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## Guantanamo: A Comprehensive Exit Strategy

*[H]istory will cast a harsh judgment on this aspect of our fight against terrorism, and those of us who fail to end it.*<sup>1</sup> – President Obama on the need to close Guantanamo. National Defense University Speech, May 23, 2013.

As the United States prepares to end major combat operations in Afghanistan—the war that gave rise to the detention facilities at Guantanamo in the first place—it is imperative that the president and Congress work together to close Guantanamo and bring an end to what has become a symbol for an America that flouts the rule of law. As the president put it in this year’s State of the Union speech: “with the Afghan war ending, this needs to be the year Congress lifts the remaining restrictions on detainee transfers and we close the prison at Guantanamo Bay, because we counter terrorism not just through intelligence and military action but by remaining true to our constitutional ideals and setting an example for the rest of the world.”

There has been significant progress over the last year towards closing Guantanamo, but the president and Congress will need to quickly take additional major steps forward to accomplish this goal. In a major counterterrorism policy address at the National Defense University in May 2013, President Obama announced critical policy shifts in a renewed effort to facilitate closing the prison at Guantanamo Bay, Cuba. The president committed to exploring all administrative options available to transfer detainees out of the prison. In a welcome step forward, the president has demonstrated this commitment by transferring 17 detainees to their home countries or third countries since his speech.<sup>2</sup> Moreover, in the past year, the president has appointed special envoys at the State and Defense Departments to lead the effort to close Guantanamo.<sup>3</sup> These efforts have included the prudent cessation of the self-imposed moratorium on transfers to Yemen and a return to the more sensible and fair practice of carefully assessing each transfer determination on a case-by-case basis. The administration has restarted Periodic Review Board (PRB) hearings to review the designation of detainees slated for indefinite detention.<sup>4</sup> In his speech, the president also pledged to work with Congress to close the detention facility and has made progress in this regard with key changes to the detainee transfer restrictions in the Fiscal Year (FY) 2014 National Defense Authorization Act (NDAA). Pursuant to this pledge, the administration has already demonstrated substantial engagement with the Hill and has stepped up efforts to explain to the public and members of Congress the benefits of more workable transfer requirements.

These are all important and welcome steps. This paper outlines key additional<sup>5</sup> measures the administration should adopt in developing a comprehensive plan for closing Guantanamo. Such closure necessarily requires the lawful disposition of the remaining 149 detainees.<sup>6</sup> This plan is

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<sup>1</sup> President Barack Obama, Address at National Defense University (May 23, 2013), available at: <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>2</sup> *The Guantanamo Docket: Timeline*, N.Y. Times, <http://projects.nytimes.com/guantanamo/timeline>.

<sup>3</sup> Clifford Sloan is now serving as the State Department Special Envoy and Paul Lewis recently began as the Department of Defense Special Envoy.

<sup>4</sup> *Periodic Review Process Now Underway*, United States Department of Defense, October 9, 2013, available at: <http://www.defense.gov/releases/release.aspx?releaseid=16302>

<sup>5</sup> Blueprint: How to Close Guantanamo, Human Rights First (2012), available at: [http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF\\_Guantanamo\\_blueprint.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/blueprints2012/HRF_Guantanamo_blueprint.pdf).

<sup>6</sup> Full list of remaining detainees attached as Annex A.

consistent with the framework articulated by the president in his May speech<sup>7</sup> and that of the Guantanamo Detainee Review Task Force.<sup>8</sup>

Many people—including President George W. Bush, who established the detention camp more than a decade ago—have expressed a desire to close Guantanamo.<sup>9</sup> In 2008, both major party presidential candidates pledged swift closure of the prison.<sup>10</sup> More recently, reactions to the hunger strike and forced feedings at Guantanamo,<sup>11</sup> along with the high costs of operating the prison—both financial<sup>12</sup> and in terms of our national security<sup>13</sup>—have renewed bipartisan interest in its closure<sup>14</sup> and created a window of opportunity to advance a comprehensive exit strategy. Clearly, closing the prison will require resolving complex legal, policy, and political issues. If closing Guantanamo were easy, it would already be closed.

But the single most important element to any viable closure plan is sustained leadership from the president. Without it, the administration will surely find that a substantial portion of president's second term has passed without material progress toward closing Guantanamo, even as the president ends the wars that gave rise to it in the first place. Failing to close Guantanamo by the end of the president's second term risks far more than a tarnished legacy or breaking a key campaign pledge. If President Obama bequeaths Guantanamo to his successor, it could lay the groundwork for a future administration to establish a permanent indefinite detention facility. Such a result would underscore the ongoing failure of U.S. military commissions, an alternative system of justice for terrorism suspects that remains ineffective and lacks credibility with the rest of the world.

Yet Guantanamo will not be closed by the end of the president's second term unless the White House leads the process and establishes momentum. It must ensure that the relevant agencies and departments work together to transfer cleared detainees out of Guantanamo expeditiously and at a steady pace. Likewise, it must fully utilize the additional flexibility that Congress has recently provided the administration to facilitate transfers. The White House must also ensure that the Department of Defense, in conjunction with the other relevant agencies and departments, conducts immediate, thorough reviews of other detainees whom the administration does not intend to prosecute to determine whether they can be transferred. In a welcome step forward, the administration has commenced long-delayed Period Review Board

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<sup>7</sup> Obama, *supra* note 1

<sup>8</sup> Guantanamo Review Task Force, Final Report, January 22, 2010, available at: <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

<sup>9</sup> *Bush Says He Wants To Close Guantanamo*, CBS NEWS/AP, February 11, 2009, available at: [http://www.cbsnews.com/2100-250\\_162-1596464.html](http://www.cbsnews.com/2100-250_162-1596464.html). In addition, others who have called for Guantanamo's closure include: Former Director of National Intelligence Admiral Dennis Blair, Former Secretary of Defense Bob Gates, Former CIA Director David Petraeus, Former Secretaries of State Colin Powell, Henry Kissinger, James Baker, Warren Christopher, Madeline Albright, and numerous retired generals and admirals including Admiral Mike Mullen, General Joseph Hoar, and General Charles Krulak.

<sup>10</sup> *The Candidates on Military Tribunals and Guantanamo Bay*, COUNCIL ON FOREIGN RELATIONS, August 24, 2008, available at: <http://www.cfr.org/world/candidates-military-tribunals-guantanamo-bay/p14751>.

<sup>11</sup> Charlie Savage, *Despair Drives Guantánamo Detainees to Revolt*, N.Y. TIMES, April 24, 2013, available at: <http://www.nytimes.com/2013/04/25/us/guantanamo-prison-revolt-driven-by-inmates-despair.html>.

<sup>12</sup> Carol Rosenberg reported in July 2013 that the most recent annual cost of operating the detention facility at Guantanamo was \$454.1 million, which translates into a cost of \$2.7 million per detainee per year. <http://www.miamiherald.com/2013/07/30/3532539/pentagon-guantanamo-tab-52b-and.html>. This staggering cost is in marked contrast to the \$34,000-\$78,000 it costs to hold someone in a high security federal prison. See Adam Smith, *An Exit Strategy from Guantanamo* (May 22, 2013), available at [http://democrats.armedservices.house.gov/index.cfm/press-releases?ContentRecord\\_id=1d233184-4366-4f23-a085-c34e4f06e7da](http://democrats.armedservices.house.gov/index.cfm/press-releases?ContentRecord_id=1d233184-4366-4f23-a085-c34e4f06e7da).

<sup>13</sup> Julian Barnes, *Retired Military Brass Press Obama on Guantanamo Closure*, WALL ST. J., June 4, 2013, available at: <http://blogs.wsj.com/washwire/2013/06/04/retired-military-brass-press-obama-on-guantanamo-closure>.

<sup>14</sup> David Morgan, *Support growing to close Guantanamo prison: senator*, REUTERS, June 9, 2013, available at: <http://www.reuters.com/article/2013/06/09/us-usa-obama-guantanamo-idUSBRE9580BL20130609>.

(PRB) hearings,<sup>15</sup> for detainees who have not yet been cleared for transfer or charged with a crime.<sup>16</sup> To facilitate this process, the administration must ensure that the Periodic Review Secretariat, along with its partner agencies and departments, is adequately staffed to complete the PRB hearings in a timely and effective manner.

The president and his national security team should also continue to make the case to Congress and the American people for why Guantanamo must be closed, and how it can be done in a way that protects our country—our national security and our values. Convincing a reluctant Congress to act will require sustained public and private engagement from the president and his advisers. Congress and the American public need to understand—and hear directly from the president and his national security team—how any risks associated with transferring detainees out of Guantanamo will be managed by the law enforcement, diplomatic, military, and intelligence services of the United States and its foreign counterparts.

One of the reasons for the prolonged paralysis around Guantanamo is the fiction that any risk posed by the transfer of detainees is intolerable. Just as the opening of Guantanamo was a risk management exercise, so is the challenge of closing it. Whatever one thinks about the wisdom of originally detaining prisoners at Guantanamo, there is a growing consensus that any benefits the policy may have had at first have long been outweighed by the costs—to our budget, our national security, and our moral standing. This is not to say that closing the prison is risk-free; few national security strategies are. But the substantial diplomatic, security, moral, and financial costs of maintaining Guantanamo far outweigh any risks associated with transfers.

As it stands, Guantanamo continues to compromise U.S. national security (and global security) by bolstering the recruiting efforts of terrorist groups.<sup>17</sup> Moreover, the prison undermines counterterrorism cooperation with allies who refuse to share intelligence or provide access to terrorism suspects if it could be seen as aiding ongoing or future military detention or trial at Guantanamo. Maintaining Guantanamo also weakens American moral standing globally, making it difficult for the United States to advance American ideals and universal values abroad. And in a time of fiscal austerity, Guantanamo is costing American taxpayers more than 2.8 million dollars a year per detainee<sup>18</sup>—a cost that will likely increase over the coming years and that is many orders of magnitude greater than what it would cost to house detainees stateside or abroad.

Members of Congress on both sides of the aisle have recognized the overwhelming costs of maintaining Guantanamo and have expressed interest in helping close Guantanamo if the president demonstrates leadership and puts forth a comprehensive plan. Senator McCain has observed that transferring detainees out of Guantanamo would be an act of “moral courage” on the part of Congress.<sup>19</sup> His trip last summer to Guantanamo with Senator Dianne Feinstein and White House Chief of Staff Denis McDonough concluded with a joint statement pledging to work

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<sup>15</sup> By executive order, these hearings were supposed to be conducted by March 7, 2012. Exec. Order No. 13567, 3 C.F.R. Order 13567, (2011), *available at*: <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>.

<sup>16</sup> *Supra* note 4.

<sup>17</sup> Letter from James R. Clapper, Director of National Intelligence, to Dianne Feinstein and Saxby Chambliss, United States Senators (November 12, 2013), *available at*: <http://www.scribd.com/doc/185248699/DNI-Letter-on-GTMO-11-14-13>

<sup>18</sup> United States Department of Defense: Guantanamo Bay, Cuba (GTMO) Costs (Detention Operation), *available at*: <http://www.humanrightsfirst.org/uploads/pdfs/Costs-DOD-GTMO-Data-Response-to-Congressional-Ltr-61713.pdf>.

<sup>19</sup> John McCain, United States Senator, Remarks at the Senate Armed Services Committee Hearing on the Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force (May 16, 2013), *available at*: <http://www.armed-services.senate.gov/Transcripts/2013/05%20May/13-43%20-%205-16-13.pdf>.

together to close Guantanamo: “We continue to believe that it is in our national interest to end detention at Guantanamo, with a safe and orderly transition of the detainees to other locations.”<sup>20</sup> Recent political controversy around the transfer of Taliban prisoners should not be allowed to obscure this bipartisan support, reflected in the Senate Armed Services Committee’s version of the FY 2015 NDAA, which contains provisions that pave the path forward to allow Guantanamo to be closed.<sup>21</sup>

Building support for a comprehensive plan to close Guantanamo, such as the one outlined in this paper, will require extensive, timely and direct engagement with Congress. However, the administration should not accept any proposal that perpetuates or expands the hallmarks of Guantanamo—indefinite detention and military commissions—whether within the United States or elsewhere.

In the past, Congress has placed unreasonable restrictions on the president’s efforts to close Guantanamo. As a result, Congress has complicated the administration’s efforts to transfer detainees to the United States or foreign countries, including those detainees that are unanimously cleared for transfer by the defense, law enforcement, and intelligence agencies. These restrictions have been a blunt tool and are opposed by nearly every national security expert who has examined the issue, including some who support keeping Guantanamo open. Fortunately, Congress has recently rolled back some restrictions on the administration’s ability to transfer Guantanamo prisoners to foreign countries.

Nonetheless, Congress has continued its imprudent ban on the transfer of Guantanamo detainees to the United States. This absolute bar to U.S. transfer applies even for the purpose of continued detention or prosecution in civilian court. It also applies to cases where the government believes a detainee has committed crimes against the United States but is not subject to the jurisdiction of the military commissions. Such restrictions effectively prevent the government from bringing criminal suspects to justice, an untenable situation. Moreover, a recent report to Congress by the Office of the Assistant Attorney General suggested that restrictions on transfers to the United States are unnecessary. In considering the potential impact of transferring Guantanamo detainees to the United States, the report concluded that “existing statutory safeguards and executive and congressional authorities provide robust protection of national security.”<sup>22</sup> Given this conclusion, Congress lacks a reasonable justification for continuing to prohibit the transfer of Guantanamo detainees to the United States.

Though any restrictions on transferring detainees out of Guantanamo are unwise and unnecessary, Congress did pursue a more sensible approach in the FY 2014 NDAA. This legislation importantly provides the administration with additional flexibility to close Guantanamo responsibly. Specifically, the new provisions replace the former cumbersome certification and waiver regime with a more sensible, factor-based standard.<sup>23</sup> They also create common-sense exceptions to the foreign transfer process by authorizing the transfer of detainees cleared by a PRB and whose detention is therefore no longer necessary to protect against a significant threat to the United States. However, Congress’ continued categorical ban on transfers to the United

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<sup>20</sup> Press Release, Senator Dianne Feinstein, Senator John McCain and White House Chief-of-Staff Denis McDonough, Feinstein, McCain, McDonough Statement on Guantanamo (June 7, 2013), *available at* [http://www.feinstein.senate.gov/public/index.cfm/press-releases?ContentRecord\\_id=cf92f5a0-4b2a-4c86-92c1-58f7dc612b67](http://www.feinstein.senate.gov/public/index.cfm/press-releases?ContentRecord_id=cf92f5a0-4b2a-4c86-92c1-58f7dc612b67).

<sup>21</sup> S. 2410, 113<sup>th</sup> Cong. Sec. 1031 (2014).

<sup>22</sup> Office of the Assistant Attorney General, Department of Justice, Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014, May 14, 2014.

<sup>23</sup> See National Defense Authorization Act for the 2014 Fiscal Year Sec. 1035.

States, and a prohibition on the use of funding to construct or modify Department of Defense facilities to house detainees in the United States, effectively prevents the administration from closing Guantanamo. If Congress fails to revise or remove these restrictions, the president should veto any future legislation that contains them.

In recent weeks, the Armed Services Committees for both the House (HASC) and the Senate (SASC) have each approved separate NDAA bills for FY 2015. On a positive note, the HASC bill<sup>24</sup> does not propose additional restrictions related to the transfer of Guantanamo detainees. However, the HASC bill fails to lift the unreasonable bar on the transfer of Guantanamo detainees to the United States. This past month, the White House Press Secretary communicated the president's intention to veto any NDAA that "continues unwarranted restrictions regarding Guantanamo detainees."<sup>25</sup> As such, the president should follow through on this veto threat if the final version of the FY 2015 NDAA contains the HASC-approved restrictions on the transfer of Guantanamo detainees to the United States for any purpose.

While the HASC bill effectively maintains the status quo on Guantanamo restrictions, the SASC bill<sup>26</sup> contains substantive changes with both positive and negative implications for the future of Guantanamo. Most importantly, Section 1031 of the SASC bill wisely lifts the restrictions on detainee transfers to the United States subject to certain procedural conditions and reporting requirements.<sup>27</sup> If enacted, this provision would provide the president with a clear means of closing the detention facility at Guantanamo.<sup>28</sup> Thus, the president should make every effort to ensure Congress includes this important provision in the final version of the FY 2015 NDAA, but should push to have removed provisions that would undermine the rule of law by limiting judicial review of certain issues arising out of the detention of Guantanamo detainees.<sup>29</sup>

Regrettably, the SASC bill also includes a new provision prohibiting the transfer of any Guantanamo detainees to Yemen until January 1, 2016.<sup>30</sup> This prohibition is unwarranted and serves no useful purpose, as 37 of the nation's most respected retired generals and admirals wrote in a letter to members of Congress.<sup>31</sup> Under the FY 2014 NDAA, in order to authorize the transfer of any Guantanamo detainee, the Secretary of Defense must already make a determination that 1) actions have been taken to substantially mitigate the threat a transferred individual may pose against U.S. persons or interests; and 2) the transfer is in the national

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<sup>24</sup> H.R. 4435, 113th Cong. (2014), available at: <http://www.gpo.gov/fdsys/pkg/BILLS-113hr4435rh/pdf/BILLS-113hr4435rh.pdf>.

<sup>25</sup> Jay Carney, Office of the Press Secretary, Statement by the Press Secretary on the Adam Smith Amendment (May 21, 2014), available at: <http://www.whitehouse.gov/the-press-office/2014/05/21/statement-press-secretary-adam-smith-amendment>.

<sup>26</sup> S. 2410, 113th Cong. (2014), available at: <http://www.gpo.gov/fdsys/pkg/BILLS-113s2410pcs/pdf/BILLS-113s2410pcs.pdf>.

<sup>27</sup> Section 1031(b) of the SASC bill provides that "[t]he Secretary of Defense may transfer a detainee [to or within the United States]... for detention pursuant to the Authorization for Use of Military Force (Public Law 107-40), trial, and incarceration" if the Secretary makes the necessary national security-related determinations and provides Congress with proper notice. *Id.* at Sec. 1031(b). Moreover, Section 1033 permits the Secretary to authorize the temporary transfer of Guantanamo detainees to the United States for the purpose of emergency medical treatment subject to procedural conditions and reporting requirements. *Id.* at Sec. 1033.

<sup>28</sup> See Massimo Calabresi, *Carl Levin Passes a Plan to Close Guantanamo Bay*, TIME, May 23, 2014 (discussing the SASC bill's Guantanamo provisions and quoting Senator Carl Levin's remarks that the "[SASC has] created a path to close Guantanamo."), available at: <http://time.com/110493/guantanamo-bay-closure-carl-levin/>; see also Marty Lederman, *The Competing 2015 NDAA Bills – A Sign of Hope for Closing GTMO*, JUST SECURITY (June 5, 2014) (providing legal analysis of the SASC-approved Guantanamo provisions and offering an optimistic view of their implications for closing Guantanamo), available at: <http://justsecurity.org/10818/competing-ndaa-gtmo-provisions/>.

<sup>29</sup> S. 2410, 113<sup>th</sup> Cong. Sec. 1031 D, F (2014).

<sup>30</sup> S. 2410, 113th Cong. Sec. 1034 (2014).

<sup>31</sup> Letter from Retired Military Leaders Group to members of the United States House of Representatives and Senate (May 19, 2014), available at: <http://www.humanrightsfirst.org/press-release/retired-military-leaders-urge-congress-make-progress-guantanamo-ndaa>.

security interest of the United States.<sup>32</sup> Moreover, the president has continued to exercise extreme caution in regard to the transfer of Guantanamo detainees to Yemen given the country's current security environment. Nonetheless, Yemenis comprise a majority of the currently cleared detainees held at Guantanamo. Consequently, the administration must have the flexibility to transfer cleared detainees to Yemen if and when it determines that such transfers no longer pose substantial security risks.<sup>33</sup> Therefore, the administration should urge Congress to remove this provision from consideration moving forward and continue working with the Yemeni government to establish the appropriate conditions necessary to facilitate future transfers.

What follows is a comprehensive exit plan for Guantanamo based on the current categorization of detainees. The plan demonstrates a pathway for closing Guantanamo, but will require sustained leadership from the president.

<b>149 Detainees</b>	<b>Status</b>
78	Cleared for Transfer
30	Referred for Possible Prosecution
38	Held Pending Further Review
3	Currently Serving/Awaiting Military Commission Sentence

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<sup>32</sup> National Defense Authorization Act for the 2014 Fiscal Year Sec. 1035(b).

<sup>33</sup> See Jennifer Daskal, *What's Wrong with a Categorical Ban on Transfers from GITMO to Yemen*, JUST SECURITY (June 5, 2014), available at: <http://justsecurity.org/11264/whats-wrong-categorical-ban-transfers-gitmo-yemen/>.

## **Recommendations**

### **Leadership from the White House**

- The president should communicate its comprehensive plan for closing Guantanamo to members of Congress, including, as appropriate, the path forward for each of the remaining 149 detainees at Guantanamo.<sup>34</sup> In detailing the intended lawful disposition of each remaining detainee at Guantanamo, the administration should build on and update the 2010 Guantanamo Review Task Force assessment. As the administration moves ahead, it must communicate with Congress in a timely and open manner that facilitates legitimate Congressional oversight.
- The administration should continue efforts to vigorously and visibly urge Congress and the American people to overturn the remaining restrictions on transferring detainees out of Guantanamo. Further, the president should veto any legislation that restricts his authority to transfer or otherwise effectuate lawful dispositions for detainees held at Guantanamo.<sup>35</sup>
- The president should direct his national security team to publicly defend the transfer of detainees out of Guantanamo as not only consistent with, but also necessary to our national security interests, and outline how any risks associated with transfers will be managed. His national security team should also outline a realistic assessment of the risks posed by transfers, including substantially revising its calculation and reporting methods of so-called “recidivism” rates. Suggested reforms to these risk assessment calculations are outlined in Annex B.

### **Leadership from Congress**

- Congress should revise the restrictions on transferring detainees out of Guantanamo to permit transfers of detainees to the United States for detention, trial, or medical treatment. No new restrictions on transferring detainees should be added.
- Congressional oversight should focus on facilitating the closure of Guantanamo with a comprehensive plan, and on timely and appropriate executive branch communication with Congress regarding execution of that plan.
- Consistent with the advice of military, counterterrorism, intelligence, penal and law enforcement professionals, Congress should communicate a realistic and non-exaggerated sense of risk regarding transferring detainees out of Guantanamo, and articulate the benefits that would accrue from closing Guantanamo.

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<sup>34</sup> Press Release, House Armed Services Committee, Chairman McKeon Responds to President Obama’s Guantanamo Claim (Apr. 30 2013), available at: [http://armedservices.house.gov/index.cfm/press-releases?ContentRecord\\_id=cd99853f-f8e4-44a4-bd8d-86f303cc8ffc&ContentType\\_id=e0c7b822-826f-493d-8cef-1e21aa53e12a&Group\\_id=12580721-af41-4987-849c-c25b730d096d](http://armedservices.house.gov/index.cfm/press-releases?ContentRecord_id=cd99853f-f8e4-44a4-bd8d-86f303cc8ffc&ContentType_id=e0c7b822-826f-493d-8cef-1e21aa53e12a&Group_id=12580721-af41-4987-849c-c25b730d096d).

<sup>35</sup> It is likely that at least some detainees cannot be transferred in good faith under the old transfer restrictions. The President should insist that these restrictions be removed or modified to allow transfers, or he should veto any legislation that would prevent him from transferring cleared detainees.

## 78 detainees cleared for transfer

Of the 149 detainees remaining at Guantanamo, 78 have already been cleared by all relevant defense and intelligence agencies for transfer to their home or third countries; many have been cleared for transfer by both the Bush and Obama Administrations. Several have languished at Guantanamo for more than 12 years, even as their home countries have requested their return. To transfer all or most of these 78 detainees, the administration should:

- Employ the authorities conferred in the FY 2014 NDAA, which supply the necessary flexibility to transfer the vast majority of cleared detainees. Unlike the prior congressionally-imposed transfer regime, which required the Secretary of Defense to personally certify compliance with several stringent restrictions prior to transfer, the current regime provides the Secretary with significantly broader authority to transfer detainees. Under current law, the Secretary may transfer a detainee following a determination that the risks associated with transfer can be mitigated and transfer is in the national security interest of the United States.<sup>36</sup> In most cases, security assurances from the receiving country or changes in its domestic political or security situation will permit such a determination. The administration must also increase its efforts to negotiate any security assurances that may be necessary to effectuate transfers.<sup>37</sup>
- Commence individual transfers to Yemen while collaborating with the international community to develop a rehabilitation program that could allow transfers of cleared Yemeni detainees en bloc.<sup>38</sup> Fifty-eight of the 78 detainees cleared for transfer are from Yemen. Of those 58, the administration has cleared 25 for transfer without conditions. These 25 detainees may be transferred on a case-by-case basis now that the administration has lifted the moratorium on transfers to Yemen. The administration has conditionally cleared the remaining 33 detainees for transfer. These 33 detainees may be transferred with improved security conditions in Yemen, an appropriate rehabilitation program, or when third-country resettlement becomes an option.<sup>39</sup>
- Repatriate the 11 cleared non-Yemeni detainees whose countries have requested their return. These countries include: Afghanistan (four),<sup>40</sup> Libya (one),<sup>41</sup> Saudi Arabia (one),<sup>42</sup> and Tunisia (five).<sup>43</sup> However, in accordance with U.S. *non-refoulement* obligations,<sup>44</sup> where there are substantial grounds for believing that detainees would be

<sup>36</sup> National Defense Authorization Act for the 2014 Fiscal Year Sec. 1035.

<sup>37</sup> Detainees cannot be transferred without aggressive efforts to obtain any necessary assurances from foreign governments.

<sup>38</sup> Any rehabilitation program developed should focus on providing services—job training, education, counseling, etc.—designed to reintegrate the Yemeni detainees into society, and should not be predicated on novel Yemeni legal authorities to hold detainees indefinitely without charge or trial. In cases in which Yemeni detainees may have violated Yemen's criminal laws, the United States should facilitate prosecutions in Yemen pursuant to international fair trial standards by sharing credible evidence of criminal wrongdoing.

<sup>39</sup> Guantanamo Review Task Force, Final Report (January 22, 2010), available at: <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

<sup>40</sup> Jeremy Herb, Karzai: Obama should close Gitmo, THE HILL, May 2, 2013, available at: <http://thehill.com/blogs/defcon-hill/policy-and-strategy/297451-karzai-says-obama-should-close-guantanamo>.

<sup>41</sup> Tripoli seeks repatriation of Libyans held in Guantanamo, AFP, January 22, 2009, available at: [http://www.google.com/hostednews/afp/article/ALeqM5hB1BELbdDW6AwSgT0i6bW\\_pi88dw](http://www.google.com/hostednews/afp/article/ALeqM5hB1BELbdDW6AwSgT0i6bW_pi88dw).

<sup>42</sup> Christopher Boucek, *The Saudi Process of Repatriating and Reintegrating Guantanamo Returnees*, CTC SENTINEL, December 15, 2007, available at: <http://www.ctc.usma.edu/posts/the-saudi-process-of-repatriating-and-reintegrating-guantanamo-returnees>.

Note: One Saudi Arabian detainee, Shaker Aamer, has dual citizenship with the United Kingdom, which has also demanded his return.

<sup>43</sup> Bouazza ben Bouazza, *Tunisia Mission Asks For Repatriation Of Guantanamo Bay Detainees*, ASSOCIATED PRESS, September 14, 2011, available at: [http://www.huffingtonpost.com/2011/09/14/tunisia-mission-guantanamo\\_n\\_962920.html](http://www.huffingtonpost.com/2011/09/14/tunisia-mission-guantanamo_n_962920.html).

<sup>44</sup> The United States cannot rely exclusively on diplomatic assurances to prevent transfers that result in torture of the former detainee. An interagency task force established by executive order in 2009 provided recommendations designed to improve the



in danger of being subjected to torture or other forms of mistreatment if returned home, the administration should resettle these detainees in third countries, or in the United States if necessary.

- Repatriate the five detainees whose countries have not, at least publicly, requested their return, including those from Mauritania, Morocco, the Palestinian Territories, Tajikistan, and the United Arab Emirates. The administration should send these detainees home if their countries are willing to accept them and transfers can be effectuated consistent with *non-refoulement* obligations. If not, they should be resettled in third countries or the United States, if necessary.
- Finally, transfer to third countries the four Syrian detainees who cannot be repatriated given the ongoing security situation in Syria.

78 Detainees	Cleared for Transfer
58	Yemenis. 25 cleared for transfer. 33 cleared for conditional transfer after first tranche.
11	Detainees from other countries (not Yemen) who have asked for their citizens back
5	Detainees to repatriate or resettle in United States or third country.
4	Syrians to repatriate or resettle in United States or third country.

### 33 detainees suspected of criminal conduct and slated for possible prosecution or already convicted

*To deny them the martyrdom they seek, the United States should be treating them as common criminals, not warriors.*<sup>45</sup> – Rear Admiral Don Guter, JAGC, USN (Ret.)

The Guantanamo Review Task Force designated 33 of the 149 detainees currently at Guantanamo as eligible for prosecution by the United States before either a federal court or military commission, three of whom have already been tried and convicted. Since the task force concluded its work, federal appellate court decisions have overturned two military commission convictions because the crimes for which the detainees were convicted—material support and conspiracy—were not internationally recognized war crimes at the time of the offense.<sup>46</sup> As a result of this ruling, there may now be only 20 men who could face trial by military commission,<sup>47</sup> though some of those 20 and other detainees in this category who the United States may want to prosecute could potentially face prosecution in an Article III federal court. In addition, the

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administrative process for ensuring that U.S. transfers are consistent with its obligations under Article 3 of the Convention Against Torture (CAT). 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.

<sup>45</sup> Donald J. Guter, *Gitmo trials 'not the U.S. at its best'*, MIAMI HERALD, May 3, 2013, available at: <http://www.miamiherald.com/2012/04/30/2776177/gitmo-trials-not-the-us-at-its.html>.

<sup>46</sup> For example, the D.C. Circuit recently overturned a military commission conviction in *Hamdan v. United States (Hamdan II)*, because the charge in that case—material support for terrorism—was not an internationally recognized war crime at the time of the alleged criminal conduct. In a similar case, *Al-Bahlul v. United States*, the D.C. Circuit overturned another military commission conviction because a separate charge—conspiracy—also could not be considered an internationally recognized war crime.

<sup>47</sup> Carol Rosenberg, *Prosecutor: Court ruling cuts vision for Guantánamo war crimes trials*, MIAMI HERALD, June 16, 2013, available at: <http://www.miamiherald.com/2013/06/16/3455042/prosecutor-court-ruling-cuts.html>.

military commission cases of the alleged 9/11 plotters and the alleged *USS Cole* bomber have been beset with scandal (e.g., the CIA was discovered to have the ability to censor the proceedings)<sup>48</sup> and legal uncertainty (e.g., the presiding judge was unsure whether the Constitution applies).<sup>49</sup> These important cases—in the instance of the 9/11 plotters, arguably the case of the century—are being tried in an untested and unstable system, raising serious questions about the durability of any convictions that might be obtained.

To successfully resolve the cases of the 33 detainees in this category, the administration should:

- Urge Congress to overturn restrictions on transferring detainees to the United States, and allow transfers for the purpose of prosecution.
- Transfer those already facing military commissions at Guantanamo to federal court or military commission trials in the United States in order to facilitate the closing of Guantanamo. Senator Lindsey Graham identified one option as the Naval Consolidated Brig in Charleston, South Carolina.<sup>50</sup>
- Transfer any remaining detainees who can be charged with crimes to a civilian court in the United States, where such transfers can be made consistent with applicable law, or to an appropriate foreign jurisdiction.
- Transfer any convicted detainees to an appropriate high security federal prison. Three of the detainees in this category have already been convicted by military commission, and one is currently serving a sentence at Guantanamo, while two are awaiting sentencing.<sup>51</sup> Any detainee who serves out his time can be subjected to appropriate immigration proceedings, including deportation.

33 Detainees	Slated for Prosecution or Convicted
3	Already convicted.
6	Currently facing trial by or has been charged before a military commission.
24	To be tried before federal court or military commission. <sup>52</sup>

### 38 detainees that have neither been charged with a crime nor approved for transfer

*...[W]ould it not be just an act of courage on the part of the Congress to find a place to put the [Guantanamo detainees] and designate it?*<sup>53</sup> – Senator John McCain, May 13, 2013

<sup>48</sup> Carol Rosenberg, *Guantanamo judge unplugs hidden censors from 9/11 trial*, MIAMI HERALD, January 31, 2013, available at: <http://www.miamiherald.com/2013/01/31/3210054/guantanamo-judge-unplugs-hidden.html>.

<sup>49</sup> John Knefel, *Justice at Guantanamo: From the Profound to the Absurd*, ROLLING STONE, June 13, 2013, available at: <http://www.rollingstone.com/politics/news/justice-at-guantanamo-from-the-profound-to-the-absurd-20130613>.

<sup>50</sup> Schuyler Kropf, *Navy Brig in Hanahan resurfaces as Gitmo alternative*, THE POST AND COURIER, May 25, 2013, available at: <http://www.postandcourier.com/article/20130525/PC16/130529477>.

<sup>51</sup> Ali Hamza Ahmad Suliman al Bahlul, Majid Khan and Ahmed Al-Darbi.

<sup>52</sup> As noted above, Guantanamo's chief prosecutor, Brigadier General Martins, has said that only 20 of the 31 who are facing or are slated for prosecution, may in fact now be tried in a military commission. Those detainees who do not have charges pending should be provided with Period Review Board hearings immediately.

<sup>53</sup> McCain, *supra* note 16.

The remaining 38 out of 149 detainees being held at Guantanamo will have to be released within some reasonable period of time after the end of combat operations in Afghanistan or some other appropriate marker of the end of hostilities.<sup>54</sup> That is what the laws of war require. The United States transferred thousands of prisoners to the state of Iraq at the end of the Iraq war<sup>55</sup> and has already transferred control of thousands of detainees in Afghanistan to the Afghan government.<sup>56</sup> To facilitate the transition of the final 38 detainees, the administration should:

- Move swiftly to complete the Periodic Review Board (PRB) hearings for eligible detainees under the direction of the Secretary of Defense. The PRB hearings should be completed promptly pursuant to Executive Order (EO) 13567,<sup>57</sup> and Section 1023 of the FY 2012 NDAA,<sup>58</sup> to determine whether each detainee in this category is eligible for transfer. The Department of Defense has commenced PRB hearings, but has not outlined a clear timeline for their completion. This uncertainty directly conflicts with EO 13567, which mandated that initial PRB hearings be completed over two years ago. The administration must ensure that the necessary resources are available to complete thorough PRB hearings to all eligible detainees by the end of 2014.
- Provide PRB hearings for any detainees who were previously slated for prosecution whom the administration no longer intends to prosecute. Timely and effective hearings should determine whether continued detention is necessary to protect against a significant threat to the security of the United States or whether there are avenues of risk management that would enable transfer.
- Determine whether there are extant credible criminal charges to try detainees in foreign jurisdictions, pursuant to internationally recognized fair trial standards.
- Determine whether the 23 Yemeni prisoners in this category can be transferred through coordination with the Yemeni government. Efforts by Yemen to institute a rehabilitation program could assist in the transition, but should not delay case-by-case transfers.
- Transfer some number of Guantanamo detainees to the United States for continued detention or trial until the end of hostilities. It is likely that some individuals in this category who cannot be tried by military commission could be tried in federal court, where prosecutors have hundreds of criminal charges at their disposal. However, Congress would have to authorize such transfers. Moreover, the Government Accountability Office has documented<sup>59</sup> that high security prison facilities in the United States have the capacity to hold detainees.<sup>60</sup> Further, the American Correctional

<sup>54</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of the Red Cross: Customary International Humanitarian Law 451, Vol 1, 2009, available at: [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule128](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule128).

<sup>55</sup> Ann Riley, *US transfers control of Camp Taji prison to Iraq authorities*, JURIST, March 25, 2010, available at: <http://jurist.law.pitt.edu/paperchase/2010/03/us-transfers-control-of-camp-taji.php>.

<sup>56</sup> Rod Nordland, Michael R. Gordon and Alissa J. Rubin, *Karzai Has Nothing but Praise for U.S. Upon Bagram Prison Transfer*, N.Y. TIMES, March 25, 2013, available at: <http://www.nytimes.com/2013/03/26/world/asia/us-cedes-control-almost-on-afghan-prisoners.html>.

<sup>57</sup> Exec. Order No. 13567, 3 C.F.R. Order 13567, (2011), available at: <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>.

<sup>58</sup> H.R. 1540, 112th Cong. Sec. 1023 (2011) (enacted).

<sup>59</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-31, GUANTANAMO BAY DETAINEES: FACILITIES AND FACTORS FOR CONSIDERATION IF DETAINEES WERE BROUGHT TO THE UNITED STATES (2012), available at: <http://www.gao.gov/assets/660/650032.pdf>

<sup>60</sup> Conditions of detention must be commensurate with those required by the "humane treatment" provisions of Common Article 3 of the Geneva Convention. In addition, provisions of the Third and Fourth Geneva Conventions applicable to prisoners of war and civilians can provide substantial guidance for detention conditions that can be easily implemented to meet the security interest of the United States. No Guantanamo detainee should be subjected to conditions of confinement that are worse than what they are currently experiencing at Guantanamo.

Association has voiced support for housing Guantanamo detainees within the United States.<sup>61</sup> Short-term law of war detention in the United States until the end of hostilities for the purpose of closing Guantanamo should not be extended to future captures. Doing so would undermine the very purpose of closing Guantanamo.

- Repatriate or resettle any remaining detainees at the end of combat operations in Afghanistan or some other reasonable marker of the end of hostilities.

<b>38 Detainees</b>	<b>Held Pending Further Review</b>
5	Afghans. Transfer pursuant to agreement with the government of Afghanistan.
23	Yemenis. Transfer pursuant to agreement with the government of Yemen. Others may be cleared for transfer by the PRBs.
10	Individual determinations, including dispositions from the PRBs, for the final ten from Kenya, Kuwait, Libya, Morocco, Saudi Arabia, and Somalia.

## Conclusion

The detention of prisoners at Guantanamo has imposed incalculable moral, fiscal, diplomatic, and national security costs on our nation. To this day, Guantanamo continues to undermine counterterrorism operations and bolster the recruiting narratives of terrorist groups. It harms the United States' moral standing in the world in a very real sense: maintaining an offshore detention facility where prisoners are held for more than a decade without charge allows tyrannical regimes around the world to credibly charge the United States with hypocrisy when it seeks to stand up against human rights abuses committed abroad. And at a growing annual cost of more than \$2.8 million per detainee, Guantanamo may be the most expensive prison operation in the world, per capita, at a time when the military is looking for ways to manage budget cuts.

Among the many challenges facing our country, closing Guantanamo is far from the most complex. There are tough questions to resolve, to be sure, but there is a clear pathway—a reasonable disposition for each of the remaining 149 detainees at Guantanamo, and bipartisan support for moving forward.

<sup>61</sup> James A. Gondles, Jr., Executive Director of the American Correctional Association, *We Can Handle Them*, MIAMI HERALD, Dec. 17, 2009.

## Annex A: Current Designations of the Existing Detainees

Remaining Detainee Population at Guantanamo Bay: 149 Updated: June 2, 2014			
Detainees Cleared for Transfer			
ISN Number	Name of Detainee	Citizenship	Country Requested Detainees
899	Shawali Khan	Afghanistan	Y
928	Khiali Gul	Afghanistan	Y
934	Abdul Ghani	Afghanistan	Y
1103	Mohammad Zahir	Afghanistan	Y
189	Falen Gherebi	Libya	Y
757	Ahmed Abdel Aziz	Mauritania	N
197	Younous Chekkouri	Morocco	N
684	Mohammed Abdullah Taha Mattan	Palestinian Territories	N
239	Shaker Aamer	Saudi Arabia	Y
327	Ali Al Shaaban	Syria	N
329	Abdul Hadi Omar Mahmoud Faraj	Syria	N
326	Ahmed Adnan Ahjam	Syria	N
722	Jihad Dhiab	Syria/LE	N
257	Omar Hamzayavich Abdulayev	Tajikistan	N
38	Ridah Bin Saleh Al-Yazidi	Tunisia	Y
168	Adel Al-Hakeemy	Tunisia	Y
174	Hisham Sliti	Tunisia	Y
502	Abdul Bin Mohammed Ourgy	Tunisia	Y
894	Mohammed Abdul Rahman	Tunisia	Y
309	Muieen Adeen Al-Sattar	United Arab Emirates	N
26	Fahed Abdullah Ahmad Ghazi	Yemen	Y
30	Ahmed Umar Abdullah al-Hikimi	Yemen	Y
31	Mahmud Abd Al Aziz al-Hikimi	Yemen	Y
33	Mohammed Al-Adahi	Yemen	Y
34	Al Khadr Abdallah Muhammad Al-Yafi	Yemen	Y
35	Idris Ahmad Abdu Qadir Idris	Yemen	Y
40	Abdel Qadir Al-Mudafari	Yemen	Y
43	Samir Naji Al Hasan Moqbil	Yemen	Y
44	Ali Ahmad al-Rahizi	Yemen	Y
88	Adham Mohamed Ali Awad	Yemen	Y
91	Abdel Al Saleh	Yemen	Y
115	Abdul Rahman Mohammed Saleh Nasir	Yemen	Y

117	Mukhtar Anaje	Yemen	Y
128	Ghaleb Nassar al Bihani	Yemen	Y
152	Asim Thabit Abdullah Al-Khalaqi	Yemen	Y
153	Fayiz Ahmad Yahia Suleiman	Yemen	Y
163	Khalid Abd Elgabar Mohammed Othman	Yemen	Y
165	Adil Said Al Haj Ubayd Al-Busayss	Yemen	Y
167	Ali Yahya Mahdi	Yemen	Y
170	Sharif Al-Sanani	Yemen	Y
171	Abu Bakr ibn Ali Muhammad al Ahdal	Yemen	Y
178	Tariq Ali Abdullah Ba Odah	Yemen	Y
202	Mahmoud Omar Muhammad Bin Atef	Yemen	Y
223	Abd al-Rahman Sulayman	Yemen	Y
224	Mahmoud Al-Shubati	Yemen	Y
233	Abd al-Razaq Muhammed Salih	Yemen	Y
240	Abdallah Yahya Yusif Al-Shibil	Yemen	Y
249	Mohammed Abdullah Mohammed Ba Odah	Yemen	Y
251	Muhammad Said Salim Bin Salman	Yemen	Y
254	Muhammed Ali Husayn Khunaina	Yemen	Y
255	Said Muhammad Salih Hatim	Yemen	Y
259	Fadhel Hussein Saleh Hentif	Yemen	Y
321	Ahmed Yasslam Said Kuman	Yemen	Y
440	Muhammad Ali Abdallah Muhammad Bwazir	Yemen	Y
461	Abd al Rahman al-Qyati	Yemen	Y
498	Mohammed Ahmen Said Halder	Yemen	Y
506	Mohammed Khalid Salih al-Dhuby	Yemen	Y
509	Mohammed Nasir Yahy Khussrof Kazaz	Yemen	Y
511	Suleiman Awadh Bin Aqil Al-Nahdi	Yemen	Y
549	Umar Said Salim Al-Dini	Yemen	Y
550	Walid Said bin Said Zaid	Yemen	Y
553	Abdulkhaliq Ahmed Al-Baidhani	Yemen	Y
554	Fahmi Salem Al-Assani	Yemen	Y
564	Jalal Bin Amer Awad	Yemen	Y
566	Mansour Mohamed Mutaya Ali	Yemen	Y
570	Sabry Mohammed	Yemen	Y
572	Saleh Mohammad Seleh Al-Thabbi	Yemen	Y
574	Hamood Abdullah Hamood	Yemen	Y

575	Saad Nasir Mukbl Al-Azani	Yemen	Y
578	Abdul al-Aziz Abduh Abdullah Ali Al Suwaydi	Yemen	Y
680	Emad Abdallah Hassan	Yemen	Y
686	Abdel Ghaib Ahmad Hakim	Yemen	Y
688	Fahmi Abdullah Ahmed al-Tawlaqi	Yemen	Y
689	Mohammed Ahmed Salam Al-Khateeb	Yemen	Y
690	Abdul Qader Ahmed Hussein	Yemen	Y
691	Mohammed Al-Zarnouqi	Yemen	Y
728	Abdul Muhammad Nassir al-Muhajari	Yemen	Y
893	Tawfiq Nasir Awad Al-Bihani	Yemen	Y
1015	Hussain Salem Mohammad Almerfedi	Yemen	Y
<b>TOTAL:</b>	<b>78</b>		
Shaded box indicates those Yemenis in the "conditional transfer" category			
<b>Designated for Indefinite Detention</b>			
<b>ISN Number</b>	<b>Name of Detainee</b>	<b>Citizenship</b>	<b>Notes</b>
560	Haji Wah Muhammed	Afghanistan	
975	Karim Bostan	Afghanistan	
1045	Mohammed Kamin	Afghanistan	
1119	Ahmid al Razak	Afghanistan	
10029	Muhammad Rahim	Afghanistan	
10025	Mohammed Abdul Malik Bajabu	Kenya	
232	Fawzi Khalid Abdullah Fahad al Odah	Kuwait	
552	Faez Mohammed Ahmed al-Kandari	Kuwait	
695	Omar Khalif Mohammed Abu Baker Mahjour Umar	Libya	
708	Ismael Ali Faraj Ali Bakush	Libya	
244	Abdul Latif Nasir	Morocco	
42	Abd al Rahman Shalbi Isa Uwaydah	Saudi Arabia	
195	Mohammed Abd al Rahman al Shumrant	Saudi Arabia	
713	Mohammed al Zahrani	Saudi Arabia	
10023	Guleed Hassan Ahmed	Somalia	
27	Uthman Abd al-Rahim Muhammad Uthman	Yemen	
28	Moath Hamza Ahmed al-Alwi	Yemen	

29	Mohammed al-Ansi	Yemen	
37	Abdel Malik Ahmed Abdel Wahab al Rahabi	Yemen	
41	Majid Mahmud Abdu Ahmed	Yemen	
44	Muhammed Rajab Sadiq Abu Ghanim	Yemen	
131	Salem Ahmad Hadi Bin Kanad	Yemen	
235	Saeed Ahmed Mohammed Abdullah Sarem Jarabh	Yemen	
242	Khalid Ahmed Qasim	Yemen	
324	Mashur Abdullah Muqbil Ahmed al-Sabri	Yemen	
434	Mustafa Abd al-Qawi Abd al-Aziz al-Shamiri	Yemen	
441	Abdul Rahman Ahmed	Yemen	
508	Salman Yahya Hassan Mohammad Rabei'i	Yemen	
522	Yassim Qasim Mohammed Ismail Qasim	Yemen	
576	Zahar Omar Hamis bin Hamdoun	Yemen	
836	Ayub Murshid Ali Salih	Yemen	
837	Bashir Nasir Ali al-Marwalah	Yemen	
838	Shawqi Awad Balzuhair	Yemen	
839	Musab Omar Ali al-Mudwani	Yemen	
840	Hail Aziz Ahmed al-Maythali	Yemen	
841	Said Salih Said Nashir	Yemen	
1017	Omar Mohammed Ali al-Rammah	Yemen	
1463	Abd al-Salam al-Hilah	Yemen	
<b>TOTAL:</b>	<b>38</b>		



**Referred for Prosecution. NOTE: GEN Mark Martins has stated only 20 will ultimately face prosecution by military commission**

<b>ISN Number</b>	<b>Name of Detainee</b>	<b>Citizenship</b>	<b>Notes</b>
753	Abdul Sahir	Afghanistan	
762	Obaidullah	Afghanistan	
3148	Haroon al-Afghani	Afghanistan	
685	Said bin Brahim bin Umran	Algeria	
694	Sufyian Barhoumi	Algeria	
535	Tariq Mahmoud Ahmed al Sawah	Egypt	
10016	Zayn al-Ibidin Muhammed Husayn (Aby Zubaydah)	Palestinian Territories	
10019	Encep Nurjaman (Hambali)	Indonesia	
10026	Nashwan abd al-Razzaq abd al-Baqi (Hadi)	Iraq	
10017	Mustafa Faraj Muhammad Masud al-Jadid al-Uzaybi	Libya	
760	Mohamedou Ould Slahi	Mauritania	
10021	Mohd Farik bin Amin	Malaysia	
10022	Bashir bin Lap	Malaysia	
1094	Saifullah Paracha	Pakistan	
1460	Abdul Rabbani	Pakistan	
1461	Mohammed Rabbani	Pakistan	
10018	Ali abd al Aziz Ali	Pakistan	KSM Co-conspirator
10024	Khalid Sheikh Mohammed	Pakistan	Military commission in pre-trial hearings
702	Ravil Mingazov	Russia	
63	Mohamed Mani Ahmad al Kahtani	Saudi Arabia	
682	Abdullah Al Sharbi	Saudi Arabia	
696	Jabran al Qahtani	Saudi Arabia	
10011	Mustafa Ahmad al Hawsawi	Saudi Arabia	KSM Co-conspirator
10015	Mohammed al Nashiri	Saudi Arabia	Military Commission in pre-trial hearings
569	Suhayl Abdul Anam al Sharabi	Yemen	
1453	Sanad Al Kazimi	Yemen	
1456	Hassan bin-Attash	Yemen	
1457	Sharqawi Abdu Ali Al Hajj	Yemen	
10013	Ramzi Bin Al Shibh	Yemen	KSM Co-conspirator
10014	Walid Mohammed Bin Attash	Yemen	KSM Co-conspirator
<b>TOTAL:</b>	<b>30</b>		

Currently Serving Sentence from Military Commission			
ISN Number	Name of Detainee	Citizenship	Notes
39	Ali Hamza Ahmad Suliman al Bahlul	Yemen	Conviction overturned/ life sentence
10020	Majid Khan	Pakistan	Accepted Plea Deal/suspended sent
768	Ahmed Al-Darbi	Saudi Arabia	Pleaded guilty, awaiting sentencing
<b>TOTAL:</b>	<b>3</b>		

## **Annex B: Understanding the Risk of Transferring Detainees**

Congress and the American people understandably want to know that any risks associated with transferring detainees will be managed appropriately by the diplomatic, intelligence, law enforcement, and military services of the United States and its foreign counterparts.

To ensure that risk management policies are effective, there needs to be a thorough and accurate understanding of what those risks are. To date, these risks, particularly the risk that transferred detainees will engage in terrorist acts in the future, have often been misconstrued.

Below we detail recommended reforms to the Director of National Intelligence's (DNI) criteria for assessing the "recidivism" rates of former Guantanamo detainees in order to more accurately reflect the number of former detainees that have engaged in terrorist activities that threaten the United States after being transferred out of Guantanamo. We note at the outset that the term "recidivism" is inaccurate here for two reasons. First, many detainees did not commit any crimes or acts of terrorism prior to being detained at Guantanamo and therefore, any future act of terrorism would not constitute "recidivism." Second, as explained in the Annex, much of the conduct that is counted as "recidivist" activity does not actually entail criminal or terrorist acts. It would be preferable, therefore, for policymakers to refrain from using the term "recidivism," and instead refer to such assessments as historical analyses of post-transfer risk. We nonetheless refer to the term in this Annex because it is already in widespread use, including in the statutory provisions that govern the production of assessments of detainees that have been involved in terrorist activity post-transfer.

The reforms outlined here are designed to better capture in the DNI's estimate former detainees for whom there is a reasonable degree of confidence that they have engaged in terrorist activity that directly and specifically threatens the safety and security of Americans. We also include recommendations for how the administration should explain the DNI's assessments to the public as it is considering reforms to those assessments.

### **Recommended Reforms to the DNI's Criteria for Assessing Post-Transfer Terrorist Activity**

Section 307 of the Fiscal Year 2012 Intelligence Authorization Act,<sup>62</sup> requires the DNI, in consultation with the Director of the Central Intelligence Agency and the Director of the Defense Intelligence Agency, to provide the public with an unclassified summary regarding the recidivism of former Guantanamo detainees every six months. Currently, the DNI's assessment of recidivism rates is based on whether the DNI has confirmed or suspects that a particular detainee has engaged in "terrorist or insurgent activities." According to the DNI, activities such as the following indicate involvement in terrorist or insurgent activities:

[P]lanning terrorist operations, conducting a terrorist or insurgent attack against Coalition or host-nation forces or civilians, conducting a suicide bombing, financing terrorist operations, recruiting others for terrorist operations, and arranging for movement of individuals involved in terrorist operations. It does not include mere communications with individuals or organizations—including other former GTMO detainees—on issues not related to terrorist operations, such as reminiscing about shared experiences at GTMO, communicating with past

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<sup>62</sup> Intelligence Authorization Act for Fiscal Year 2012 § 307, Pub. L. No. 112-87 (2012).

terrorist associates about non-nefarious activities, writing anti-US books or articles, or making anti-US propaganda statements.

The DNI's most recently published assessment<sup>63</sup> of the number of Guantanamo detainees that have engaged in terrorist or insurgent activities after release, contains the following report on engagement rates as of January 14, 2014<sup>64</sup>:

**Section 307 (a) (1) Intelligence relating to recidivism of detainees currently or formerly held at the Detention Facility at Guantanamo Bay, Cuba, by the Department of Defense.**

<b>Reengagement of Former Guantanamo Bay (GTMO) Detainees as of 14 January 2014</b>			
	Total	Pre-22 January 2009 <sup>a</sup>	Post-22 January 2009
Detainees Transferred	614*	532	82
Confirmed of Reengaging	104 of 614 (16.9%)	99 of 532 (18.6%)	5 of 82 (6.1%)**
Dead – 20 of 104		20	0
In custody – 27 of 104		27	0
Not in custody – 57 of 104		52	5
Suspected of Reengaging	74 of 614 (12.1%)	72 of 532 (13.5%)**	2 of 82 (2.4%)**
Dead – 2 of 74		2	0
In custody – 24 of 74		24	0
Not in custody – 48 of 74		46	2

\*An additional nine detainees died while at GTMO, and one was transferred to New York for trial, was convicted, and is now imprisoned in Colorado.

\*\*One detainee in each of these categories was transferred pursuant to a court order.

The chart includes breakdowns that distinguish between cases of confirmed engagement in terrorist or insurgent activities and cases of suspected engagement in such activities. The chart also distinguishes between cases in which the detainee was released before January 22, 2009, and cases in which the detainee was released after January 22, 2009. At that time, a more thorough approach to evaluating transfers was implemented, with individualized assessments of detainees based on a review of all reliable intelligence available, as compared to prior assessments of individuals and groups based on nationality and other characteristics that may

<sup>63</sup> DIR. OF NAT'L INTELLIGENCE, SUMMARY OF THE REENGAGEMENT OF DETAINEES FORMERLY HELD AT GUANTANAMO BAY, CUBA (January 2014), available at: <http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/GTMO.pdf>.

<sup>64</sup> Note that one detainee was released after this report was release. Inclusion of that detainee would presumably further decrease the percentages contained in the chart.

have little relationship to transfer risk. Nonetheless, many members of the media and Congress have tended to report the overall historical recidivism number without distinguishing between confirmed and suspected recidivism, and without noting the impact of the 2009 changes, which substantially reduced the rate of engagement.

In addition, many members of Congress refer to the recidivism numbers as reflecting the percentage of detainees that have “rejoined the fight” or “returned to the battlefield,” despite the fact that the DNI’s assessment includes individuals that were never on the battlefield in the first place and did not return to it. Moreover, the DNI’s list of “terrorist or insurgent activities” that inform the recidivism assessment does not require direct connection to a terrorist attack or plot. Because the DNI does not offer any criteria for its recidivism assessment—it only offers an illustrative, not exhaustive, list of activities that qualify—it remains unclear what other activities could lead one to be placed on its recidivism list.

Even more concerning is the implication in the DNI’s recidivism assessment that merely communicating with other individuals on issues related to terrorist operations could be counted as recidivism, if such communication is done with suspicious motive, intention, or purpose. While such communications are obviously concerning, and should be monitored by the intelligence agencies in appropriate cases, merely discussing “issues related to terrorist operations” does not equate to “rejoining the fight.” In some cases, such communications may include activities that would otherwise be protected under the First Amendment, if there is not a direct and substantial connection to criminal activity. In response to criticism that writing an op-ed in the *New York Times* or otherwise engaging in peaceful expression may have resulted in some former detainees being placed on the recidivism list, the DNI has specifically disclaimed that benign communications could be considered evidence of recidivism. However, the DNI has not disclaimed that communications could qualify as an instance of recidivism even if the communication is not actually tied to a specific terrorist plot or attack.

For these and other reasons, the DNI’s assessment of whether detainees have engaged in terrorist or insurgent activities has been criticized by many independent observers for producing inaccurate and exaggerated recidivism assessments. A 2013 Seton Hall Law School study of the DNI’s recidivism figures concluded that “[t]he government’s inconsistent claims of recidivism show that the government is either incapable of accurately identifying recidivists or not interested in being accurate.”<sup>65</sup> Similarly, the New America Foundation prepared a study<sup>66</sup> that sought to independently verify the DNI’s recidivism claims, and found that at most 9 percent of former Guantanamo detainees were confirmed or suspected recidivists, with only 2.8 percent actually confirmed as having engaged in terrorist or insurgent activities against the United States.<sup>67</sup>

In addition to the concerns over the way the administration is defining recidivism, it is also problematic that a substantial portion (12.1 percent in the most recent report) of the DNI’s recidivism figures includes former detainees who are only *suspected* of having engaged in terrorist or insurgent activities. Yet policymakers count those cases as if they were confirmed. This practice is particularly troubling given that the DNI defines “suspected” engagement as

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<sup>65</sup> Mark Denbeaux et al., *National Security Deserves Better: “Odd” Recidivism Numbers Undermine the Guantánamo Policy Debate*, 43 SETON HALL L. REV. 643 (2013).

<sup>66</sup> *How Many Guantanamo Detainees “Return to the Battlefield?”*, NEW AMERICA FOUNDATION (May 7, 2013), available at [http://newamerica.net/sites/newamerica.net/files/profiles/attachments/GTMO\\_Appendix\\_5-7-2013.pdf](http://newamerica.net/sites/newamerica.net/files/profiles/attachments/GTMO_Appendix_5-7-2013.pdf).

<sup>67</sup> Giving the government the benefit of the doubt, where the study could not independently verify the government’s assessment in a particular case, it treated the government’s assessments as accurate.

*“plausible but unverified or single-source reporting indicating a specific former GTMO detainee is directly involved in terrorist or insurgent activities.”* The low threshold of evidence required for inclusion in the “suspected” engagement category raises serious concerns regarding whether individuals in this category can reasonably be considered recidivists, as many members of Congress and commentators assume. As a Department of Defense spokesperson recently stated: “[s]omeone on the ‘Suspected’ list could very possibly NOT be engaged in activities that are counter to our national security interests.”<sup>68</sup>

To address these concerns about the government’s assessment of recidivism of former Guantanamo detainees, the DNI should:

- Revise the criteria used to determine “terrorist or insurgent activities” for purposes of the recidivism assessment so that it only includes activities that are directly and materially connected to a terrorist plot or attack. The DNI should further consider revising the criteria to include only those activities that target American citizens or coalition forces in active zones of hostilities. Activities directed at foreign nationals or that occur far from recognized zones of hostilities where the United States is engaged in combat are clearly of serious concern, but have an unclear relationship to an assessment of the threat to the United States of transferring detainees.
- Discontinue the practice of including cases of suspected recidivism, as this category does not provide reliable information and is distorting the public’s understanding of the true rate of recidivism of former detainees.
- Make public the criteria used to place individuals on the recidivism list. What is currently made available to the public is merely a list of examples of activities that could lead to someone being placed on the recidivist list. Until the relevant criteria is made public, it is impossible to determine *why* the particular list of activities offered are considered relevant, or what *other* activities may lead to placement on the recidivism list.
- Make public the list of former detainees who the DNI has determined to be recidivists, and the specific actions they took that gave rise to the determination, to the maximum extent possible consistent with national security interests.

## **Explaining the DNI’s Recidivism Assessment**

As noted above, the DNI’s recidivism assessment methods are problematic and should be reconsidered. However, in addition, the administration has a responsibility to address commonly held misconceptions about detainee recidivism rates.

First, as noted above, members of Congress, reporters, and others who shape public opinion routinely report that the DNI has concluded that 28 percent of released Guantanamo detainees have “returned to the fight.”<sup>69</sup> This statement is false. The phrase “terrorist or insurgent activities” is defined to include actions that do not necessarily constitute violent terrorist activities that threaten the United States, let alone actions that would be considered “returning to the fight.”

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<sup>68</sup> Pam Benson, *Report: More Former GITMO Detainees Back on the Battlefield*, CNN.com (March 6, 2012), available at <http://security.blogs.cnn.com/2012/03/06/report-more-former-gitmo-detainees-back-on-the-battlefield/>.

<sup>69</sup> The often-cited 28 percent figure is based on a previous DNI report. Based on this more recent report, the skewed percentage would now be misreported as 29 percent.

Second, the category of individuals *suspected* of recidivism—which constitutes 12.1 percent of the overall 29 percent calculation is routinely being treated as if it contains confirmed cases of recidivism. This is highly problematic because, as was previously explained, inclusion in this category is based on “*plausible but unverified or single-source reporting*” and even DOD acknowledges that individuals in the suspected category “could very possibly not be engaged in activities that are counter to our national security interests.”

Third, the administration has failed to emphasize sufficiently the important differences between the recidivism rates of detainees released during the Bush and Obama Administrations. The DNI’s assessment includes a breakdown of recidivism rates of detainees released before January 22, 2009, and after January 22, 2009, when the administration began implementing new guidelines to govern the circumstances in which detainees were released. Among other precautions, these guidelines required fresh threat assessments based on a totality of the intelligence available on detainees, and unanimous agreement among the security and intelligence agencies regarding whether detainees should be transferred. Accordingly, the DNI assessment shows that only five individuals of 82 (6.1 percent) released after January 22, 2009 were confirmed to have engaged in terrorist activities, as compared to the higher recidivism rates of detainees released before January 22, 2009.

To address these misperceptions regarding the DNI’s assessment, the administration should:

- Forcefully reject any characterization of the DNI’s recidivism figures as reflecting the number of individuals who have “rejoined the fight” or “returned to the battlefield,” and explain that the recidivism figures are estimated percentages of former Guantanamo detainees that may have taken some unlawful or derogatory actions associated with terrorist groups, but may not have directly participated in any terrorist plots or attacks, or otherwise posed a concrete and specific threat to the United States.
- Clarify that the category of individuals *suspected* of recidivism does not reliably capture those who pose a threat to the United States, and should not be relied on or cited as such. To the extent the DNI’s reengagement percentages are referenced, the focus should be on the estimates of *confirmed* reengagement.
- Explain that thorough interagency assessments are now required prior to transferring detainees under current policy, which is in contrast to past detainee transfers practices under the Bush Administration. In addition, the administration should further explain that only three former Guantanamo detainees (6.1 percent) who have been released after implementation of the 2009 guidelines are confirmed to have engaged in terrorist or insurgent activities. Based on the DNI’s report, this number much more accurately reflects current rates of engagement after release.

