

*A Plan to
Close Guantánamo and End the Military Commissions*

submitted to the

Transition Team of President-elect Obama

from the

American Civil Liberties Union

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HOW TO CLOSE GUANTÁNAMO: A PLAN

Introduction

Guantánamo is a scourge on America and the Constitution. It must be closed. This document outlines a five-step plan for closing Guantánamo and restoring the rule of law.

Secrecy and fear have distorted the facts about Guantánamo detainees. Our plan is informed by recognition of the following critical facts, largely unknown to the public:

- The government has quietly repatriated two-thirds of the 750 detainees, tacitly admitting that many should never have been held at all.
- Most of the remaining detainees will not be charged as terrorists, and can be released as soon as their home country or a haven country agrees to accept them.
- Trying the remaining detainees in federal court – and thus excluding evidence obtained through torture or coercion – does not endanger the public. The rule of law and the presumption of innocence serve to protect the public. Furthermore, the government has repeatedly stated that there is substantial evidence against the detainees presumed most dangerous – the High Value Detainees – that was not obtained by torture or coercion. They can be brought to trial in federal court.

I. Step One: Stay All Proceedings of the Military Commissions and Impose a Deadline for Closure

The President should immediately issue an Executive Order to:

- Rescind all previous Presidential authorizations for detention without charge or trial and for the establishment of military commissions;
- Suspend all Military Commissions proceedings immediately, pending review and disposition of all cases as detailed below;
- Unequivocally state that the Military Commissions are to be de-commissioned permanently;
- Provide for permanent closure of Guantánamo detention facilities by time certain, but no longer than one year;
- Provide that, until closure, Guantánamo shall meet all requirements of the Geneva Conventions, specifically rescinding Presidential Order signed February 7, 2002¹;
- Explicitly prohibit destruction of any electronic, documentary, or physical evidence, and direct that all documentary and physical evidence, including all electronic records such as computer hard drives and email messages, be preserved and retained, as well

¹ Presidential Memorandum titled *Humane Treatment of al Qaeda and Taliban Detainees*.

- as all custodial records of any sort, including, but not limited to, records concerning interrogations, conditions of confinement, and Military Commission proceedings;
- Create a Guantánamo Working Committee reporting directly to the Secretary of Defense and the Attorney General to make concrete recommendations to end the Military Commissions and relocate each of the 248 remaining detainees on Guantánamo. The Committee's charge should include making specific recommendations regarding the transfer of all detainees to be prosecuting into federal courts.

II. Step Two: Appoint Guantánamo Working Committee (Committee)

- The Committee should be charged with creating a detailed resolution for each detainee and facilitating the implementation of those recommendations, including such tasks as proposing and implementing diplomatic solutions for repatriation; selecting specific prisons for pre-trial detainees; creating temporary haven facilities for detainees in the United States; and issuing follow-up recommendations after the detention facilities are closed at Guantánamo and the Military Commissions are permanently ended.
- The Committee should have wide latitude in making specific recommendations for the prosecution of those detainees turned over to federal criminal courts, including recommendations concerning where the detainees might best be tried, and on what charges, consistent with the rights of detainees, and the interests of the government and victims' families in swift and public trials.
- The Committee should be headed by a person of international stature and distinguished experience, such as General Colin Powell.
- Members of the Committee would serve at the pleasure of the President. They should be of impeccable integrity and distinguished service to the country, such as eminent former or current prosecutors, defense attorneys, and law professors, with both military and civilian legal expertise. The Committee should be small enough to work efficiently; this is not a figurehead committee.
- The work of the Committee should be facilitated by access to experts in federal national security cases, military law under the Uniform Code of Military Justice, international law of armed conflict, international human rights law, and capital trials. The Committee should be appropriately staffed from the ranks of the Department of Defense (DoD) and the Department of Justice (DoJ), but Committee members should not have held a position at or be supervising Guantánamo or in the Military Commission.

- The Committee should: have access to all relevant physical, documentary, and electronic evidence and all records of the Military Commissions; have power to review all government agencies' documents; be empowered to make public all non-classified conclusions; and report directly to the Secretary of Defense and the Attorney General.
- The Committee should have full access and priority support from other executive actors: for example, the State Department will assist in settling the impasse with Yemen and facilitating the return of Yemeni detainees.
- The Committee should announce a timetable within its first six weeks of operation, setting a date certain for:
 - Repatriation of the majority of detainees;
 - Establishing safe haven for those who can be released but cannot return to their home countries;
 - Initiating prosecution for those detainees who will be tried for federal crimes;
 - Releasing all non-classified information and publication of the Report of the Guantánamo Working Committee.

III. Step Three: Re-Classify Detainees

The Committee should review detainee cases on an individual basis to determine appropriate action, which should be one of the following:

- A. Repatriate detainees to their home countries (e.g., many of the Saudis, Yemenis). The Military Commission/DoD prosecutors have acknowledged for some time that this can be done for the **majority** of the detainees.
- B. Resettle releasable detainees in countries other than their home countries (e.g., the Uighurs, Algerians, Tunisians, and others who cannot be returned to their home countries, either because they will not be accepted for repatriation or they face risk of mistreatment). If the United States agrees to provide haven for some of the detainees, it will almost certainly facilitate the diplomatic negotiations to place others.
- C. Transfer those detainees, including the so-called High Value Detainees, for whom there is evidence of terrorism crimes, to the U.S. to face charges in federal court.

While theoretically there may be a few detainees appropriate to try by military court-martial, it would require amendment of the Uniform Code of Military Justice (UCMJ), and would have potentially unwholesome political consequences, creating a two-tier

system for treatment of detainees and requiring amendment of the UCMJ². Further, fairly or not, the secrecy, impenetrability, and confusion of the Military Commissions has tainted international perception of military courts, and the courts-martial process is likely to be viewed with a skepticism that federal trials would not produce. Finally, and importantly, **there are no detainees who could be tried by courts-martial who could not also be tried in federal court.**

The ACLU is not in a position to name every detainee who falls in the majority of the categories above (categories A and B); access to complete information, denied to us, will be furnished to the Committee. We attach an appendix which lists the remaining detainees and their countries of origin. This list demonstrates the role that diplomatic stalemates play in the repatriation of the majority of detainees remaining. For more on this issue, see the Center for Constitutional Rights' *Closing Guantánamo and Restoring the Rule of Law*.

IV. Step Four: Address Concerns Associated with Transfer to Federal Court

From an initial position that all 750 detainees were “bad men” who needed to be locked up without charges or counsel, the current administration has quietly repatriated two-thirds of the detainees and tacitly admitted that many would never have been held at all. No one can doubt that the formidable barriers to release, the doomsday predictions, were exaggerated at best.

Similarly, a number of the concerns raised to the proposed transfer to the federal courts are specious. Human Rights First produced *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court*, by Richard B. Zabel & James J. Benjamin, Jr., (see Footnote 7) debunking many of these concerns and addressing legitimate ones.

A. Federal Criminal Charging Options: Federal criminal law provides more than sufficient charging options.

Federal criminal statutes have developed over time away from purely redressing past wrongs. In the years since the first attack on the World Trade Center in 1993, a robust body of anti-terrorism law has developed that focuses on prevention of future wrongs by criminalizing a broad spectrum of associational, financial, and status offenses. Some

²Both the personal and subject matter jurisdiction provisions of the UCMJ would need to be amended. Most of the detainees at Guantánamo are not likely to fall within the definition of persons subject to the UCMJ, which is in Section 802, unless they are declared to be prisoners of war – which seems highly unlikely and undesirable. Perhaps even more importantly, the offenses section of the UCMJ (chapter X) does not cover most of the terrorism-related offenses with which defendants have been charged, with the exception of murder/manslaughter (UCMJ 918, 919).

examples of the wide array of federal offenses, both newer and much older, that may be used to prosecute individuals suspected of serious terrorism offenses, include:

1. Material support for terrorist acts or organizations, 18 U.S.C. §§ 2339A and B
2. Collecting or providing funds to be used in an act of terrorism, 18 U.S.C. § 2339C
3. Receiving military training from a designated foreign terrorism organization, 18 U.S.C. § 2339 D
4. Homicide or serious assault against U.S. nationals outside the U.S., with the intent to conduct terrorism, 18 U.S.C. § 2332
5. Use of weapons of mass destruction, 18 U.S.C. § 2332a
6. Bombing places of public use, 18 U.S.C. § 2332f
7. Acts of terrorism within the U.S. that transcend national boundaries, 18 U.S.C. § 2332b
8. Financial transactions with countries that support international terrorism, 18 U.S.C. § 2332d
9. Harboring or concealing terrorists, 18 U.S.C. § 2339
10. Treason offenses, including levying war against the United States and giving aid and comfort to the enemy, 18 U.S.C. § 2381
11. Seditious conspiracy, 18 U.S.C. § 2384
12. Recruitment and enlistment for hostile force, 18 U.S.C. §§ 2389-90

In addition, the DoJ has already developed and employed a specific strategy of using a variety of other offenses in terrorism prosecutions to achieve prevention, including charges of conspiracy, immigration violations, fraud, false statements to federal officials, and others.

B. Fair Trials:

1. Exclusion of Statements Induced by Coercion or Torture:

NO OTHER SINGLE CHANGE MATTERS AS MUCH AS THIS TO DEMONSTRATE TO THE WORLD AND TO AMERICANS THAT THE RULE OF LAW HAS BEEN RE-ESTABLISHED.

Rules in federal court prohibit the use of tortured or coerced statements³, but that does not mean that guilty defendants will go free. The Committee will determine if there are low-level individuals for whom the only incriminating evidence is a

³ The Supreme Court has “repeatedly explained that those subjected to coercive police interrogations have an automatic protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial.” *United States v. Patane*, 542 U.S. 630, 640 (2004) (internal quotations omitted).

statement obtained under torture. None of the doomsayers has been able to produce a single example of such a detainee. The vast majority of detainees who would be affected by this exclusion are High Value Detainees (HVD), such as those accused of plotting 9/11. As noted below, the government has repeatedly stated that there is substantial evidence against High Value Detainees that was not obtained through torture or coercion.

2. Application of Rules of Evidence: Transfer of detainees to federal court will reinstate rules of evidence that have been developed over decades in the courts and are supported by a body of interpretive law that ensures a fair trial. **The adversarial process produces both fairness and the satisfaction of restoring the appearance of fairness**, both of which were lost under the “pick and choose” creation of rules in the Military Commissions Act (MCA).⁴

3. Classified Evidence Procedures under CIPA: The Classified Evidence Procedures Act (CIPA) provides a framework for open public trials in the federal system that completely protects the information where release would jeopardize American interests or personnel. CIPA ensures that classified evidence is available to the prosecution but not completely denied to the defense, something the MCA does not provide. Those who argue against prosecution in federal court ignore decades of successful prosecutions of terrorists in the United States in which classified evidence has been presented and evaluated without any risk to national security whatsoever. The federal judiciary, particularly in jurisdictions that try a majority of national security cases presently, are well-versed in classified procedures and have access to security personnel and secure facilities to protect our countries legitimate secrets.

C. Open and Public Courtrooms: Federal trials are open to the public. Openness and transparency will help to restore public confidence in the process, engage the public in dialogue regarding charging, trial, and punishment of detainees, and assist in dissemination of information about conditions of confinement, mistreatment, and torture of detainees while in CIA custody. The Military Commission prohibition against any reference to torture, conduct of trial in the presence of the CIA, and the excessive protective orders⁵ combined with the remote and completely controlled location at

⁴ MCA creates a very uneven playing field by using the model of the UCMJ but dropping many rules of evidence that serve to protect a defendant’s ability to obtain a fair trial. For instance, the MCA authorizes the Secretary of Defense to prescribe provisions permitting the admission of, among other things, hearsay evidence, evidence seized without a search warrant, and coerced confessions. 10 U.S.C. 949a(b)(2).

⁵ On January 14, 2009, four leading non-governmental organizations filed a friend-of-the-court brief opposing a court order on classified information in the military commission case of the alleged 9/11 conspirators, *United States v. Khalid Sheikh Mohammed, et al.* The order, which was signed by military judge Stephen R. Henley on December

Guantánamo destroyed any possibility that the public could have confidence in the results of the trial or the process of charging and punishment. The national and international public and the families of victims are better served by an open and transparent process, as opposed to one that takes place offshore on an inaccessible island base in secrecy.

D. Protecting the American Public: Should defendants be acquitted they are unlikely to remain at liberty in the U.S., as there will be immigration holds placed and detainees will ultimately face transfer out of the country. The Committee will already have established relationships with NATO and Middle East partners to work on issues of resettlement, monitoring, and rehabilitation. Those who urge indefinite preventive detention as a solution present this issue as a false dichotomy: that we must either detain persons we deem dangerous or release them under conditions that leave us entirely blind. The reality is that detainees who are released, whether it is upon acquittal or without charge, may be monitored in the location of resettlement to ensure that they pose no threat.

E. Civilian Prison Facilities in the Event of Convictions: The Bureau of Prisons maintains a Supermax facility in Florence, Colorado. Several other terrorism convicts are held there, including Ramzi Yousef, Omar Abdul Rahman, Jose Padilla, Richard Reid, and Zacharias Moussaoui. For non-violent or low-risk offenders, the Bureau of Prisons maintains two Communications Management Unit (CMU) facilities where it currently houses certain terrorism-related offenders. One is in Terre Haute, Indiana and the other is in Marion, Illinois. The unit at Terre Haute currently houses some of the Lackawanna Six, and the Marion, Illinois facility currently houses Ali Asad Chandia, convicted of providing material support to Lashkar-e-Taiba. CMU facilities provide offenders greater personal liberty in the form of movement outside of cells during the day, recreation, and the like. However, the offenders' ability to communicate with people outside the institution, whether by receiving information or sending it, is very restricted and extremely carefully monitored.

18, 2008, goes far beyond protecting documents and information that have been classified by intelligence agencies. It greatly expands the definition of "classified information" to include any information merely "referring" to various government agencies, including the CIA, the FBI and the NSA. It further allows the court, under certain circumstances, to classify information already in the public domain and presumptively classifies "any statements made by the accused." The *amicus* brief was filed by the American Bar Association, the American Civil Liberties Union, Human Rights First and Human Rights Watch. All four groups are regular observers of the military commission proceedings at Guantánamo Bay. The protective order "diminishes the fairness and transparency of these proceedings by permitting the government to exercise virtually unlimited authority to exclude the press, public, and trial observers – including *amici*," the brief states. As a result, the groups ask the court to rescind the protective order or to modify it to require individualized determinations about whether specific information should be withheld for reasons of national security or personal safety.

F. Special Note: The High Value Detainees: The 14 so-called High Value Detainees (HVD), including Khalid Sheikh Mohammed and his five co-accused in the 9/11 case, are the persons many people think of when the problem of closing Guantánamo is raised. The dilemma posed is this one: if the only evidence was obtained by torture, isn't the choice going to be between subverting our laws (indefinite detention or permitting tainted sources) and letting a terrorist go free? The answer is: that is a false dichotomy, and will never arise.

The individual for whom the *only* evidence is a statement made under torture and subsequently recanted is a very low-level person or a completely innocent one. Torture evidence is unreliable: if indeed such a person or persons exist, they should probably be released.

The Military Commissions were designed not to effect fair and public prosecutions, but to allow control over the evidence of torture, and the complicity by various official actors with that torture. There is no other explanation for the absurd rulings by Military Commissions judges that, for example, the public testimony by the Secretary of Defense before Congress, or the conclusions of the 9/11 Commission could become "classified" if one of the accused repeated it, or any defense lawyer who had access to the defendant repeated it.

Prosecutions will not depend on evidence obtained by torture. The evidence against the HVD defendants was substantial enough *before* their capture by the CIA or other governmental entities that some were indicted in this country and internationally. Indeed, there is currently a prosecution in France of Khalid Sheikh Mohammed *in absentia* for causing the deaths of 22 people in the Tunisian synagogue bombing. Further, in the past prosecutions of Al Qaeda members or terrorists motivated by ideological beliefs, the individuals rarely concealed their involvement in the actions charged, preferring to assert the right to act in, as they saw it, a religious or politically justified war.

Finally, the startling news that, according to Convening Authority Susan Crawford, one of the 9/11 accused, al-Qatani, was not prosecuted because of his torture, does not mean that he will be released either. A defendant in federal court deemed incompetent to stand trial is not released if dangerous to himself or others; his status is reviewed periodically while appropriate experts assist in restoring him to competency.

In short, the detainees that raise the greatest concern because of the severity and nature of the charges against them are those for whom there is likely to be substantial evidence to proceed in federal trials. The adversarial process works, and will work in these cases.

V. Step Five: Transfer Detainees to Federal Jurisdiction

The Military Commissions must be halted immediately. Current observation of the Military Commissions system, now in virtual shambles with the controversy concerning the purported “re-referral” and the admission by Convening Authority Susan Crawford that detainee al-Quatani was tortured, only serve to underscore the impossibility of salvaging anything of this illegitimate process. The remainder of this plan details the choices available to the Committee in transferring the accused criminals detained at Guantánamo to federal court, and lists some considerations that should guide those choices. Transferring detainees to federal courts for trial does not require Congressional action or repeal of any Executive Orders. This includes all detainees currently being tried in the Military Commissions (see Endnote #1: Current Prosecutions in the MCA).

A. Federal Districts for Charging and Trial: Where will trials be held?

Both legal and practical considerations will affect the choice of venue. The first is venue under federal law. Appropriate venues for trial include the district where the offense occurred or that has a significant connection to the offense.⁶ Some of the trials would likely be channeled to one of the U.S. courts where enhanced security arrangements already exist or can be arranged easily. The courts with the most experience with terrorism prosecutions and the attendant security issues are ED Virginia, SDNY, and EDNY.⁷ Other suitable courthouses may include New Jersey, Chicago, Boston, Seattle, and Los Angeles.

The government has maximum flexibility in selecting a venue for trial of cases transferred from the military commissions in Guantánamo. The facts and the law give the government extremely wide latitude to select a venue by indicting the defendant in a district selected based upon resources and security issues and then transferring the defendant into that jurisdiction for arrest and initial appearance.⁸

⁶ To determine where an offense occurred, a court first identifies the acts that make up the offense, and then identifies the location of the commission of the specific criminal acts. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999); Fed. R. Crim. P. 18.

⁷ Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court* at 21–27 (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>. According to Zabel and Benjamin’s analysis of terrorism prosecution data, these districts are the top jurisdictions both by cases filed and by defendants charged.

⁸ Federal Rule of Criminal Procedure 18 provides that “the government must prosecute an offense in a district where the offense was committed.” Rule 18 accords with the venue provisions in Article III, section 2, of the Constitution, which requires that “The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . .” and in the Sixth Amendment to the Constitution, which provides that “In all criminal prosecutions,

At a minimum, jurisdiction could be had in New York, Washington D.C., Virginia, Ohio; Massachusetts; any of the states that lay in the flight path of the aircraft; or the last locale where the detainee resided in the United States, if he ever did.

Jurisdiction could be properly created by selecting a location based on the factors discussed and bringing the detainee there directly from Guantánamo. This means that the answer to “Where can the trials be held?” is “Virtually anywhere in the federal court system.”

Finally, certain offenses, particularly those involving violations of the material support provisions of 18 U.S.C. § 2339B, may have been committed entirely outside of the United States. For these offenses, venue is proper in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders; or if no such residence is known, the indictment or information may be filed in the District of Columbia.⁹

B. Factors influencing choice of venue

A non-inclusive list of factors that should be weighed by the Committee are security concerns, the complexity of the case based on number and severity of charges, number of co-defendants, and likelihood of classified evidence; the logistical ability of the jurisdiction chosen to mount lengthy and complex cases; the proximity of a federal prison

the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .” 18 U.S.C. § 3235 somewhat narrows the venue available in capital cases to “the county where the offense was committed, where that can be done without great inconvenience.” To determine the district or districts in which the offense was committed, “a court first identifies the acts that make up the offense, and then identifies the location of the commission of the specific criminal acts.” “[W]here a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done.” *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999). Thus, a defendant charged with murder for commission of the September 11th attacks may be tried in any district or districts in which fatal injuries were inflicted. Similarly, offenses “begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.” 18 U.S.C. § 3236, a venue rule specific to murder and manslaughter, states that “In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs.” Trial may therefore be held in the district where flights originated or even in districts over which the flights passed.

⁹ 18 U.S.C. § 3238. *See, also United States v. De Leon*, 641 F.2d 330, 336 (5th Cir. 1981) (holding that, “[b]ecause a conspiracy may be ‘committed’ in a number of places,” it was permissible under both the Constitution and Rule 18 for the prosecution to choose among several venues).

for pretrial detention¹⁰; and the defense resources available in the jurisdiction, including an experienced federal defender office. For the 20 or so individuals currently in prosecutions in the military commissions, continuity of defense counsel is an important consideration (see Endnote #1).

Additional considerations will emerge as the cases are fully reviewed by the Committee. For example, some detainees may have ongoing prosecutions. Khalid Sheikh Mohammed has already been indicted in federal court in the Southern District of New York,¹¹ so proceeding with those charges in the district where they are filed, and perhaps joining the additional offenses charged against him, is one solution. That district court would also of course be available for the four other defendants currently charged along with Khalid Sheikh Mohammed. Also, the Committee will be able to consider if it is appropriate to give credit for conditions of confinement and harsh treatment, as Judges did in Padilla and Hamdan¹², where defendants' sentences reflected the nature of the conditions of confinement and prior treatment; this should be recognized as an appropriate consideration in cases transferred from Guantánamo.

Availability and quality of civilian pre-trial detention facilities is also a factor. The Bureau of Prisons maintains non-punitive pretrial detention facilities in each of the urban areas mentioned above. The Bureau may impose Special Administrative Measures (SAMs) on detainees, visitors, and counsel to achieve the appropriate level of security. In the absence of genuine security issues, however, detainees should be treated the same as other pre-trial detainees.

¹⁰ The ACLU's National Prison Project has extensive information on every federal prison in the United States including accessibility for counsel, proximity to federal courthouse.

¹¹ This indictment stems from the alleged Operation Bojinka plot to destroy multiple commercial airliners in-flight.

¹² At Padilla's sentencing, Judge Marcia Cooke stated, "I do find that the conditions were so harsh for Mr. Padilla . . . they warrant consideration in the sentencing in this case." Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years, Cites His Detention*, Washington Post, January 23, 2008, at A3, at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/22/AR2008012200565.html>.

ENDNOTE # 1: The Status of Current Prosecutions in the Military Commissions.

Nothing in the MCA precludes federal court jurisdiction over the detainee. There are over 20 cases currently pending in the Military Commissions. In order to effect a “transfer” of these cases to federal court, the Secretary of Defense must withdraw the charges pending in the Military Commission. The Rules for the Military Commissions give the Secretary the authority to withdraw and dispose of charges at any time before findings are announced.¹³ The defendant may then be relinquished to the Department of Justice. With three exceptions, (Salim Hamdan, Ali al-Bahlul, and David Hicks), none of the proceedings in the Military Commissions have reached the point at which jeopardy attaches. Therefore, dismissal, followed by prosecution in federal courts, would not violate the constitutional ban on double jeopardy.

Jeopardy has not attached under the terms of the Military Commissions Act, because the Act provides that jeopardy attaches only “after review of the case has been fully completed.” (Section 949h of the Military Commissions Act). Nor has jeopardy attached as that term defined in federal, state, or military law. In *Crist v. Bretz*, 437 U.S. 28 (1978), the Supreme Court explained that its prior holding in *Downum v. United States*, 372 U.S. 734 (1963) was explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn.”¹⁴ The vast majority of states follow the same rule.¹⁵ In military law, the point at which jeopardy attaches is defined by statute, and is consistent with federal decisional law. The Uniform Code of Military Justice provides that “[a]t a minimum, jeopardy attaches when the jury is impaneled and sworn, or when the first witness testifies in a judge alone trial.”¹⁶

Another important consideration for these cases is the principle of continuity of defense counsel. For those detainees who have been represented by volunteer civilian counsel, the default position

¹³ See R.M.C. 604 (providing that “[t]he convening authority may for any reason cause any charges or specifications to be withdrawn from a military commission at any time before findings are announced”). The notes to R.M.C. 604 state that “[c]harges which are withdrawn from a military commission should be dismissed (see R.M.C. 401(b)), unless it is intended to refer them anew promptly or to forward them to another authority for disposition.” R.M.C. 401 provides that the Secretary of Defense or a delegated official may dispose of charges against a detainee by dismissal for, among other reasons, “sound reasons why trial by military commission is not appropriate.”)

¹⁴ *Crist*, 437 U.S. at 35, discussing *Downum v. United States*, 372 U.S. 734 (1963); see also *Willhauck v. Flanagan*, 448 U.S. 1323, 1325–26 (1980) (holding that “[u]ntil a jury is empaneled and sworn, or, in a bench trial, until the first witness is sworn, jeopardy does not attach.”) (internal citations omitted).

¹⁵ See, e.g., *McLaughlin v. Fahringer*, 150 Ariz. 274, 277 (1986) (“Jeopardy attaches as soon as the jury is impaneled and sworn.”); *People v. Burgess*, 206 Cal. App. 3d 762, 767 (Cal. App. 1st Dist. 1988) (“jeopardy attaches, both by federal and state constitutional mandate, when the jury is empaneled and sworn”); *State v. Gaines*, 770 So. 2d 1221, 1225 (Fla. 2000) (“jeopardy attaches in a criminal proceeding when the jury is impaneled and sworn”); *Lupi v. Commonwealth*, 434 Mass. 1018 (2001) (“In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn.”).

¹⁶ *United States v. Hutchinson*, 49 M.J. 6, 7 (C.A.A.F. 1998), citing *Crist v. Bretz*, 437 U.S. 28 (1978). See also *United States v. Browers*, 20 M.J. 542 (A.C.M.R. 1985) (holding that in a nonjury trial, jeopardy attaches only when the court begins to hear evidence).

should be that their counsel are retained and, if eligible, appointed to continue representation under the Criminal Justice Act system in federal court. This may apply as well to some of the detailed military counsel, should their orders change or with appropriate accommodations.

ENDNOTE # 2: Why the Military Commissions must be immediately stayed

For the following reasons, closing Guantánamo, or even announcing a relatively short time period for closing the infamous detention center, is meaningless unless the Military Commissions are shuttered for good, and immediately ordered to stop.

1. The current mistreatment of detainees must end. Evidence at the Military Commissions proceedings, (even with all mention of “conditions of confinement” or previous mistreatment by the CIA, the military, or other governmental agencies forbidden as a security matter in the trial proceedings) still suggests that there is ongoing potential for mistreatment, including cell extraction, forced medication, and hooding and isolating, connected to court proceedings.
2. All proceedings must end before jeopardy attaches. Taking the far less expansive definition of when jeopardy attaches that is common to most states and used in federal court, rather than the MCA’s attenuated period, (see previous Note) there is no case in which prosecution has been initiated. **That could change on the 26th of January**, when the Khadr case is set to be tried. If the Commissioners are seated and sworn (analogous to a jury) lawyers would argue that jeopardy has attached. This of course might well preclude future prosecutions by the United States.
3. The Khadr case alone requires an immediate stay. If continued, the United States would become the first Western nation in modern times to prosecute a child for war crimes. The United States’ treatment of juveniles detained at Guantánamo violates international juvenile justice standards and treaties, including the Optional Protocol of the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and the International Covenant on Civil and Political Rights.
4. Last-minute efforts by the Military Commissions, including scheduling court on the national federal holiday celebrating the life of Dr. Martin Luther King, Jr., have the potential to either create problems for future prosecutors and defense attorneys (such as in the Khadr case) or, in the worst-case scenario, preclude future prosecutions by obtaining pleas from arguably incompetent clients who were admittedly tortured.
5. The Military Commissions themselves bring disrepute to the United States. The perception that the Military Commissions are unfair and illegitimate sham tribunals, convened more to hide the names and actions of those complicit in the torture than to obtain just verdicts in an open and fair proceeding, are furthered by the secrecy that centers not on national security measures but on an obsessive silence that is enforced on the topic of torture; the CIA presence in the courtroom despite objections; the five prosecutors who resigned in protest from unethical proceedings; the denial of counsel for years and then reluctance or refusal to clear willing counsel; and the refusal

to provide adequate translators or even the most basic tools of a competent defense.

6. Even if none of the above was true (and that is not the case) the Military Commissions are a symbol of everything that is wrong with Guantánamo. In fact, the name of the place is a shorthand reference to the show trials that are produced there. Many in the international community have great hope for the United States, believing that a new day is upon us; these friends and observers will never accept as fair the results of these flawed and unfair Commissions. They must be ended.

Appendix:

Detainees Currently Held At Guantánamo Bay

Source: *The New York Times* at: <http://projects.nytimes.com/guantanamo/detainees/held>

Name	Citizenship	At Guantánamo Since
al Aasmi, Assem Matruq Mohammad	Palestine, Saudi Arabia	January 2002
Aamer, Shaker	Saudi Arabia	February 2002
Abbas, Yusef	China	June 2002
Abd al Mujahid, Mahmoud Abd al Aziz	Yemen	January 2002
Abd al Rahman, Allal Ab Aljallil	Yemen	January 2002
Abd al Sattar, Muieen A Deen Jamal A Deen Abd al Fusal	United Arab Emirates	February 2002
Abd al Wahab, Abd al Malik	Yemen	January 2002
Abdelrahman, Abdelrazak Ali	Algeria	June 2002
Abdallah, Sayf Bin	Tunisia	January 2002
Abdul Rahman, Abdul Ghappar	China	June 2002
Abdulahat, Emam	China	June 2002
Abdulayev, Omar Hamzayavich	Tajikistan	February 2002
Abdulghupur, Hajiakbar	China	June 2002
Abdulqadirakhun, Abdullah	China	June 2002
Abdurehim, Dawut	China	June 2002
Abu Bakr, Omar Khalifa Mohammed	Libya	August 2002
Abu Ghanim, Mohammed Rajab Sadiq	Yemen	January 2002
Abu al Qusin, Abdul Rauf Omar Mohammed	Libya	August 2002
Abu Rahman, Abdul Rabbani Abd al Rahim	Pakistan	September 2004
Adayn, Omar Said Salem	Yemen	February 2002
al Afghani, Haroon	Afghanistan	June 2007
al Afghani, Muhammad Rahim	Afghanistan	March 2008
Ahjam, Ahmed Adnan	Syria	June 2002
Ahmad, Majid Mahmud Abdu	Yemen	January 2002

Ahmed, Abdul Rahman	Yemen	February 2002
Ahmed, Fahmi Abdullah	Yemen	June 2002
Ahmed, Fayad Yahya	Yemen	June 2002
Ahmed, Faruq Ali	Yemen	January 2002
Alahdal, Abu Bakr Ibn Ali Muhammad	Yemen	January 2002
al Alwi, Moath Hamza Ahmed	Yemen	January 2002
Aleh, Ali Bin Ali	Yemen	June 2002
Algazzar, Adel Fattough Ali	Egypt	January 2002
Ali, Abd al Aziz	Pakistan	September 2006
al Ali, Mahmud Salem Horan Mohammed Mutlak	Syria	May 2002
Ameziane, Djamel Saïd Ali	Algeria	February 2002
al Ansi, Muhammad Ahmad Abdallah	Yemen	January 2002
Anvar, Hassan	China	February 2002
Arale, Abdullahi Sudi	Somalia	June 2007
Awad, Jalal Salam Awad	Yemen	June 2002
Awad, Waqas Mohammed Ali	Yemen	January 2002
al Awda, Fouzi Khalid Abdullah	Kuwait	February 2002
Azani, Saad Masir Mukbl Al	Yemen	June 2002
Aziz, Ahamed Abdel	Mauritania	October 2002
Baada, Tarek Ali Abdullah Ahmed	Yemen	February 2002
al Bahlul, Ali Hamza Ahmad Suliman	Yemen	January 2002
al Bakush, Ismael Ali Farag	Libya	August 2002
Barhoumi, Sufyian	Algeria	June 2002
Barre, Mohammed Sulaymon	Somalia	May 2002
Basardah, Yasim Muhammed	Yemen	February 2002
Batarfi, Ayman Saeed Abdullah	Yemen	May 2002

al Bedani, Abdul Khaled Ahmed Sahleh	Saudi Arabia	May 2002
Bel Bacha, Ahmed Bin Saleh	Algeria	February 2002
Belkacem, Bensayah	Algeria	January 2002
al Bihani, Ghaleb Nassar	Yemen	January 2002
al Bihani, Tolfiq Nassar Ahmed	Saudi Arabia	February 2003
Bin al Shibh, Ramzi	Yemen	September 2006
Bin Ali, Lotfi	Tunisia	February 2003
Bin Atef, Mahmmoud Omar Mohammed	Yemen	February 2002
Bin Attash, Hassan Mohammed Ali	Yemen	September 2004
Bin Attash, Walid	Yemen	September 2006
Bin Hadiddi, Abdul Haddi	Tunisia	August 2002
Bin Hamdoun, Zahar Omar Hamis	Yemen	May 2002
Bin Hamida, Adil Mabrouk	Tunisia	February 2002
Bin Hamlili, Adil Hadi al Jazairi	Algeria	September 2004
Bin Salem, Muhammad Said	Yemen	February 2002
Bismullah, Haji	Afghanistan	March 2003
Boumediene, Lakhdar	Algeria	January 2002
al Busayss, Adil Said al Haj Obeid	Yemen	January 2002
Bwazir, Mohammed Ali Abdullah	Yemen	May 2002
Balzuhair, Shawki Awad	Yemen	October 2002
al Darbi, Ahmed Muhammed Haza	Saudi Arabia	March 2003
al Dhuby, Khalid Mohammed Salih	Yemen	May 2002
Diyab, Jihad Ahmed Mujstafa	Syria	August 2002
Dokhan, Moammar Badawi	Syria	February 2002
Dourad, Gouled Hassan	Somalia	September 2006
al Edah, Mohammed Ahmad Said	Yemen	January 2002

Faraj, Abd al Hadi Omar Mahmoud	Syria	June 2002
Farhi, Saiid	Algeria	February 2002
Fazl, Mullah Mohammad	Afghanistan	January 2002
Ghailani, Ahmed Khalfan	Tanzania	September 2006
Ghani, Abdul	Afghanistan	March 2003
Ghazi, Fahed Abdullah Ahmad	Yemen	January 2002
al Ghazzawi, Abdel Hamid Ibn Abdussalem Ibn Miftah	Libya	June 2002
Ghereby, Salem Abdul Salem	Libya	May 2002
Gul, Awal	Afghanistan	
Gul, Khi Ali	Afghanistan	March 2003
Hadi, Salem Ahmed	Yemen	January 2002
Hadjarab, Nabil	Algeria	February 2002
Hafiz, Abdul	Afghanistan	July 2003
Haidel, Mohammed Ahmed Said	Yemen	May 2002
Hakim, Abdel Ghalib Ahmad	Yemen	June 2002
Hambali (Riduan Isamuddin)	Indonesia	September 2006
al Hami, Rafiq Bin Bashir Bin Jalud	Tunisia	February 2003
Hamidullah	Afghanistan	November 2003
Hamidullah, Ali Sher	Uzbekistan	June 2002
Hamiduva, Shakhrukh	Uzbekistan	January 2002
al Hamiri, Mohammed Abdullah	Yemen	January 2002
al Hanashi, Mohammad Ahmed Abdullah Saleh	Yemen	February 2002
Hashim, Mohammed	Afghanistan	October 2002
Hassan, Emad Abdalla	Yemen	June 2002
Hassen, Mohammed Mohammed	Yemen	June 2002
Hatim, Said Muhammed Salih	Yemen	June 2002

al Hawsawi, Mustafa Ahmed	Saudi Arabia	September 2006
al Hikimi, Ahmed Umar Abdullah	Yemen	January 2002
al Hilal, Abdul al Salam	Yemen	September 2004
Hintif, Fadil Husayn Salih	Yemen	February 2002
Hkimi, Adel Bin Ahmed Bin Ibrahim	Tunisia	February 2002
Idris, Ibrahim Othman Ibrahim	Sudan	January 2002
Inayatullah	Afghanistan	Sept. 2007
al Iraqi, Abd al Hadi	Iraq	April 2007
Ismail, Yasin Qasem Muhammad	Yemen	May 2002
Jamaludinovich, Abu Bakir	Uzbekistan	June 2002
Janko, Abd al Rahim Abdul Rassak	Syria	May 2002
Jarabh, Saeed Ahmed Mohammed Abdullah Sarem	Yemen	February 2002
Jawad, Mohamed	Afghanistan	
Kamin, Mohammed	Afghanistan	September 2004
al Kandari, Faiz Mohammed Ahmed	Kuwait	May 2002
al Karim, Arkan Mohammad Ghafil	Iraq	June 2002
Karim, Bostan	Afghanistan	March 2003
Kasimbekov, Kamalludin	Uzbekistan	June 2002
al Kazimi, Sanad Yislam	Yemen	September 2004
Khadr, Omar Ahmed	Canada	October 2002
Khairkhwa, Khirullah Said Wali	Afghanistan	May 2002
Khan, Majid	Pakistan	September 2006
Khan, Shawali	Afghanistan	February 2003
Khantumani, Abd al Nasir Mohammed Abd al Qadir	Syria	February 2002
Khantumani, Muhammad Abd al Nasir Muhammad	Syria	February 2002
al Khalaqi, Asim Thahit Abdullah	Yemen	January 2002

Khalik, Saidullah	China	June 2002
Khnenah, Muhammed Ali Hussein	Yemen	June 2002
Khusruf, Mohammed Nasir Yahya	Yemen	May 2002
Lahmar, Sabir Mahfouz	Algeria	January 2002
al Libbi, Abu Faraj	Libya	September 2006
Lillie (Mohammed Nazir Bin Lep)	Malaysia	September 2006
al Madoonee, Musab Omar Ali	Yemen	October 2002
Mahmud, Arkin	China	June 2002
Mahnut, Bahtiyar	China	June 2002
Mamut, Abdul Helil	China	June 2002
Mari, Jamal Muhammed Alawi	Yemen	May 2002
al Marwalah, Bashir Nasir Ali	Yemen	October 2002
Masud, Sharaf Ahmad Muhammad	Yemen	June 2002
al Maythal, Hail Aziz Ahmad	Yemen	October 2002
Malik, Abdul	Kenya	March 2007
Mingazov, Ravil	Russia	October 2002
al Mishad, Sharif Fati Ali	Egypt	May 2002
Mohamed, Ahmed	China	May 2002
Mohamed, Binyam	Ethiopia	September 2004
Mohammed, Haji Wali	Afghanistan	May 2002
Mohammed, Hussein Salem	Yemen	May 2003
Mohammed, Kahlid Saad	Saudi Arabia	February 2002
Mohammed, Khalid Shaikh	Pakistan	September 2006
Mohammed, Nag	China	January 2002
Moqbel, Samir Naji al Hasan	Yemen	January 2002
Mouhammad, Maasoum Abdah	Syria	June 2002

al Mudhaffari, Abdel Qadir Hussein	Yemen	January 2002
Muhammad, Abd al Rahman Abdullah Ali	Yemen	February 2002
Muhammed, Noor Uthman	Sudan	August 2002
al Mutayri, Khalid Abdullah Mishal Thamer	Kuwait	February 2002
al Naely, Abbas Habid Rumi	Iraq	August 2002
al Nahdi, Sulaiman Awath Sulaiman Bin Ageel	Yemen	May 2002
Naji, Aziz Abdul	Algeria	August 2002
Nashir, Said Salih Said	Yemen	October 2002
al Nashiri, Abd al Rahim	Saudi Arabia	September 2006
Nasir, Abdul Latif	Morocco	May 2002
Nasseri, Riyad Bil Mohammed Tahir	Tunisia	June 2002
Nassir, Jamil Ahmed Said	Yemen	August 2002
al Noofayaae, Abdalaziz Kareem Salim	Saudi Arabia	June 2002
Noori, Adel	China	May 2002
Noori, Mullah Norullah	Afghanistan	January 2002
Obaidullah	Afghanistan	October 2002
Omari, Mohammad Nabi	Afghanistan	October 2002
Ourgy, Abdul Bin Mohammed Bin Abess	Tunisia	May 2002
Paracha, Saifullah	Pakistan	September 2004
Parhat, Hozaiifa	China	May 2002
al Qadasi, Khalid Abd Jal Jabbar Muhammad Juthman	Yemen	February 2002
Qader, Ahmed Abdul	Yemen	June 2002
Qader Idris, Idris Ahmed Abdu	Yemen	June 2002
al Qahtani, Jabran Said Wazar	Saudi Arabia	August 2002
al Qahtani, Mohammed	Saudi Arabia	February 2002
Qahtani, Said Muhammad Husyan	Saudi Arabia	January 2002

al Qarani, Muhammed Hamid	Chad	February 2002
Qasim, Khaled	Yemen	May 2002
Qattaa, Mansoor Muhammed Ali	Yemen	June 2002
al Qosi, Ibrahim Ahmed Mahmoud	Sudan	January 2002
al Qurashi, Sabri Mohammed Ebrahim	Yemen	May 2002
al Quwari, Mahrar Rafat	West Bank	June 2002
Qyati, Abdul Rahman Umir Al	Yemen	May 2002
Rabbani, Mohammed Ahmad Ghulam	Pakistan	September 2004
Rabeii, Salman Yahya Hassan Mohammed	Yemen	May 2002
al Rabia, Fouad Mahoud Hasan	Kuwait	May 2002
al Radai, Riyad Atiq Ali Abdu al Haj	Yemen	June 2002
Rahim, Mohamed	Afghanistan	November 2003
al Rahizi, Ali Ahmad Muhammad	Yemen	January 2002
al Raimi, Ali Yahya Mahdi	Yemen	May 2002
al Rammah, Omar Mohammed Ali	Yemen	May 2003
Razak, Abdul	China	June 2002
al Sabri, Mashur Abdallah Muqbil Ahmed	Yemen	May 2002
Sadkhan, Jawad Jabber	Iraq	May 2002
Said, Hassan Abdul	Iraq	May 2002
Said, Hassan Mujamma Rabai	Algeria	May 2002
Said Kuman, Ahmed Yaslam	Yemen	May 2002
Salam, Mohammed Ahmed	Yemen	June 2002
al Sani, Fahmi Salem Said	Yemen	February 2002
al Sawah, Tariq Mahmoud Ahmed	Egypt, Bosnia And Herzegovina	May 2002
Sayab, Mutij Sadiz Ahmad	Algeria	January 2002
al Saleh, Abdul	Yemen	February 2002

Saleh, Ayoub Murshid Ali	Yemen	October 2002
Saleh Naser, Abdul Rahman Mohamed	Yemen	June 2002
Salem al Zarnuki, Mohammed Ali	Yemen	June 2002
Shaaban, Ali Husein	Syria	June 2002
Shalabi, Abdul Rahman	Saudi Arabia	January 2002
al Shabli, Abdullah Yahia Yousf	Yemen	February 2002
al Shamyri, Mustafa Abdul Qawi Abdul Aziz	Yemen	June 2002
al Sharabi, Zuhail Abdo Anam Said	Yemen	May 2002
al Sharbi, Ghassan Abdullah	Saudi Arabia	June 2002
Sharifullah	Afghanistan	March 2003
Sharqawi, Abdu Ali al Haji	Yemen	September 2004
Shokuri, Yunis Abdurrahman	Morocco	May 2002
al Shumrani, Mohammad al Rahman	Saudi Arabia	January 2002
al Shurfa, Ohmed Ahmed Mahamoud	Saudi Arabia	
Salih, Abdul al Razzaq Muhammad	Yemen	February 2002
Slahi, Mohamedou Ould	Mauritania	August 2002
Sliti, Hisham Bin Ali Bin Amor	Tunisia	May 2002
Sohail, Mohammed Mustafa	Afghanistan	May 2003
al Suadi, Abdul Aziz Abdullah Ali	Yemen	May 2002
Sulayman, Abdul Rahman Abdul Abu Ghityh	Yemen	February 2002
Suleiman, Fayiz Ahmad Yahia	Yemen	January 2002
Sultan, Ashraf Salim Abd al Salam	Libya	February 2002
Tahamuttan, Mohammed Abdullah	West Bank	June 2002
Tahar, Mohmmad Ahmad Ali	Yemen	June 2002
Tayeea, Ali Abdul Motalib Awayd Hassan Al	Iraq	May 2002
Tourson, Ahmad	China	January 2002

Tsiradzho, Poolad T	Azerbaijan	January 2002
Uthman, Uthman Abdul Rahim Mohammed	Yemen	January 2002
al Wady, Hamoud Abdullah Hamoud Hassan	Yemen	June 2002
al Warafi, Muktar Yahya Najee	Yemen	May 2002
Wasiq, Abdul Haq	Afghanistan	January 2002
al Yafi, al Khadr Abdallah Muhammed	Yemen	January 2002
al Yazidi, Ridah Bin Saleh	Tunisia	January 2002
al Zabe, Slah Muhamed Salih	Saudi Arabia	Jan. 2009
Zahir, Abdul	Afghanistan	October 2002
Zahir, Mohommod	Afghanistan	November 2003
al Zahrani, Muhammed Murdi Issa	Saudi Arabia	August 2002
Zaid, Walid Said Bin Said	Yemen	May 2002
Zubair (Mohd Farik Bin Amin)	Malaysia	September 2006
Zubaydah, Abu	Palestine	September 2006
Zuhair, Ahmed Zaid Salim	Saudi Arabia	June 2002
Zumiri, Hassan	Algeria	May 2002