

There Is a Way to Close Guantanamo

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As the Biden administration labors to shape a post-endless war American existence and to reassert U.S. leadership on issues like human rights and respect for the rule of law, it must also end the vestigial policies of the past two decades of war that undermine that mission. Indefinite law of war detention at Guantanamo Bay is one of those policies. Just as President Joe Biden said that he would not pass on the war in Afghanistan to a fifth U.S. president, neither can he pass on the detention facility at Guantanamo. Setting aside pressing legal questions – like whether the government retains authority to detain individuals captured in the course of the war in Afghanistan now that the war is ending, or whether the Due Process Clause applies at Guantanamo – that may force the Biden team to scramble to release individuals from Guantanamo, either in response to a court order or to avoid one, there is real urgency to closing the detention facility where today 39 men remain. There is also a way ahead.

Since day one of the Obama administration there have been numerous plans and roadmaps for Guantanamo closure, each of them frustrated to some degree by changing domestic and international political realities and missed opportunities. Thirteen years later, it's time for a serious rethink. The steps outlined below are achievable, with real leadership from the White House and sustained interagency attention. They reckon with current realities and take into account what has and has not worked in past administrations. I served at the State Department for eight years and worked in the office of each of the three Special Envoys for Guantanamo Closure, where I negotiated detainee transfers and ultimately served as Chief of Staff to the last envoy. I also worked on Guantanamo policy as Director for Human Rights and National Security Issues on the staff of the National Security Council, and am now on the legal team representing Majid Khan, the sole cooperating high-value detainee in the military commissions at Guantanamo.

Over the past decade-plus, substantial progress has been made in the effort to close Guantanamo, but there remains hard work to be done to achieve that goal. The steps outlined here provide the Biden administration with a framework that, if pursued with seriousness of purpose, would end the policy of law of war detention, close Guantanamo, and with it end one of the grimmest chapters of the endless war era.

Part I: Transfer All Detainees Not Subject to Criminal Charge

Of the 39 men currently detained at Guantanamo, 27 have not and never will face any criminal charges either in U.S. federal courts (in part due to a legislative prohibition on transferring detainees to the U.S. mainland for any purpose, including for prosecution or to receive medical treatment) or the military commission system established specifically to prosecute Guantanamo detainees. Each of these 27 men must be transferred to their home country (repatriation) or third countries (resettlement) without delay.

Periodic reviews are a helpful, but are not a prerequisite process for all transfers: This group includes the 17 men who have yet to be “approved for transfer” by the Periodic Review Board (PRB), an interagency body that conducts a discretionary administrative process akin to a parole board and determines whether a detainee’s continued law of war detention is necessary to protect against a “significant threat to the security of the United States.” The PRB has proven useful as a forum to evaluate and contextualize relevant information in the U.S. government’s possession related to a detainee’s history, time in detention, and plans for the future, and it has helped to facilitate detainee transfers. But the PRB is not the exclusive means by which the administration could or even should exercise its discretion to decide whether it is time to transfer these detainees.

Time is of the essence and the Biden administration can and should arrange detainee transfers even for individuals currently awaiting a PRB hearing while negotiating individualized security and humane treatment assurances as it would for any detainee transfer from U.S. custody. Forgoing potential transfer opportunities because of delays inherent to a bureaucratic process, even a thoughtful and helpful one, is a good way to miss another opportunity to close Guantanamo.

The detainees whom the PRB has not yet approved for transfer have been pinned with the moniker “too dangerous to release” and thus sustained in a category of men held indefinitely and without charge at Guantanamo. It is true that some of these men have concerning histories, skill sets, and past affiliations that in previous years may have posed a threat that U.S. officials believed could not be appropriately mitigated after transfer. But it is also true that nearly twenty years after their capture circumstances have changed; the men have aged (the oldest detainee is 73 years old and has suffered multiple heart attacks), and the battlefields upon which some of them were captured and the groups to which they are alleged to belong no longer exist. Some of these men were tortured while in U.S. custody and suffer from serious medical and psychological conditions that not only cannot be sufficiently addressed at Guantanamo, but militate in favor of transfer out of U.S. custody. In essence, what has kept these men at Guantanamo are allegations based on a two-decade old immutable set of facts, which should not serve as the sole basis for a contemporary decision to continue to hold them indefinitely in law of war detention.

It simply does not make sense, and is not in the U.S. national security interest, to maintain a policy of indefinite law of war detention for these few men. Indeed, Section 5(b) of Executive order 13567, which established the PRB, foresaw this very situation and requires that *at least* once every four years the Principal officers of relevant departments and agencies review “whether a continued law of war detention policy remains consistent with the interests of the United States, including national security interests.” If such a review has not yet happened under the Biden administration – I am not aware of any such review *ever* happening – now would be a good time to conduct one.

A renewed diplomatic strategy: Some of these 27 detainees can be repatriated and others, due to circumstances outside of their control, will need to be resettled in third countries. Transferring these individuals will require direct and sustained engagement by President Biden who, as Vice President, used every opportunity to lend his personal support to advancing the closure effort, including by directly making asks of foreign leaders to accept former detainees into their countries. Simply put, he helped create transfer opportunities and close out negotiations on transfer arrangements. With the help of his cabinet, in particular that of Secretary of State Antony Blinken and Secretary of Defense Lloyd Austin, he can and must engage with the same vigor now that he is president.

Detainee transfers from Guantanamo will require a diplomatic strategy to secure transfer agreements, a strategy that itself must fit into a broader, increasingly complex diplomatic calculus, including, for example, the recalibration of the U.S.-Saudi relationship. Saudi authorities have a demonstrated ability to reintegrate former Guantanamo detainees and their rehabilitative infrastructure has proven apt to accommodate the transfer of a large number of detainees, including Yemeni nationals who cannot return to Yemen given the security situation there. Saudi authorities also have a demonstrated track record of successfully implementing appropriate security measures to mitigate any risk potentially posed by those detainees who may not yet have been approved for transfer by the PRB and may represent heightened security-related concerns to U.S. officials. One-off transfers, like that of Abdul Latif Nasser to Morocco this past July (thus far the Biden administration's only detainee transfer, which was overdue but laudable as a step in the right direction) are necessary in the context of some repatriations but cannot be the strategy for all detainees in need of transfer. The landscape of potential resettlement destinations is quite different now than it was a decade ago, or even in the latter part of the Obama administration, but it is navigable.

Some two dozen countries lent their assistance and resettled scores of detainees after rightly demanding the United States end detention operations at Guantanamo. But many previous resettlement locations now present a more complicated set of circumstances. Take for example Europe. The historic migration crises that brought to European countries large numbers of refugees from the Middle East and North Africa dramatically amplified the same anti-immigrant voices that opposed those nations offering humanitarian resettlement to former Guantanamo detainees during the Obama years. And today many of these countries are confronting the prospect and politics of providing refuge to those fleeing Afghanistan.

In short, the domestic politics in these countries just are not the same now. That is not to suggest that it was ever an easy decision by these governments. But they made the choice to resettle former detainees as a humanitarian gesture and in solidarity with the Obama administration as it worked to close Guantanamo, even when the United States itself was unwilling to resettle detainees. None of this is to say it is no longer worth knocking on the doors of those who have already taken in former detainees. The United States doesn't have that luxury. There may be compelling reasons that make a detainee a strong resettlement candidate for a particular country, like familial connections. It will be a challenging task for U.S. officials, but not impossible.

Part II: Resolution for Detainees Subject to Military Commission Prosecution

As to the other category of detainees, the 12 individuals who are at various stages of criminal process in the military commissions, there too is a path forward that the Biden administration should pursue in short order: negotiated resolutions to the pending cases.

Recognize the centrality of the torture legacy: It is open and obvious to any casual observer of the military commission system that much of the reason why trials have been illusive revolves around the issue of torture and mistreatment of detainees in U.S. custody. Torture is the U.S. government's original sin with regard to the detention of terrorism suspects now at Guantanamo, and it pervades each of the pending military commission cases. In the words of my former boss, the first Special Envoy for Guantanamo Closure Ambassador Dan Fried, "torture is non-biodegradable." While the taint of torture will never disappear, negotiated resolutions present an opportunity to sidestep the most significant issues that have vexed the military commissions while also providing for some measure of accountability.

The case of my client, Majid Khan, a longtime cooperator with U.S. authorities who pleaded guilty to a range of charges in 2012, is instructive. (As noted above, I am a member of Mr. Khan's legal team). While Khan's original plea agreement allowed him to present evidence of his torture and call witnesses at sentencing, when it came time for an in-court examination of his mistreatment – which a military judge ruled could be worthy of an award of sentencing credit as a remedy – the government balked and renegotiated the plea agreement to avoid that public examination of his torture. Khan's case demonstrates that in any military commission case the government will ultimately be faced with a Hobson's choice with respect to some accountability for torture. It will either have to confront head on the issue of torture, the occurrence of which isn't seriously in dispute, or assert the national security privilege. (When classified information, or "state secrets," is material to a case, the government has the choice to either allow or prevent disclosure of the information in question by asserting the "national security privilege." However, if the government opts to prevent disclosure, there are a range of consequences for that decision up to and including the dismissal of charges). With either choice the law compels that a remedy be provided. In the case of the five 9/11 co-conspirators where the death penalty is sought, their treatment will be relevant to their sentences and that means, simply, capital punishment will not occur. The only real question is whether to spend

additional millions of dollars and wait an unknown number of years longer to get to that point. The answer is clear and should be to the Biden administration: it is a hard no. Negotiated resolutions are the way to exit what has otherwise proven to be a road to nowhere.

Negotiated resolutions to pending cases: Much as President Biden leveled with the American people about the dim prospects of sustained military engagement in Afghanistan and the need as a strategic matter to end the endless wars, he should similarly acknowledge the reality that merits trials in the military commissions are exceedingly unlikely. Moreover, even if convictions are secured years from now, there will be appeals that deprive victims' families and our larger society of closure and accountability, likely guaranteeing that the 30th anniversary of the 9/11 attacks will arrive and there will still be no finality to the case. There is a better way.

The president, as commander in chief and the ultimate authority in the military justice system, should instruct the Secretary of Defense to begin discussion with his designee, the convening authority for military commissions, about the possibility of negotiated resolutions to the pending cases. (In the military justice system an accused enters into a plea agreement with the convening authority and not prosecutors). While some may wrongly assert that the president providing this instruction would constitute "undue command influence," such an action would in fact not be improper. As a practical matter, military courts have found undue command influence when action has been taken to the *detriment* of the accused, and when a specific outcome or punishment has been directed. Any guilty plea in the capital cases would require taking death off of the table, and thus be to the benefit of the accused given the potential punishment they are currently facing. The president would not be directing specific action in a specific case, rather providing policy guidance with respect to the military commissions writ large. This guidance would be no different than, for example, if President Biden, who is opposed to the death penalty, set a policy that capital punishment would not be sought for crimes committed under the jurisdiction of the military justice system. Most important, as the president would articulate, negotiated resolutions are in the interest of all parties, taking into account the need for finality and closure after the passage of two decades since the offenses for which the defendants stand accused.

Assuming plea agreements are reached, which I am confident they can be, the question arises as to where the detainees-turned-prisoners should serve their sentences?

Where should sentences be served? To address this question, let me briefly return to the 27 detainees not facing prosecution as the answer will in part result from their transfer out of U.S. custody. Transferring these men from Guantanamo fundamentally alters the discussion about the wisdom and resources spent to continue detention operations at Guantanamo for the small number of men then remaining (12). Some have argued that simply moving detainees out of Guantanamo to the U.S. mainland or to another U.S. military facility elsewhere in the world achieves closure. It does not – moving Guantanamo is not closing Guantanamo. As a substantive matter, in the case of relocating detainees elsewhere outside of the United States, to another military base for example, such a course of action would simply *export* the same problematic policy of indefinite law of war detention to another location. Bringing uncharged individuals to the U.S. mainland, which arguably would require a change in the law, would in effect *import* to the United States the same problematic policy of indefinite law of war detention and raise even more grave Constitutional concerns than already attend detention at Guantanamo. Simply put, it is the policy of indefinite law of war detention that must end, and with regard to the men that will not face prosecution, the only answer is to transfer them to third countries.

Returning to those that plead guilty and are convicted in the military commissions, as imperfect a system as it is, what to do is a little more complicated. The U.S. government must make some hard choices. It can retain these individuals in U.S. custody to serve their sentences, or it can transfer them to serve sentences in foreign custody. The latter solution makes a lot of sense for the non-capital cases. For example, the defendants in the most recently initiated prosecutions related to a series of terrorist attacks in Southeast Asia in the early 2000's, two Malaysian nationals and an Indonesian who have been held for 18 years prior to their arraignment just last month, could serve their eventual sentences in either of those two countries. The five co-conspirators in the 9/11 case present a more complex scenario and for a range of reasons the U.S. government would likely want to retain custody of these individuals as they serve what would likely be life sentences.

So, where do they go – do they remain at Guantanamo? No. While there is currently a statutory ban on entry into the United States by anyone ever held at Guantanamo, there is a real question whether that prohibition unconstitutionally infringes on the powers of the president. Some argue that the president, pursuant to his authorities as commander in chief, could simply order these individuals brought to serve their sentences at an appropriate facility on the mainland. Were such a decision to be made and if challenged by Congress, it may well be a political question that the courts would not entertain. There is also a question as to what the remedy for such an executive action would be. That said, the politics cut in favor of not having the

fight that would result from such a decision. Moreover, President Biden, having spent years in the Senate, may interpret Congress' powers (in relation to immigration, for example) as broad enough to deprive the commander in chief of this authority, at least when Congress has already spoken. So, the administration would be left to work with Congress to change the law, something that it has already said it plans to do, *but only with respect to those serving sentences*.

It's also worth considering what plea agreements are likely to entail. Taking the capital cases first, given the torture the defendants endured while in U.S. custody, dropping the death penalty in favor of life sentences would be both a moral and legal necessity. It would also be a vindication of U.S. commitment to the rule of law by providing a modest degree of accountability for the abuse. (Ironically, life sentences are effectively what proceeding with prosecutions in the military commissions would amount to given the intractable delays in going to trial and the certain appeals process to follow.) Once convicted, the men would serve their sentences in an appropriate facility on the mainland with similar stringent security controls and living conditions under which they have been held for the past fifteen years. As for the non-capital cases, defendants would plead guilty in exchange for a term of years, preferably to be served abroad in foreign custody (with appropriate humane treatment and security measures in place).

While as a factual matter it seems plain that amending the law to allow convicted detainees to serve sentences at an appropriate facility within the United States is a solution in the interests of justice for the American people, moving any men to the mainland, even to serve sentences, would be rife with the same political hyperbole and scare tactics that scuttled the initial attempt to try the 9/11 co-conspirators in federal court in the Southern District of New York in 2011. But unlike a decade ago, the facts surrounding Guantanamo would be different. At that point, Guantanamo could hold as few as five men, and the arguments for why the U.S. government should not spend what surely would be an astronomical sum to imprison just five men at Guantanamo, would be stronger and may materially change the discourse. It is worth the try.

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Justice is frequently imperfect and true accountability can be illusive. But the lack of both in the context of Guantanamo exacerbates the still raw pain associated with the 9/11 attacks and also highlights a failure to reckon with the worst excesses of the post-9/11 period which, unfortunately, Guantanamo continues to epitomize. There is a better way, and it is still achievable if we try.