



13 RECOMMENDATIONS TO CLOSE THE GUANTÁNAMO BAY DETENTION FACILITY

CERL WORKING GROUP STATEMENT

JANUARY 11, 2022

I. Introduction

January 11, 2022, marks the 20th anniversary of the arrival of the first detainees to the Guantánamo Bay (GTMO) detention facility at the U.S. naval base in Cuba. The base is also the site of the U.S. military commissions to try detainees alleged to have committed offenses subject to military trial in the context of armed conflict with the United States. The United States has spent upwards of \$8 billion on the Guantánamo experiment to date, and current running costs equal roughly \$540 million each year to house the remaining 39 detainees, a sum vastly in excess of costs at U.S. maximum security prisons. Yet in 20 years of operation, the commissions have achieved only one conviction that has been sustained following rehearing and appeals. Unsurprisingly, closing the Guantánamo Bay prison facility has been a stated goal of several administrations, including the current Biden administration. Yet no administration has progressed meaningfully toward closing the facility since its inception in 2001.

The current statement provides the recommendations of a working group convened by the [Center for Ethics and the Rule of Law \(CERL\)](#), a center partner of the Annenberg Public Policy Center (APPC) of the University of Pennsylvania, to effectuate the closure of the Guantánamo Bay prison and to begin to repair damage done to the rule of law. CERL is a nonpartisan interdisciplinary institute dedicated to preserving and promoting ethics and the rule of law in national security, warfare, and democratic governance. CERL assembled the GTMO Working Group in June of 2021 to address the difficult legal and policy questions that arise in anticipation of renewed attempts to close the Guantánamo detention facility. Co-chaired by Professor Claire Finkelstein, a professor of criminal and national security law at the University of Pennsylvania and the Faculty Director of CERL, and Mr. Harvey Rishikof, former Convening Authority for the commissions and a visiting professor of national security law at Temple University, the group comprises over 30 national security and counterterrorism experts, retired military officers, lawyers, former Department of Justice (DOJ) officials, psychologists, psychiatrists, academics, ethicists, and experts in the law of armed conflict. The recommendations of the Working Group reflect the views of both current and former defense attorneys in the commissions and former Guantánamo prosecutors, as well as two former convening authorities and other former executive branch officials. The report, which will be issued this spring, is intended to be nonpartisan in nature and based on an objective assessment and application of facts and law.

The Working Group's recommendations provide an avenue by which the executive branch, Congress, and the country as a whole can move forward to resolve the pending cases before the commission as well as to chart a path toward resolution of the many remaining "forever prisoners" who will likely never see the inside of a courtroom. The Working Group hopes that, by identifying several options for resolving existing cases and addressing the difficult questions of legal legitimacy that plague the continued operation of the prison facility, it may assist President Biden, key congressional committees, and various federal agencies in closing the Guantánamo Bay prison. An advance summary of the report appears below.

II. Identifying Impediments to Closure

The original goal of the military commissions at Guantánamo Bay was to provide justice for the thousands of victims and families who were killed or injured or who suffered the loss of a loved one as a result of the vicious 9/11 attacks on the United States and its citizens, through a process that

confers legitimacy—historically, through a trial process. After 20 years of operation, however, the commissions have not yet achieved their primary objective—the clearest indication that Guantánamo and the effort to bring suspected terrorists to justice is a failed experiment. As Colleen Kelly, whose brother Bill Kelly, Jr., was killed in the North Tower of the World Trade Center on 9/11, testified before the Senate Judiciary Committee on December 7, 2021, “The rule of law is a bedrock principle of our nation, and after 9/11 we expected our government to uphold the rule of law in seeking accountability for our relatives’ deaths. It failed to do so and as a result we still are awaiting justice twenty years later.”¹ The fact of delay and the near-total inability to secure convictions has reinforced the extremely negative perception of Guantánamo by the American public, and the prison facility has badly damaged the standing of the United States in the international arena. As Chairman Dick Durbin said in his opening statement to the 2021 Senate Judiciary Committee hearing, “the story of Guantánamo is a story of a nation that lost its way. It is a story of unspeakable abuse and indefinite detention without charge or trial... And it is a story of justice delayed and denied again and again and again—not only for detainees, but also for the victims of 9/11 and their loved ones.”² In advance of the hearing, the Working Group submitted a letter to the Judiciary Committee that is now incorporated into the congressional record.³

The failure to close the Guantánamo prison, despite many years of problematic practices, abuse, expense, and failed attempts to bring suspected terrorists to justice, has many different causes. For purposes of the present statement, three such causes are worth highlighting. First and foremost, the specter of the violations of the interrogation programs hangs over the commission process and the prison as a whole and interferes with attempts to distribute justice. While debate over the treatment of detainees continues to divide the legal community, few can deny that the methods employed to interrogate detainees in Guantánamo violated Common Article 3 of the Geneva Conventions, the Uniform Code of Military Justice (UCMJ), the Law of Armed Conflict (LOAC), and U.S. federal law. Such violations have bedeviled the commissions and tainted the legitimacy of the U.S. detention authority. Particularly in light of the history of interrogational abuses of those currently detained, the length of time that has passed and the advanced age and poor state of health of many detainees, as well as the lack of clear legal authority for continued detention outside of the commission process, the legal, moral and national security justification for continued detention remains elusive as a matter of law.

Second, in large part as a response to its complicated history, the commissions lack the transparency of an Article III courtroom, resulting in the vast over-classification of all aspects of the commissions process. This over-classification in turn hampers the ability to conduct forthright and just legal proceedings and undermines the legitimacy of both the commission and the continuing detention of uncharged individuals. The secrecy surrounding all aspects of the operation of the prison camp reflects a clear unwillingness to admit the abuses that occurred at Guantánamo and in other U.S.-led black sites and detention centers around the globe. The commissions have effectively been paralyzed by the government’s own determination to obscure the treatment of the detainees in U.S. custody.

¹ Testimony of Ms. Colleen Kelly before the Senate Judiciary Committee, December 7, 2021. [Kelly Testimony4.pdf \(senate.gov\)](#).

² <https://www.durbin.senate.gov/newsroom/press-releases/durbin-delivers-opening-statement-in-senate-judiciary-committee-hearing-on-closing-the-detention-center-at-guantanamo-bay>

³ <https://archive.law.upenn.edu/live/files/12030-statement-of-working-group-members-for-dec-7>

Third, a further consequence of the country's ambivalent relationship with its own past is the absence of any meaningful assignment of authority in the U.S. government to shutter the facility. Even though 13 detainees have been cleared for transfer or release, the office in the Department of State responsible for negotiating transfer to foreign jurisdictions that was closed by President Trump has not been restored as of this date. Based on public reporting, the Department of Justice does not appear to be taking active steps toward resolving the present paralysis. On February 12, 2021, and reaffirmed on January 4, 2022, the Biden administration stated its commitment to closing Guantanamo Bay, yet it appears it has not put in place the governmental framework necessary to effectuate such a significant undertaking. The forthcoming report by CERL covers these and other challenges and offers concrete guidance for how to overcome obstacles to closure.

III. Why and How to Close Guantánamo

The acts of terrorism inflicted on U.S. civilians and military personnel require justice and accounting. The use of abusive interrogation techniques as well as other problematic governmental behavior, such as excessive classification and secrecy-driven policymaking, has made such accounting significantly more difficult to achieve. It has complicated the prosecutorial process by creating issues related to the admissibility of both confessions and direct and derivative evidence, classification of evidence, and access to potentially favorable information held by the government. Moreover, the instances of prosecutorial violations of attorney-client privilege have never been fully vetted, and the reports of the investigations remain classified. At the same time, the option of simply releasing all remaining detainees remains unrealistic from the standpoint of national security. The essential question is how to balance the legitimate national security concerns the United States faces against the need to restore both the reality and the perception that the United States is committed to rule of law values. The following general principles that are a fundamental part of commitment to the rule of law for any society have guided the Working Group's efforts.

The Value of Transparency. Information continues to emerge regarding the methods and extent of interrogational abuses of detainees at Guantánamo Bay as well as in other detention facilities and black sites. With each revelation, the legitimacy of the commission as well as further detention is undermined. It was transformative, for example, when a Guantánamo detainee, Majid Khan, was able for the first time to publicly describe his black site torture—a message he delivered in a commission courtroom while holding his shirt up to reveal the physical scars of torture for the entire courtroom to see. The impact was immediate and significant. A panel of military officers recommended clemency for Mr. Khan and described the treatment he sustained in U.S. custody as “a stain on the moral fiber of America” and “a source of shame for the U.S. government.” The more the public learns, the more difficult it becomes to justify the continued operation of the prison facility.

By contrast, the government's ability to censor and approve every piece of information given to cleared defense counsel poses a serious impediment to the legitimacy of both detention review proceedings and criminal trials. Because of the substantial risk of potential government embarrassment resulting from full disclosure of the details of the interrogation program, its review of information is inherently conflicted, creating a genuine risk of over-classification. Moreover, most detainees and their lawyers are never able to see a substantial portion of the evidence available to the prosecution, though this feature is not unique to commission proceedings. Repeatedly, there are alleged classification “spills” that require seizure of computers and destruction of data. Indeed, the discussions of the Working Group made clear that excessive classification and the government's

desire to protect against public disclosures have contributed more than any other factor to the paralysis in the military commissions and the inability of the prosecution and the defense to move into the trial phase of the commissions process. Thus, transparency and declassification of all relevant reports and documents should be independent goals.

Duty to Adhere to International Law. Debates abound over the scope of the president's authority to continue to detain those uncharged individuals who are not in the commissions process, particularly in the wake of the U.S. troop withdrawal from Afghanistan during the summer of 2021. The change in U.S. operations implies the cessation of hostilities in Afghanistan, and thus arguably under international law there is no remaining authority to detain individuals not charged with a crime. Nonetheless, many argue that despite the troop withdrawal, the "war" against terror continues, and that the president retains authority under the 2001 AUMF as well as Article II of the U.S. Constitution to continue the indefinite or "administrative" detention of uncharged detainees. Under the law of armed conflict, there is a duty to repatriate prisoners of war (POWs) upon cessation of hostilities, a duty that the Fourth Geneva Convention applies to those interned in war more generally.²⁴ Though U.S. law may assert the authority to detain individuals captured in conflict indefinitely based on an assessment of dangerousness, historically, international law does not recognize this entitlement. The tradition of repatriation of belligerent detainees when war ends is longstanding and is one the United States should continue to recognize. For Taliban detainees, this principle is clearly implicated by the U.S. withdrawal of troops from Afghanistan in August of 2021. These detainees have never qualified for POW status, according to U.S. authorities, either because they have operated as a non-state group or because they have failed to meet the POW qualification requirements. Nevertheless, the end of hostilities between the United States and the Taliban raises a legitimate question whether the underlying principle of post-hostilities repatriation applies in their case. At a minimum, it would be consistent with the withdrawal of the United States from active hostilities in Afghanistan to resolve the ambiguity and indefinite detention of those who are detained based on their involvement in this aspect of the war on terror. More generally, the CERL Working Group is unanimous in its view that continued operation of the Guantánamo Bay detention facility undermines, rather than advances, U.S. national security interests, and that therefore the relevant question is not what the United States may do, but what path is both right and expedient for the United States to pursue.

Duty to Impose Swift and Impartial Justice. The CERL Working Group is also unanimous in viewing the military commissions as dysfunctional, a system unlikely ever to produce meaningful trials and impartial verdicts. Whatever the original intention, the military commissions have failed to provide the justice that was promised, and most of the pending cases continue to languish in pre-trial proceedings, showing little hope of resolution. The commissions have been beset by extreme and unacceptable delays, largely due to a number of factors we have noted: the geographic location; the lack of a governing body of law; the involvement of multiple bureaucracies and agencies that render procedures cumbersome and inefficient; multiple rotating judges; the felt need on the part of the U.S. government to maintain high levels of secrecy; and repeated instances of governmental misconduct and interference with the process. This has created an indelible taint that calls into question the likelihood these tribunals will be capable of producing impartial verdicts or outcomes perceived as legitimate or being sustained on appellate review. Although many lawyers and individuals of good will have tried over the last 20 years to make the commissions work, the facts are

²⁴ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

the facts. Accordingly, the Working Group proposes to disband the Guantánamo Bay detention facility over the course of the next 12-plus months and to abandon any hope of conducting trials before the U.S. military commissions as currently composed.

The Value of Negotiated Resolutions and Limited Ambitions. The Working Group unanimously concluded that resolving cases by plea is the preferred option whether the pleas are effectuated in the commission system or in federal court. In either case, the desired outcome is most likely to be achieved by taking the death penalty charges off the table for those who are willing to plead guilty. A preponderance of the Working Group strongly supports the use of video teleconferencing in order to resolve a number of the outstanding commissions cases, particularly where guilty pleas are concerned, since the NDAA and other restrictions on the use of federal funds to bring detainees into federal court can be obviated by conducting guilty pleas by video with the detainees' consent. Where guilty pleas are unavailable, trial through the use of the concurrent military jurisdiction over war crimes vested in General Courts-Martial (GCM) authority pursuant to Article 18 of the UCMJ presents a feasible option, some of whose proceedings could occur by videoconference. Even the military commissions have allowed pre-trial proceedings through video teleconferencing via a secure remote hearing room, conducted entirely through video teleconferencing, including arraignments, and sentencing proceedings. Needless to say, a full criminal trial could not be conducted by video, in which case resort to the full GCM jurisdiction remains an option.

Duty to Recognize the Universal Applicability of Due Process in Trial Proceedings and Detention. Though most Working Group members do not believe impartial justice can be achieved by prosecution before the currently composed military commissions, the Working Group nevertheless maintains that if trials are to move forward in the facility, due process rights must apply to all military commission proceedings at Guantánamo. Of particular importance is the right of each defendant in the commissions process to view the government's evidence against him, a right of unquestioned stature in federal courts and one that is critical for determining whether continued detention is justified. A recent case argued before the U.S. Circuit Court for the District of Columbia, *Al Hela v. Biden*, considers whether *ex parte* filings, hearsay, and other evidence used to justify Abdulsalam Ali Abdulrahman Al-Hela's detention should be admissible in court. Developments in this case may have important implications for the application of due process rights at GTMO and could possibly open different avenues for detainees to challenge the basis of their detention. The case could also necessitate a revision of current government procedures regarding evidence and transfers. Twenty years into the process these questions still remain unresolved.

The Need for Improved Clarity Regarding the Legal Status of Detainees. Improved clarity regarding the categorization of the remaining GTMO detainees is critical, not only for resolving current cases but for avoiding the legal confusion surrounding detainee status in future conflicts, especially against non-state organized armed groups. Some members of the Working Group believe that most detainees should be identified as civilians who directly participated in hostilities against U.S. forces or their allies, although we note this is not a consensus view. Other members consider these detainees to qualify as unprivileged enemy belligerents—members of enemy-organized armed groups. Importantly, however, this difference in no way affects the broader recommendations related to closure, alternative criminal prosecution options, or due process rights. The full report, which will be released in final form this spring, discusses the background and history of the status question, and articulates several recommendations relating to these questions.

IV. CERL Working Group Recommendations

Based on the above guiding principles, among others, the Working Group agreed upon the following recommendations—nine directed toward the White House and executive branch agencies and four directed toward Congress.

A. Executive Branch Recommendations:

1. President Biden should rescind Executive Order (EO) 13823 and make closing Guantánamo Bay detention facility a national priority. He should give the Secretary of Defense the overall authority and responsibility to close the Guantánamo prison and end the military commissions process. He should direct the Department of Defense (DoD) to close the military commissions and the detention facility no later than the end of the 2022-23 fiscal year—September 30, 2023.
2. DoD should attempt to resolve as many cases as possible by guilty plea, whether by pleas conducted in the commissions or in federal court by videoconference. In order to facilitate such pleas, DoD should eliminate the death penalty from the range of possible sentences for defendants willing to plead guilty.
3. If bringing detainees into federal court remains foreclosed, DoD should consider invocation of General Courts-Martial jurisdiction to prosecute any individual whose case is not resolved through guilty plea or repatriation or release.
4. The President should restore the office of the Special Envoy for Guantánamo within the Department of State (DoS) to work exclusively on closing Guantánamo as a national priority.
5. The Secretary of Defense (SecDef) should direct the Periodic Review Board (PRB) to conduct a thorough review of the status of each detainee currently interned at Guantánamo and to release publicly the findings of such review. The PRB's review should identify a mechanism of resolution for each ongoing case as well as to assess the detainees' health and physical conditions as needed to conduct successful repatriation or transfer. The SecDef should also work with the Department of Justice on case resolutions and DoS or other agencies/departments to identify countries that are willing to accept detainees for transfer or release and then serve as a coordinating body to facilitate such transfers to be completed no later than the end of the 2022-23 fiscal year.
6. Any currently uncharged individuals should either be charged or transferred to other countries, at least to the extent that hostilities with that detainee's nation of origin have ceased. This recommendation does not purport to make any assessment of the president's authority to detain uncharged individuals past the end of hostilities, but rather constitutes a recommendation that is specific to the current Guantánamo detainees and the history and length of their incarceration.

7. President Biden should issue an EO to mandate widespread declassification of the RDI Program and direct the attorney general to issue a memorandum imposing presumption of declassification of all government documents relating to torture or other forms of illegal treatment of detainees in U.S. custody associated with the war on terror. This presumption should be rebutted only based on legitimate, specific, and concretely described classification concerns and not for the purpose of concealing illegal or improper government conduct.
8. The federal government should revise its position to explicitly affirm that due process does apply to Guantánamo detainees. Accordingly, the Office of Legal Counsel (OLC) should make clear that due process applies to all American tribunals capable of adjudicating detention as a punishment as well as to habeas proceedings.
9. OLC should issue an opinion advising that the state secrets privilege cannot be legitimately invoked when doing so would serve to obscure U.S. involvement in inappropriate or potentially unlawful activity.

B. Recommendations for Congress:

10. In order to allow the president to make use of the broadest range of options in attempting to close the Guantánamo prison, Congress should remove the prohibition on using federal funds to transfer detainees to other U.S. jurisdictions from Guantanamo Bay from future NDAA's, starting with the 2023 NDAA.
11. Congress should mandate that evidence derived from any illegal activity, including torture, cruel, inhuman, or degrading treatment, or the use of interrogation practices prohibited by U.S. law be excluded from all stages of military tribunal proceedings and for all purposes, except as evidence of the illegal activity.
12. Congress should repeal the Military Commissions Act (MCA) of 2009. In the event that Congress is unwilling to repeal the MCA, Congress should consider a variety of amendments to that statute, including but not limited to reevaluation of the status distinctions for detainees; revision of the MCA Punitive Articles to remove offenses that are not closely aligned with widely accepted war crimes; and integration of a "fruit of the poisonous tree" exclusionary rule pertaining to admissible evidence.
13. The Senate Judiciary Committee should conduct hearings and issue a report, comparable to the SASC and SSCI reports, to consider and set future standards for the role of members of the legal profession in facilitating policy decisions related to the detention and interrogation practices that were and remain inconsistent with prevailing legal standards.

V. Closing Guantánamo and Restoring U.S. Integrity in War

The Working Group is of the unanimous opinion that it is critical not only to close the Guantánamo Bay detention facility, but also to take steps to restore the integrity and international standing of the United States by ending this ignominious chapter in U.S. history. Repairing some of the damage that the failed experiment of the commissions and protracted extraterritorial detention has wrought will require a legal framework to govern the capture and detention of suspected terrorists in the future, as well as a legal process for adjudicating their cases that not only is consistent with U.S. standards of fair and due process, but that enables swift resolution and justice for the victims and their families. Four different administrations have pledged to close or resolve the Guantánamo “problem.” It is time for the relevant actors to step up and end this stain on our collective political and legal consciousness for the surviving family members, our nation, and our reputation as a people that believe in and uphold the rule of law.

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**Based on the restrictions the U.S. government places on former government employees with security clearances, CERL Interim Executive Director Mark Fallon recused himself from authoring any section of this report to avoid the requirement to submit published writing to the government for prepublication review. He is listed as an author based on his counsel and guidance throughout the production and editing process.*

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