Review Boards (PRBs) to determine whether these law of war detainees should be transferred because they no longer pose a significant threat to the security of the United States.⁸ The executive order mandated that each detainee shall have an initial review, consisting of a PRB hearing, no later than March 7, 2012. Yet, nearly nine months after the deadline, not even a single PRB hearing is known to have been completed. The secretary of defense should order that all PRB reviews commence immediately, and that determinations be made as soon as possible, and not later than December 31, 2013.

STAGE 2

RECOMMENDATIONS

Once the framework to close Guantanamo has been established, President Obama should:

- **Transfer cleared detainees at an accelerated rate.** If the Obama Administration were to continue transfers out of Guantanamo at the current pace, Guantanamo would remain open until 2054.⁹ Any realistic plan to close Guantanamo in an Obama second term must include an accelerated schedule for transferring detainees who have already been cleared—the category of detainees that poses the

⁸ See Executive Order 13567: Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force (Mar. 7 2011); National Defense Authorization Act for the 2012 Fiscal Year, § 1023, Pub. L. No. 112–81 (2011).

⁹ Calculation assumes four transfers a year, consistent with the number of transfers in 2012, as of the date of publication.

fewest difficulties with respect to securing transfer. Accordingly, the president should direct the secretary of state, in conjunction with the secretary of defense and other relevant agency and department heads, to transfer cleared detainees as quickly as possible consistent with applicable law.

- **Manage the risk posed by repatriation and resettlement by facilitating monitoring, rehabilitation, and security programs to ensure that transfers occur consistent with U.S. national security interests and obligations under international human rights and humanitarian law.**

Guantanamo detainees subject to transfer have been cleared through an interagency process that includes all the relevant security and intelligence agencies. Moreover, when necessary, robust post-transfer security and monitoring mechanisms have been put in place to mitigate any risks associated with transfers. As a result, there have been very few post-transfer security problems; according to the Office of the Director of National Intelligence, there are only 3 confirmed cases of “reengagement” in 72 transfers (4.5%) since 2009.¹⁰ Nonetheless, transfers out of Guantanamo have been hampered by greatly exaggerated reports of Guantanamo detainees “returning to the fight.” While there will always be some risk that a detainee could engage in criminal acts after being transferred, past acts of terrorism by a small number former Guantanamo detainees do not justify categorically barring the transfer of other detainees who have been cleared for transfer.

To manage potential risks from transfers, President Obama should:

- Direct the secretary of state to obtain appropriate security assurances from receiving countries, including assurances to lawfully monitor returned detainees’ activities.

¹⁰ Director of National Intelligence, Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba (Sep. 5, 2012).

- Direct funding to support, or propose legislation to invest in, reintegration programs to facilitate the safe and effective reintegration of Guantanamo detainees post-transfer. Particular emphasis must be placed on developing a plan to deal with the Yemeni detainees, with consideration given to whether a comprehensive security agreement can be made with the Yemeni government to provide lawful security arrangements that would allow transfers.
- Direct funding to support, or propose legislation to invest in, law enforcement training to assist other countries in lawfully monitoring detainees' activities and investigating suspected criminal activity.

Detainees should be returned home when possible and resettled when repatriation is not possible consistent with international law. Article 3 of the United Nations Convention against Torture (CAT) prohibits the transfer of individuals to countries where there are substantial grounds for believing that such individuals are in danger of being tortured.¹¹ The United States cannot rely exclusively on diplomatic assurances to prevent transfers to torture. An interagency task force established by executive order in 2009 provided recommendations designed to improve the administrative process for ensuring that U.S. transfers are consistent with its obligations under Article 3 of the CAT.¹² However, the task force recommendations have not been made public. President Obama should direct the Department of Justice, in coordination with all other relevant agencies and departments, to make these recommendations public, as well as any information regarding how these recommendations are being applied in practice.

- **Transfer detainees whom the attorney general believes have committed crimes to a civilian court in the United States, or to an appropriate foreign jurisdiction, where such transfers can be made consistent with applicable law. By December 31, 2013, the attorney general should identify an appropriate lawful disposition for all Guantanamo detainees slated for prosecution. This disposition should be one of the following:**
 - Transfer to a civilian court in the United States. Because the congressionally-mandated prohibition on transfers to the United States operates on a renewable year-to-year basis, the president can reopen the doors to civilian courts in the United States by working with Congress to eliminate those restrictions or vetoing any legislation in 2013 that seeks to renew the transfer restrictions.
 - Transfer to a civilian court in the detainee's home country, or in a third country that has appropriate jurisdiction. The United States should insist that any country to which it transfers detainees for purposes of prosecution adheres to minimum, internationally-recognized due process trial guarantees. The U.S. government should assist in this effort by providing these countries with information in its possession, including witness names and statements, interrogation reports and exculpatory evidence.
 - Transfer to home or third country pursuant to a determination by a PRB or other competent authority that detention is no longer warranted. If there is insufficient admissible evidence to charge any particular detainee, he should be repatriated or resettled with appropriate and lawful assurances to mitigate any risk associated with the transfer. No detainee currently slated for prosecution should be moved to the current category of detainees that are to be held indefinitely in law of war detention.

¹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 3, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

¹² Dep't of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President, Press Release (Aug. 24, 2009).

- There are currently three Guantanamo detainees serving sentences associated with military commission convictions. These and any other detainees convicted of offenses in military commissions should be transferred upon completion their sentences, or sooner if they can be repatriated to serve out their sentences in their home countries.
- **Direct the secretary of state and secretary of defense to initiate immediate efforts to transfer detainees for whom the secretary of defense, pursuant to the periodic review process, has determined detention is no longer warranted.** The PRB process will likely determine that a number of detainees being held in law of war detention no longer warrant continued detention because the acts that initially gave rise to their detention occurred ten or more years ago and the detainees no longer pose a significant threat to the national security of the United States. The secretary of state, in coordination with the secretary of defense, should immediately begin negotiating and securing transfer agreements for these detainees.
- Through transfers subsequent to the PRB determinations, there should be fewer detainees being held in law of war detention. Nonetheless, those law of war detainees that remain in custody should be transferred at the end of hostilities, or resettled to third countries if there are legitimate concerns about post-transfer torture or abuse.
- The attorney general should commence proceedings against all remaining detainees slated for criminal prosecution who are subject to trial within the United States. Alternatively, or in addition, the Obama Administration should transfer those remaining detainees subject to criminal prosecution to their home or third countries for trial.
- Any detainees serving a military commission sentence should be transferred to their home countries or to the United States to serve the remainder of their sentences.
- **Continue to manage the risk posed by repatriation and resettlement by facilitating monitoring, rehabilitation, and security programs in countries receiving detainees.** Risk management will not end with the repatriation or resettlement of the final Guantanamo detainees. The United States should continue to assess the risks posed by detainees who have been resettled and repatriated and should continue to invest in reintegration programs and law enforcement training even after the Guantanamo detention facility is closed.

STAGE 3

RECOMMENDATIONS

By the end of his second term in office, President Obama should:

- **Complete the transfer of all remaining detainees, consistent with negotiated repatriation and resettlement agreements.**

Conclusion

The national security imperative to close Guantanamo remains as compelling today—perhaps more so—as it was four years ago when the president first took office. As the administration ends the war in Afghanistan, new questions will arise about the legal justifications for continued law of war detention. The Obama Administration should close Guantanamo on its own terms. On his second day in office, the president promised to close Guantanamo and reiterated that promise during the recent campaign. Whether he succeeds will be a significant test for his legacy.

There is a path forward. Human Rights First's three-stage plan offers a strategy for closing Guantanamo during President Obama's second term that builds on the successes to-date, ensures national security, adheres to American ideals, and restores U.S. global leadership on the rule of law.



American ideals. Universal values.

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