

**Questions for the Record from Senator Charles E. Grassley  
Hearing on “Closing Guantanamo: Ending 20 Years of Injustice”  
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**1) Of the 39 remaining detainees at Guantanamo, 13 are held in law-of-war detention but are recommended for transfer if security conditions are met.**

**a. What are the prerequisites to a transfer of a Guantanamo detainee?**

Congress has, over time, legislated certain requirements with respect to the transfer of Guantanamo detainees. For example, as recently as in the National Defense Authorization Act for Fiscal Year 2022 (FY22 NDAA), enacted into law on December 27, 2021 as Public Law 117-81, Congress mandated that certain provisions of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115–232) (FY19 NDAA) related to transfer of detainees be extended through the end of 2022, as they had in the prior two NDAA since 2019.<sup>1</sup> These provisions, in relevant part, prohibit the transfer of detainees to the United States and certain other countries. Specifically, with respect to transfers to the United States, the FY19 NDAA (as extended by the FY22 NDAA) provides that:

No amounts authorized to be appropriated or otherwise made available for the Department of Defense may be used...to transfer, release, or assist in the transfer of or release to or within the United States, its territories, or possessions Khalid Sheikh Mohammed or any other detainee who...is not a United States citizen or a member of the Armed Forces of the United States[] and...is or was held on or after January 20, 2009, at United States Naval Station, Guantanamo Bay, Cuba, by the Department of Defense.<sup>2</sup>

Likewise, with respect to the transfers to certain foreign countries, the FY19 NDAA (as extended by the FY22 NDAA) provides that:

No amounts authorized to be appropriated or otherwise made available for the Department of Defense may be used...to transfer, release, or assist in the transfer or release of any individual detained in the custody or under the control of the Department of Defense at United States Naval Station, Guantanamo Bay, Cuba, to the custody or control of any country, or any

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<sup>1</sup> See P.L. 117-81 §§ 1032-1033 (2021).

<sup>2</sup> See P.L. 115-232 § 1033 (2018).

entity within such country, as follows: (1) Libya. (2) Somalia. (3) Syria. (4) Yemen.<sup>3</sup>

In prior NDAAAs, Congress has set out certain requirements for the Executive Branch to follow with respect to periodic reviews of the continued detention of individuals at Guantanamo Bay and has also mandated that the Executive Branch notify Congress of transfers of Guantanamo detainees and to make certain certifications to Congress prior to such transfers. For example, with respect to congressional notification and certification, in the National Defense Authorization Act for Fiscal Year 2016 (FY16 NDAA), Congress provided that, subject to certain exceptions:

[T]he Secretary of Defense may not use any amounts authorized to be appropriated or otherwise available to the Department of Defense to transfer any individual detained at Guantanamo to the custody or control of the individual's country of origin, any other foreign country, or any other foreign entity unless the Secretary submits to the appropriate committees of Congress [a] certification described in subsection (b) not later than 30 days before the transfer of the individual...that—

(1) the transfer concerned is in the national security interests of the United States;

(2) the government of the foreign country or the recognized leadership of the foreign entity to which the individual detained at Guantanamo concerned is to be transferred—

(A) is not a designated state sponsor of terrorism or a designated foreign terrorist organization;

(B) maintains control over each detention facility in which the individual is to be detained if the individual is to be housed in a detention facility;

(C) has taken or agreed to take appropriate steps to substantially mitigate any risk the individual could attempt to reengage in terrorist activity or otherwise threaten the United States or its allies or interests; and

(D) has agreed to share with the United States any information that is related to the individual;

(3) if the country to which the individual is to be transferred is a country to which the United States transferred an individual who was detained at United States Naval Station, Guantanamo Bay,

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<sup>3</sup> *Id.* § 1035.

Cuba, at any time after September 11, 2001, and such transferred individual subsequently engaged in any terrorist activity, the Secretary has—

(A) considered such circumstances; and

(B) determined that the actions to be taken as described in paragraph (2)(C) will substantially mitigate the risk of recidivism with regard to the individual to be transferred; and

(4) includes an intelligence assessment, in classified or unclassified form, of the capacity, willingness, and past practices (if applicable) of the foreign country or foreign entity.<sup>4</sup>

The question whether a Guantanamo detainee ought be subject to continued law of war detention or transfer to a third country is generally governed by the Periodic Review Board (PRB) process established in 2011 under Executive Order 13,567 and the procedures required to be promulgated by the Secretary of Defense under Section 1023 of the National Defense Authorization Act for Fiscal Year 2012 (FY12 NDAA).<sup>5</sup> That process was reiterated in 2018 by Executive Order 13,823, which provides in relevant part that:

Unless charged in or subject to a judgment of conviction by a military commission, any detainees transferred to U.S. Naval Station Guantánamo Bay after the date of this order shall be subject to the procedures for periodic review established in Executive Order 13567 of March 7, 2011 (Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force), to determine whether continued law of war detention is necessary to protect against a significant threat to the security of § United States.<sup>6</sup>

The PRB process set forth in E.O. 13,567 requires an assessment every three years of whether “[c]ontinued law of war detention...is necessary to protect against a significant threat to the security of the United States,” and if such detention is not necessary, requires that “rigorous efforts [be] undertaken to identify a suitable transfer location for any such detainee, outside of the United States, consistent with the national security and foreign policy interests of the

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<sup>4</sup> See P.L. 114-92 § 1034.

<sup>5</sup> See Executive Order 13,567, *Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, 76 Fed. Reg. 13277 (Mar. 7, 2011), available online at <<https://www.govinfo.gov/content/pkg/FR-2011-03-10/pdf/2011-5728.pdf>>; see also P.L. 112-81 § 1023.

<sup>6</sup> See Executive Order 13,823, *Protecting America Through Lawful Detention of Terrorists*, 83 Fed. Reg. 4831 (Jan. 30, 2018), available online at <<https://www.govinfo.gov/content/pkg/FR-2018-02-02/pdf/2018-02261.pdf>>.

United States” and that “[t]he Secretary of State, in consultation with the Secretary of Defense, [is] responsible for obtaining appropriate security and humane treatment assurances regarding any detainee to be transferred to another country, and for determining, after consultation with members of the Committee, that it is appropriate to proceed with the transfer.”<sup>7</sup>

As of September 23, 2022, the Biden Administration had approved for transfer 21 of the 36 detainees being held in law of war detention at Guantanamo Bay. One other detainee, Majid Khan, is awaiting transfer having completed his sentence pursuant to a plea deal and cooperation with prosecutors.<sup>8</sup>

Recent transfers of detainees to foreign countries by the Biden Administration include the transfer of Mohammad al-Qahtani to Saudi Arabia in March 2022 and the transfer of Sufiyan Barhoumi to Algeria in April 2022.<sup>9</sup> Despite al-Qahtani being held at Guantanamo Bay because of his role as the suspected “20th hijacker” during the 9/11 terrorist attacks that killed nearly 3,000 Americans on U.S. soil,<sup>10</sup> in June 2021, the PRB determined that his continued law of war detention was no longer necessary to protect against a significant threat to the security of the United States.<sup>11</sup>

**b. Are their home countries capable of providing adequate security for the transfer of these detainees?**

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<sup>7</sup> See E.O. 13,567, *supra* n. 5 at §§ 2, 4.

<sup>8</sup> See Carol Rosenberg, *Libyan Held at Guantánamo Bay Is Approved for Transfer*, New York Times (Sept. 23, 2022), available online at <<https://www.nytimes.com/2022/09/23/us/politics/libyan-guantanamo-transfer.html>>; Jess Bravin, *Biden Administration Quietly Steps Up Effort to Close Guantanamo*, Wall Street Journal (Sept. 17, 2022), available online at <<https://www.wsj.com/articles/biden-administration-quietly-steps-up-effort-to-close-guantanamo-11663412402>>.

<sup>9</sup> See Department of Defense, *Guantanamo Bay Detainee Transfer Announced* (Mar. 7, 2022) (al-Qahtani), available online at <<https://www.defense.gov/News/Releases/Release/Article/2957801/guantanamo-bay-detainee-transfer-announced/>>; Department of Defense, *Guantanamo Bay Detainee Transfer Announced* (Apr. 2, 2022) (Barhoumi), available online at <<https://www.defense.gov/News/Releases/Release/Article/2987202/guantanamo-bay-detainee-transfer-announced/>>.

<sup>10</sup> See Department of Defense, *Guantanamo Detainee Profile: Mohammad Mani Ahmad al-Qahtani (SA-063)*, available online at <[https://www.prs.mil/Portals/60/Documents/ISN063/20160309\\_U\\_ISN063\\_GOVERNMENTS\\_UNCLASSIFIED\\_SUMMARY\\_PUBLIC.pdf?ftag=YHF4eb9d17](https://www.prs.mil/Portals/60/Documents/ISN063/20160309_U_ISN063_GOVERNMENTS_UNCLASSIFIED_SUMMARY_PUBLIC.pdf?ftag=YHF4eb9d17)> (“Mohammad Mani Ahmad al-Qahtani (SA-063) attempted to enter the United States on 4 August 2001, after almost certainly having been selected by senior al-Qa’ida members to be the 20th hijacker for the 9/11 attacks....He was denied entry to the United States by Immigration and Naturalization Service officers who found the circumstances of his travel and his conduct to be suspicious.”).

<sup>11</sup> *Id.*

While the Biden Administration determined in the cases of al-Qahtani and Barhoumi that their respective home countries, Saudi Arabia and Algeria, could provide the necessary security assurances to warrant their transfer to those countries,<sup>12</sup> the fact that the current Administration and the three prior ones—Republican and Democrat alike—have been unable to transfer all of the individuals approved during their respective administrations makes clear that there are significant challenges in finding countries that are willing to take these detainees and can provide the necessary security and humanitarian assurances that the United States requires. Indeed, for some detainees, transfer their home country—even if that nation would be willing to take them (which they often are not) and could provide relevant security assurances (which they often cannot)—is not an option because transfer to those countries might violate U.S. law and policy with respect to humanitarian treatment, including our obligations under the Convention Against Torture as implemented in U.S. law.

**c. What kinds of security assurances would we need to transfer a detainee to another country other than their home country?**

As noted above, in the FY16 NDAA, Congress mandated that, at a minimum, detainees could only be transferred to certain countries that, among other things have “taken or agreed to take appropriate steps to substantially mitigate any risk the [detainee] could attempt to reengage in terrorist activity or otherwise threaten the United States or its allies or interests[] and...agreed to share with the United States any information that is related to the individual.”<sup>13</sup> In addition, Congress has required that if the country where the detainee is to be transferred has taken other detainees in the past and such detainees have “subsequently engaged in any terrorist activity,” these circumstances have been considered and that the country will be able to take appropriate steps to “substantially mitigate the risk of recidivism with regard to the individual to be transferred.”<sup>14</sup>

While these requirements are a good base minimum, given the 30%+ recidivism rate noted by the Office of the Director of National Intelligence in late 2020,<sup>15</sup> it is important that Congress consider tightening up these requirements and conducting robust oversight to ensure that the Administration is vigorously adhering to the requirements as the White House ramps up efforts to transfer as many detainees out of Guantanamo Bay as possible.

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<sup>12</sup> See *supra* n. 9.

<sup>13</sup> See *supra* n. 4.

<sup>14</sup> *Id.*

<sup>15</sup> See Office of the Director of National Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba* (declassified on Dec. 18, 2020), available online at <[https://www.dni.gov/files/documents/Newsroom/12-18-20\\_Report\\_Summary\\_GTMO\\_Reengagement\\_20-01043\\_U\\_CR-OGC-Final.pdf](https://www.dni.gov/files/documents/Newsroom/12-18-20_Report_Summary_GTMO_Reengagement_20-01043_U_CR-OGC-Final.pdf)>.

- d. In terms of finding third countries to accept Guantanamo detainees, is it correct that there have already been substantial, potentially exhaustive, efforts to locate countries willing to take them? Is there reason to believe the failure to find a country to accept them is from a lack of trying?**

Given the well-documented efforts of four consecutive Administrations to transfer as many detainees as possible out of Guantanamo Bay consistent with protecting American national security, including the efforts of two Presidents—Presidents Biden and Obama—who made clear their intent to close Guantanamo Bay permanently,<sup>16</sup> it is wholly reasonable to believe that there have already been substantial, and potentially exhaustive, efforts to locate countries willing to take them. Given this, our inability to find countries willing to accept Guantanamo detainees consistent with requirements designed to protect our nation is not due to a lack of effort on the part of the U.S. government.

- e. Do countries that have previously agreed to take detainees guarantee that they will be incapacitated for life?**

No. Countries that have agreed to take former Guantanamo detainees are not generally required to ensure that those detainees are incapacitated for life. Indeed, many are released immediately upon arrival or soon thereafter, whether because the security assurances obtained by the U.S. government do not require continued detention or because of other reasons. Moreover, over time, security assurances may be reduced, either as part of the agreement negotiated by the Executive Branch, or by the country to whom the individual was transferred. Notable examples of former Guantanamo detainees no longer being held by the nation they were transferred to—notwithstanding any ostensible security assurances that might have been in place at the time of transfer—include the five Taliban detainees released in 2014 in exchange Sgt. Bowe Bergdahl, each of whom were appointed to senior leadership positions in the new Afghan government following our precipitous withdrawal from that nation in August 2021.<sup>17</sup> It is worth noting that the Government Accountability Office determined that these individuals were

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<sup>16</sup> See, e.g., E.O. 13,492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities* (Jan. 22, 2009), available online at <> (“The detention facilities at Guantanamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order.”)

<sup>17</sup> See Tim Lister and Eliza Mackintosh, *Taliban Name Ex-Guantanamo Detainees and Wanted Nan to New Caretaker Government*, CNN (Sept. 8, 2021), available online at <<https://www.cnn.com/2021/09/07/asia/taliban-government-announcement-intl/index.html>> (“Four men receiving senior positions in government had previously been detained by the US at Guantanamo Bay, and were released as part of a prisoner swap for Sgt. Bowe Bergdahl in 2014: The Taliban appointed Noorullah Noori to acting minister of borders and tribal affairs, Abdul Haq Wasiq as acting intelligence director, Khairullah Khair to acting minister of information and culture and Mohammad Fazil Mazloom to deputy minister of defense. A fifth detainee released in the 2014 trade, Mohammed Nabi Omari, was appointed as the new governor of the southeastern province of Khost last month, according to Taliban”).

released in violation of federal law in place at the time, including congressional notification requirements, prohibitions on the use of funds, and the Antideficiency Act.<sup>18</sup>

**f. Do we have any system in place for evaluating whether countries that have previously accepted detainees have been successful in preventing them from rejoining their war against America and our allies?**

The United States has some limited capacity to evaluate whether countries that have previously accepted detainees have been successful in preventing them from rejoining their war against America and our allies. As noted above, in late 2020, the Office of the Director of National Intelligence determined that over 1/3 of the detainees released from Guantanamo had (or were suspected of having) returned to the fight against the United States and our allies.<sup>19</sup>

**g. Can it be assured that, if transferred, these detainees will never be able to rejoin the fight against America and our allies?**

It certainly cannot be assured that terrorist detainees released from Guantanamo Bay will never be able to rejoin the fight against America and our allies. To the contrary, we know, based on recent analysis from the Office of the Director of National Intelligence, that over 1/3 of the detainees released as of late 2020 are known to have (or suspected of having) returned to the fight against the United States and our allies.<sup>20</sup>

**2) It was suggested at the hearing that the best estimate of the recidivism rate for Guantanamo detainees is about 5%, based on ODNI's finding that about 5% of post 2009 released detainees are absolutely confirmed to have rejoined the war against the United States.**

**a. What is the total rate of known and suspected Guantanamo detainee recidivism tracked by ODNI?**

According to the Office of the Director of National Intelligence, as of late 2020, of the 729 individuals that had been transferred out of Guantanamo Bay at that point, over 1/3 of them (229 individuals) were known to have returned to the fight against the United States and our allies.

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<sup>18</sup> See Susan A. Poling, *Letter to the Hon. Mitch McConnell et al.*, Government Accountability Office (Aug. 21, 2014), available online at <<https://www.gao.gov/assets/b-326013.pdf>> (“As explained below, we conclude that DOD violated section 8111 because it did not notify the relevant congressional committees at least 30 days in advance of the transfer. In addition, because DOD used appropriated funds to carry out the transfer when no money was available for that purpose, DOD violated the Antideficiency Act.”)

<sup>19</sup> See *supra* n. 15.

<sup>20</sup> *Id.*

**b. Is the actual offender rate likely to be higher or lower than the rate of known and suspected recidivism?**

It is hard to know whether the actual offender rate is likely to be higher or lower than the rate of known and suspected recidivism identified by the Office of the Director of National Intelligence, but what is clear, is that at least a third of the detainees released from Guantanamo Bay are known or suspected of having returned to the fight against the United States or our allies. This is obviously much too high a rate and increases the risk to our nation, particularly as the Biden Administration considers releasing more and more of the handful of detainees remaining at Guantanamo Bay, a group that includes people like Khalid Shakih Muhammad, who at the time of the 9/11 attacks, served the “head of the al Qaida military committee and was Usama bin Laden's principal al Qaida operative who directed the 11 September 2001 attacks in the United States[.]”<sup>21</sup>

**c. Is intelligence as to suspected recidivism valuable in determining the risks of releasing Guantanamo detainees?**

Intelligence on the suspected recidivism rates of former Guantanamo detainees is, in my view, critically valuable in determining the risks of releasing similarly situated detainees in the future.

**d. Are detainees released after 2009 less dangerous because of a special process implemented by President Obama? If that process were implemented with regard to the current detainees, would that lower their recidivism rate to 5%?**

In my view, detainees released after 2009 were not less dangerous because of any “special process” implemented by President Obama, nor would the implementation of any such special process reduce the recidivism rate of detainees released at this time. The surest way to reduce recidivism rates of detainees at Guantanamo Bay that we fear may return to the fight is to continue their law of war detention consistent with the threat evaluation process required by Executive Order 13,567 and reiterated in Executive Order 13,823. Indeed, given the overall recidivism rates identified by the Office of the Director of National Intelligence in 2020, there is a strong argument to be made that the standards applied by the PRB ought be tightened even further. And to the extent that individuals are to be transferred if the relevant standards are met, the most effective way to ensure they do not return to the fight is to require those countries

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<sup>21</sup> See Department of Defense, Office for the Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba, *Unclassified Summary of Evidence: Khalid Shaykh Muhammed* (Feb. 8, 2007), available online at <<https://int.nyt.com/data/documenttools/78033-isn-10024-khalid-shaikh-mohammed-combatant/414bd1cf130bdfc8/full.pdf>>.

that take them to provide strong security assurances in writing, including, as appropriate, the continued detention of transferred individuals in those countries.

- e. **The current 39 detainees include not only those for whom we have found no country willing to make adequate security assurances with regard to the detainee, but also those who have been charged by the military commissions such as 9/11 mastermind Khalid Sheikh Mohammed and USS Cole attack mastermind Abd al-Rahim al-Nashiri. Is the likely recidivism rate for the remaining 39 detainees expected to be low?**

Given the highly dangerous history of a number of the individuals still detained at Guantanamo Bay, including KSM and Abd al-Rahim al-Nashiri as well as Ramzi bin al-Shibh and Mustafa Faraj Masud al-Jadid Mohammed (aka “Abu Faraj Al Libi”), the likely recidivism rate for the remaining detainees, including these individuals, would, in my view, be at least as high as the overall rate found by the Office of the Director of National Intelligence in 2020, if not higher.

- f. **What is the effect of the availability of a terrorist safe haven in Afghanistan for a reconstituted Al Qaeda or ISIS in as soon as 6 months on the risks of recidivism by Guantanamo detainees?**

The availability of a terrorist safe haven in Afghanistan as the result of our precipitous withdrawal from that nation in August 2021 and the ongoing efforts of al Qaeda and ISIS to reconstitute their capabilities there as well as elsewhere in the region and across the globe in my view only heightens the risk of recidivism by current Guantanamo detainees.

- 3) **The combat mission in Iraq was recently ended, but 2,500 servicemembers stayed behind to ensure peace. Had something similar been done in Afghanistan, would it be at the same level of risk that it is now of becoming a safe haven for terrorism in as soon as 6 months?**

In my view, the complete departure of U.S. forces from Afghanistan and the manner in which it was undertaken in August 2021, including the abandonment of thousands of U.S. citizens, Green Card holders, and Afghan allies who had worked alongside U.S. forces for decades, was a massive strategic blunder that will haunt our nation for many years to come. This decision—seriously contemplated over the course of three presidencies—will make it harder to recruit assets and allies in the future and will put the U.S. at greater risk for a terrorist attack down the road. These risks could have been significantly mitigated had we maintained an appropriately sized force in the region past the departure date and had we take steps to protect Americans and uphold our commitments to those that worked with us.

- 4) **This is the first war in which the United States has released enemy combatants before the war is over. Not just from Guantanamo but from detention facilities in**

**Iraq and Afghanistan as well. What has the effect of those releases been on the safety of Americans?**

Americans are less safe today because we have chosen to release enemy combatants lawfully held during an ongoing conflict where the enemy has not been eliminated or agreed to an end to hostilities. This assessment is buttressed by the fact that the Office of the Director of National Intelligence has assessed that more than a third of detainees released from Guantanamo Bay over the course of its history are known to have returned to the fight against the United States and our allies or are suspected of having done so. It is reasonable to suspect that recidivism rates are likely high for individuals that have been released in Iraq and Afghanistan, particularly when one includes those individuals released not only by U.S. forces, but also by partners and allies, as well as those released by the Iraqi security forces and by the Taliban government in Afghanistan. One need only look at the recent terrorist attacks in that nation and the targeting and persecution of young women in schools, minority ethnic and religious sects like the Hazaras, and American allies that we have left behind to see the reality of what the world looks like when America abandons the field and leaves the continued detention of bad actors to our adversaries.