

Walking the Talk:

2021 Blueprints for a Human Rights-Centered
U.S. Foreign Policy



Chapter 6: Closing Guantanamo



Acknowledgments

Human Rights First is a nonprofit, nonpartisan human rights advocacy and action organization based in Washington D.C., New York, and Los Angeles. © 2020 Human Rights First. All Rights Reserved.

Walking the Talk: 2021 Blueprints for a Human Rights-Centered U.S. Foreign Policy was authored by Human Rights First's staff and consultants. Senior Vice President for Policy Rob Berschinski served as lead author and editor-in-chief, assisted by Tolan Foreign Policy Legal Fellow Reece Pelley and intern Anna Van Niekerk.

Contributing authors include:

Eleanor Acer
Rob Berschinski
Cole Blum
Benjamin Haas

Scott Johnston
David Mizner
Reece Pelley
Rita Siemion

Trevor Sutton
Raha Wala

Significant assistance was provided by:

Chris Anders
Abigail Bellows
Brittany Benowitz
Jim Bernfield
Heather Brandon-Smith
Christen Broecker
Felice Gaer
Bishop Garrison
Clark Gascoigne
Liza Goitein
Shannon Green

Steven Feldstein
Becky Gendelman
Ryan Kaminski
Colleen Kelly
Kate Kizer
Kennji Kizuka
Dan Mahanty
Kate Martin
Jenny McAvoy
Sharon McBride
Ian Moss

Stephen Pomper
Jennifer Quigley
Scott Roehm
Hina Shamsi
Annie Shiel
Mandy Smithberger
Sophia Swanson
Yasmine Taeb
Bailey Ulbricht
Anna Van Niekerk

Human Rights First challenges the United States of America to live up to its ideals. We believe American leadership is essential in the struggle for human dignity and the rule of law, and so we focus our advocacy on the U.S. government and other key actors able to leverage U.S. influence. When the U.S. government falters in its commitment to promote and protect human rights, we step in to demand reform, accountability, and justice.

When confronting American domestic, foreign, and national security policies that undermine respect for universal rights, the staff of Human Rights First focus not on making a point, but on making a difference. For over 40 years we've built bipartisan coalitions and partnered with frontline activists, lawyers, military leaders, and technologists to tackle issues that demand American leadership.

Human Rights First is led by President and Chief Executive Officer Mike Breen and Chief Operating Officer Nicole Elkon.

We thank the many foundations and individual donors who provide invaluable support for the organization's research and advocacy.

This and other reports are available online at humanrightsfirst.org.



Closing Guantanamo

Introduction

As the detention and trial facilities at Guantanamo Bay approach their 20th year of operations, the United States continues to detain 40 individuals,¹ including five men whose transfer has already been approved by the Department of Defense.² The base also hosts the military commissions system, where cases against seven of the detainees have remained stalled in the pretrial phase for years.

By any reasonable standard, the Guantanamo experiment has been a costly moral and strategic failure. Purportedly conceived to protect national security, the military commission and detention systems at

Guantanamo have instead harmed national security by undermining efforts to cooperate with allies on global counterterrorism campaigns and feeding into the propaganda and recruitment efforts of terrorist groups.³ Moreover, the human rights abuses at Guantanamo have tarnished the United States'

While Congressional restrictions make closing Guantanamo more difficult, it has never been more important or achievable.

reputation as a global leader on human rights⁴ at a time when such leadership is being questioned more than ever. The most expensive prison in the world,⁵ the crumbling detention facility and ineffectual commissions have also cost American taxpayers more than \$7 billion since opening in 2002.⁶

Because of these harms, both Republican and Democratic administrations have sought to close Guantanamo. Five Secretaries of Defense, eight Secretaries of State, six National Security Advisors, five Chairmen of the Joint Chiefs of Staff, and dozens of retired generals and admirals have supported closing Guantanamo.⁷ President George W. Bush aimed to close the facility during his second term, acknowledging that “the detention facility had become a propaganda tool for our enemies and a distraction for our allies.”⁸ President Obama, when asked in 2015 what advice he would give himself at the beginning of his first term, replied, “I think I would have closed Guantanamo on the first day.”⁹ President Trump has to-date declined to send additional detainees to Guantanamo, noting that allies should take responsibility for detention and trial of their citizens, and emphasizing that it’s “crazy” how much the United States spends to detain individuals at the facility.¹⁰

The incoming administration can and should take swift and decisive action to finally end detention operations and shut down the failed military commissions. While Congressional restrictions make closing Guantanamo more difficult, it has never been more important or achievable. Only 40 detainees remain at the prison, the lowest number the facility has held since its earliest days. The last time a detainee was sent to Guantanamo was in 2008—12 years ago. The start of a new administration presents a renewed opportunity to shut down the prison, once and for all. What follows is a blueprint for how the next presidential administration can take immediate action to close Guantanamo and end the military commissions.

1 Carol Rosenberg, *The Cost of Running Guantánamo Bay: \$13 Million Per Prisoner*, New York Times (last updated Sep. 19, 2019) available at <https://www.nytimes.com/2019/09/16/us/politics/guantanamo-bay-cost-prison.html>.

2 Missy Ryan, Julie Tate, *The Trump era has stranded these five men at Guantanamo Bay*, Washington Post (Jan. 22, 2017) available at <https://www.washingtonpost.com/news/checkpoint/wp/2017/01/22/the-trump-era-has-stranded-these-five-men-at-guantanamo-bay/>.

3 Mehdi Hasan, Dina Sayedahmed, *Blowback: How Torture Fuels Terrorism Rather Than Reduces It*, Intercept (Feb. 12, 2018) available at <https://theintercept.com/2018/02/12/torture-terrorists-guantanamo-abu-ghraib/>.

4 Nick Gass, Colin Powell: *Gitmo was always closing*, Politico (Feb. 24, 2016) available at <http://www.politico.com/story/2016/02/colin-powell-guantanamo-bay-219739>.

5 Rosenberg, *supra* note 1.

6 *Id.*; Peter Baker, *Trump Says 'It's Crazy' to Spend \$13 Million Per Inmate at Guantánamo*, New York Times (Sep. 19, 2019) available at <https://www.nytimes.com/2019/09/19/us/politics/trump-guantanamo.html>.

7 Human Rights First, *Fact Sheet: Former Top U.S. Officials Who Support Closing Guantanamo* (Nov. 18, 2016) available at <https://www.humanrightsfirst.org/resource/former-top-us-officials-who-support-closing-guantanamo>; Human Rights First, *Quote Sheet: National Security Leaders Support Closing Guantanamo*, available at <https://www.humanrightsfirst.org/sites/default/files/Quotes-National-Security-Leaders-Support-Closing-Guantanamo.pdf>; *Retired Generals and Admirals Letter to Senate and House Armed Services Committees on Closing Guantanamo* (Mar. 1, 2016) available at <https://www.humanrightsfirst.org/sites/default/files/GeneralsAdmiralslettertoHASCASASC.pdf>.

8 George W. Bush, *Decision Points*, p. 179-180 (2010).

9 U.S. President Barack Obama, *Remarks by the President to the City Club of Cleveland* (Mar. 18, 2015) available at <https://www.whitehouse.gov/the-press-office/2015/03/18/remarks-president-city-club-cleveland>.

10 Baker, *supra* note 6.

Recommendations

✓ End indefinite detention at Guantanamo

The next administration should move quickly to end indefinite detention at Guantanamo. Despite Congressional restrictions on transferring detainees, numerous avenues remain for taking decisive action to end indefinite detention. The administration should begin by putting structures in place to keep the closure of Guantanamo on the agenda, and utilize all available pathways for transferring the remaining detainees. To achieve this objective without waiting on Congress to act, the incoming administration should:

- **Establish senior positions at both the State Department and White House tasked with negotiating and implementing transfers.**

The next president should appoint a senior State Department official whose sole responsibility is to negotiate and implement transfers from Guantanamo. The president should also direct the Department of Defense to prioritize approving such transfers. Additionally, the new administration should designate a senior official within the White House able to convene agency deputies with the primary responsibility of closing Guantanamo.

- **Convene a recurring principals meeting on closing Guantanamo.**

Within 30 days of taking office, the next president should authorize and direct principals of all relevant stakeholder agencies to develop and implement plans to close Guantanamo. In order to effectuate closure as rapidly as possible, the next president should direct the national security advisor and senior official described above to convene principal-level meetings on a recurring basis (ideally, monthly), until all detainees have been transferred or released.

- **Begin transfers of uncharged detainees immediately.**

The new administration should make transferring the remaining uncharged detainees—all of whom have been imprisoned without charge or trial for well over a decade—a top priority. Not only will this be the first step in correcting the injustice of their prolonged detention, but it will also significantly reduce the detainee population, making it more feasible to find dispositions for the remaining detainees.

- All detainees who were previously approved for transfer should be transferred immediately. Five of the detainees at Guantanamo have already been approved for transfer by the Justice Department, Defense Department, State Department, Department of Homeland Security, Office of the Director of National Intelligence, and the Joint Chiefs of Staff.¹¹ The Secretary of Defense also approved their transfers. This means that these U.S. agencies and offices have determined that these detainees do not pose a “continuing significant threat” to the United States.

- The administration should also immediately transfer any uncharged detainees who can be prosecuted in foreign courts, which may have jurisdiction over crimes the detainees allegedly committed before capture.

- All other uncharged detainees should be transferred as soon as possible, but no later than within the



¹¹ *The Guantanamo Docket*, New York Times, available at <https://www.nytimes.com/interactive/projects/guantanamo/detainees/current>.

first 180 days.

- The United States must ensure that these transfers, to either the detainees' home countries or third countries, adhere to international law and respect non-refoulement obligations. Detainees may not be transferred to countries where there are substantial grounds for believing the detainees would be in danger of being subjected to torture or other forms of mistreatment.¹²
- The administration should also ensure any detainees who are transferred for prosecution in foreign courts are guaranteed access to a free and fair trial.
- **Swiftly initiate new, full, in-person Periodic Review Board (PRB) hearings for all remaining detainees.**¹³ In order to ensure that all uncharged detainees will be transferred within six months, the administration should conduct full, in-person hearings for all remaining uncharged detainees. In conducting these hearings, the administration should prioritize reviews for detainees still awaiting decisions from review hearings that took place during the Trump administration, two of whom have still not received final determinations more than two years after their full hearings were conducted.¹⁴ In order to encourage detainee participation, it is critical that the new administration quickly demonstrate a good-faith commitment that transfers will occur and the PRB process will be taken seriously moving forward—for example, by transferring as quickly as possible the five detainees already approved for transfer. Two of these detainees were approved for transfer in 2016 by the PRB, and three of them have been approved for transfer since 2010—a decade ago.¹⁵ These hearings should be conducted pursuant to new operating guidance that directs the board to:
 - Take into consideration factors such as the considerable passage of time since a detainee's capture;
 - not consider any lack of attendance or participation on the part of a detainee in previous or current PRB proceedings, nor any disciplinary issues while in detention, as factors in favor of continued detention;
 - not treat any denial of allegations as evidence of a lack of candor, nor treat any admission of allegations as evidence of reform;

The White House should direct the Justice Department to cease opposing habeas corpus petitions for detainees the United States believes are no longer a threat or where any risk from transfer can be mitigated.

- screen out information that might have been derived from torture or other cruel, inhuman, or degrading treatment; and
- subject to appropriate security clearance, provide each detainee, and their personal representative and private counsel, access to the record the PRB will consider when making its determination.

- **Stop opposing habeas petitions for certain classes of detainees.** The White House should direct the Justice Department to cease opposing habeas corpus petitions for detainees the United States believes are no longer a threat or where any risk from transfer can be mitigated. There is precedent for this from the Obama administration. In October 2013, the Obama administration withdrew its opposition to the habeas petition for Guantanamo detainee Ibrahim Osman Ibrahim Idris.¹⁶ Following this decision,

12 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 3, available at <http://www.ohchr.org/en/ProfessionalInterest/pages/cat.aspx>.

13 The PRB, designed to evaluate the threat posed by detainees slated for indefinite detention, is made up of high-level representatives from the same agencies and offices noted above. The PRB examines a detainee's history (including any updated intelligence), his conduct while imprisoned, the details of his possible release (including any support system or possible connections to terrorism awaiting him upon release), his outlook on the United States, and his health, among other factors. Periodic Review Secretariat, *About: The Periodic Review Board*, available at <http://www.prs.mil/About-the-PRB/>.

14 Periodic Review Secretariat, *Subsequent Full Review*, available at <https://www.prs.mil/Review-Information/Subsequent-Full-Review/>.

15 The Guantanamo Docket, *supra* note 11.

16 Ben Fox, *U.S. won't fight release of ill prisoner*, Miami Herald (Oct. 3, 2013) available at <https://web.archive.org/web/20131005111335/http://www.miamiherald.com>.

a judge recognized that Idris' physical and mental illnesses rendered him incapable of participating in terrorist or insurgent activities, and ordered him released.¹⁷ When the Justice Department declines to oppose a detainee's habeas petition, the transfer of that detainee is not subject to the cumbersome foreign transfer requirements and the domestic transfer ban, providing the administration with greater flexibility to negotiate the transfer. The new administration should not oppose habeas petitions from Guantanamo detainees who:

- do not pose a threat to the United States due to their debilitating mental or physical health. These detainees should also be prioritized for transfers;
- the Guantanamo Review Task Force or the PRB have approved for transfer. As six national security and intelligence agencies—including the Justice Department—have already found that these detainees no longer pose a continuing significant threat to the United States, the Justice Department should not oppose their habeas petitions; or
- were detained in connection with an armed conflict that has ended with respect to the unit, cell, or organized armed group to which a detainee belongs, particularly as the new administration seeks to bring the conflict in Afghanistan to an end.



- **Utilize a medical review process to transfer detainees with special medical considerations.** The new administration should create a medical review commission charged with reviewing each detainee to determine if their physical or medical conditions render them incapable of participating in hostilities against the United States, prioritizing those who are victims of torture. If found by the commission to be incapable of rejoining the fight, a detainee should be approved for transfer.
- **Press for legislation to roll back foreign and domestic transfer restrictions.** The new administration should work with the new Congress to lift restrictions on transferring detainees to third countries, as well as the restrictions on bringing Guantanamo detainees to the United States. The president should veto any legislation that maintains or adds to existing restrictions. The administration should also support any interim changes in law that would allow transfers to the United States for medical treatment or access to the federal courts.

✓ End the military commissions

It is time to recognize that the experiment with military commissions in the counterterrorism context has failed.¹⁸ In nearly 20 years, only eight cases have been concluded in the commissions, three of which have been completely overturned and one partially overturned because the crimes the defendants were charged

[com/2013/10/03/3667663/us-wont-fight-release-of-ill-prisoner.html](https://www.washingtonpost.com/2013/10/03/3667663/us-wont-fight-release-of-ill-prisoner.html).

¹⁷ Jenifer Fenton, *Guantanamo hunger striker nearing death*, Al Jazeera (Aug. 12, 2015) available at <https://www.aljazeera.com/indepth/features/2015/08/guantanamo-hunger-striker-nearing-death-150812101059995.html>.

¹⁸ Steve Vladeck, *It's Time to Admit That the Military Commissions Have Failed*, Lawfare (Apr. 16, 2019) available at <https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed>.

with were not war crimes at the time the conduct at issue occurred.¹⁹ Nearly two decades after the attacks of September 11, 2001, the trial in the case against the alleged 9/11 co-conspirators has not even begun. That case is stalled in pretrial hearings, and although the trial date has been set for January 2021, it is likely to be pushed back at least several months, if not much longer.²⁰ Though the rules for the commissions have been revised twice, the system remains deeply flawed and inconsistent with fairness and justice. The pretrial hearings have become mired in dysfunction, unclear and changing rules and procedures, ethical issues, continued government interference, and over-classification—particularly of information related to the government’s torture of the defendants.²¹

By contrast to the commissions’ tragic circus, U.S. federal courts have effectively prosecuted more than 900 terrorism suspects since 9/11.

One example of the commissions’ failure is the 2019 unanimous decision of the U.S. Court of Appeals for the D.C. Circuit throwing out three-and-a-half years’ worth of pretrial rulings by the military commission judge in the USS Cole case, because that judge had been issuing rulings while secretly applying for a job as an immigration judge with the Department of Justice.²²

By contrast to the commissions’ tragic circus, U.S. federal courts have effectively prosecuted more than 900 terrorism suspects since 9/11, owing to clear rules and decades of precedent.²³ Of these, over 100 were captured overseas, including al Qaeda spokesman and Osama bin Laden’s son-in-law Suleiman Abu Ghaith, who is currently serving a life sentence in U.S. federal prison.²⁴ Other individuals held in U.S. prisons include Zacarias Moussaoui, the 20th 9/11 hijacker; “shoe bomber” Richard Reid; and eight men involved in the 1998 bombings of U.S. embassies in Kenya and Tanzania.²⁵

Given these stark facts, the next administration should take immediate executive action to end the military commissions by:

- Directing the Secretary of Defense to discontinue their use and order that no new military commissions charges be brought against any detainees;
- Tasking the Attorney General with pursuing Article III plea agreements, including in federal court via video conference, for any defendants currently in the military commissions system, which would allow those detainees to serve their sentences abroad;
- Charging current commission defendants in U.S. federal court where such trials would be consistent with justice and due process;
- Releasing or transferring any remaining detainees who have not been charged or convicted; and
- Rescinding all military commissions regulations and working with Congress to repeal the Military Commissions Act of 2009.

¹⁹ *Id.*

²⁰ Carol Rosenberg, *Judge Excuses 9/11 Defense Lawyer and Postpones Torture Testimony*, New York Times (Feb. 19, 2020) available at <https://www.nytimes.com/2020/02/19/us/politics/sept11-defense-lawyer-guantanamo.html>.

²¹ Human Rights First, *Fact Sheet: Some Key Facts on Military Commissions v. Federal Courts*, available at <http://www.humanrightsfirst.org/sites/default/files/KeyFactsMilitaryCommvFedCourts.pdf>; Human Rights First, *Confusing Commission Rules Continue to Hamper 9/11 Case* (Oct. 29, 2015) available at <http://www.humanrightsfirst.org/blog/confusing-commission-rules-continue-hamper-911-case>; Spencer Ackerman, *Guantánamo hearings halted amid accusations of FBI spying on legal team*, Guardian (Apr. 14, 2014) available at <https://www.theguardian.com/world/2014/apr/14/guantanamo-bay-hearing-halted-fbi-spying>.

²² Steve Vladeck, *Al-Nashiri III: A No Good, Very Bad Day for U.S. Military Commissions*, Just Security (Apr. 16, 2019) available at <https://www.justsecurity.org/63663/al-nashiri-iii-a-no-good-very-bad-day-for-u-s-military-commissions/>.

²³ Trevor Aaronson, Margot Williams, *Trial and Error*, Intercept (last updated Jul. 15, 2020) available at <https://trial-and-terror.theintercept.com/>.

²⁴ Human Rights First, *Identified Foreign Captures*, available at <http://www.humanrightsfirst.org/sites/default/files/Identified-Foreign-Captures.pdf>.

²⁵ *U.S. Prisons Can Safely Hold Guantanamo Bay Detainees: Hearing before the H. Homeland Sec. Subcomm. on Oversight & Management Efficiency*, 114th Cong. (Apr. 28, 2016) (statement of James A. Gondles Jr., Executive Director, American Correctional Association) available at <http://www.humanrightsfirst.org/sites/default/files/Gondles-statement-for-the-record-April-2016.pdf>; U.S. Department of Justice, *Attorney General Eric Holder Speaks at the American Constitution Society Convention* (Jun. 16, 2011) available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-theamerican-constitution-society-convention>; see also U.S. Department of Justice, National Security Division, *Chart of Public/Unsealed International Terrorism and Terrorism-Related Convictions from 9/11/01 to 12/31/16* (last updated Feb. 10, 2017) available at <http://www.humanrightsfirst.org/sites/default/files/NSD-Terrorism-Related-Convictions.pdf>.

Human Rights First challenges the United States to live up to its ideals. When the U.S. government falters in its commitment to promote and protect human rights, we step in to demand reform, accountability, and justice. For over 40 years, we've built bipartisan coalitions and partnered with frontline activists, lawyers, military leaders, and technologists to tackle issues that demand American leadership.



humanrightsfirst.org

 @humanrightsfirst

 @humanrightsfirst

 @humanright1st

