

TESTIMONY OF
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HEARING ON

CLOSING GUANTANAMO:
The National Security, Fiscal, and Human Rights Implications

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS

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Introduction

Chairman Durbin, Ranking Member Cruz and Members of the Subcommittee, thank you for inviting me to be here today to share my perspective on the national security, fiscal and human rights implications of our policies at the Guantanamo Bay Detention Center. We are deeply grateful to this subcommittee and to you, Mr. Chairman, for your leadership on this and so many other human rights issues. Your tireless commitment to keeping human rights on the agenda of the United States Congress helps to ensure that our nation lives up to its ideals, and can lead the world by example.

My name is Elisa Massimino. I am the President and Chief Executive Officer of Human Rights First. Human Rights First is one of the nation's leading advocacy and action organizations, and the only group whose central mission is to advance American global leadership on human rights. We believe that upholding human rights is not only a moral obligation; it is a vital national interest. America is strongest when our policies and actions match our values. For 35 years, Human Rights First has worked to ensure that our country is a beacon on human rights in a world that sorely needs American leadership.

Human Rights First is non-profit and nonpartisan. To maintain our independence, we accept no government funding. Our work focuses on building coalitions with frontline activists, lawyers, and religious, military, and business leaders to develop pragmatic and bi-partisan solutions to the toughest human rights challenges where American leadership is essential.

Human Rights First is an American organization and, since 9/11, much of our work has focused on ensuring that our country stays true to its values, even as it confronts the threat of terrorism. We know from our 35 years of work around the world that what the United States does—particularly on human rights—matters deeply. In the aftermath of WWII, it was an American—Eleanor Roosevelt—who led the effort to develop a global consensus on the inherent rights and dignity of all people. Now, as then, American leadership is essential to build a world in which those universal rights are universally respected.

That is why we have focused so much of our energy and attention on getting this right. For the last decade, Human Rights First has worked with a group of retired generals and admirals, as well as law enforcement officials, professional interrogators, faith organizations and others to promote effective security policies that respect the rule of law and human rights, and uphold American ideals and universal values. We have challenged arbitrary detention, torture and other cruel treatment in the wake of post-9/11 abuses. We have worked for the restoration of habeas corpus. We have served as official observers to every military commission convened at Guantánamo. And we have published a series of groundbreaking reports on Guantanamo and other aspects of U.S. detention policy. Our report, *IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS*¹, written by two respected former federal prosecutors, examines more than 120 terrorism cases prosecuted over the past 15 years and concludes that the

¹ RICHARD B. ZABEL AND JAMES J. BENJAMIN, *IN PURSUIT OF JUSTICE* 65 (Human Rights First 2008).

federal system has capably handled important, complex, and challenging international terrorism cases without compromising national security or sacrificing rigorous standards of fairness and due process.

Closing Guantanamo has proven to be more difficult than many anticipated. There are tough questions to resolve, to be sure, but it is possible to close the detention facility with smart and sustained leadership from the President and Congress. Our new paper, **GUANTANAMO: A COMPREHENSIVE EXIT STRATEGY**, which we are releasing today, provides a roadmap for closing Guantánamo, with practical guidance on how to address the challenges of risk management raised by transferring detainees out of the facility.

I. Why We Need to Close Guantanamo

In a world that for many is characterized by tyranny, war, and injustice, the United States stands as a beacon. Despite our many failings, the United States has a long history of advancing human rights, having played a leading role in developing the international laws and standards that define and enforce them, and continuing today by protecting refugees and supporting human rights defenders on the frontlines of the struggle for freedom in many countries around the world. Domestically, respect for freedom, democracy, and the rule of law defines our political culture and constitutional system, setting an example for people around the world who seek to advance democracy and human rights in their own societies.

A glaring exception to this narrative is the post-9/11 abuses committed by our government, defined largely by Guantanamo and the torture of detainees in U.S. custody. It's hard to overstate how much this has undermined our country's moral standing and credibility. In my role as the head of an international human rights organization, the scenarios in which I most often hear about Guantanamo are not in our domestic political debates here at home or in our courts. I hear Guantanamo raised by officials of repressive governments who use it to deflect criticism of their own policies by charging hypocrisy. And I hear about Guantanamo from human rights defenders around the world who tell me that the best thing the United States can do to support their bids for freedom and democracy is to make sure that our country can lead by example, including closing Guantanamo. Three years ago, I brought two dozen human rights and democracy activists from around the world to the White House to meet with President Obama, and that's exactly what they told him.

The ability of the United States to credibly push other governments to respect human rights is seriously compromised when we have failed to correct the post-9/11 abuses that have cast a shadow on America's foreign policy over the last decade. And that shadow will continue to loom large until Guantanamo is closed, and the policies of indefinite detention and military commission trials are ended.

There have been instances in the life of our relatively young country when we have pursued policies out of fear that we later realize are inconsistent with our values.

Sometimes it takes hearing the perspective of those outside our national community, who know the values for which we hold ourselves out, to remind us of who we are. Consider the perspective of some family members of Guantanamo detainees. Several have written letters to you in advance of this hearing, and I want to read a few excerpts from them.

Nabil Hadjarab is an Algerian man who has been detained at Guantanamo for over a decade without charge or trial. He has been unanimously cleared for transfer by our government's security and intelligence agencies. Here's what his uncle Ahmed Hadjarab wrote:

"I must admit that my perception of the United States of America has been severely tarnished by this issue. When in 2002, I was told that Nabil was detained by the Americans; I thought that at least he would have a right to a fair trial. I thought his rights would be respected and that justice would prevail. What I feel today is mostly incomprehension. How can this nation, one that prides itself of defending Human Rights, close its eyes to these violations of its founding principles?"

Hisham Sliti from Tunisia has been held in Guantanamo for more than a decade without charge or trial. He has also been cleared for transfer. His mother, Maherzia Sliti, wrote:

"One of the worst things is the uncertainty, and the false hope that things are about to change. Sometimes I hear rumors that men have been released from Guantanamo and that Hisham is one of them. I miss and love my son so much that although my mind knows the rumors are probably false, my *heart* believes them every time. And every time I am devastated when I realize he is not coming home. I do not understand why my son is still in Guantanamo after all these years, when we know he has been cleared. We never thought the United States was the kind of place where people could be held like this."

Ahmed Belbacha, an Algerian, has been held since 2002 without charge or trial. He has been cleared for transfer. His brother Mohammed Belbacha wrote:

"My family is horrified at how Ahmed and others in Guantanamo have been treated. Algerian youth has long looked up to America for its democracy and respect for human rights. We always associated a lot of good with it. But now, America has lost its standing not just with our family, but with Algerian youth as a whole. Arbitrary arrest, detention without trial, renditions and torturous interrogation methods have cast a dark stain upon America's reputation."

These excerpts come from letters collected by Reprieve, a human rights organization that currently represents 15 prisoners in Guantanamo Bay and has provided assistance for many more. Attorneys and family members of Guantanamo detainees submitted the full versions of these and other letters to the hearing record. I encourage you to read them.

I raise these issues of justice and America's moral standing in the world because I want to be clear that what's at stake in figuring out a way to close Guantanamo is our ability to lead by example, and our reputation for upholding justice and the rule of law.

There are some who say that we need Guantanamo to hold and interrogate detainees that can't be tried in civilian court because they were captured by our military on the battlefield. But the military has never needed Guantanamo for battlefield captures; those detainees have typically been held in detention facilities in theater. Moreover, the vast majority of terrorism suspects captured abroad are dealt with by the security and law enforcement services of our foreign counterparts, and that's how it should be. Since 9/11, more than 120,000 suspected terrorists have been arrested around the world, and more than 35,000 have been convicted.² Our military cannot—and should not—be the world's police force or jailor.

In cases in which we have needed to detain, interrogate, and jail terrorism suspects, our civilian system has handled these cases remarkably well. Since 9/11, civilian federal courts have handled nearly 500 cases related to international terrorism, including at least 67 where suspects were captured abroad,³ often in inhospitable environments. Despite claims to the contrary, there is no credible evidence that trying these cases in civilian courts has caused breaches of sensitive national security information, or invited attacks on U.S. soil.

Nor does the civilian process preclude us from obtaining actionable intelligence to disrupt terrorism plots. The administration has established a High-Value Interrogation Group (HIG) that has been deployed in a number of cases to interrogate terrorism suspects using lawful and effective methods. Even in more routine terrorism cases, and in situations where Miranda rights and other due process protections are respected, offering plea deals and working with the defendant's family and lawyers, in addition to lawful interrogations, have produced a wealth of actionable intelligence information, including: telephone numbers and email addresses used by al Qaeda and other terrorist groups; information about al Qaeda communications methods and security protocols; information about their recruiting and financing methods; the location of al Qaeda training camps and safe houses; information on al Qaeda weapons programs; the identities of operatives involved in past attacks; and information about future plots to attack U.S. interests.⁴

By contrast, detention and trial at Guantanamo has proven highly problematic on several levels. Since 9/11, only 7 detainees have been convicted by military commission. Two of those convictions were recently overturned by a federal appeals court because the

² Martha Mendoza, *Global Terrorism: 35,000 Worldwide Convicted For Terror Offenses Since September 11 Attacks*, AP, September 3, 2011, available at: http://www.huffingtonpost.com/2011/09/03/terrorism-convictions-since-sept-11_n_947865.html.

³ Deborah Pearlstein, *Counterterrorism in Court*, OPINIO JURIS, March 25, 2013, available at: <http://opiniojuris.org/2013/03/25/counterterrorism-in-court/>.

⁴ David Kris, *Law Enforcement as a Counterterrorism Tool*, JOURNAL OF NATIONAL SECURITY LAW AND POLICY, June 2011, at 85, available at: http://jnslp.com/wp-content/uploads/2011/06/01_David-Kris.pdf.

crimes with which the detainees were charged were not war crimes—the only acts over which military commissions have jurisdiction—at the time the offenses were committed. More broadly, in contrast to the civilian system, in Guantanamo—where detention is indefinite and Congress has made it difficult to effect transfers out of the prison—there is not the same kind of leverage (e.g., offering release or shorter detention in exchange for cooperation) to exploit with detainees.

There are other pragmatic reasons to move forward with closing Guantanamo. The impending end of combat operations in Afghanistan in 2014 increases the urgency for Congress and the administration to determine the disposition of all law-of-war detainees. The detainees at Guantanamo were apprehended and detained pursuant to the 2001 Authorization for Use of Military Force. As hostilities come to an end, Guantanamo detainees will have a legitimate claim before the courts that they should be released. Congress and the administration should proactively determine the lawful disposition of detainees now, or the courts could force those dispositions later.

There has long been a national security consensus that Guantanamo should be closed. More than 50 retired generals and admirals, along with three Secretaries of Defense—Gates, Panetta and Hagel—have called for Guantanamo to be closed. Today’s witnesses underscore that many senior military leaders believe that closing Guantanamo is a national security imperative.

As a national security issue, closing Guantanamo should be beyond politics. And it has been in the past. In 2008, there was significant bipartisan consensus that Guantanamo should be closed. Then-President Bush said he wanted to close Guantanamo,⁵ as did then-candidates Obama and McCain.⁶ That consensus has started to re-emerge, with Senator McCain recently stating that Guantanamo should be closed, and emphasizing that it would be an “act of courage” to transfer detainees out of Guantanamo and into the United States as part of a plan to close the facility.

And Guantanamo can be closed—safely and securely. This is not to say that closing Guantanamo will be easy—it if were, Guantanamo would already be closed. There are difficult legal, practical, and political problems that must be addressed to move forward.

But there is a pragmatic path forward to close Guantanamo, if the administration and Congress demonstrate sustained and focused leadership to get the job done.

I want to spend a few minutes outlining this path forward.

II. A comprehensive plan for closing Guantanamo

⁵ *Bush Says He Wants To Close Guantanamo*, CBS NEWS/AP, February 11, 2009, available at: http://www.cbsnews.com/2100-250_162-1596464.html.

⁶ *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>.

In 2009, President Obama signed an executive order establishing an interagency taskforce to conduct a review and recommend lawful dispositions of the detainees being held at Guantanamo.⁷ Since then, 72 prisoners have been transferred, repatriated or resettled, and a number of other detainees have died—either by suicide or other causes—bringing the current detainee population down to 166.⁸ Transfers have stalled in part because of restrictions imposed by Congress in 2010, 2011 and 2012, and because the administration has failed to exercise the authority Congress gave it in 2012 under the National Defense Authorization Act to waive the transfer restrictions by invoking, among other requirements, national security interests.

Concerns about recidivism—the possibility that a released detainee may “return to the fight”⁹—are understandable, as they are in the criminal context. But, as many analysts have detailed, the claims about recidivism of detainees who have already been released are inflated. The claim by members of Congress and some in the media that 28% of former Guantanamo detainees have “rejoined the fight” or “returned to the battlefield”¹⁰ is highly misleading. It appears to be based on unreliable or unconfirmed reports of suspected activities, and in any event includes detainees that may not have participated in any terrorist plots or attacks. The process to evaluate potential transfers has changed since the prior administration to more accurately capture post-transfer risk, leading to fewer cases of recidivism for detainees transferred by the Obama administration. The Director of National Intelligence’s recidivism assessment should be revised to more accurately reflect the circumstances in which former detainees that have engaged in terrorist plots or attacks against the United States so that evaluation—and mitigation—of this risk is grounded in reality, not hyperbole.

Nonetheless, as senior military commanders have told me, transfers of detainees from Guantanamo—just as transfers of detainees out of detention facilities in Iraq and Afghanistan—have always been about risk management, not risk elimination. Some detainees pose little risk; others will pose more. Establishing a “zero tolerance for risk” policy with respect to individual detainees is neither wise nor necessary. Our military, intelligence, law enforcement, and diplomatic agencies, along with those of our foreign counterparts, can significantly mitigate the risks of transferring detainees out of Guantanamo through security assurances, monitoring, rehabilitation and other reasonable

⁷ Guantanamo Review Task Force, Final Report, January 22, 2010, *available at*: <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

⁸ Sarah Childress, *Four Obama Policies That Help Keep Guantanamo Open*, PBS/FRONTLINE, May 1, 2013, *available at*: <http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/four-obama-policies-that-help-keep-guantanamo-open/>.

⁹ The term “recidivism” is used in this testimony solely because of its widespread use in the detainee transfer context. However, the term 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 is noted in the testimony, much of the conduct that is counted as recidivist does not actually entail criminal or terrorist activity.

¹⁰ Senator Kelly Ayotte, Floor Speech on Counterterrorism Policy (November 29, 2012), *available at*: <http://www.c-spanvideo.org/clip/4179700>.

measures. The risks associated with keeping Guantanamo open are harder to mitigate, and the harm is potentially far more lasting.

A. Disposition of the 86 detainees cleared for transfer.

Of the 166 detainees remaining at Guantanamo, 86 have already been cleared by all relevant law enforcement, defense, and intelligence agencies for transfer back home or to third countries. The United States has determined that those men should neither face trial nor be detained, and many were cleared for transfer by both the Bush and Obama administrations. Several of these men have languished at Guantanamo for more than eleven years, even as their home countries have demanded their return. To successfully transfer all or most of these 86 detainees, the administration should take the following steps.

The Secretary of Defense should certify transfers and issue national security waivers to the fullest extent possible consistent with applicable law. The current set of certification requirements, coupled with the national security waiver, provides the administration with the authority to transfer many, if not all,¹¹ of the 86 detainees who have already been cleared for transfer. In most cases, security assurances from, or changes in the political or security context in, the receiving country can be read to satisfy the remaining certification requirements that cannot be waived under the national security waiver. Efforts to negotiate any required assurances should begin immediately¹² and be given the highest priority under the direction of the Secretary of Defense, in concurrence with the Secretary of State and in consultation with the Director of National Intelligence, pursuant to the required statutory guidelines.

The administration should begin transferring individuals to Yemen on a case-by-case basis, while also expeditiously developing a rehabilitation program there that could facilitate transfers of cleared Yemeni detainees en bloc.¹³ Fifty-six of the 86 detainees cleared for transfer are from Yemen. Of those 56, 26 are cleared for transfer without conditions, and may be transferred now that the moratorium on transfers to Yemen has been lifted. The remaining 30 are conditionally cleared for transfer, and may be

¹¹ Some detainees likely cannot be transferred even with the flexibility in the certification requirements and national security waiver. For example, 5 detainees (1 from Sudan and 4 from Syria) cannot be repatriated because their home countries are considered state sponsors of terrorism, and transfers to such countries are prohibited.

¹² Detainees cannot be transferred without aggressive efforts to obtain any necessary assurances from foreign governments. At an average rate of 4 transfers over 18 months—the rate at which detainees were transferred out over the last 18 months—Guantanamo would not close until 2075.

¹³ Any rehabilitation program developed should be focused 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.

transferred with improved security conditions in Yemen, an appropriate rehabilitation program, or where third-country resettlement becomes an option.¹⁴

The administration should transfer home the 17 cleared detainees who are from countries that have requested their return (other than Yemen, which has also requested its citizens back). Countries that have demanded the return of their cleared citizens include: Afghanistan (4),¹⁵ Algeria (5),¹⁶ Libya (1),¹⁷ Saudi Arabia (2)¹⁸, and Tunisia (5).¹⁹ However, in accordance with U.S. non-refoulement obligations,²⁰ where there are substantial grounds for believing that a detainee would be in danger of being subjected to torture or other forms of mistreatment if returned home, the administration should resettle such detainees in third countries.

The administration should transfer to third countries (including, possibly, the United States) the three Uighur detainees who cannot be repatriated to China based on their well-founded fear of persecution. The Uighurs are not part of al Qaeda, the Taliban or any “associated forces,” and do not pose a material threat to the United States. U.S. federal courts have ordered their release. Moreover, resettling such detainees here would place the United States in a stronger position to negotiate transfers of other detainees to third countries by demonstrating a willingness to share in the responsibility of resettlement.²¹

The administration should transfer home the five men whose countries have not, at least publicly, asked for their citizens back, including men from Mauritania, Morocco, the Palestinian Territories, Tajikistan, and the United Arab Emirates. These detainees should be repatriated home if their countries are willing to accept them and transfers can be

¹⁴ Guantanamo Review Task Force, Final Report, January 22, 2010, available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

¹⁵ 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>.

¹⁶ Holly Manges Jones, *Guantanamo Algerians complained to visiting delegation about treatment: report*, JURIST, March 28, 2006, available at: <http://jurist.org/paperchase/2006/03/guantanamo-algerians-complained-to.php>.

¹⁷ *Tripoli seeks repatriation of Libyans held in Guantanamo*, AFP, January 22, 2009, available at: http://www.google.com/hostednews/afp/article/ALeqM5hB1BELbdDW6AwSgT0i6bW_pi88dw.

¹⁸ One Saudi Arabian detainee, Shaker Aamer, has dual citizenship with the United Kingdom, which has also demanded his return.

¹⁹ Bouazza ben Bouazza, *Tunisia Mission Asks For Repatriation Of Guantanamo Bay Detainees*, AP, September 14, 2011, available at: http://www.huffingtonpost.com/2011/09/14/tunisia-mission-guantanamo_n_962920.html

²⁰ The United States cannot rely exclusively on diplomatic assurances to prevent transfers to torture. An interagency task force established by executive order in 2009 provided recommendations designed to improve the administrative process for ensuring that U.S. transfers are consistent with its obligations under Article 3 of the CAT. 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.

²¹ William Glaberston and Steven Erlanger, *Europe's Hedging on Inmates Clouds Guantanamo Plans*, N.Y. TIMES, March 16, 2009, available at: <http://www.nytimes.com/2009/03/16/world/16gitmo.html>.

effectuated consistent with non-refoulement obligations. If that is not possible, they should be resettled in third countries.

Finally, the administration should transfer to third countries the four Syrian detainees and one Sudanese detainee who cannot be repatriated because federal law prohibits transfers to Syria and Sudan as state sponsors of terrorism.

Congress has a role to play in facilitating the responsible closure of Guantanamo. The annual defense bill reported out of the Senate Armed Services Committee presents the opportunity for a compromise approach on the resettlement or repatriation of detainees. While it requires the Secretary of Defense to take steps to mitigate the risks of transfer and to consult with Congress about decisions made, it properly places such decisions with the defense and intelligence agencies that are better situated than Congress to make those decisions. This legislation places unnecessary restrictions on the President's ability to close Guantanamo, but it is certainly an improvement on the current absolute bar on transferring detainees to the U.S.

B. Disposition of the 34 detainees suspected of criminal conduct and slated for prosecution.

The Guantanamo Review Task Force designated 34 of the remaining 166 detainees at Guantanamo as eligible for prosecution before either a federal court or military commission. Recent 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.²² As a result, there may now be only twenty men who could face trial by military commission,²³ though they and other detainees in this category could possibly face prosecution in an Article III federal court should Congress permit transfers to the United States for prosecution. In addition, the current 9/11 cases and the case of the alleged *USS Cole* bomber before military commissions have been beset with scandal (the CIA was discovered to have the ability to censor the proceedings)²⁴ and legal uncertainty (the presiding judge could not even rule whether the constitution applies).²⁵

²² 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—could not be considered 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.

²³ 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>.

²⁴ 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>.

²⁵ 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>.

In order to resolve the cases of the 34 detainees in this category, Congress should pass the Senate version of the National Defense Authorization Act (S. 1197), reported out of the armed services committee, which removes the ban on use of Pentagon funds for transfers to the United States for prosecution, incarceration and medical treatment. The administration cannot currently issue national security waivers to ensure prosecution of these detainees; Congress must act.

If transfers to the United States are again allowed, the administration should transfer those already facing military commissions at Guantanamo to military commission trials in the United States in order to facilitate the closing of Guantanamo. Military commissions should be used only to resolve the legacy cases at Guantanamo, not to supplant Article III federal courts, which have proven more muscular and adept in counterterrorism prosecutions. Article III courts have four times the number of substantive criminal laws available to them for use against terrorism suspects—not to mention more than two hundred years of experience and precedent on which to rely.

The administration should therefore transfer any remaining detainees who can be charged with crimes to a civilian court in the United States, or to an appropriate foreign jurisdiction, where such transfers can be made consistent with applicable law. Ahmed Ghailani, a former Guantanamo detainee, was transferred to the Southern District of New York, convicted, and is now serving a life sentence.

The administration should transfer those already convicted to any appropriate high security federal prison, which can safely house detainees. There are 355 terrorism convicts serving sentences in United States federal prisons, including the only 9/11 defendant to stand trial—Zacarias Moussaoui—who was convicted in federal court and sentenced to life in prison as the alleged 20th hijacker on 9/11. Three Guantanamo detainees have already been convicted by military commission and are serving sentences at Guantanamo.²⁶ Those who suggest that detainees who have served their sentence would be set loose on the streets of America are misinformed. Any such person would be subject to mandatory deportation.

C. Disposition of the 46 detainees that have neither been charged with a crime nor been cleared for transfer.

The remaining 46 out of 166 detainees being held at Guantanamo will either have to be charged with a crime or, eventually, be released within some reasonable period of time at the end of combat operations in Afghanistan or some other appropriate marker of the end of hostilities.²⁷ That is what is required under the laws of war and our Constitution, and it is what we have done at the end of past conflicts. The United States transferred 10,000

²⁶ Ali Hamza Ahmad Suliman al Bahlul, Majid Khan and Noor Uthman Muhammed.

²⁷ 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.

prisoners to the Iraqi government at the end of the Iraq war,²⁸ and has already transferred control of thousands of detainees in Afghanistan to that country's government.²⁹ Finding a reasonable, lawful disposition for this group may be more challenging, but it is not insurmountable.

First, the administration must initiate the Periodic Review Board hearings pursuant to Executive Order 13567 for eligible detainees immediately under the direction of the Secretary of Defense. No congressional action is needed to do this. These hearings should be completed in a timely and effective manner to determine whether each detainee is eligible for transfer. In an encouraging development, the Pentagon has announced that PRB hearings will begin soon, though it has not said when, or established a timeline for completing the hearings.³⁰

The Periodic Review Boards should, consistent with the interests of national security, afford detainees access to evidence, counsel and other markers of due process to ensure a thorough and accurate review. The boards could determine that some number of men in this group is now eligible to be transferred because new evidence has surfaced, the political situation in their country has improved, their networks of influence have degraded, their health has deteriorated, or other factors, such that they no longer pose a significant risk.

The administration should also provide Periodic Review Board 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.

The administration should also determine whether there are extant credible criminal charges in other foreign jurisdictions where the detainees could be tried.

The administration should determine whether the 10 Afghan detainees of the 46 held in this indefinite detention category can be repatriated to Afghanistan pursuant to a negotiated agreement with the Taliban or the government of Afghanistan. Likewise, the administration should determine whether the 26 Yemeni men held in this category can be transferred based on coordination with the state of Yemen. Long-term efforts by Yemen to institute a rehabilitation program could assist in the transition.

Lastly, the administration could transfer some number of Guantanamo detainees to the United States for continued detention or trial until the end of hostilities. Some have expressed concerns that doing so could embed the injustices of Guantanamo's indefinite

²⁸ 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>.

²⁹ 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>.

³⁰ Carol Rosenberg, *Pentagon prepares review panel for 71 Guantanamo detainees*, MIAMI HERALD, July 21, 2013, available at: <http://www.miamiherald.com/2013/07/21/3512527/pentagon-prepares-parole-board.html>.

detention scheme in domestic practice. While we don't discount those concerns, we believe that with appropriate safeguards to ensure against the use of indefinite detention and military trial authorities for future captures, transfer of detainees to the United States is an acceptable option in furtherance of a broader effort to close Guantanamo. The Government Accountability Office has documented³¹ the high security prison facilities in the United States with capacity that could hold detainees.³²

To the extent that the administration has not resolved the disposition of any detainees prior to the end of hostilities, the administration should repatriate or resettle these detainees at the end of combat operations in Afghanistan or some other reasonable marker of the end of hostilities.

III. Conclusion

In one sense, closing Guantanamo is a numbers problem—how to get from 166 to zero. Once there were 779 prisoners at Guantanamo. The Bush administration resettled or repatriated more than 500 of them. The Obama Administration has gotten that number down to 166, a majority of whom have been cleared for transfer by the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff. The remaining task is about managing risk to achieve an important national security objective on which there is bipartisan consensus. The risks of transfer can be mitigated; the risks of maintaining Guantanamo forever cannot.

But in another sense, closing Guantanamo is about who we are as a Nation. As the President recently said:

“I know the politics are hard. But history will cast a harsh judgment on this aspect of our fight against terrorism, and those of us who fail to end it. Imagine a future – ten years from now, or twenty years from now – when the United States of America is still holding people who have been charged with no crime on a piece of land that is not a part of our country. Look at the current situation, where we are force-feeding detainees who are holding a hunger strike. Is that who we are?”

At a certain point, who we are as a Nation cannot be separated from what we do. Guantanamo is a symbol for many around the world of torture, injustice and illegitimacy. As the United States winds down the war in Afghanistan, Congress and the President

³¹ 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>.

³² Conditions of detention must be commensurate with those required by the “humane treatment” provisions of the Geneva Conventions’ Common Article 3. 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.

have the opportunity to transform this legacy and restore America's reputation for justice and the rule of law.

I urge you to align our actions with our ideals and work with the President to get this done.

