Statement of Professor Claire Finkelstein, Harvey Rishikof and Members of the Center for Ethics and the Rule of Law (CERL) Working Group for the United States Senate Judiciary Committee Hearing on "Closing Guantánamo: Ending 20 Years of Injustice"

December 6, 2021

Senator Richard Durbin, Chairman
Senator Chuck Grassley, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Durbin and Ranking Member Grassley:

January 11, 2022 will mark the twentieth anniversary of the arrival of the first detainees to the Guantánamo Bay detention facility at the U.S. Naval base in Cuba. The base is also the site of the U.S. military commissions for trying detainees alleged to have committed offenses subject to military trial in the context of armed conflict with the United States. Closing this facility has been a stated goal of several administrations, including the Biden administration, and rightly so. The GTMO detention facility has a shameful history involving the infliction of brutal methods of interrogation on detainees, full details of which have yet to emerge. These methods have produced no appreciable intelligence benefits to date. Indeed, in the opinion of many experts, abuse of detainees and the failure to grapple honestly with this history has imposed grave costs on U.S. national security.[1] In addition, GTMO is a highly inefficient operation, one that is costing taxpayers sums vastly in excess of comparable detentions in federal facilities. GTMO operations have cost U.S. taxpayers upwards of 8 billion dollars to date, costs that will continue to increase disproportionately, given increased need for medical personnel and updated infrastructure. Yet with more than three dozen detainees remaining in U.S. custody in Guantánamo, and most of the cases before the military commissions still in pre-trial proceedings, the United States has made only incremental progress toward the goal of shuttering the facility in two decades of detention. Thus far, the Biden administration has announced no plans for shuttering the facility and bringing closure to this ignominious chapter in U.S. history.

I. The 2021 CERL Working Group on Guantánamo Bay

The Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania is a non-partisan interdisciplinary institute dedicated to preserving and promoting ethics and the rule of law in national security, warfare, and democratic governance. CERL issues periodic reports representing the views of independent experts in the national security field. In June of 2021, CERL assembled a working group to address the difficult legal and policy questions that arise in anticipation of renewed attempts to close the Guantánamo detention facility. The

[1] See Claire Finkelstein and Steve. N. Xenakis, *Repairing the Damage from Illegal Acts of State: The Costs of Failed Accountability for Torture,* in Interrogation and Torture: Integrating Efficacy with Law and Morality, eds. Steven J. Barela et. al, Oxford University Press, 2020; see also Douglas A. Johnson, Alberto Mora, and Averell Schmidt, *The Strategic Costs of Torture: How "Enhanced Interrogation" Hurt America,* Foreign Affairs, September/October 2016.

CERL 2021 Working Group on Guantánamo Bay is co-chaired by Professor Claire Finkelstein, a professor of criminal and national security law at the University of Pennsylvania and the Faculty Director of CERL and Mr. Harvey Rishikof, former Convening Authority for the commissions and a visiting professor of national security law at Temple University. The group comprises over thirty national security and counterterrorism experts, retired military officers, lawyers, former Department of Justice (DOJ) officials, psychologists, psychiatrists, academics, ethicists, and experts in the law of armed conflict. Members of the group are Republicans, Democrats and Independents, and the forthcoming recommendations of the group reflect the views of both current and former defense attorneys in the commission and former Guantánamo prosecutors. The views of the Working Group are intended to be non-partisan in nature and based on an objective assessment and application of facts and law.

The Working Group set out to study the current legal and policy challenges associated with closing the Guantánamo Bay detention facility. While it is unrealistic to expect complete agreement among the members of such a diverse group, a broad consensus has emerged on a number of critical points regarding the objective of closing Guantánamo and identifying alternative mechanisms to address the national security concerns related to such closure. The CERL Working Group will issue its comprehensive report on January 11, 2022. However, in order to assist the Senate Judiciary Committee in its December 7 hearing in advance of the official release of the report, the Working Group chairs have made an advance draft of the report available to the committee. In addition, Professor Finkelstein, Mr. Rishikof and a subsection of the Working Group have joined in making this statement.

II. Summary of Working Group Primary Findings

The Working Group unanimously concludes that closing the Guantánamo Bay detention facility (GTMO) is both feasible and desirable and that such closure would better advance the national security interests of the United States than continuing to detain the small number of individuals captured in the war on terror that remain at this facility. Guantánamo is currently home to thirty-nine detainees: thirteen are recommended for transfer, ten are in the military commission prosecution process, fourteen are being held pursuant to a determination that if released they will return to hostilities, and two are serving penal sentences as the result of conviction by the military commissions. Many, if not all, of these individuals suffer from the psychological and physical consequences of abusive treatment, practices federal judges, convening authorities, and even a former U.S. president has referred to as "torture."[2] This abuse represents a clear violation of protections established by both international and domestic law.

This history of torture overshadows and permeates every legal, medical and political decision the federal government makes relating to Guantánamo Bay. The impact of detainee abuse has complicated the prosecutorial process by creating issues related to the admissibility of both confessions and direct and derivative evidence, classification of evidence, and access to potentially favorable information held by the government. At the same time, the option of simply releasing all remaining detainees remains both unrealistic and undesirable from the standpoint of national security. The essential question is how to balance the legitimate national security concerns the U.S. faces against the need to restore both the reality and the perception of U.S commitment to rule of law values in the wake of many years of improper conduct on the part of the U.S. government, conduct that likely violated the international law of armed conflict, federal law, and the U.S. Uniform Code of Military Justice (UCMJ).

Information continues to emerge regarding the methods and extent of interrogational abuses used on detainees at Guantánamo Bay and in other detention facilities and black sites around the globe. With each such

[2] President Obama famously announced early in his presidency that "we tortured some folks." Former Convening Authority Susan Crawford said of the treatment of Mohammed al-Qahtani that "his treatment met the legal definition of torture," further explaining that this was why she did not refer his case for prosecution

revelation, public sentiment continues to shift against the continued operation of the Guantánamo prison facility and towards a desire not only to close the facility itself but to seek moral, legal and psychological closure of this troubling chapter in U.S. history. For the first time, a detainee at Guantánamo, Majid Khan, was able to publicly describe his black site torture, literally holding his shirt up to reveal physical scars for the entire courtroom to see.[3] The impact was immediate and significant. A jury of military officers recommended clemency for Mr. Khan and described the treatment he sustained in U.S. custody as "a stain on the moral fiber of America" and "a source of shame for the U.S. government."[4]

Under the law of armed conflict, there is a duty to repatriate prisoners of war (POWs) upon cessation of hostilities. While this obligation may or may not technically extend to Guantánamo detainees, the tradition of repatriation of belligerent detainees when war ends is of longstanding and is one the U.S. should readily embrace. For Taliban detainees, this principle is clearly implicated by the U.S. withdrawal of troops from Afghanistan in August of 2021. These detainees have never qualified for POW status, either because they have operated as a non-state group or because they have failed to meet the POW qualification requirements. Nevertheless, the end of hostilities between the U.S. and the Taliban raises a legitimate question whether the underlying principle of post-hostilities repatriation applies in their case. At a minimum, it would be consistent with the withdrawal of the U.S. from active hostilities in this conflict to resolve the ambiguity and indefinite detention of those who are detained based on their involvement in this conflict. More generally, the CERL Working Group is unanimous in its view that continued operation of the Guantánamo Bay detention facility undermines, rather than advances, U.S. national security interests.

The Working Group is also unanimous in seeing the military commissions as dysfunctional, a system unlikely ever to produce meaningful trials and impartial verdicts. Whatever the original intention, the military commissions have failed to provide either the promised transparency or justice, and most of the pending cases continue to languish in pre-trial proceedings, showing little hope of resolution. The commissions have been beset by extreme and unacceptable delays, largely due to the following factors: the geographic location; the lack of a governing body of law; the involvement of multiple bureaucracies and agencies that render procedures cumbersome and inefficient; multiple judges; the felt need on the part of the U.S. government to maintain high levels of secrecy; and repeated instances of governmental misconduct and interference with the process. This has created a near indelible taint that calls into question the likelihood these tribunals will be capable of producing impartial verdicts or outcomes perceived as legitimate. Accordingly, the Working Group proposes to disband the Guantánamo Bay facility over the course of the next twelve plus months and to abandon any hope of conducting trials before the U.S. military commissions as currently composed.

Resolving cases by guilty plea, wherever possible, is the preferred option, whether the pleas are effectuated in the commission system or in federal court. In either case, the desired outcome is most likely to be achieved by taking the death penalty off the table for those who are willing to plead guilty. The Working Group strongly supports the use of video teleconferencing in order to resolve a number of the outstanding commission cases, particularly where guilty pleas are concerned, since the NDAA and other restrictions on the use of federal funds to bring detainees into federal court can be obviated by conducting guilty pleas by video with the detainee's consent.[5] In addition to guilty pleas, teleconferencing could prove useful in resolving some of the remaining cases through the use of the concurrent military jurisdiction over war crimes vested in general courts-martial pursuant to Article 18 of the UCMJ. Even the military commissions have allowed proceedings conducted entirely through video

[3] See Carol Rosenberg, *For the First Time in Public, a Detainee Describes Torture at C.I.A. Black Sites,* N.Y. TIMES, Oct. 28, 2021.
[4] Carol Rosenberg, *U.S. Military Judge Condemns Terrorist's Torture and Urges Clemency,* N.Y. Times, Oct. 31, 2021.
[5] Steve Vladeck, *Can Detainees Plead Their Way Out of Guantánamo?* JUST SECURITY, May 17, 2016.

teleconferencing, including arraignments and sentencing proceedings. Needless to say, a full criminal trial could not be conducted by video.

With respect to detainees who are currently uncharged, the most likely resolution is repatriation, release, or transfer to other legal systems for resolution. There is presumably little appetite for charging detainees who have been detained many years without charge, given the insufficiency of evidence to make the charging decision thus far. Moreover, the legality of such delayed charges would be questionable, particularly given the history of abusive treatment and the concern that any evidence used to make new charging decisions might be tainted. The alternative to repatriation or release has been indefinite detention with no clear conditions for release. Such has been the situation of Abu Zabaydah, for example, who has been held for 20 years without charge and who was allegedly tortured nearly to death by the CIA. He has recently petitioned the U.S. District Court for the District of Columbia for release on the ground that the war between the U.S. and Al Qaeda is now over.[6] Under sound principles of international and domestic law, if there is no basis for charging a detainee with either a war or domestic crime, and the U.S. involvement in hostilities in Afghanistan is over, that individual should be released or repatriated.[7] This is all the more so if the only evidence against him was obtained under torture, which cannot legally be admitted into any U.S. court.

Substantial progress could be made by proceeding to transfer the thirteen detainees who have been released for transfer to foreign jurisdictions, yet they remain incarcerated at GTMO because of the failure to coordinate with foreign partners who might accept them. Notably, the federal government has not yet dedicated the personnel that would be needed to resolve the cases of the detainees, both charged and uncharged, at GTMO. This is particularly true where the Department of State is concerned, where engagement is critical in order to effectuate the international diplomacy necessary to transfer detainees and to liaison with the Department of Defense (DOD) to ensure that these comport with the Convention Against Torture's requirement of *nonrefoulement*, as well as to safeguard U.S. strategic relations with foreign nations. The Office of the Special Envoy for Guantánamo Closure at the State Department tasked with the job of detainee transfer was shut down and it has not reopened.[8] It is the recommendation of the Working Group that this office be restored.

Though the Working Group does not believe impartial justice can be achieved by prosecution before the currently composed military commissions, it nevertheless maintains that if trials are to move forward in the facility, due process rights must apply to all military commission proceedings at Guantánamo. Of particular importance is the right of each defendant in the commission process to view the government's evidence against him, a right of unquestioned stature in federal courts and one that is critical for determining whether continued detention is justified. A recent case argued before the U.S. Circuit Court for the District of Columbia, *Al Hela v. Biden*, considers whether ex parte filings, hearsay, and other evidence used to justify Abdulsalam Ali Abdulrahman Al-Hela's detention should in fact be admissible in court. The oral arguments before the en banc court occurred on September 30, 2021.[9] Developments in this case may have important implications for the application of due process rights at GTMO and could possibly open different avenues for detainees to challenge the basis of their detention. The case could also necessitate a revision of current government procedures regarding evidence and transfers.

Another bar to the ability to hold fair trials before the commissions stems from the degree of over-classification involved in the military commission process. The government's ability to censor and approve every

[6] Zayn Al Abidin Muhammad Husayn v. Lloyd Austin III, No. 08-CV-1360 (EGS).
[7] Members of the Working Group have differing views about the scope of the president's authority to prolong detention in the absence of charges following the cessation of hostilities. There is general agreement that there should at a minimum be a high bar for such continued preventive detention and that the administration has the burden of demonstrating future dangerousness in order to continue detention outside the commission process or other legal proceeding.
[8] Charlie Savage, *Office Working to Close Guantánamo Is Shuttered*, N.Y. TIMES (Jan. 28, 2013),
[9] Oral Argument for Abdulsalam Ali Al-Hela v. Joseph Biden.

piece of information given to cleared defense counsel poses a serious impediment to the legitimacy of both detention review proceedings and criminal trials. Because of the substantial risk of government embarrassment resulting from full disclosure of the details of the CIA interrogation program, its review of information is inherently conflicted, creating a genuine risk of over classification. Moreover, most detainees and their lawyers are never able to see a substantial portion of the evidence available to the prosecution, though this feature is not unique to commission proceedings.[10] Indeed, the discussions of the Working Group made clear that excessive classification and the government's desire to protect against public disclosures involving the use of torture have contributed more than any other factor to the paralysis in the military commissions and the inability of the prosecution and the defense to move into the trial phase of the commission process.

Improved clarity regarding the categorization of the remaining GTMO detainees is critical, not only for resolving current cases but for avoiding the legal confusion surrounding detainee status in future conflicts, especially against non-state organized armed groups. Some members of the Working Group believe that most detainees should be identified as civilians who directly participated in hostilities against U.S. forces or their allies, although we note this is not a consensus view. Other members consider these detainees to qualify as unprivileged enemy belligerents – members of enemy organized armed groups. Importantly however, this difference in no way impacts the broader recommendations related to closure, alternative criminal prosecution options, and due process rights. The full Report will discuss the background and history of the status question and articulates several recommendations relating to this question.

III. Summary of Draft Working Group Recommendations

The key recommendations presented in the Working Group's draft report to date are as follows:[11]

1. President Biden should rescind Executive Order (EO) 13823 and make closing Guantánamo Bay detention facility a national priority. It should direct the Department of Defense (DoD) to close the military commissions and the detention facility no later than the end of the 2022-23 fiscal year.

2. The Department of Defense (DoD) should instruct the convening authority to maximize the use of incentives in order to resolve as many of the defendants' cases as possible in the commissions by guilty plea, such pleas to be conducted either in the commissions or in federal court by way of videoconference. In order to effectuate such pleas, DoD could agree to eliminate the death penalty from the range of possible sentences for defendants willing to plead guilty.

3. In order to allow the president to make use of the broadest range of options in attempting to close Guantánamo, Congress should remove the prohibition on using federal funds to transfer detainees to federal court from facilities outside the territorial jurisdiction of the United States from future NDAAs, starting with the 2022 NDAA.

4. If bringing detainees into federal court remains foreclosed by the current ban in place in the NDAA and other funding restrictions in federal appropriations, DoD should consider invocation of General Courts-Martial jurisdiction to prosecute any individual who does not plead guilty in the commissions or federal court, or who is not released or repatriated.

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[10] See for example the Classified Information Procedures Act (CIPA), at 2054 and Synopsis Of Classified Information Procedures Act (CIPA) | JM | Department of Justice. Note that unlike the process utilized by federal courts, the decision as to whether unclassified substitutes satisfy defendant's rights is influenced far more extensively by outside agencies directly involved in the review process.

[11] Working Group members will have the option to exempt themselves from particular recommendations in the final draft. The recommendations will be finalized in the version released on January 11, 2021.

5. Congress should mandate that evidence derived from illegal government activity be subject to exclusion in military tribunals to the same extent it would be excluded in a federal criminal court.

6. Congress or the administration should create a governmental task force to review the status of each detainee currently interned at Guantánamo. Such a task force should seek to identify a mechanism of resolution for each on-going case as well as assess detainee health and physical condition as needed to conduct successful repatriation or transfer. The task force should also work with the Department of State (DoS) to identify countries that are willing to accept detainees for transfer or release and then serve as a coordinating body to facilitate such transfers.

7. Congress should review the current Military Commissions Act (MCA) (2009) and consider a variety of amendments, including but not limited to: the use of civilian life-tenured judges to preside over trials; reevaluation of the status distinctions for detainees; revision of the MCA Punitive Articles to remove offenses that are not closely aligned with widely accepted war crimes; and integration of a "fruit of the poisonous tree" exclusionary rule pertaining to admissible evidence.

8. The United States Office of the Solicitor General should revise its position that due process fails to apply to Guantánamo detainees. Accordingly, the Office of Legal Counsel (OLC) should clarify the correct position on this matter, namely that due process applies to all American tribunals capable of adjudicating detention as a punishment as well as to habeas proceedings.

9. The Office of Legal Counsel (OLC) should issue an opinion advising that the State Secrets Privilege cannot be legitimately invoked when doing so would serve to obscure U.S. involvement in inappropriate or potentially unlawful activity.

10. Any currently uncharged individuals should either be charged or transferred to other countries, at least to the extent that hostilities with that detainee's nation of origin have ceased. At a minimum, Congress could impose a high burden on the Department of Defense to justify continued detention of uncharged individuals. Any continuing detention without charge must be ruled lawful by a court with criminal jurisdiction over the individual based on a judicial finding that if released the individual poses a substantial risk of returning to hostilities in the context of an ongoing armed conflict against the United States.

11. The Senate Judiciary Committee should conduct hearings and issue a report, comparable to the SASC and SSCI Reports, to explore the role of the legal profession in facilitating policy decisions related to detention and interrogation that were and remain inconsistent with prevailing legal standards. This is critical in order to clarify the standards of the profession for government and private lawyers advising the federal government for any future conflict.

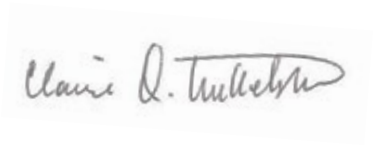
12. The Office of Legal Counsel (OLC) should issue a memorandum imposing a presumption of declassification of all government documents relating to torture or other forms of illegal treatment of detainees in U.S. custody associated with the war on terror. This presumption should be rebutted only based on legitimate secrecy concerns and may not for the purpose of concealing illegal or improper government conduct.

It is the view of the signatories of this statement that the above recommendations provide implementable steps that Congress and the Biden administration can take that will enhance U.S. national security. Implementing these recommendations will not only enable the United States to close the Guantánamo Bay detention facility but also to take steps towards repairing the damage that operation of the detention facility has done to the perception of U.S. commitment to the rule of the law and to the legitimacy of U.S. claimed national security imperatives. We remain at the Committee's disposal to assist with evaluation of this critical matter and respectfully urge the

Committee to make both closing Guantánamo Bay and grappling with the history of torture one of its highest priorities.

Sincerely,

Working Group Co-Chairs:



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