



How to Close Guantanamo

Blueprint for the Next Administration

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BLUEPRINT
FOR THE NEXT U.S. ADMINISTRATION

About Us

Human Rights First believes that building respect for human rights and the rule of law will help ensure the dignity to which every individual is entitled and will stem tyranny, extremism, and violence.

Human Rights First protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security, and human rights advocates who are targeted for defending the rights of others. These groups are often the first victims of societal instability and breakdown; their treatment is a harbinger of wider-scale repression. Human Rights First works to prevent violations against these groups and to seek justice and accountability for violations against them.

Human Rights First is practical and effective. We advocate for change at the highest levels of national and international policymaking. We seek justice through the courts. We raise awareness and understanding through the media. We build coalitions among those with divergent views. And we mobilize people to act.

Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.

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How to Close Guantanamo

A Three-stage Plan

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

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

Introduction

The decision to send detainees to the Guantanamo Bay detention camp was driven in part by a desire to insulate the detention, interrogation and trial of terrorism suspects there from judicial scrutiny and the rule of law. That goal was illegitimate and unworthy of this nation, and any policy designed to implement it was destined for failure.

The policies of detention, interrogation and trial at Guantanamo have failed as both a practical and legal matter. The Supreme Court has rejected those policies each time it has examined them. In its third such decision in June 2008, the Court ruled that Guantanamo detainees have a right to habeas corpus, thereby invalidating the Administration’s position that Guantanamo lies beyond the reach of the U.S. Constitution and the federal courts. Guantanamo policies also run counter to sound counterinsurgency doctrine. The attempt to create a “law-free zone” where prisoners are subjected to detention, interrogation and trial practices that violate basic norms of human dignity and fundamental fairness has provided America’s enemies with an easy recruiting tool, severely impaired counterterrorism cooperation with our allies, and failed to bring dangerous terrorists to justice.

President-elect Obama has acknowledged the damage to America’s reputation for fairness and transparency done by Guantanamo, and he has vowed to close the detention facility as a first step towards repairing our reputation as a nation committed to human rights and the rule of law.

Making good on this pledge will require comprehensive policy changes and a major investment in domestic and political capital. After seven years of error upon error, the policies underlying the existence of Guantanamo are embedded in law and executive pronouncements. Reversing this will require bold action.

This Blueprint offers a strategy for closing Guantanamo that minimizes risk, recognizes the need for international cooperation, and encourages the support of the American public.

How to Close Guantanamo

A Three-stage Plan

Summary

FIRST MONTH IN OFFICE

- Announce intention to empty the detention facility at Guantanamo within one year
- Direct the Attorney General to review cases for federal court prosecution
- Direct the Secretary of State to perform individualized risk assessments and review remaining cases for transfer to prosecution, repatriation, or resettlement
- Direct the Attorney General to identify secure U.S. detention facilities capable of housing detainees identified for federal court prosecution
- Improve access to family and counsel, and improve conditions of confinement at Guantanamo
- Suspend all pending military commission proceedings
- Terminate the Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs)
- Direct the Secretary of Defense to release convicted Guantanamo detainees upon completion of their sentences

FIRST SIX MONTHS IN OFFICE

- Bring those detainees who the Attorney General believes have committed crimes against the United States to U.S. soil for federal court prosecution
- Transfer for prosecution those detainees found eligible for transfer by the Secretary of State and who may be tried in their home countries or in third countries, even if they cannot properly be tried for crimes against the United States
- Negotiate repatriation agreements, and begin to repatriate a third group of detainees who have not committed crimes against the United States and who may be returned to their home countries in accordance with U.S. obligations under international human rights and humanitarian law
- Negotiate resettlement agreements, and begin to resettle a fourth group of detainees who cannot be returned home in accordance with international law
- Manage the risk posed by repatriation and resettlement by expanding risk assessment, monitoring, and other security programs
- Propose legislation to repeal the Military Commissions Act of 2006 (MCA)

FIRST YEAR IN OFFICE

- Initiate federal court prosecutions of detainees suspected of having committed crimes against the United States
- Complete transfers to prosecution, repatriation and resettlement of the remaining detainees
- Continue to manage the risk posed by repatriation and resettlement

How to Close Guantanamo

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Details

FIRST MONTH IN OFFICE

During the first month in office, President-elect Obama should signal a clear intention to steer a new course with respect to detainee policy. Taking the following preliminary steps will send this important signal and will begin to establish a framework for later actions that will enable the transfer of prisoners out of Guantanamo.

We propose that President-elect Obama:

- **Announce intention to empty the Guantanamo detention facility within one year:** Setting a firm and definitive deadline for closing Guantanamo will inspire public confidence and encourage international cooperation over the coming year. It will also create incentives to think through the most challenging problems, while allowing time to address those problems in a meaningful way.
- **Direct the Attorney General to review cases for federal court prosecution:** The current administration has said it intends to prosecute approximately 80 Guantanamo detainees. In more than six years, however, only two trials have been conducted. While some say the answer to this problem lies in creating yet another substitute system for detaining and trying terrorist suspects, such a project is unnecessary and risks embroiling the new administration in prolonged legal challenges that would obviate many of the advantages of closing Guantanamo and ending the military commissions. Most importantly, however, no new system has been proven necessary. Federal courts offer the possibility of finality, transparency, legitimacy and due process. *In Pursuit of Justice*, a recent Human Rights First report, studies more than 120 international terrorism cases prosecuted in U.S.

courts and finds that the federal criminal justice system adequately balances the government's need to protect sensitive national security information with defendants' fair trial rights. Specially tailored federal anti-terrorism laws and other generally applicable federal criminal statutes provide an adequate basis to detain and monitor suspects and offer a broader spectrum of prosecutable conduct than the military commissions, which have jurisdiction only over war crimes. President-elect Obama should direct the Attorney General to thoroughly examine the cases slated for military commission trial, and all other cases where criminal charges may be appropriate, to assess the feasibility of federal court prosecution. While federal courts are capable of handling these cases, this assessment need not preclude the possibility of trying some cases in court martial proceedings under the Uniform Code of Military Justice.

- **Examinations** should include briefings and recommendations from Department of Defense (DOD) prosecutors previously assigned to the cases; a review of all existing evidence for materiality, reliability, and admissibility; a thorough canvassing of the federal criminal code to identify offenses with which detainees could be charged; and consideration whether any additional investigation should be undertaken.
- **Prosecutions** should begin on a rolling basis as individual case reviews are completed.
- **While case reviews are being completed** the Attorney General should seek representation agreements from qualified federal defender offices and private defense attorneys and issue security clearances expeditiously so that the security clearance process does not cause future delays.

■ **Direct the Secretary of State to perform risk assessments and review cases for transfer to prosecution, repatriation or resettlement:**

Guantanamo has become more than a place. It is a symbol of injustice, of expediency over fundamental fairness. If the prison facility is closed, but the policies persist in another venue, the objectives prompting closure of Guantanamo will not be achieved. Creating a state-side replica of the administrative detention regime at Guantanamo, as some have proposed, would raise serious practical and constitutional questions, and would likely perpetuate the same bureaucratic incentives that resulted in prolonged detention without trial at Guantanamo. Instead, President-elect Obama should direct the Secretary of State to perform individualized risk assessments in each of the remaining cases and review the cases for transfer to prosecution, repatriation or resettlement in third countries.

- **Transfer for prosecution:** Some detainees may be transferred for trial in their home countries or third countries, even if they cannot be tried for crimes against the United States. Such transfers should be made in accordance with international human rights and humanitarian law obligations.
- **Repatriation:** Detainees not suspected of criminal activity should be repatriated to their home countries whenever possible in accordance with international human rights and humanitarian law obligations.
- **Resettlement:** Some detainees, including Uighers, Tunisians, Algerians, and Libyans, may not be returned to their home countries because they face a substantial likelihood of torture there. Those detainees should be resettled in third countries.

■ **Direct the Attorney General to identify secure U.S. detention facilities:**

U.S. detention facilities are capable of housing Guantanamo detainees selected for federal court prosecution. During the past decade, the Federal Bureau of Prisons has developed a regime of Special Administrative Measures (SAMs) to ensure security against highly dangerous defendants. Such measures include administrative segregation and the denial of telephone privileges and access to the media. Multiple terrorist suspects have been detained in federal detention facilities prior to trial. Ramzi Yousef was held for close to three years at the Metropolitan Correctional Center in New York City, and Zacarias Moussaoui was held for more than four years at the Alexandria Detention Center in Alexandria, Virginia. The Attorney General should be charged with identifying appropriate U.S. detention facilities for Guantanamo detainees. The facilities should be identified within 90 days so that any necessary modifications or renovations can be completed in a timely manner.

■ **Improve access to family and counsel, and improve conditions of confinement at Guantanamo:**

Until Guantanamo can be closed, increasing access to family members through video- and tele-conferencing, improving access to counsel, and reducing the use of solitary confinement will ease the burden of isolation experienced by Guantanamo detainees and bring U.S. policy more in line with international treatment obligations. In addition, providing detainees' families with access to regular health assessments and other appropriate data, as is done for the families of U.S. detainees in Iraq, will inspire domestic and international confidence that the United States is treating prisoners with appropriate care.

- **Suspend all pending military commission proceedings:** Continuing the military commission proceedings will likely result in additional legal challenges and delay and could create legal hurdles for eventual federal prosecutions. Placing a moratorium on these proceedings will allow time for the Attorney General to review case files and assess the feasibility of federal court prosecution. The sooner the illegitimate military commission proceedings come to a close, the sooner prosecutions may proceed with fairness and finality in the federal courts.
- **Terminate CSRTs and ARBs:** Approximately 250 men remain imprisoned at Guantanamo, only 19 of whom currently face criminal charges or have been convicted. The others are being held as “enemy combatants” pursuant to determinations made by Combatant Status Review Tribunals (CSRTs) and reviewed annually by Administrative Review Boards (ARBs). The CSRTs were a belated attempt, prompted by Supreme Court review, to remedy the deficiencies created by the decision to disregard the requirements of the Geneva Conventions and U.S. Army regulations requiring battlefield status determinations. They have been a poor substitute for determining status. The *Boumediene* Court found serious deficiencies in the CSRT process, including that prisoners were not entitled to lawyers, had no access to the evidence against them, and no meaningful right to present exculpatory evidence. And they have backfired in terms of our counterterrorism strategy. Labeling Guantanamo detainees as “combatants” cedes an advantage to al Qaeda, allowing its members to project themselves and their followers as warriors engaged in a worldwide struggle against the United States and its allies. Withdrawing the orders establishing and implementing the CSRTs is an important step towards remedying these errors. President-elect Obama should direct the Secretary of Defense to:
 - **Withdraw** the July 7, 2004, “Order Establishing Combatant Status Review Tribunals.”
 - **Withdraw** the July 16, 2004, Memorandum “Re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba.”
- **Direct the Secretary of Defense to release detainees upon completion of their sentences:** On August 7, 2008, Salim Hamdan was sentenced to 66 months in prison. With credit for the 61 months he has already served, Mr. Hamdan will complete his sentence before the end of 2008. Nevertheless, DOD maintains it has the right to continue to detain Mr. Hamdan as an “enemy combatant” even after his sentence is complete. The law of war permits the continued detention of prisoners of war until the end of international armed conflict. But Mr. Hamdan was not properly detained as a prisoner of war, and his continued detention would only further diminish the legitimacy of the military commission proceedings. President-elect Obama should direct the Secretary of Defense to release Mr. Hamdan and any other Guantanamo detainees who are tried and convicted, upon completion of their sentences.

FIRST SIXTH MONTHS IN OFFICE

The initial announcement to close Guantanamo should be followed by swift action that demonstrates the new administration's seriousness, both to the American public and the international community.

We propose that President-elect Obama:

- **Transfer detainees for criminal prosecution to U.S.-based detention facilities:** Transfers should be made to appropriate facilities once any necessary modifications or renovations are completed.
- **Transfer detainees for criminal prosecution in home or third countries:** Facilitating the transfer of some detainees for criminal prosecution is essential to closing Guantanamo, but those transfers must be conducted responsibly. *Arbitrary Justice*, a recent Human Rights First report, studied the transfer of detainees from Bagram and Guantanamo to the Afghan government for criminal prosecution and found that the criminal trials held in Afghanistan fail to meet international or Afghan fair trial standards. In the future, countries should be pressed to conduct prosecutions in accordance with international fair trial standards. The U.S. government should assist in this effort by providing these countries with information in its possession, including witness names and statements, interrogation reports and exculpatory evidence.
- **Negotiate repatriation agreements and repatriate detainees:** International pressure may be required to convince some countries to accept their own citizens and legal residents. The president's early announcement to close Guantanamo, and his efforts to improve conditions of confinement while the facility remains open, will increase the chances of cooperation from U.S. allies during this stage.
- **Direct the Secretary of State to review the process for considering transfer to torture claims:** Article 3 of the Convention against Torture (CAT) prohibits the transfer of prisoners to countries where they are at risk of torture. The United States cannot rely on diplomatic assurances to prevent transfers to torture. Under current regulations, diplomatic assurances from the receiving country are obtained in secret, there is no opportunity for the individual being transferred to challenge their reliability, and little is known about how they are obtained, what they consist of, and what happens to individuals transferred in reliance upon them. In at least some cases where the United States has relied upon diplomatic assurances, detainees have been abused upon return. To better protect against transfers to torture, President-elect Obama should direct the Secretary of State to review and modify as needed the agency's administrative process for considering individual CAT claims.
- **Negotiate resettlement agreements and resettle detainees:** In light of early pronouncements by then-Secretary of Defense Donald Rumsfeld that all detainees at Guantanamo were dangerous terrorists, the reluctance of other countries to accept resettlement of those now found not to pose a danger is unsurprising. Yet President-elect Obama is unlikely to succeed in closing Guantanamo without the assistance of third countries. The failure of the United States to resettle any such detainees here has only compounded the reluctance of other countries to accept third-party nationals themselves. President-elect Obama should consider resettling some detainees in the United States if their individual circumstances make them eligible for such relief. Doing so, even if the numbers are quite small, would send an important message and likely would increase the willingness of other countries to accept resettlement of the remaining detainees. The Uighers are just one group of detainees that could be resettled in the United States. The United States has small Uigher communities in Los Angeles, San Francisco, New York and Washington D.C., some of

which have agreed to provide assistance. President-elect Obama should:

- **Select senior officials from the Department of State** to negotiate resettlement agreements.
- **Approach UNHCR** or another international body to act as an intermediary, screening detainees for refugee status and helping to find placements.
- **Manage the risk posed by repatriation and resettlement:** Approximately 100 of the remaining detainees are Yemeni. State Department and Yemeni officials made little progress during negotiations several months ago to agree upon a plan for their release. The United States does not believe that Yemen is taking adequate steps to monitor and respond to acts of terrorism within its borders. Officials are also worried that prisons in Yemen are not secure. Releasing the Yemenis and some others will require an assumption of some risk, but those risks can be managed and are less than the risk posed by their continued detention. To manage the risk, President-elect Obama should:
 - **Direct the Secretary of State to perform individualized risk assessments** of detainees selected for repatriation and resettlement.
 - **Direct the Secretary of State to obtain appropriate security assurances** from receiving countries, including assurances to lawfully monitor returned detainees' activities.
 - **Direct that transfers be made on a rolling basis** to ease the burden on home countries charged with monitoring detainees' activities.
 - **Propose legislation to invest in reintegration programs** modeled after the Saudi rehabilitation program, which led to the transfer of more than 100 Saudis out of Guantanamo. Yemen has already proposed instituting such a program.
 - **Propose legislation to invest in law enforcement training** to assist other countries in monitoring detainees' activities and investigating suspected criminal activity.

■ **Propose legislation to repeal the MCA:** From the beginning, with the Military Order of November 14, 2001, the military commissions devised by the Bush Administration were unnecessary and unwise. Originally intended as a mechanism for delivering swift justice in battlefield conditions, military commissions under the current administration have been neither swift nor just and have taken place far from the battlefield. These military commissions are a perversion of the military justice system. President-elect Obama should begin to erase this blot, which has given "military justice" a bad name, by working to dismantle the legal architecture on which the commissions are based. Doing so is consistent with counterinsurgency doctrine, which suggests that moving detained insurgents into a criminal justice system helps to de-legitimize them as criminals. Proposing legislation to repeal the Military Commissions Act of 2006 will help to achieve this goal and will encourage the Attorney General to move forward with the remaining prosecutions in the federal courts. In addition to proposing such legislation, President-elect Obama should:

- **Rescind** President Bush's order of November 13, 2001, establishing military commissions.
- **Direct the Secretary of Defense** to officially withdraw the March 21, 2002, "Military Commission Order No. 1," establishing procedures for trial by military commission.
- **Direct the Attorney General** to officially withdraw the August 12, 2005, "Proposed Amendments to Military Commission Order No. 1," proposing certain amendments to the Secretary of Defense's Military Commission Order No. 1.

FIRST YEAR IN OFFICE

By the end of the first year in office, each Guantanamo detainee should be designated for prosecution, transfer, repatriation or resettlement.

We propose that President-elect Obama:

- **Initiate prosecutions against Guantanamo detainees in federal courts:** Certain districts with experience handling terrorism cases, such as the Eastern District of Virginia and the Southern District of New York, should be assigned most cases. Other case assignments could be determined based on proximity to suitable detention facilities.
- **Complete transfers for prosecution, repatriation and resettlement:** By the end of the president's first year in office, all detainees who are not selected for federal court prosecution should be transferred for prosecution, repatriated to their home countries or resettled in third countries.
- **Continue to manage the risk posed by repatriation and resettlement:** Risk management will not end with the repatriation or resettlement of the final Guantanamo detainees. The United States should continue to assess the risks posed by detainees who have been resettled and repatriated and should continue to invest in reintegration programs and law enforcement training even after the Guantanamo detention facility is closed.

Conclusion

The misguided embrace of indefinite detention, torture and abuse has greatly damaged the reputation of the United States, fueled terrorist recruitment and undermined international cooperation in counterterrorism operations. The challenge of addressing these problems lies with the next administration, and President-elect Obama has said he recognizes this reality. To restore integrity to the American justice system, and repair our reputation as a nation committed to the rule of law, Guantanamo must be closed.

Human Rights First's three-stage plan offers a strategy for closing Guantanamo that minimizes risk, recognizes the need for international cooperation, and encourages the support of the American public.



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