Statement of the Center for Victims of Torture
on
"Closing Guantánamo: Ending 20 Years of Injustice"

Before the Senate Judiciary Committee
December 7, 2021

The Center for Victims of Torture (CVT) thanks the Senate Judiciary Committee for the opportunity to submit this statement for the record for its hearing, "Closing Guantánamo: Ending 20 Years of Injustice."

CVT is the oldest and largest torture survivor rehabilitation center in the United States and one of the two largest in the world. Through programs operating in the U.S., the Middle East, and Africa, we annually rebuild the lives of tens of thousands of primary and secondary survivors. CVT also conducts research, training, and advocacy. Our legal and policy advocacy leverages the expertise of five stakeholder groups: survivors, clinicians, human rights lawyers, operational / humanitarian aid providers, and foreign policy experts. This work seeks to center human rights in U.S. government approaches, policies, and practices that impact CVT's clients and their communities, and that otherwise implicate the prohibition on torture and related domestic and international protections

CVT is signatory to a statement for the record submitted by members of the Human Rights and Security Coalition, as well as a statement for the record submitted by independent medical experts. We submit this separate statement – on December 14, 2021 – to address gaps in, and highlight several important takeaways from, the hearing itself.

I. Guantánamo's History with Torture

On January 11, 2022, the prison at Naval Station Guantánamo Bay, Cuba will mark its 20th year. Guantánamo was built purportedly to house "the worst of the worst;" a "limited number of detainees [who] . . . would all be targets for prosecution or high-value intel exploitation."[1] In fact, "most of the people who ended up at [Guantánamo] were picked up by the Northern Alliance or other groups that didn't necessarily have any interest in the global war on terror, aside from picking up a $5,000 per head bounty."[2]

The Bush administration chose Guantánamo, in the words of one administration official, hoping it would prove to be the "legal equivalent of outer space"[3]—outside the reach of U.S. courts and of public scrutiny. For the men subjected to the Central Intelligence Agency's Rendition, Detention and Interrogation Program ("Torture Program"), the goal was to hold them in a location where they might well remain for the rest of their lives. As described in the Senate Intelligence Committee's 2014 Study of the CIA Torture Program ("Torture Report"), "[a]fter

[1] Mark Fallon, Unjustifiable Means 50 (2017).
[2] *Id.* at 49.
[3] Michael Isikoff, The Gitmo Fallout, Newsweek, July 16, 2006, available at https://www.newsweek.com/gitmo-fallout-112933.

taking custody of Abu Zubaydah," the Torture Program's first victim, "CIA officers concluded that he 'should remain incommunicado for the remainder of his life…'"[4]

Guantánamo also played a central role in the birth of government-sanctioned torture. Throughout its early years, several Defense Department officials, including senior Guantánamo commanders, referred to the detention facility as a "Battle Lab".[5] The label proved accurate: the torture the military first tested at Guantánamo would soon spread to Afghanistan, and then to Iraq, culminating in the horrors of Abu Ghraib.[6]

By executive order in 2002, President Bush gave Guantánamo's Joint Task Force-170 responsibility "for the worldwide management of interrogation of suspected terrorists detained in support of us [sic] military operations…"[7] As a 2008 Senate Armed Services Committee report explains in detail, Guantánamo staff discharged that responsibility by researching, developing and implementing strategies to "break" detainees.[8] They solicited, and received, advice and training from instructors for the military's Survival, Evasion, Resistance and Escape (SERE) program, which is designed to teach American soldiers to resist (largely Communist-era) torture tactics that historically were aimed at producing false confessions.[9]

SERE "interrogators" are typically just "role players" who are "not trained to obtain reliable intelligence information from detainees" or qualified to do so.[10] Medical personnel—psychologists and psychiatrists in particular—were deeply involved, both in designing abusive interrogation plans and, at times, monitoring their implementation.[11]

Guantánamo interrogators brutalized detainees in a wide variety of ways. Some men were literally treated like animals: strapped in dog collars, led around on leashes, and forced to perform tricks. One female interrogator wiped what she told a detainee was menstrual blood on his face. Men were stripped naked and otherwise sexually humiliated. They were forcibly groomed, shackled in stress positions, and subjected to extreme temperatures. They were sensory and sleep deprived. They were threatened with death.[12]

---

[4] Committee Study of the Central Intelligence Agency's Detention and Interrogation Program at 19, Senate Select Committee on Intelligence, December 9, 2014, available at https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf.
[5] Senate Armed Services Committee, Inquiry into the Treatment of Detainees in U.S. Custody, at 43 (2008), available at https://www.armed-services.senate.gov/imo/media/doc/DetaineeReport-Final_April-22-2009.pdf ("SASC Report").
[6] *Id.* at xxii, xxiii.
[7] E-mail from Linda Watt to Gregory M. Suchan (Feb. 19, 2002, 16:00), available at https://www.thetorturedatabase.org/document/email-gregory-suchan-linda-watt-foreign-policy-advisor-southcom-re-establishment-jtf-170-gu?pdf_page=1.
[8] SASC Report at xx.
[9] *Id.* at xiii, 103-104.
[10] *Id.* at xiii.
[11] *Id.* at 38, 39; Mark Fallon, *Unjustifiable Means* 66 (2017); Sheri Fink, *Where Even Nightmares Are Classified: Psychiatric Care at Guantanamo*, N.Y. Times, Nov. 12, 1016, available at https://www.nytimes.com/2016/11/13/world/guantanamo-bay-doctors-abuse.html.
[12] E.g., SASC Report at 132-145.

Several of these abuses were clearly designed to exploit the men's faith. Others were simply gratuitous. None of it improved intelligence gathering.[13]

Today, 39 of the nearly 800 Muslim men and boys who have been held captive at Guantánamo at some point remain. This includes men subjected to the CIA's Torture Program. Twelve have been charged criminally in the fundamentally broken military commission system. The rest – including 13 already unanimously recommended for transfer out by every executive branch agency with a significant national security function – languish in indefinite detention.

Notwithstanding changes that have occurred at Guantánamo over the years, the prison will forever be synonymous with torture and torture's legacy will continue to infect and damage nearly all aspects of its operation, including the men themselves.

II. Three Important Takeaways from the 12/7 Hearing

1. <u>There is bipartisan agreement that the Guantánamo military commissions have failed, and that negotiated resolutions are the path forward</u>

Brigadier General John Baker, Chief Defense Counsel for the Military Commissions Defense Organization, opened the hearing by explaining in no uncertain terms that the military commissions have failed, why, and the only realistic path forward:

> I am well-positioned to address the subtitle, "Ending 20 Years of Injustice." In a word, the only path to ending injustice in the military commissions – for the accused detainees, for the country, and above all for the victims of 9/11 and the other crimes currently on trial in Guantánamo – is to bring these military commission proceedings to as rapid a conclusion as possible. Notice I do not say "as just a conclusion as possible." It is too late in the process for the current military commissions to do justice for anyone. The best that can be hoped for at this point, more than 20 years after the crimes were committed, is to bring this sordid chapter of American history to an end. And that end can only come through a negotiated resolution of the cases.
>
> …
>
> Justice delayed is justice denied. But the injustice meted out by the Guantánamo military commissions to the defendants, public, and victims extends far beyond mere delay. These delays are the direct result of government decisions that have corrupted the process from its outset, and that make any just or satisfying future outcomes of commission cases – in the form of legitimate convictions and fair sentences – unlikely if not impossible. Allowing the military commissions to proceed in their current form will thus result at very best in many more years of agonizing delay, and at worst in verdicts that – following those years of delay – are overturned on appeal. To be blunt, the government is gambling with the victims' real need to achieve closure in some form. That is unconscionable.

[13] Fallon, *Unjustifiable Means* at 204, 207.

"At the heart of the commissions' problems," Gen. Baker continued, "is their original sin, torture." "More specifically, the government's fear that the truth will become public is what has most undermined the commission processes."[14]

Colleen Kelly, whose younger brother, Bill Kelly Jr., was killed in the North Tower of the World Trade Center on September 11th, echoed Gen. Baker's remarks:

> [I]n May of 2012—more than a decade after 9/11—five men were arraigned. Today, another nine years and seven months later, a trial has not even begun. Instead, family members have heard years of argument in pre-trial hearings. While these hearings have produced no legal justice for 9/11, they have revealed the shocking role of torture in undermining the 9/11 prosecution. Instead of learning how and why the attacks were carried out, and who was responsible for doing what, family members have followed seemingly endless litigation largely concerned with the defendants' torture by government agents and the government's attempts to keep that information from coming to light.
>
> …
>
> The Government ultimately chose military commissions as the legal mechanism for accountability for 9/11. Today, I am asking this Committee to acknowledge that the military commissions have fundamentally failed, and to encourage the Biden Administration to end them and find a means to bring the 9/11 case to resolution
>
> …
>
> In searching for alternatives, our organization's members have met with federal prosecutors from the Southern District of New York and the Eastern District of Virginia, to learn more about prosecuting complex terrorism trials. In 2017, we began exploring the option of pretrial agreements with legal advisors. Today we advocate strongly for pursuing pre-trial agreements in the 9/11 case
>
> …
>
> We want to share what we, as family members, would hope to achieve by reaching agreements in these cases. We understand that in exchange for guilty pleas the government would in all likelihood no longer seek the death penalty; this would be in part in recognition of the torture each of the defendants experienced. What we would hope to finally get, however, is answers to our questions about 9/11 from the defendants—answers and information that we have been denied for two decades.

Nobody at the hearing seriously disputed that the military commissions have failed, and that pursuing plea agreements is the only viable path forward. Indeed, Charles D. Stimson – a Senior

---

[14] Testimony of John G. Baker, Brigadier General, United States Marine Corps, Chief Defense Counsel Military Commissions Defense Organization, Department of Defense, before the Senate Judiciary Committee, 7 December, 2021, available at https://www.judiciary.senate.gov/imo/media/doc/Baker%20Testimony2.pdf.

Legal Fellow at The Heritage Foundation and former Deputy Assistant Secretary of Defense for Detainee Affairs (DASD-DA) during the Bush Administration – opened his remarks be saying: "I would like to associate myself" with Gen. Baker's testimony.[15]

2. Myths about Guantánamo continue to persist

    i. Fact: Detainees do not receive adequate medical care

Several times during the hearing witnesses and Committee Members referred to improvements over the years in conditions of confinement at Guantánamo, including in at least one instance specifically that the men receive quality medical care. The Defense Department has repeatedly made that same claim.

The claim is not accurate. As several independent medical experts explained in their statement for the record:

> Indeed, for years now a variety of detainees' medical needs – which in many cases arise out of or are exacerbated by their torture and prolonged indefinite detention – have outstripped Guantánamo's medical care capabilities. This limitation, coupled with the current statutory ban on detainee transfers to the United States, has led to repeated and ongoing violations of the United States' legal obligation to provide Guantánamo detainees adequate medical care. To the extent there was any dispute in the past about the scope of that obligation, Congress resolved it through the Fiscal Year 2020 National Defense Authorization Act, which requires that detainees are provided "evaluation and treatment that is accepted by medical experts and reflected in peer-reviewed medical literature as the appropriate medical approach for the relevant condition, symptoms, illness, and/or disease and that is widely used by health care professionals."[16]
>
> Guantánamo's medical care challenges are going to worsen with time; as the men continue to age, it should be expected that they will increasingly present with medical needs that cannot be managed at Guantánamo, such as strokes, severe heart disease, kidney failure, and myriad significant mental health conditions—including suicidality (which is already an issue for multiple detainees).

Serious medical care deficiencies the experts identified include:

- Guantánamo lacks the necessary medical-care capabilities to appropriately address the medical issues that detainees are facing
- Detainees lack meaningful access (and in many cases have no access at all) to independent medical experts
- Detainees lack meaningful access to their own medical records

---

[15] Closing Guantanamo: Ending 20 Years of Injustice, Hearing before the Senate Judiciary Committee, Dec. 7, 2021 at 48:35, available at https://www.judiciary.senate.gov/meetings/closing-guantanamo-ending-20-years-of-injustice.
[16] National Defense Authorization Act for Fiscal Year 2020 § 1046, Public Law 116-92, Dec. 19, 2019, available at https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf.

- Security-related policies and/or practices at times supersede or constrain medical professionals' authority and decision-making
- Some detainees understandably do not trust military medical professionals

As the independent medical experts discussed in more detail in their statement, these deficiencies trace back to and/or are exacerbated by U.S. torture.[17] As one of the experts warned recently, "If the problems aren't addressed and Guantánamo remains open, I'm very concerned that men will begin to die."[18]

ii. Fact: Closing Guantánamo does not require brining men to the United States for prosecution and/or continued indefinite detention

At several points during the hearing, discussion around closing Guantánamo appeared to assume that doing so requires bringing men to the United States, either for continued indefinite detention or for prosecution. It does not, nor should it. Moreover, bringing men to the U.S. is prohibited under current law.

As was noted repeatedly at the hearing, by both Democrat and Republican Committee Members and witnesses, President Biden has the authority to close Guantánamo. Specifically, he can and should:[19]

Swiftly transfer detainees who have not been or will not be charged with a crime

This process should begin with immediate transfer of the 13 men long approved for transfer by the Guantánamo Review Task Force or the Periodic Review Boards. The remaining men who have not and will not be charged with a crime should be repatriated or resettled to third countries as soon as possible.

Men who are transferred must not be sent to a country where there are substantial grounds for believing they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment (CIDT), including continued indefinite detention without charge or trial, or otherwise be forcibly transferred. Nor should they be subject to transfer conditions that violate their human rights.

To facilitate expeditiously negotiating transfer agreements with foreign governments, the U.S. should agree to:

---

[17] For additional details see Deprivation and Despair, The Crisis of Medical Care at Guantanamo, a report by the Center for Victims of Torture and Physicians for Human Rights (2019), available at https://www.cvt.org/sites/default/files/attachments/u131/downloads/2019_phr-medical-report_v5.pdf.

[18] Scott Roehm, Torture's Terrible Toll, Voices, January 11, 2021, available at https://www.opensocietyfoundations.org/voices/tortures-terrible-toll.

[19] Hina Shamsi, Rita Siemion, Scott Roehm, Wells Dixon, Rev. Ron Stief and Colleen Kelly Towards a New Approach to National and Human Security: Close Guantánamo and End Indefinite Detention, September 11, 2020, available at https://www.justsecurity.org/72367/toward-a-new-approach-to-national-and-human-security-close-guantanamo-and-end-indefinite-detention/.

- Provide sufficient funding for effective rehabilitation and reintegration, which in any individual case may include, but not be limited to, medical and psychological care, housing, education, job training, a living stipend for some period, and family reunification.
- Provide detainees (through their counsel for those represented) and foreign officials with detainees' complete medical records, declassified if / where necessary, subject to detainees' consent.
- Permit foreign government medical personnel to examine detainees, subject to detainees' consent.
- Permit diplomatic officials from foreign governments to participate in visits or interviews; (i.e., such visits should not be limited to security personnel).
- To the maximum extent possible, involve counsel in the transfer negotiation process, in particular with respect to providing foreign governments with holistic and accurate information (whether proactively or in response to questions).
- Continue to allow the International Committee of the Red Cross to conduct "exit interviews" with detainees who are designated for transfer, and ensure such interviews are conducted with sufficient lead time to adequately address any resulting concerns.
- Work with resettling governments to ensure that resettled detainees are provided with a secure, recognized legal status, with a clear track to permanent residency for detainees who wish to reside permanently in transfer countries.

As discussed above, pursue plea agreements with detainees the government is prosecuting or will prosecute

Plea negotiations should be governed by the following principles:

- There is no historical analogue to this context, which provides an opportunity for creative solutions.
- Federal judges can hold arraignments, take pleas, enter judgements, and impose sentences via videoconference from Guantánamo with consent of all parties.
- There are significant rights and accountability concerns on all sides of these cases that must be accounted for.
- Victims and their family members deserve to know, and should be provided, as much detail as possible about the planning and execution of the September 11, 2001 attacks, or other attacks in which the defendants were involved.
- For plea deals that recommend incarceration beyond time already served at Guantánamo, the administration should prioritize negotiating agreements with foreign governments that allow sentences to be served outside the United States, subject to any terms of the plea deal regarding conditions of confinement.

For any detainee for whom there is not sufficient evidence, untainted by torture and/or CIDT, to continue to prosecute, the administration should withdraw any charges and apply the steps outlined above for detainees who have not been charged with a crime.

iii. Fact: The men who remain are not "too dangerous to release"

The idea that Guantánamo cannot be closed because it is too dangerous to repatriate or resettle the men who remain there is perhaps the most frequently reiterated myth pressed by those who oppose closing the prison. Major Gen. Michael R. Lehnert, USMC (Ret.) debunked this myth directly in his written testimony at the hearing:

> Who gains by keeping Guantánamo open? Not America. Those who would do us harm are the ones who gain. They point to the existence of Guantánamo as proof that America is not a nation of laws. They use Guantánamo as a recruiting tool. They do not want us to close Guantánamo. Some of you might be thinking. "My constituents don't ever ask me about Guantánamo" and you'd be correct. Most of America
>
> Now some are going to worry that detainees who are released might turn around and try to harm us. The question of risk is real and I acknowledge it. My life as a Marine involved managing risk. But in my view the damage caused by continuing to ignore the rule of law and gifting a recruitment tool to our enemies far outweighs the risk that some of these aging and sickly detainees might one day engage in terrorism. It is hard to overstate how damaging the continued existence of Guantánamo has been to our national security and the fundamental values we stand for as a nation. Who we are cannot be separated from what we do. It is past time to close Guantánamo and reaffirm who we are as a nation.[20]

Major Gen. Lehnert is far from alone when it comes to military and other national security officials who support closing Guantánamo.[21]

Those who perpetuate the "dangerousness" myth often fall back on false claims about "recidivism" rates of men released from Guantánamo; indeed, certain witnesses and Committee Members repeated these false claims during the hearing.

Their argument is specious for two reasons: first, and most important, "recidivism" is not a legitimate justification for indefinite detention without charge or trial, at least not in a country that purports to respect the rule of law. Second, the "recidivism" claims advanced during the hearing to justify keeping Guantánamo open are inaccurate or misleading in a number of respects.

Once every six months, the Director of National Intelligence (DNI) – in consultation with the Director of the Central Intelligence Agency and the Secretary of Defense – is required to make public an unclassified "Summary of the Reengagement of Detainees Formerly Held at

[20] Statement for the Record of Major General Michael R. Lehnert, UMSC (Ret.), before the Senate Judiciary Committee, Dec. 7, 2021, available at https://www.judiciary.senate.gov/imo/media/doc/Lehnert%20Testimony.pdf.
[21] See, e.g., https://www.humanrightsfirst.org/campaigns/close-guantanamo/rml-commentary.

Guantánamo Bay, Cuba" (Reengagement Report). DNI's most recent such report[22] was made public on April 5, 2021.

Ostensibly on the basis of DNI's numbers, some claim roughly a 30% recidivism rate for former Guantánamo detainees. However, if being used to gauge the likelihood that a detainee transferred *now* will subsequently engage in "terrorist activities" (as that term is defined in DNI's reports), the most accurate figure for that purpose is 5.1%.

The 30% figure deceptively combines two very different statistical categories in the Reengagement Report. The first category is for former detainees "confirmed of reengaging" (17.1%). The second is for those "suspected of reengaging" (14.3%).

The standard for inclusion in the "confirmed" category is "a preponderance of information which identifies a specific former Guantánamo detainee as directly involved in terrorist or insurgent activities." In other words, DNI considers reengagement "confirmed" if it is more likely than not – i.e., there is a 51% chance – that a former detainee is directly involved in terrorist activities. That is not an especially high threshold to meet, but it is significantly more burdensome than the minimal standard for inclusion in the "suspected" category: "Plausible but unverified or single-source reporting indicating a specific former GTMO detainee is directly involved in terrorist or insurgent activities."

It is not reasonable to count as "recidivists" the 14.3% of former detainees who are merely "suspected" of reengaging given how low the bar has been set for inclusion in that category.

Moreover, an overwhelming majority of the 17.1% of former detainees that DNI assess are more-likely-than-not to have "reengaged" was transferred during the Bush Administration, before current rules and processes governing transfers were in place.

As of the most recent DNI report, 729 detainees had been transferred out of Guantánamo. According to DNI, 125 of them were "confirmed of reengaging." 115 of those 125 were transferred during the Bush Administration—again, before both rigorous internal processes and congressional restrictions on foreign transfers (in the form of security-related certification requirements) were implemented.

DNI assesses that only 5.1% of detainees – 10 men total, 2 of whom are deceased – transferred since 2009 are "confirmed of reengaging." To the extent that the issue of recidivism arises in the context of discussions around transferring additional detainees out of Guantánamo and closing the detention facility, this is the number that matters most.

3. <u>There is bipartisan agreement that the Biden administration owes the Committee answers to key questions and should have attended the hearing</u>

[22] Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba, available at https://www.dni.gov/files/documents/Newsroom/12-18-20_Report_Summary_GTMO_Reengagement_20-01043_U_CR-OGC-Final.pdf.

Both Democrat and Republican Committee Members expressed frustration that the Biden Administration did not send a witness to the hearing who could speak on behalf of the administration. Senator Durbin noted specifically that he had written to President Biden in April, and to Attorney General Merrick Garland in July, regarding steps that the administration should be taking – and litigation approaches the Department of Justice ("DOJ") should abandon – but that he had not received a response to either.

The Committee should follow up with the administration, and in particular the Justice Department given that DOJ operates directly under the Committee's oversight jurisdiction. The Committee's question should include, but not be limited to, the following:

Is the administration considering plea agreements to resolve the military commission prosecutions?

For the reasons explained above, this is the only realistic forward for military commissions cases and one which appears to have bipartisan support.

Why are DOJ litigators fighting to hold men that senior DOJ officials have already agreed should be released?

The Justice Department is continuing to oppose in federal court the cases of men that senior officials from every national security agency, including DOJ, have already recommend be resettled or repatriated.

Why are government lawyers defending the use of torture-derived evidence, and resisting the application of fundamental human rights at Guantánamo?

In his letters to the President and the Attorney General, Senator Durbin raised serious concerns about litigation positions and approaches DOJ is taking in Guantánamo-related cases, which frustrate rather than facilitate closure. Since the time he sent those letters, government litigators have refused[23] to acknowledge that due process applies at Guantánamo, or to disclaim[24] authority to use torture-derived evidence against the men the government tortured.

Will the Justice Department open a criminal investigation into Majid Khan's torture?

The case of Majid Khan — who pled guilty and has been cooperating with the government for years — was discussed throughout the hearing. Mr. Khan recently became[25] the first CIA Torture Program survivor permitted to discuss publicly what was done to him. to tell the world his story. His detailed description of his torture, which led to the extraordinary clemency letter hand-written by the jury of senior military offices (rand referenced several times at the hearing),

---

[23] Ryan Goodman, What the US Government Brief Should Have Said in Al-Hela: On Guantanamo and Due Process, Just Security, July 12, 2021, available at https://www.justsecurity.org/77386/what-the-us-government-brief-should-have-said-in-al-hela-on-guantanamo-and-due-process/.
[24] Carol Rosenberg, Guantánamo Prosecutors Ask to Strike Information Gained From Torture, New York Times, July 17, 2021, available at https://www.nytimes.com/2021/07/17/us/politics/guantanamo-cia-torture.html.
[25] Carol Rosenberg, For First Time in Public, a Detainee Describes Torture at C.I.A. Black Sites, New York Times, October 28, 2021, available at https://www.nytimes.com/2021/10/28/us/politics/guantanamo-detainee-torture.html.

included obviously criminal conduct. Mr. Khan also revealed that the CIA videotaped[26] at least one of his interrogations, a fact it appears the CIA never told Senate Intelligence Committee investigators. In 2012, after a limited criminal investigation,[27] Assistant U.S. Attorney John Durham concluded there was not enough admissible evidence to charge anyone in connection with CIA torture. The Committee should require DOJ to explain whether that investigation included Mr. Khan's case; if so, what were the limitations on admissible evidence; and based on Mr. Khan's testimony why DOJ should not pursue an investigation now.

[26] Spencer Ackerman, "I Was Raped By The CIA Medics," Says Black-Site Survivor, Forever Wars, October 29, 2021, available at https://foreverwars.substack.com/p/i-was-raped-by-the-cia-medics-says.
[27] Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees, August 30, 2012, available at https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees.